



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 90 of 2006

[From Original Civil Suit No. 1936 of 2004 of CM's Court at Mombasa]

MITCHELL COTTS FREIGHT (K) LTD.....APPELLANT

VERSUS

STEPHEN OTIENO OUMA.....RESPONDENT

JUDGMENT

The defendant, Mitchell Cotts Freight (K) Limited (hereinafter “*the appellant*”), was sued by the plaintiff Stephen Otieno Ouma (hereinafter *the respondent*) for damages for injuries he sustained on 10th April 2004 while engaged as a casual worker by the appellant. He pleaded that on the said date, while carrying sacks of fertilizer from a warehouse to a lorry, the appellant’s employee negligently dropped a sack on him thereby crashing him. In the particulars of negligence, the respondent alleged among other things, that the appellant failed to provide and maintain a proper and safe system of work and caused or permitted bags to be arranged in a weak and unstable stack. The respondent pleaded further that as a result of the appellant’s said negligence, he sustained injuries to his elbow, chest and back.

The appellant filed a defence in which it, *inter alia*, denied that the respondent was its employee but that if he was it was an express or implied term of the contract of employment that the respondent would attend to his duties in an attentive manner and would avoid taking unnecessary risks and follow the appellant’s instructions as to performance of his work. The appellant further specifically denied that the injuries suffered by the respondent were caused by the negligence and or breach of duty on the part of the appellant and or its servants. Without prejudice, the appellant pleaded that the accident was wholly caused or substantially contributed to by the negligence or breach of duty on the respondent’s part in that: he failed to comply with the defendant’s instructions and procedures; he failed to carry out his duties with due care and attention and was careless and inattentive in the performance of his duty; he failed to take all or any reasonable steps for his personal safety and failed to prevent or take any evasive action to ensure that the alleged accident was prevented.

At the trial, the respondent testified and called one witness, the doctor who prepared a medical report of his injuries. His case was that he used to be a casual worker of the appellant and on 10th April 2004, while engaged as such work parking fertilizer on a lorry, a

workmate caused a 50kg fertilizer sack to fall on him, injuring his chest, back and elbow. He went to Coast General Hospital two days later where he was x-rayed and treated. Later he was examined by Dr. Obwando who prepared a medical report of his injuries. He blamed the appellant for the accident because its employee failed to warn him and was careless. He identified Patel as the appellant's employee who engaged him and Michael as his supervisor.

The appellant's case at the trial was presented by Johnson Odongo who had been in the appellant's employment as a casual employee since 1996. He testified that on the material date he worked at the appellant's Voi street warehouse and recorded casuals who worked on that day. The respondent was not among them and no injury was reported that day. He however admitted that there were four gangs each comprising 50 casuals and he could not say whether the respondent was in a different gang under a different gang leader.

In the judgment delivered after the trial, the Learned Resident Magistrate analysed the evidence adduced before her and concluded her judgment as follows:-

“On a balance of probability, I do find that the plaintiff was an employee of the defendant company that day and was injured in the course of his duty. From the events of the day, I can conclude that there was no safe system of work. There was no set procedure of removing the bags from the stack and no system of advance warning or a methodical way of unloading or loading. This exposed the plaintiff to a risk of injury which they ought to have known. The employer did not take any precautions to ensure the safety of the plaintiff. I do find also that the employee partly contributed to this accident. He ought to have taken some evasive action to ensure that the alleged accident did not take place. He knew the stacks were arranged dangerously and he knew there was no warning when they are being dropped. He ought to have been vigilant. To this reason (sic) I find him 10% liable.”

That decision has triggered this appeal by the defendant (now appellant). He has put forward some 11 grounds of appeal which in the main challenge, the Learned Resident Magistrate's findings that the respondent was an employee of the appellant at the material time and that the appellant was negligent.

When the appeal came up before me for hearing, counsel agreed to file written submissions which they duly filed. I have considered the record, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter. This is a first appeal. The court should therefore subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses testify. The court should also be slow to disturb findings of facts of the trial court (see Peters – v – Sunday Post Limited [1958] EA 424). The court is duty bound to examine with care whether the findings on facts were not based on evidence adduced before the trial court or whether there was a misapprehension of the evidence or that the trial court acted on wrong principles in arriving at those findings of fact.

I ask myself whether on the evidence adduced before the Learned Resident Magistrate, the respondent proved on a balance of probabilities that he was a casual employee of the appellant. During his testimony at the trial, the respondent testified that he was employed by the appellant's employee named Patel and was supervised by one Michael. He had no documentary evidence of that engagement. There was however no suggestion that the appellant's casual employees were given any documents to show that they were so engaged. That position was indeed confirmed by the appellant's witness Johnson Odongo. The only documentary evidence of employment of casuals was a list allegedly prepared by other casual employees (Mr. Odongo was himself a casual employee). None of the casuals was required to sign

against his name. In the premise, documentary evidence would not be available to prove the employment of the respondent as a casual by the appellant.

The appellant testified that he was employed by a Mr. Patel and his supervisor was a Mr. Michael. It was never suggested at the trial that the said Patel and Michael were fictitious or that the appellant did not have such employees. Johnson Odongo who testified for the appellant did not expressly deny that the said Patel and Michael were the appellant's employees. His evidence further buttressed the respondent's testimony when he acknowledged that he could not know whether the respondent was employed in one of the gangs engaged as casual workers by the appellant. In the premises there was basis for the Learned Resident Magistrate's finding that the respondent was one of the appellant's casual workers. In any event that finding was one of fact. I can only interfere with such a finding if the same was not based on the evidence adduced before the Learned trial Magistrate or if the Learned trial Magistrate misapprehended the evidence. I am unable to find that there was no evidence upon which the Learned trial Magistrate could make that finding. I cannot also say that the Learned trial Magistrate's finding was based on a misapprehension of the evidence. In the premises, I cannot disturb the Learned Resident Magistrate's findings that the respondent was on the material date employed by the appellant as a casual worker.

With regard to negligence, the respondent pleaded the same against the appellant. In his testimony before the trial Magistrate he expressly blamed the appellant's employee. In his own words:-

“A fellow workmate caused injuries. He never gave a warning. Had he done so I would have been alert.....It was not me who was careless, it was my colleagues who were.”

That testimony was not rebutted by the appellant's witness. His concern was that the respondent was not the appellant's worker at the time of the said accident. He did not demonstrate the measures the appellant had put in place to prevent such an accident. And what did the Learned Resident Magistrate say of that aspect of the evidence. In her own words:

“From the events of the day, I can conclude that there was no safe system of work. There was no set procedure of removing the bags from the stack and no system of advance warning or a methodical way of unloading or loading. This exposed the plaintiff to a risk of injury which they ought to have known. The employer did not see any precautions to ensure the safety of the plaintiff.”

For the reasons given above, I cannot disturb the Learned Resident Magistrate's finding on negligence as it was founded on the evidence adduced before here. In the premises, the appellant's challenge against the trial Magistrate's findings on negligence is without merit.

The appellant did not allege that the award made in favour of the respondent was manifestly excessive or that it was so high as to suggest an erroneous estimate of the damage. The challenge touching on the award was expressed as follows:-

“The Learned Magistrate erred in awarding the plaintiff Kshs. 50,000/= general damages and Kshs. 2,000/= special damages when the plaintiff was not employed by the defendant let alone injured at the material time of the

alleged injury.”

The challenge against the award of Kshs. 50,000/= general damages and Kshs. 2,000/= special damages was made because in the defendant’s view, the plaintiff was not its employee and was not injured at the material time. The appellant did not suggest that the Learned Magistrate in assessing the damages took into account an irrelevant factor or left out of account a relevant one. So, the principles upon which a court on appeal can interfere with the quantum of damages awarded by a trial court were not demonstrated (see **Kemfro Africa Limited T/A Meru Express Service Gathogo Kanini – v- A. M. Lubia and Olive Lubia [1982-88]1KAR 727, Ilango – v – Manyoka [1961] EA 705, Leukemia Ranching & Farming Cooperative Society Ltd – v – Karoloto [1970] EA 414 and David Kiprugat & Another – v – Peter Okabe Pango [C.A. No. 68 of 2004 Eldoret] (UR).**

In view of the foregoing, there is no basis to interfere with the awards made by the Learned Resident Magistrate and her apportionment of liability.

In the end, I have found that the Learned Resident Magistrate came to the correct decision on all the issues laid before her and there are no grounds to fault her. This appeal is without merit and is dismissed in its entirety.

The respondent shall have the costs of the appeal. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS

F. AZANGALALA

JUDGE

Read in the presence of:-

Omondi for the Appellant and Oddiaga holding brief for Jumbale for the Respondent.

F. AZANGALALA

JUDGE

4TH MARCH 2010