Editorial Summary

1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

TORT/CONTRACT

2.1 *Workplace injury/industrial accident.*

2.2 *Male adult aged 26 years old*

14th February 2009.

2.3 *Casual labourer, paid at end of week.*

2.4 *Operates machine*

2.5 *Machine faulty, right forearm caught in*

Machine crushed.

2.6 *injuries*

Compound fractures

Regent distal radial ulna

Soft tissue injuries

2.7 *Kenyatta National Hospital Ksh. 176,870/-*

Medical report Ksh. 5,000/-

2.8 *Defence denied. Plaintiff's worker*

Called no evidence.

2.9 *Trial magistrate held*

i) *Plaintiff failed to prove case.*
ii) *Liability – nil*
iii) *Quantum possible award*

Pain and suffering Ksh. 400,000/-

iv) Suit dismissed.

3. Appeal

Hon. Magistrate erred in law and fact

3.1 … finding plaintiff not entitled to any compensation as he did not prove he was an employee of defendant.

3.2 Did not owe a duty of care to plaintiff by defendant.

3.3 … that plaintiff required to prove security … he was employee.

3.4 … failing to find defendant totally liable …. For condition of machine.

3.5 … failing to find defendant in breach of duty failing To repair machine.

3.6 … failing to find that as a result of breach of duty of care … plaintiff suffered severe injuries to his right hand.

3.7 … in siding with defendant's submission.

3.8 … in finding plaintiff's suit compensation as low as Ksh. 400,000/-

Prayed appeal be allowed.

Prays for Ksh. 950,000/-

4. In reply:

4.1 No employee/employer relationship.
4.2 Not duty of defence to file gap.
4.3 No proof of employment details
4.4 Do not know appellant.

5. Held:

i) Appeal allowed.

6. Case Law:

7. Advocates :

i) N.A. Owino instructed by M/s N.A. Owino & Co Advocates for appellant/original plaintiff

ii) R C Ajiambo holding brief for Omangi instructed by M/s Omangi Musanga & Co Advocates for respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURST

CIVIL APPEAL NO. 248 OF 2010

KENNEDY AGO LIDWEYE.....APPELLANT/ ORIGINAL PLAINTIFF

VERSUS

STEEL PLUS LIMITED.....RESPONDENT/ ORIGINAL DEFENDANT

(Being an appeal from the Judgment of Hon. D. Mulekyo Esq, Principal Magistrate in Civil Case No. 302 of 2009

dated 18th June 2010 at Kikuyu Courts)

J U D G M E N T

I. INTRODUCTION

1. In this appeal, filed by Kennedy Ago Lidwege, the original plaintiff in the subordinate court case, the issue between the parties is that of employee/employer relationship.

2. The original suit filed in the subordinate court concerned a 'work place injury/industrial accident case.' Kennedy Ago Lidwege, herein referred to as the employee was aged 26 years old in the year 2009. He alleged that on the 14th February 2009. He alleged that on the

14th February 2009 he had been employed as a casual employer of the respondent/original defendant M/s Steel Plus Limited (herein referred to as the employer). He worked daily but his payment would be made at the end of the end of the week.

3. An accident occurred when he was operating a machine. It was faulty. He switched off the machine. When he attempted to rectify the fault and replace a rod to the machine, his right forearm was pulled into the machine. He had worn gloves (albeit old.) The effect of the accident was that his right forearm was caught into the machine, crushed and he sustained injuries of a "compound fracture to the right distal radial ulna."

4. He was rushed to the Kenyatta National Hospital where he was admitted for 7 months. Part of the reason being that he was detained in hospital for the inability of not being able to pay the hospital bill.

5. He sued the employer and prayed for special damages for the Kenyatta National Hospital of Ksh. 176,870/-. He also prayed for Ksh. 5,000/= medical report.

6. The employer called no evidence but did state in its defence that the employee original plaintiff was never employed by them.

7. The trial magistrate noted that the plaintiffs employee's case was very poorly prosecuted by the advocate for the employee. The case was therefore not proved and as a result, the Hon. Trial magistrate dismissed the suit. The possible award he would have granted would have been Ksh. 400,000/=

8. The employer in their submissions before that court stated that the possible award should be only 135,000/= with 60% liability. The advocate for the plaintiff had prayed for Ksh. 1 million with liability at 100%.

9. Upon the suit being dismissed, the employee appealed to the High Court on the 1st July 2010.

10. The employee alleged that the Hon. Magistrate erred in law and fact:

10.1 … by finding that the plaintiff was not entitled to any compensation as he did not prove he was an employee of the defendant.

10.2 … by finding that the plaintiff was not on duty of care by the defendant.

10.3 … by finding that the plaintiff required to prove liability … he was an employee.

10.4 … by failing to find the defendant totally liable … for the condition of the machine.

10.5 … by failing to find the defendant was in breach of duty for failing to repair the machine.

10.6 … by failing to find that as a result of breach f duty of care … the plaintiff suffered severe injuries to his right hand.

10.7 … in siding with defendant's submission.

10.8 … in finding the plaintiff's suit was prosecuted in a casual manner and carelessly.

10.9 … in calling for compensation as low as Ksh. 400,000/-

10.10 … in failing to notify the date of delivery of judgement.

11. The employee through his advocate prayed that the appeal be allowed and that a sum of Ksh. 950,000/- be awarded.

12. The arguments put forward is that the employee was injured when his hand was caught up in the machine. He owes the hospital money by way of an invoice.

13. The issue of the employee being a casual worker demonstrate how he was paid on a daily basis no

letter would be issued to him.

14. The defendant employer called no evidence. The burden of proof was placed on the employee was high. There was no rebuttal evidence by the employer.

15. The employee is entitled to compensation.

16. In reply to these submissions, the employer stated there was never any nexus to show a contract existed between the parties.

17. For example the hospital insurance of the agreement was in itself an indication that the employer was not named. The employee did not disclose that he was employed by the employer/respondent.

18. As to the issue of special damages this had not been proved.

19. If per chance the employee was then working, the said employer had a duty of reporting the faulty machine, which he did not. The machine could not have started on its own.

20. The employer prayed that the appeal be dismissed.

III OPINION

21. The trial magistrate commented in his judgment that the suit was poorly prosecuted. This fault lies with the advocate for the employee.

22. Whereas the employee required to prove his case on a balance of probability, care could have been taken in so doing. In this appeal, the fault being with the advocate. It should not be visited upon the litigant.

23. Upon reviewing the evidence in facts, the issues herein is not whether the employee sustained injuries as a result of operating a machine but whether the employee was, at the time of the accident employed by the respondent.

24. It is therefore without a doubt that the said employee was injured and the said employee was injured and the said injuries were sustained as a result of the machine suddenly pulling on his hand and forearm being injured.

25. The main issue is that the employee was never employed. This is the contention raised. If this is true then the employee was never an employee. He was a trespasser, a busy body and therefore should not compensated for any injuries sustained.

26. The allegation that the employee was never one was raised by the defendant. In civil law cases, a defendant cannot keep forte as one would do in a criminal matter or alleged there is no case to answer. The employer required to prove that the employee was never employed by them.

27. All the employer required to do was to bring their record of staff, at the date when the incident occurred. It is a requirement of the labour laws that the employer is the one who keeps a record of the staff and all the payments made. The employee alleged he began to work in November 2008 and the accident occurred in February 2009. He most certainly was in temporary employment and or probation.

28. Failure to bring up the said records during trial means that on the balance of probability the employee was indeed in employment.

29. It is also common good that an employee who is newly employed is not normally placed to work on

a machine when they have had o training or experience.

30. The allegation of the machine being faulty was never pursued extensively by both parties.

31. I would find that the issue of whether the employee was so employed, was established and consequently would allow this appeal. on the aspect of suitability I would compute this at 100%

32. As to quantum, the recommendation as stated above was as follows:-

General damages

Pain and suffering

The employee asked for Ksh. 1 million. This was based on an authority (really a digest) of an amputated arm. The appellant's arm was never amputated. The award asked for is inordinately high.

The employer asked that Ksh. 135,000/= be awarded but that liability be at 60%.

The trial magistrate placed the award at Ksh. 400,000/=

33. The injuries sustained was a compound fracture of the right distal radial ulna. It is indeed the advocate for the employee who failed to cal on orthopedic consultant to give evidence. The evidence of the medical doctor came from a medical practitioner who described the injuries as an open fracture of the right forearm

34. I would find that the award given by the trial magistrate who was able to see the witnesses would not be interfered with of Ksh. 400,000/=

35. Special damages

i) Medical report Ksh. 5,000/-

I would agree with the advocate for the employer that there was no proof of payment of this head. The receipt provided did not comply with the stamp duty act and is accordingly rejected.

ii) Bill at Kenyatta National Hospital Ksh. 176,870/-

It is a requirement that a bill must first be paid before it is claimed. This head of damages is also rejected.

36. Any other claim outside the above is rejected on grounds it had never been pleaded, particularized or proved.

CONCLUSION

37. I would hereby allow the appeal as follows:-

That the judgment of the subordinate court be and is hereby set aside and substituted with the following orders.:-

i) There be judgment for the employee original plaintiff on

LIABILITY 100%

Quantum

a) General Damages

Pain and suffering Ksh. 400,000/=

b) Special damages Nil not proved

38. There will be interest on Ksh. 400,000/= from the date of the judgment of the subordinate court.

39. There will be no costs in the subordinate courts due to the poor conduct of the trial by the advocate for the employee/original defendant.

40. There will be costs to the employee original plaintiff on this appeal.

DATED THIS 16TH DAY OF FEBRUARY 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

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Advocates :

iii) N.A. Owino instructed by M/s N.A. Owino & Co Advocates for appellant/original plaintiff

iv) R C Ajiambo holding brief for Omangi instructed by M/s Omangi Musanga & Co Advocates for respondent