REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 588 OF 2004

DARSHAN SINGH BANZAL T/A ORIENTAL

STEEL FABRICATORS & BUILDERS.....APPELLANT

VERSUS

JAVAN ONGWECH.....RESPONDENT

(From the judgment of El Kindy principal magistrate in Milimani CMCC no. 1998 of 1994)

J U D G M E N T

The facts behind this appeal are that the Respondent was an alleged employee of the Appellant who was a building contractor. The Respondent, who apparently was a casual worker as a builder, was on 7th August 1992, instructed by a foreman of the Appellant, to repair joints of a building which was under construction. He was using a ladder made by the Appellants workers. The latter gave way as the Respondent was descending on it and he fell to the ground with stones falling on his leg. In the process the Respondent is said to have had a fracture of one of his legs. He was rushed to hospital by the Appellants foreman or contractor. He got medical treatment for which the Appellant paid using its cheque.

Later the Respondent filed this claim alleging a breach of common law or statutory duty of care. The Appellant had filed a general defence denying every allegation in the plaint and seeking proof. In the alternative he/it alleged negligence on the part of the plaintiff/respondent as the main cause of the accident.

During the hearing, the Respondent testified but called no other witness. The Defendant as well testified and called no other witness. He denied the claim although he admitted that the accident must have occurred. His main defence was that the construction of the building had been awarded to an independent contractor whose conduct and activities were independent and for which he could not be answerable. He alleged that he did not accordingly employ the Respondent nor any worker since the building contractor was independently responsible. He, however eventually admitted that he paid for the medical treatment of the Respondent when the latter was in hospital.

This appeal raised eight grounds of appeal. The same can be reduced into two main grounds of appeal: -

1. **That the Respondent was not an employee of the Appellant who accordingly, did not at any relevant time owe any common law or statutory duty of care to the Respondent.**

2. **That the trial court erred in law in admitting the medical document proving the injuries alleged by the Respondent without calling the makers to personally testify.**

I have carefully considered the 1st ground of appeal shown above. I am satisfied that the trial magistrate was right in concluding that the Respondent was a casual employee of the Appellant at the relevant time. The Appellant's denial of employment relationship fell apart when the Appellant admitted that he/it paid for the Respondent's hospitalization in respect of the injuries sustained by Respondent. The Appellants admission reasonably suggested that the Respondent was indeed an employee of the Appellant.

Furthermore, the Appellant failed to explain away the fact that Alfred Muteti who employed the Respondent and later instructed the Respondent to carry out the relevant duty during which he was injured, was not really his/its employee at the material time. Finally, on this issue the appellant had not specifically or particularly pleaded the defence that the employer of the Respondent/plaintiff was a different independent person or contractor. In the circumstances, that defence was rightly rejected by the trial magistrate.

The second ground of appeal could have had merit in different circumstances.. The trial magistrate admitted medical evidence documents including a medical report and treatment documents without calling the doctor or doctors who made them. I have examined the circumstances of such admission and note that the defendant's counsel let the documents be produced without objecting. It can, therefore, be said that the medical report was admitted by consent

Section 48(1) of the Evidence Act Cap 80 provides as follows: -

> ***"When a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions." (The stress is mine)***

There is no doubt that a medical opinion is an opinion upon a point of science or art. Such opinion is admissible only if made by a person specially skilled in medical science or art, such as a medical doctor or a medical clinical officer or other related officers who originally made or drew the medical report or opinion, with a few exceptions allowed by law where it is not possible for the maker to personally testify.

As I have however, concluded, the medical report was admitted by the trial court its contents were not really controverted by any cross-examination. It is the view of this court, thereof that once the medical report found its way into the record of evidence, the trial court was entitled to take it into account while assessing the damages due. That is what he did taking into account relevant precedents. In these circumstances, the Appellants ground of appeal that the admission of the medical report was in error of the Section 48(1) aforestated does not hold water.

The result is accordingly, is that this appeal, taking into account the reasons above, has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 27th day of February 2014.

.....

D A ONYANCHA

JUDGE