



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)

Civil Appeal 244 of 2006

GEOFFREY OKUKU OUKO.....APPELLANT

VERSUS

PREMIER FLOUR MILLS LIMITED.....1ST RESPONDENT

**PAUL OUMA OMULO.....2ND
RESPONDENT**

J U D G M E N T

1. This appeal arises from a suit filed in the lower court by Godfrey Okuku Ouko, (hereinafter referred to as the appellant), against Premier Flour Mills Limited, and Paul Ouma Omulo (hereinafter referred to as 1st and 2nd respondent respectively). The appellant claimed to have been employed by the respondents as a general worker. The appellant sued for general and special damages for injuries suffered by him during the course of his employment with the respondents. The appellant maintained that he suffered the injuries as a result of the respondents' negligence and or breach of contract.
2. The 1st respondent filed a defence in which it denied having employed the appellant. The 1st respondent further denied that the appellant was injured at the 1st respondent's premises or that the 1st respondent was negligent or in breach of contract. In the alternative the 1st respondent maintained that if the appellant suffered any injuries then the same were caused by the appellant's own negligence.
3. The 2nd respondent also filed a defence, denying that the appellant was employed by him. In the alternative, the 2nd respondent maintained that the appellant was engaged by the 1st respondent as an independent contractor, through the agency of the 2nd respondent, to undertake specific duties at the premises of the 1st respondent. The 2nd respondent maintained that he had no control over the manner in which the appellant undertook the duties. The 2nd respondent denied that he was negligent or that he owed the appellant any duty of care. The 2nd respondent further contended that if the appellant suffered any injuries, then the same was caused or substantially contributed to by his own negligence or negligence of persons not named by the appellant, with whom the appellant was working as an independent contractor.
4. During the trial, 3 witnesses testified on behalf of the appellant. These were, Dr. C.O. Okere, the appellant, and one Isaac Tete. Their evidence was that on the material day the appellant was working at the premises of the 1st respondent. The appellant and other persons were carrying sacks (gunny bags) full

of wheat from the 1st respondent's warehouse and loading them into train wagons. The sacks of wheat were stacked on top of each other in the 1st respondent's go-down from where they were being removed. The 2nd respondent was the supervisor who had also employed the appellant. It was while the appellant was in the process of removing one of the sacks of wheat from the go-down that some sacks of wheat were dislodged from one of the stacks and fell on the appellant causing him injuries. The accident was witnessed by Isaac Tete who was one of the persons carrying the sacks of wheat. The appellant blamed the 1st respondent for failing to provide him with protective clothing. He also blamed the 2nd respondent who was hurrying the appellant to carry as many sacks of wheat as possible.

5. The 1st respondent testified through its personnel manager Bedford Iguna Riara. The witness denied that the appellant was an employee of the 1st respondent, or that he was injured in the 1st respondent's premises. The witness testified that the 1st respondent had engaged the 2nd respondent as a contractor to carry sacks of wheat from the 1st respondent's go-down. It was the responsibility of the 2nd respondent as a contractor to engage his own workers. The 2nd respondent was further responsible for the safety of his workers which included providing them with protective clothing. The witness further testified that the accident was never reported to the 1st respondent.

6. The 2nd respondent did not call any evidence, but relied on written submissions filed by his counsel. Counsel for the appellant and the 1st respondent also each filed written submissions. Although submissions made by 1st respondent's counsel were omitted from the record of appeal, I was able to access the same from the original record.

7. In his submissions, counsel for the appellant submitted that there was uncontroverted evidence that the appellant was injured whilst carrying a sack of wheat. Counsel contended that although the 1st and 2nd respondent blamed each other, the appellant was not privy to any agreement entered into between the 1st and 2nd respondent. Counsel urged the court to find the two respondents jointly liable.

8. On his part, counsel for the 1st respondent submitted that according to the appellant's own evidence, he was hired by the 2nd respondent who was also his supervisor. This was consistent with the evidence of the 1st respondent's personnel manager that the 2nd respondent was an independent contractor. Counsel further argued that the 2nd respondent did not call any evidence to rebut the evidence of the 1st respondent's witness. The court was urged to find that there was no privity of contract between the 1st respondent and the appellant, and therefore there was no duty of care owed to the appellant by the 1st respondent. Counsel for the 1st respondent submitted that 2nd respondent was wholly liable for the industrial accident. Nevertheless, should the court find that any duty of care was owed by the 1st respondent to the appellant, then, its liability should be minimal.

9. For the 2nd respondent it was submitted that there was no evidence that the 2nd respondent or its servants or agents, negligently handled the sacks of wheat. It was further submitted that the evidence regarding who had employed the appellant was contradictory. It was argued that should it be found that the appellant was employed by the 2nd respondent, and that he was injured during the course of his employment, the 2nd respondent would be entitled to claim indemnity from the 1st respondent within whose premises the appellant was injured.

10. It was maintained that the 2nd respondent was only contracted to carry bags of wheat from the go-down, and that it was only the 1st respondent who could explain how the sacks of wheat were stacked in the go-down. It was maintained that if the bags of wheat fell on the appellant because the sacks of wheat were not stable due to the way they were stacked, the 1st respondent must bear full responsibility for the accident and indemnify the 2nd respondent.

11. On quantum, counsel for the 2nd respondent maintained that there was inconsistency in the evidence

regarding the injuries suffered by the appellant. The court was urged to find that the appellant only sustained fracture of the right patella and deep cut in the right elbow.

12. In her judgment, the trial magistrate found that the appellant's evidence was at variance with his pleadings. She noted that the appellant had not proved as a fact that he was either employed by 1st or 2nd respondent or the two of them jointly. The trial magistrate further found that the appellant did not prove any negligence on the part of any of the respondents. She therefore dismissed the appellant's suit.

13. Being aggrieved by that judgment, the appellant has lodged this appeal raising 4 grounds as follows:

(i) That the learned trial magistrate erred in law and in fact in finding that the appellant had not proved his case on a balance of probability whereas there was sufficient evidence in support of the appellant's case.

(ii) That the trial magistrate misdirected herself on the law by failing to appreciate that the plaintiff had proved that the defendants were liable for the accident that resulted into his injuries.

(iii) That the trial magistrate erred in law by raising the standards of proof for the appellant. The trial magistrate erred in law by failing to evaluate and consider the appellant's evidence in its entirety.

(iv) That the learned magistrate erred in law and fact by delivering a judgment that was against the weight of evidence.

14. During the hearing of the appeal, the 2nd respondent though duly served, did not attend court. In support of the appeal, Mr. Mogire who appeared for the appellant, submitted that the trial magistrate failed to appreciate the appellant's evidence that he was working for the 2nd respondent at the premises of the 1st respondent. He maintained that the trial magistrate further ignored the appellant's evidence that the 2nd respondent was negligent. Counsel further noted that the trial magistrate failed to consider the appellant's injuries or quantify the damages.

15. Mr. Ombati who appeared for the 1st respondent submitted that the appeal was defective as it was brought against a judgment which did not form part of the court record. This was because as per the memorandum of appeal, the judgment appealed against was CMCC No.7989 of 2004 whilst the record of appeal showed the appeal was against CMCC No.7998 of 2004. It was further contended that the memorandum of appeal was not seeking specific prayers. Mr. Ombati maintained that the trial magistrate considered the issue of liability in detail, and noted the contradictory evidence adduced in support of the appellant's case. He therefore urged the court to uphold the judgment of the trial magistrate.

16. I have considered this appeal and the submissions made before me. With regard to the apparent discrepancy between the case number of the judgment appealed against, as indicated on the memorandum of appeal, and that indicated on the record of appeal, it is evident that the correct number is Nairobi CMCC No.7998 of 2004 as indicated in the record of appeal and also proceedings of the lower court contained in the record of appeal. I find that the case number CMCC No.7989 of 2004 indicated in the memorandum of appeal is a simple typing error which the court hereby amend to enable it determine the real issues in this appeal.

17. With regard to the prayer sought in the memorandum of appeal, I concur that the same could have been worded in a better way, but again nothing turns on that as it is evident that the appellant seeks to have the judgment of the lower court set aside and the respondents found liable.

18. I have reconsidered and evaluated the evidence which was adduced in the lower court, as well as the submissions made by counsel. In his plaint, the appellant was not specific as to who had employed him. Paragraphs 4, 5 & 6 of the plaint all imply that the appellant was employed by the two respondents, and that he worked at a store owned by the two respondents, and that the two respondents jointly owed him a duty of care. In the particulars of breach of contract and or negligence, the appellant talks of "defendants'

agents, servants and or employees.”

19. These pleadings were however not consistent with the appellant’s evidence. In his evidence in chief, the appellant maintained that he was working with the 1st respondent as a general worker, while the 2nd respondent was a supervisor. In cross-examination he stated that he had worked for the 1st respondent for about 4 months. Pressed further, the appellant stated that during the period he worked, he was engaged on a daily basis by the 2nd respondent. The appellant’s witness Isaac Tete, corroborated the appellant’s evidence that they were being employed daily, but threw a spanner in the works by claiming it was in fact one Kikwai who engaged the workers on the day of the accident.

20. In the light of such contradictory evidence, the appellant did not prove that he was engaged by the two respondents or that they owed him a duty of care. Further, in his pleadings, the appellant gave specific particulars of breach of contract of employment and or negligence of the defendant as follows:

- (a) Failing to take any or adequate precautions for the safety of the plaintiff while he was engaged in the said work.
- (b) Failing to provide or maintain a safe system of working.
- (c) Failing to maintain adequate or suitable appliances to enable the plaintiff carry out the said work safely.
- (d) Failing to give proper instructions and effective supervision to the other employees on how to handle sacks.
- (e) Failing to provide appliances to hold the sacks firmly in the stores.
- (f) Pulling the sacks of wheat carelessly and recklessly without regard to the plaintiff’s presence.

21. In his evidence before the trial magistrate, the appellant did not show in what way either of the respondents or their servants failed to take adequate precaution for the safety of the appellant. There was no evidence of any suitable appliance which the respondents failed to give the appellant, nor was there any evidence of the appliances which were required to hold the sacks of wheat firmly or any evidence of recklessness or carelessness on the part of the respondents or their servants or agents.

22. In fact, according to the appellant’s evidence in chief, he was the one removing a sack of wheat from the stack of wheat, when the other sacks fell on top of him. During cross-examination, the appellant changed that story and maintained that he was passing by a stack of wheat bags when the sacks of wheat fell on him without anyone having touched the stack. Thus, the evidence adduced once again fell far short of proving the appellant’s allegations of negligence. Although there was evidence that the appellant was injured, the appellant failed to connect his injuries to the respondents and therefore the trial magistrate was right in finding the respondents not liable.

23. As concerns general damages, the trial magistrate was under a duty notwithstanding her finding on liability to assess the quantum of damages. From the report of Dr. Okere, it was evident that the appellant suffered a fracture on the right patella (knee), a fracture on the right malleolus (ankle), deep cut on the right elbow and a blunt injury to the right upper leg. It was submitted that the report of Dr. Okere did not provide a correct picture as the doctor was not truthful about having examined the X-ray films and report. It is true that there was contradiction between the doctor’s evidence and the appellant’s evidence in that regard. However, I have no reason to believe that Dr. Okere lied. It is possible that it is the appellant who did not speak the truth regarding the X-rays. Moreover, the respondents had the opportunity to have the appellant examined by a doctor of their choice. They did not do so and this court has no reason to reject the professional opinion of the Dr. Okere. Given the injuries suffered by the appellant and the authorities which were cited to the trial magistrate, a sum of Kshs.200,000/= would have been adequate as general damages.

24. The upshot of the above is that I find that the appellant failed to prove liability on the part of the respondents. His appeal has no merit. It is accordingly dismissed with costs.

Those shall be the orders of this court.

Dated and delivered this 25th day of May, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs Effendi H/B for the appellant

Ombati H/B for the 1st respondent

Advocate for the 2nd respondent absent