



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 18 OF 2013

- 1. SMOKIES BAR & RESTAURANT**
- 2. RAJAN KARIM.....APPELLANTS**

VERSUS

REUBEN KIETI.....RESPONDENT

(An appeal from the original judgement and decree of Hon. Nditika delivered in Milimani Commercial Court CMCC No. 8001 of 2007 on 3rd December, 2007)

JUDGMENT

1. The Respondent sued the Appellants seeking compensation following an industrial accident that was alleged to have occurred on 3rd October, 2006. He alleged the said date while in the course of duty under employment of the Appellants thus servicing a generator, a fire was negligently started and as a result he suffered extensive burn wounds to the right leg between the knee and the ankle joint, extensive burns on the whole face with loss of skin, burn wounds to the lips with loss of skin colouring, burn wounds to both ears with loss of skin and colouring, deep and extensive burn wound on the entire right hand from the elbow to the fingers and palm and deep and extensive burn wound on the entire left hand from the elbow to the fingers and palm.
2. He claimed that the said accident occurred as a result of the Appellants' negligence thus exposing him to risk of damage or injury which they ought to have known; failure to provide a safe and proper system of work and working environment, placing flaming jikos next to him when they knew he was using petrol, negligently placing flaming jikos near him when they knew petrol was flammable and failing to install fire extinguishers for emergency cases. The Appellant filed a defence in which they denied the Respondent's claim.
3. Dr. P. Mburu (PW1) who is the in charge of the medical officers of Kiambu District Hospital produced a treatment summary (P. Exhibit 1), a confirmation report (P. Exhibit 2 (a)) confirming that the Respondent was treated at Kiambu District Hospital, and a receipt for KShs. 500 for the confirmation report (P. Exhibit 2 (b)) and the discharge summary as P. Exhibit 3. He stated that the discharge summary was signed by Dr. Nyakundi who treated the Respondent but who he had assigned other duties at the time he was giving evidence.
4. Dr. Kimani Mwaura (PW2), a gynaecologist who examined the Respondent stated that the Respondent had sustained 2nd degree burns on both arms and the right leg and 1st degree burns on the face. He stated that at the time of examination, the Respondent complained of itching. He produced the report as P. Exhibit 4, receipt for KShs. 2,000/= for medical report (P. Exhibit 5) and receipt for KShs. 5,000/= for his court attendance (P. Exhibit 6).
5. The Respondent (PW3) who is a mechanic testified that he was an independent contractor working under contract with the Appellants. That on the material day he was cleaning the Appellants' generator using petrol. He had dismantled parts and put them in a basin. While working, he had a burst sound and the basin caught fire. He stated that he then tried to throw the basin away to avoid

- the fire consuming the generator and gas cylinders which were nearby but the fire had engulfed around him. That on turning to run away, he found that jikos had been placed behind him by the Appellants' staff without his knowledge and that it is the said that caused the fire. He stated that as a result he sustained injuries as pleaded in the plaint. That he was rushed to Kiambu District Hospital where he was admitted for treatment for 16 days.
6. David Kahoro (DW1) who is the Appellants' manager stated that the Respondent had been hired by the Appellants to repair a generator. He stated that he did not witness the accident but confirmed that the Respondent suffered serious burns. On re-examination, DW1 denied there being an employer employee relationship between the parties and stated that the Respondent was an independent contractor. He sought to rely on one Rajan Karim's written statement although the said Rajan was not called to testify. In the said written statement, Rajan contended that the Respondent was an independent contractor and that he was aware of the risks involved in his work but failed to take precautions. That he put petrol in an open basin yet he was aware that it was risky to do so thereby he exposed himself to injury. He denied that any of the Appellants' employees put a jiko behind the Respondent as he worked on the generator.
 7. The trial court heard the case and came to the conclusion that the Appellants were 80% liable for the accident. The basis for reaching that decision was that it was the Appellants' employees who took jikos to where it resulted into fire which occasioned the Respondent burns without alerting him of its presence. Nonetheless, that the respondent had worked in that place before therefore he ought to have known that he was exposed to danger. He also awarded the respondent general damages for pain suffering a sum of Kshs 250,000 subject to 20% contribution and special damages of Kshs 2000 being cost of medical report.
 8. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on grounds which can be summarised as follows:-
 - a. *That the trial magistrate erred in law and in fact finding that there was employer employee relationship between the parties.*
 - b. *That the trial magistrate erred in law and in fact by not finding that the Respondent was bound to prove that he was an employee of the Appellants.*
 - c. *That the learned trial magistrate erred in law and in fact in finding that the Appellants were in breach of implied terms of contract.*
 - d. *That the learned trial magistrate erred in law and in fact in failing to appreciate the Respondent's admission that he was an independent contractor.*
 - e. *That the learned trial magistrate erred in law and in fact in finding the Appellants negligent.*
 - f. *That the learned trial magistrate erred in law and in fact in failing to disqualifying PW2 who was a gynaecologist in a matter relating to burns.*
 - g. *That the learned trial magistrate erred in law and in fact by failing to consider the Appellants' submissions thereby arriving at a wrong decision on quantum.*
 9. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses.(See: **Peter v. Sunday Post (1958) at pg. 429**).
 10. This appeal was canvassed by way of written submissions. It was the Appellants' argument that having admitted being an independent contractor, the Respondent waived proof and it was thereby clear that there was no employer employee relationship between the Appellants and him. It was further argued that the Appellants did not breach any statutory duty or implied terms of contract as there was none. The Appellant cited Waweru J's decision in **Trancisco Maina Mwangi v. Evan Mweha & John Wanyange Mweha (2014) eKLR**. In the said case Waweru J quoted **Cassidy v. Ministry of Health** that and held that it was clear that the Plaintiff and the 1st Defendant entered into a contract for services, not a contract of service. That he was therefore not an employee of the 1st Defendant but an independent contractor thereby he was not owed any duty by the 1st Defendant.
 11. The Appellant further argued that while PW2 stated that first degree burn does not cause peeling of the skin the Respondent stated the contrary; that PW2 in examination in chief stated that he examined the Respondent but was unable to show exactly which part of the arm got burnt and that PW2 was a gynaecologist and his evidence was thereby a sham as he was not an expert in burns. The Appellant for the said reasons urged that PW2's evidence be disregarded.

12. The Respondent on the issue of duty of care cited **Rylands v. Fletcher (1861) ALL ER** where it was held that a person would be found liable for keeping a thing which is harmful to his neighbour if it escapes and causes harm. It was argued that there was no dispute that he was working within the Appellants' premises for their interest and were thereby to be found liable.

13. **Halsbury's Laws of England Vol. 22, 2nd Edition paragraph 191** reads as follows:-

“Whether or not in any given case the relation of a master and servant exists is a question of fact but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do but also the manner in which it is to be done”.

14. In the case of **Hill v. Birket [1915] 1 KBS 78** it was said, inter alia, by Avery J:-

“There is no better working rule than laid down many years ago by Blackburn J in R v Negas (1873) 28 LT 646, where he said that the test is whether the alleged servant was under the control or bound to obey the orders of the alleged master; if he is then the relation of master and servant exists”.

15. An Independent Contractor is defined in **Black's Law Dictionary 9th Edition** as :-

“One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it”.

16. In the present case the Respondent was a mechanic who was not on a daily wage. He was therefore an independent contractor and not an employee. However, four categories of Occupiers were identified by Lord Denning in the case of **Wheat v. E. Lacon & Co. Ltd (1966) AC 522**.

“Whenever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an occupier and the person coming lawfully there is his visitor.”

17. From the above persuasive holdings, in my view, it follows that to such a visitor as the respondent herein on the appellant's premises, the occupier owed a duty of care bearing in mind that it was in control of the premises. In the circumstances I find that the Respondent although not the Appellants' employee but considering that he visited the premises for their interest and benefit and at the appellant's invitation, as opposed to being a trespasser, the appellants owed the respondent a duty of care.

18. There is no doubt from the evidence on record that the 1st Appellant is a restaurant which obviously uses fire. That being so, the fire incident was a foreseeable risk and it was necessary for both parties to take precautionary measures and both parties have to be held liable. The only issue is the level of contribution by each party. I note from the Respondent's testimony that one of the Appellant's employees placed a jiko behind him unknowingly and that evidence was not controverted. I say so because the statement of Karim is watered by the fact that it was not subjected to any cross-examination. The trial court was therefore in my view right in holding the Appellants liable to the extent of 80%.

19. On PW2's evidence, I take judicial notice that before doctors specialise, they are normally trained and engaged as general medical practitioners therefore in my view, PW2 was in a position to examine the Respondent. Further, it is to be noted that PW2 was clear to the fact that there is no such thing as a burn specialist and the Appellant did not tender any evidence to the contrary. I find no reason to disregard his testimony. I therefore uphold the trial magistrate's findings of liability.

20. For this court to interfere with the trial court's decision on quantum, it must be established that the trial court acted on wrong principles and or misapprehended the law. See **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** the Court held:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those

or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga –vs- Musila (1984) KLR 257.)"

21. The appellants have not established that the trial magistrate made any erroneous estimate or misapprehended the legal principles applicable in awarding damages. A reading of the trial court's judgment reveals that the trial court stated that it considered the submissions and the authorities placed before her by the parties. I see no reason to interfere with the findings of the trial magistrate on quantum. Taking into account the extent of the appellant's injuries, the rate of inflation on the Kenyan Shilling vis a vis the age of this case and the cases of **Philip Munyao Musyoki-v- The Kenya Power and Lighting Co. Ltd, HCCC No. 1783 of 1989** where the plaintiff therein suffered injuries of similar gravity to the appellant's, I find that an award of KShs. 250,000/= as general damages as awarded by the trial court reasonable and suffices, subject to the 20% contribution. As for special damages, the appellant pleaded shs 2000 as special damages but produced more receipts. However, the law is clear that special damages must be specifically pleaded and strictly prove. The trial magistrate awarded what was pleaded and proved. I confirm the award of Kshs 2000 special damages.
22. In the end, I uphold the findings, judgment and decree of the subordinate court and dismiss this appeal with costs to the respondent.

Dated, signed and delivered in open court at Nairobi this 9th day of December, 2015.

R.E.ABURILI

JUDGE