



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 162 OF 2011**

**BETWEEN**

**OMKARESHWAR ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**RAYMOND OTIENO OLOO ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon.R. B. N. Maloba, RM dated 16<sup>th</sup> September 2011 at the Chief Magistrates Court at Kisumu in Civil Case No. 502 of 2011)***

**JUDGMENT**

1. The respondent, **Raymond Otieno Oloo**, filed suit against the appellant, **Omkareshwar Enterprises Limited**, seeking an award of damages on account of injuries sustained while working in the appellant's construction site. The respondent claimed that he was employed by the appellant and since the appellant failed to ensure safety in the working area, the appellant liable for negligence.
2. In its statement of defence, the appellant denied liability. It averred that the appellant was not its employee and in the alternative pleaded that if any accident occurred then it was due to negligence on the part of the respondent. The appellant further pleaded that the respondent was liable as the accident was outside its scope and control and it could not, notwithstanding the exercise of all reasonable care and diligence, have prevented the accident.
3. After hearing the case, the trial magistrate found that the respondent was an employee of the appellant and was fully liable for the accident. The respondent was awarded Kshs. 70,000/- and Kshs. 1,500/- general and special damages respectively. It is this judgment that has precipitated this appeal.
4. In the memorandum of appeal dated 20<sup>th</sup> December 2011, the appellant being raised several grounds of appeal. It faulted the trial magistrate for treating the evidence and submissions on liability and quantum superficially. It contended that the learned magistrate failed to consider the element of contributory negligence and that the trial magistrate proceeded on wrong principles in assessment of damages thus arriving at an inordinately high award in the circumstances.
5. Counsel for the appellant, Mr Nyamweya, submitted that the appellant should not have been held liable as it proved that it was not the owner of the property where the accident occurred or that it was the respondent's employer. On the issue of quantum, he submitted that the award of Kshs. 70,000/- was excessive as the injuries suffered by the respondent were minor and were already healed. He suggested an award of Kshs. 25,000/- would suffice.

6. Mr Omondi, counsel for the respondent, opposed the appeal and submitted that although employment contract was not documented, the testimony of PW 1 corroborated by PW 2 was sufficient to prove employment. He argued that search certificate produced by the appellant showed that the property where the accident took place was owned by a third party after the incident and not before and a sale agreement was not produced to show that the accident took place before the property was sold. Counsel submitted that the award of damages was reasonable in the circumstances.

7. As this is a first appeal, this court is mandated to re-evaluate and re-assess the evidence adduced before the trial Court bearing in mind that it is the trial Court that saw and heard the witnesses (see *Peter v Sunday Post Limited* [1958]EA 424).

8. The respondent (PW 1) testified that on 20<sup>th</sup> June, 2007 he was working as a casual labourer at the appellant's construction site at AP Lines Kibuye. Together with other workers, he was mixing concrete which was to be used on the first storey of the building. To get to the storey he had to use a ladder. When it was his turn to carry the concrete, the ladder broke, he fell off and was cut by iron sheets on his left forearm and the right leg at the back of the knee. He went to New Nyanza General Hospital where he was treated. He blamed the appellant for accident for failure to provide him with protective gear and a safe working environment.

9. Dr Onyango (PW 2), who examined the respondent on 30<sup>th</sup> November 2008, confirmed that he had sustained bruises on the back of the knee joint and on the left elbow joint which he classified as soft tissue injuries from which he had fully recovered. Collins Ochieng (PW 3) testified he was working at the construction site with the respondent and that on the material day the respondent fell from the ladder and got injured. He stated that as casual workers they were never given any documents to indicate that they were employed but their names were recorded when they were being paid.

10. Godfrey Otieno (DW 1), the Human Resource/Marketing manager of the appellant, told the court that the appellant was involved in buying and selling plots but not in construction work. He testified that the appellant had sold the plot on which the accident occurred to one Jeremiah Sauji on 18<sup>th</sup> May 2005 as such he was the person responsible for the construction and the accident. He maintained that Jeremiah Sauji became registered owner on 22<sup>nd</sup> January 2009 on payment of the full purchase price but he had been allowed to begin construction after payment of 75% of the purchase price. DW 1 tendered a search certificate and payment receipts for plot No. 5/828 as exhibits. When cross-examined, DW 1 confirmed that when the accident occurred he went there and saw a broken ladder on Plot 5/828.

11. The substantial issue in this appeal is whether the respondent was employed by appellant. The respondent bears the burden of proving, on a balance of probabilities, that he was an employee and that he was injured in the course of employment since the issue was denied by the appellant. **Section 107** and **109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* places the evidential burden upon the appellant to prove that he was an employee of the respondent. **Section 107** of the *Act* provides that “*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*” **Section 109** of the *Act* stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence while **section 108** of the *Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

12. The respondent testified on oath that he was a casual employee and as such employee he was not issued with any letter of employment although he would be paid per day. PW 3 corroborated that they were casual employees and their name would be recorded in a register at the end of the day when they were being paid. That evidence standing alone proved on the balance of probabilities that the respondent was employed by the appellant. It was therefore incumbent on the appellant to rebut this evidence in terms on **section 109** of the *Evidence Act*.

13. The rebuttal was to the effect that the appellant was not his employer and that the accident did not take place on its premises. DW 1 confirmed that the accident took place on the material day as he saw a broken ladder. He also confirmed that the property was at the material time registered in the appellant's

name. This tended to confirm that respondent's case as the incident took place on property the appellant owned. Like the trial magistrate, I do not find its evidence sufficient to rebut the respondent's case because the issue of Jeremiah Sauji was not pleaded and was never put to or suggested to the respondent in cross-examination. Moreover, the appellant had an opportunity to seek indemnity from the person it had sold to the property but it did not. I therefore affirm the decision of the trial court that the respondent was an employee of the appellant.

14. I now turn to the issue of liability. An employer has the duty to provide a safe working environment for his employees. This general principle is captured in *Halsbury's Laws of England (4<sup>th</sup> Ed)*, Vol. 16 which provides;

*At common law, an employer is under duty to take reasonable care for the safety of his employees in all circumstances so as not to expose them to unnecessary risk.*

15. In this case, the evidence from PW 1 and PW 2 is that the respondent fell when the ladder broke. DW 1 stated that when he went to the site, he found a broken ladder. The inescapable finding is that the ladder was defective. The provision of a safe ladder wholly falls on the employer. There is nothing the respondent would have done to prevent the ladder from breaking or in any way avoid an accident that is caused by a defective ladder. The issue of contributory negligence does not arise in these circumstances. I therefore find that the appellant was fully liable.

16. It is accepted that the award of general damages is at the discretion of the trial court and the appellate court will only disturb the award if it is demonstrated that it is inordinately high or low as to represent an entirely erroneous estimate or it is shown that the trial court proceeded on wrong principles, or misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low (see *Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5*).

17. The injuries suffered by the respondent were minor soft tissue injuries which had fully healed without any permanent disability or long term effects. The respondent proposed a sum of Kshs. 200,000/- as general damages and called in aid two cases before the trial court; *Margaret Wangui Kuria v John Maina Ithangu and Others NKU HCCC No. 110 of 2005 (UR)* where the plaintiff was awarded Kshs. 80,000/- in 2007 and *Kithoka Youth Polytechnic v Lucy Kithira Riungu MRU HCCA No. 126 of 2006 (UR)* where the court awarded Kshs. 100,000/- in 2008. The appellant suggested a sum of Kshs. 15,000/- based on the case of *Elias Mumbi v Said Jume Chiti and Another MSA HCCC No. 53 of 1990 (UR)* where the plaintiff was awarded Kshs. 15,000/- in 1990 for multiple soft tissue injuries on the neck, left side of face, left arm and shoulder.

18. I have considered the record and the decisions cited by the parties. Regrettably the respondent did not annex a full report of the cases to its submission before the trial court. I could therefore not tell the nature and extent of injuries sustained by the claimants in those cases. The case cited by the appellant was a very old case that bore little relation to the case at hand. It is the duty of the advocates to cite relevant cases and give full assistance to the court particularly when citing unreported cases. Having regard to the cases cited, I cannot say the award of Kshs. 70,000/- calls for interference in the manner authorised by the principal in *Butt v Khan (Supra)*.

19. The appeal is dismissed with costs.

**DATED and DELIVERED at KISUMU this 12<sup>th</sup> day of October 2016.**

**D.S. MAJANJA**

**JUDGE**

Mr Nyamweya instructed by L. G. Menezes Advocates for the appellant.

Mr Omondi instructed by Ouma Njoga and Company Advocates for the respondent.