



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 61 OF 2007

AMALGAMATED SAW MILLS LTD.....APPELLANT

VERSUS

JOYCE MWIHAKI MACHARIA.....RESPONDENT

JUDGMENT

This is an appeal against the judgment delivered by Hon. H. M. Nyaga, Senior Resident Magistrate Nakuru, on 20/3/2007 in CMCC 1735/2002, **Joyce Mwachaki Macharia V Amalgamated Saw Mills Ltd** in which an award of Kshs.45,000/- was made in general damages and Kshs.2000/- in special damages. The appellant was dissatisfied with that judgment and has preferred this appeal.

By a plaint dated 9/9/2001, the respondent moved the court seeking damages against the appellant for injuries the respondent sustained in an industrial accident while working for the appellant. The respondent blamed the appellant for negligence or breach of contract. The appellant filed a defence denying that the respondent was its employee or that it was negligent or was in breach of any of its terms of the contract. The respondent testified in support of her case. She recalled that on 19/4/2000, she was working as a casual employee in the blockboard section making doors. At about 10.00 a.m. she was carrying a door with a colleague, by name Mary slipped, released the door which fell on her leg as a result of which she was injured. First aid was done by the supervisor, Maganda. She blamed the appellant for failing to provide safe apparel like gloves or boots. When shown the muster roll, she could not find her name there nor was her name in the injury book. She denied knowing of their existence.

DW1, Maurice Aloo, an Assistant Security Officer at the appellant Company was charged with the duty of recording statements of injured persons and was on duty on 19/4/2000. He testified that the respondent worked at the factory but in April 2000 she was not their employee as she had left the company in October 1999. He produced the Muster Roll for Blockboard Section where her name appeared as No.6 on the casual list. He denied that the respondent worked in April and May 2000 as the machine was broken down. Her name did not appear in the injury book or payroll.

The defence also called Geoffrey Kibobi (DW2) a wages clerk. He acknowledged that the respondent worked with the appellant in the year 2000 but not April. He relied on the muster roll to pay wages and the respondent's name did not appear.

Being dissatisfied with the decision of the trial magistrate the appellant filed this appeal citing the following grounds:-

1. That the learned magistrate erred in finding that the accident indeed occurred at the defendant's premises when there was strong evidence that the respondent was not working for the plaintiff at all on

the material date.

2. That the learned magistrate erred in finding that the plaintiff was indeed injured at all when there was no medical evidence tendered at all to prove that such an injury occurred.

3. That the learned magistrate erred in common law by shifting the burden of proof to the appellant and thus making the erroneous finding that the respondent had made out a proper case for the award of damages.

4. That the learned magistrate erred in awarding unproven special damages to the plaintiff.

5. That the learned magistrate failed to take heed to the documentary evidence tendered by the defendant and erroneously dismissed and challenged parts of the same when the same were not rebutted in any manner by the respondent.

6. That the learned magistrate erred in relying on the evidence of only one witness) the plaintiff) in finding that this claim was proven on a balance of probability.

On the first ground, Mr. Murimi, counsel for the appellant submitted that the respondent was not an employee of the appellant and in the defence, the respondent was put to strict proof. He who alleges must prove. The respondent alleged that she was an employee of the appellant and it was her duty to prove that fact. In cross examination, she said that her employment card had been left at the gate of the appellant. However, the respondent never issued notice to produce on the appellant. **Section 107 (1 & 2)** of the **Evidence Act** requires one who alleges to prove. It reads as follows:-

The respondent did not comply with **Section 107** of the **Evidence Act** which provides:-

“107(1) Whoever desires any court to give judgment as to on any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

The burden of proof lay on the respondent to prove that she was an employee of the appellant. In **BUDS & BLOOM LTD V JAMES SAWAMI SIKINGA NKU HCCA 126/2005**, J. Mugo held that the respondent failed to serve notice to produce and there was no material placed before the court as proof that the respondent was an employee of the appellant. That is the same position in this case. The respondent has totally failed to prove that she was an employee of the appellant at the time she was injured.

The evidence of DW1 and DW2, employees of the appellant were at variance as to whether the respondent was working at the appellant company on 19/4/2000 when she claims to have been injured. Whereas DW1, denied that the respondent left in October 1999, DW2 said that the plaintiff left working for the appellant in January 2000 yet they were referring to the same documents. Both witnesses then said that the respondent's names did not appear in the muster roll but DW1 in re-examination, said that the muster roll only deals with permanent employees and there was therefore no possibility of finding the respondent's names in the muster roll. Further, DW2 said that casual employees do not have pay slips. Though the defence evidence was at variance as to whether or not the respondent was an employee of the appellant in April 2000. It was the duty of the respondent to prove on a balance of probability that she was an employee. She totally failed to do so. In his judgment the trial magistrate shifted the burden of proof on the applicant which was contrary to the law. (refer **Section 207** of the **Evidence Act**).

The respondent alleged that a door which she was carrying with one Mary fell on her leg when the said Mary slipped. She did not produce the medical treatment card issued to her at Njoro Dispensary. She did not produce in evidence the report prepared by Dr. Omuyoma who later examined her nor was the doctor called as a witness. She claimed to have been examined by Dr. Malik but similarly, the report was not

produced in evidence. Filing a list of documents does not mean that the same have been produced in evidence. The trial magistrate failed to consider the fact that the respondent's documents in support of her claim were only marked for identification but were never produced in evidence. I therefore find that there was no basis for the magistrate to find that the respondent had proved that she was injured. The finding on liability had no basis.

In the event that the respondent had proved that she was injured, she had attributed her alleged injuries to the negligence of the employer, by exposing the respondent to danger of injury, failing to provide the respondent with proper and safe systems of work, failing to provide the respondent with protective devices, permitting the door to injure the respondent. It is the respondent who took up the said job. By taking up the job the respondent exposed herself to risk of injury. The respondent explained that her colleague, Mary slipped and that is when she was injured. The magistrate found that the appellant failed to provide protective gear. If the appellant had provided gloves, maybe the respondent and Mary would have had a proper grip on the door and the chance of the door slipping would have been minimized. I would have held that the appellant was not wholly to blame and would have apportioned liability at 30% as against the respondent.

In conclusion, having found that the respondent failed to prove that she was an employee of the appellant or that she suffered any injury to herself on 19/4/2000, I do hereby set aside the judgment/decreed of the trial court dated 20/3/2007 and order that the respondent do bear the costs in the lower court and of this appeal.

DATED and DELIVERED this 14th day of April 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Murimi for the appellant.

N/A for the respondent.

Kennedy – Court Clerk.