REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO. 67 OF 2009

[Being judgment arising from Bungoma CM'S civil case

No. 67 of 2009

GEORGE WAMALWA JOHN..APPELLANT

VERSUS

ELLIS OMINDE t/a MARREL ACADEMY...................RESPONDENT

JUDGEMENT

1. This is an appeal arising from the judgment of Hon. F. Kyambia RM in Bungoma CMCC No. 67 of 2009. In the said suit the appellant **George Wamalwa John** had sued **Ellis Ominde t/a Marell Academy** for damages arising from an accident involving the plaintiff as he constructed pit latrine at the defendant's school citing breach of duty of care by an employer to an employee and seeking for special and general damages.

2. The appellant filed suit vide a plaint dated 10th March, 2007 where he cited particulars of negligence.

3. In a statement of defence dated 30th March, 2007 the defendant denied the allegations of negligence and the injuries sustained. In the alternative he pleaded that if any injuries were sustained at all, it was due to the appellant's own negligence. He sought to have the plaint dismissed.

4. The trial court upon hearing the parties found that the appellant had not proved his case on a balance of probabilities and dismissed the case.

5. Being dissatisfied with the judgment the appellant preferred this appeal on the grounds that;

> i. The learned trial Magistrate erred in both fact and law in dismissing the appellants claim without regard to the testimony and submissions on record.
>
> ii. The honorable Magistrate erred in law and fact when presiding over a matter that was not properly transferred to him by the Resident Magistrate.
>
> iii. That the Honorable learned trial Magistrate erred in fact when he held that a mere signing of the workman compensation forms by the respondent was not evidence of negligence.
>
> iv. The honourable learned trial Magistrate erred both in law and fact when he failed to hold that the place where the accident occurred was exclusively owned/managed and supervised by the

respondent.

v. The learned trial Magistrate erred in law and fact when he failed to take into consideration the fact that equipment and tools that the appellant used in carrying his work were provided for and supplied by the respondent.

vi. The learned trial Magistrate erred both in law and fact when he failed to appreciate that the appellant was injured and he suffered damages while at the respondent's place for the benefit of the respondent.

6. The appellant's counsel filed his written submissions on 11th May, 2015 and also submitted orally at the hearing of the appeal.

7. The respondent relied on oral submissions at the hearing.

8. This being the first appellate court it has to consider the evidence afresh; analyze and evaluate the same in order to arrive at an independent decision see ***Selle vs. Associated Motor Boat Company ltd. [1968] EA 123.***

9. **PW1 George Wasilwa John** testified that he was employed by the defendant at his business premises known as Marell Academy in Bungoma and on 15.8.2005 while he was working on plastering a septic tank with others including **PW2** and one Rogers Kadenya. While inside the pit with **PW2,** Rogers Kadenya dropped mortar in a bucket weighing about 20kg, which hit the plaintiff who lost consciousness and found himself at the Bungoma District Hospital where he was admitted between the 15th of August, 2005 and 21st August, 2005. That he paid kshs. 1,540/= as charges. He was later examined by Dr. Mulianga Ekesa and paid Kshs. 2,000/= for the report. He earned kshs. 250/= a day. After the injury his employer sent him to the labour office and filled the Workman Compensation. He received injuries on the head, right shoulder and neck. He blamed his employer for failing to avail proper working gear. He was not permanently employed as he received his dues weekly. He was not an independent contractor.

10. **PW2 Chrispinus Okumu Wanjala** He is a mason and known to the appellant and the respondent the owner of Marrel Academy where they were constructing a pit latrine.

He recalled that on 15.8.09 at about 9.00 a.m. he was with the appellant in the pit as they were plastering the wall, they were on different sides. He was engaged by Marell Academy on weekly basis so was the appellant. Mortor was being lowered down the pit using a rope, the bucket hit the appellant on the back and he lost consciousness. They removed the appellant from the pit and took him to hospital where the respondent's wife worked. The rope cut because it was weak further they had not been supplied with protective gear by the respondent. The appellant could not have prevented the accident as he was hit on the back. They supervised themselves. He was called for the job by the appellant. The appellant would receive money from the respondent and transmit to them.

11. **PW3 Dr. Mulianga Egesa**, works for Bungoma District Hospital and consults on the side. He examined the appellant on 15.8.2005. He found that appellant had sustained injuries to the lower back and right shoulder joint.

On examination the appellant complained of pain in areas of injury, he had sustained no fracture. He formed the opinion that the injuries were soft tissue and expected the appellant to heal with time. He charged kshs. 2000/=. He also filed the Workman Compensation form.

12. On his part the respondent Ellis Ominde admitted being the owner of Marrel Academy but denied knowing the appellant. He also admitted that pit latrines were being constructed at the site. However he contended that one Rogers Kadenya had been introduced to him and he had entered into a verbal agreement with him. He paid a deposit and supplied material and tools. He denied having contracted the appellant. He paid money to Kadenya who in turn employed the appellant. He further contended that

Kadenya was responsible for injuries of any of the people he employed. As regards the stamp and signature by the school on the Workman Compensation form, he said he was not aware as he was not the head master of Marell Academy.

13. Having considered the evidence on record and submissions on record two things are not in dispute. Firstly that the respondent was the owner of Marrel Academy where pit latrines were being constructed. Secondly that the appellant sustained injuries while working inside a pit latrine in the said school.

14. In issue is whether or not the appellant was an employee of the respondent, whether the respondent owed him a duty of care, and if so to what extent, thirdly whether the appellant was negligent on his part and if so to what extent, lastly damages if any payable.

15. In both his pleadings and his evidence the appellant maintained that he had been employed as a mason by the respondent. This corroborated by **PW2** and the Workman Compensation form that has the rubber stamp of Academy and a signature in the space for an employer. Indeed, both the appellant and the respondent are in agreement that at the time of the accident there was construction of a pit latrine. Being questioned on the workman compensation and the school rubber stamp on it, the respondent gave an absurd answer that he was not the headmaster of the school. The respondent denied employing the appellant stating that he had contracted one Rodgers Kadenya to do the construction, however he had no agreement to the effect that notwithstanding nothing would have been easier than to call the contracted as his witness and the headmaster to explain how the workman compensation form had the school stamp.

16. In my view the appellant adduced evidence on a balance of probabilities to the effect that he had been employed by the respondent to carry out construction work on his premises..

17. There is also sufficient evidence that the appellant sustained injuries when a bucket full of mortar fell on his back. There is an implied term of contract that an employer will avail proper gear and a safe environment to his workers. The appellant did not have a helmet or any other gear to protect him and as stated the rope that was used to lower the bucket was weak and it cut and the bucket then dropped hitting the appellant.

18. Can the appellant be blamed knowing that he was working in a dangerous environment without proper tools. The appellant should have ensured that he had a helmet and other gear that would ensure his safety which he did. He cannot entirely blame the respondent. In my view this is an obvious case of contributory negligence.

19. The Counsel's' did not address the court on the issue of damages and I therefore assume that both were comfortable with the award by that trial court at Kshs. 150,000/=. Having arrived at a finding that this was a case of contributory negligence I will apportion blame at 40% appellant and 60% against the respondent.

20. The issue of jurisdiction was raised as a ground but none of the parties canvassed the same at the trial or on appeal and I will therefore not delve into the same.

21. All in all, I set aside the trial court's judgment in favour of the appellant as follows;

i. General damages Kshs. 150,000/=

<u>Specials</u>

Medical report <u>Kshs. 2,000/=</u>

Total <u>**Kshs. 152,000/=**</u>

Less 40%	Kshs. 60,800/=
Total	**Kshs. 91,200/=**

ii. Costs of the trial and the appeal.

iii.

DATED at BUNGOMA this 22nd day of DECEMBER, 2016.

ALI-ARONI

JUDGE.