



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 104 & 105 of 1999

LAGONY CONSTRUCTION COMPANY LTD:.....APPELLANT

VERSUS

WANJOHI NJUGUNA:.....RESPONDENT

AS

CONSOLIDATED WITH

CIVIL APPEAL NO. 105 OF 1999

C.P.C. INDUSTRIAL PRODUCTS (K) LTD:.....APPELLANT

VERSUS

WANJOHI NJUGUNA:.....RESPONDENT

(Appeals From the Judgment of Mr. K.A. Ngeno, the Resident Magistrate

in Eldoret SPM.CC.NO. 493 OF 1995 dated 9TH November,1999)

JUDGEMENT

These are two consolidated appeals from the Judgement of Mr. K.A. Ngeno, the Resident Magistrate in Eldoret SPM.CC.No. 493 of 1995, dated 9th November,1999.

In the said suit the plaintiff sued the Defendant (the First Appellant for the purposes of these consolidated appeals), for general and special damages as a result of injuries sustained by the plaintiff allegedly while in the course of his duties as an employee of the Defendant (the First Appellant) at its premises on 2nd June, 1994. The plaintiff alleged that the accident through which he sustained the injuries took place due to the negligence of the Defendant as an employer.

The Plaintiff in his plaint averred that on the material day he was welding a tank supported by pillars at a height of approximately 6 meters when he slipped on loose boards and fell down to the ground sustaining serious injuries. In its Amended Defence, the Defendant denied liability on the ground that the plaintiff was not its employee but that of a Company called Lagony Construction Company Limited. The Defendant then caused the said Company to be enjoined in the suit as a Third Party from which it

sought indemnity and/or contribution. The said Third party, now the Second Appellant for purposes of the appeals herein denied liability and disclaimed that the plaintiff was its employee.

From the judgment and evidence on record it was the trial court's finding that the Third party was a sub-contractor retained and doing some extension works at the Defendant's premises. The Learned Magistrate found that both the Defendant and the Third party shared workers and their services. He held that they were both liable and apportioned liability at 50% as against the Defendant and 50% as against the Third party. The Learned Magistrate awarded Shs.270,000/= as general damages and Shs.2000/= as special damages.

At the hearing of the Appeals, both the First and Second Appellants (Defendant and Third party) abandoned their respective grounds challenging the quantum of damages. What remained, therefore, were the grounds on liability. The questions for determination that emerged are:-

1. Whether the Plaintiff was an employee of the Defendant, the Third party or both.
2. Whether any of them breached any duties owed to the plaintiff as an employee and whether there was any negligence in that regard as set out in the particulars.
3. If there was any breaches or negligence, on whose part was it? The Defendant or the Third party and if so, to what extent respectively?
4. Was there any contributory negligence on the Plaintiff's part?

The burden of proof that the plaintiff was employed by either the Defendant or the Third Party or both of them was entirely, in law and in fact upon him. He had to prove the existence of an employer – employee relationship with the Defendant, the Third Party or both of them. This is the case whether the employment was in writing, of a casual nature or otherwise.

In his evidence-in-chief, the plaintiff said that he is a welder and on the 2nd June, 1994 he was given an assignment by the Defendant to weld their water tank pillars. These pillars held water tanks 20 feet above the ground. In cross-examination, the plaintiff said that he was not employed by C.P.C the Defendant. He did not fill out any contract forms with the Defendant. He testified that Lagony Company, the Third Party had taken him to C.P.C. to do the job. He went further to state that the Defendant was to pay for the services. The Defendant's supervisor assigned him the duties. Lagony are the ones who showed him the C.P.C. supervisor. He added that the Foreman he met worked at C.P.C but the construction works belonged to Lagony Company. C.P.C was to pay Lagony. The Defendant said that he had not applied for any employment with the plaintiff. However, the Defendant paid hospital bills and workmen's compensation.

The Plaintiff said that he did not know the name of the person at Lagony who took him to the work place on 2nd June, 1994. The Defendant called its personnel officer as a witness. He testified that the Third party had been contracted to carry out some works at their premises. They were carrying out works for extension of pipes. He said that the Third Party controlled their workers. He denied that the plaintiff was ever employed by the Defendant. His name did not appear in their records and they did not know him. The said Defendant witness further stated that Lagony was working independently. He admitted that the accident took place in their premises where the extension work were going on and the plaintiff sustained injuries. He said that the plaintiff was the Third party's employee.

The Third Party called one of its directors as a witness. He confirmed that his company was engaged to work at C.P.C. on a sub-contract to carry out extension works. The main contractor was a company called Flour Engineering, South Africa Limited. He denied that the Plaintiff was employed by his company. He said that his name did not appear on their records.

I have considered the judgment, the proceedings and submissions by counsel in these Appeals. The Plaintiff stated that on the material day, he was taken to the site where the work was going on by a person

who worked with the Third party. He did not know his name or position. The Plaintiff admitted during cross-examination that he had not been employed by the Defendant. That should have been the end of the matter on the question as to whether he was employed by the Defendant or not. The Learned Magistrate was obliged to accept this admission by the plaintiff himself.

I do hereby find and hold that the Plaintiff was not employed by the Defendant. He did not enter into any written contract with the Plaintiff. He had never applied for any employment with the Plaintiff. He did not fill out any contract forms with the Defendant. The Plaintiff did not prove the existence of any employment relationship with the Defendant, written, casual or otherwise. Without any doubt, the Learned Magistrate erred in fact in finding that the Defendant and the Third party shared casuals and their services. There was no basis for such a finding. This was even denied by the Third Party's witness.

From the evidence, It is clear that a person representing or working for the Third party approached the Plaintiff to do welding work at the Defendant's premises. The Third party was in the premises as a sub-contractor to carry out extension works. It had its own employees including casual workers. Considering the informal manner of engagement, the plaintiff was retained as a casual worker on 2nd June, 1994. On a balance of probability, the Trial Magistrate ought to have found that the plaintiff was retained or employed by the Third party as a casual worker on the material day. He was so employed to carry out welding works on behalf of the Third party.

It was the duty of the Third party to produce in evidence or show the terms and condition of its contract with the Defendant. This would have showed whether the Defendant as the developer and client assumed any responsibility or liability in respect of the safety of the third party's workers on the premises or was responsibly for the supervision of its workers and system of work. The Third Party simply denied liability and stated that the plaintiff was not theirs otherwise he should have sued them directly in the first place.

Of critical significance, is that the Third party denied that it had paid for the plaintiff's medical bills at Pacifica Hospital where he was taken for treatment. However the admission sheet produced by the plaintiff (Exhibit, P1(h)) clearly showed the address of the plaintiff to be the Third party's. It read.

“ Pt No. 326/94

Lagon Construction

P.O.BOX 2804,

ELDORET.

TEL: 32187,ELDORET”

This detail must have been given by the Plaintiff in the absence of any other evidence. The Third party chose to keep silent about this.

In the premises I do hereby find that the Third party was employed as a casual worker by the Third party. The Learned Magistrate, therefore, erred in law and in fact in holding in effect that he was employed by both the Defendant and the Third party or that they were both liable because they shared casual workers and therefore their services. The Plaintiff himself did not plead this in his plaint and such a finding was misconceived. I agree with the Third party's ground 2 in the memorandum of Appeal, that the Learned magistrate erred in law and in fact in failing to find conclusively as to who was Plaintiff/Respondent's employer and therefore liable.

This brings me to the question of contributory negligence. Upon considering the finding of liability and apportionment thereof I do hereby find that the Learned magistrate did not address his mind to and determine the question as to whether the Third Party was in any way himself negligent and if so, to what extent. This question arose from the Defendant's Amended Defence and ought to have been considered.

This failure makes me conclude and hold that the trial court erred in law in this regard. It is, therefore, the duty of this court to correct this. An order of retrial of this issue is not in the interest of the parties due to the age of this case and date of the accident. I would therefore, do the best that I can to determine the said question to bring this litigation to an end.

I have carefully read the proceedings and judgment of the trial court. The Plaintiff testified, inter alia, that:-

1. As a welder he would usually carry tools which are not available at the site of work. On this day he did not do so.
2. He was given a welding machine and glasses. He did not go back to his workshop to take the missing items at the site necessary for his work.
3. He was not given any safety belt though he asked the Foreman for it.
4. While welding, he stood on a piece of wood.
5. Pieces of hot sparks fell on his feet and as he tried to avoid them by moving his foot, the wood turned over. He lost balance and metal bars fell on him.
6. He was an experienced welder.
7. He knew it was dangerous to work without a safety belt.

On the basis of the evidence of the plaintiff and the fact that the Third party's witness did not testify in respect of the accident, the alleged breaches and negligence, I do hereby uphold the learned magistrate's findings on the facts on the question of negligence. The employer of the Plaintiff did not provide him with or maintain adequate or suitable plants, tackle and appliances to carry out his work.. They also did not provide him with a safe work place. However, it is noted that the flying hot sparks are inherent and common when one is carrying out welding works. The Plaintiff was an experienced welder and ought to have worn proper shoes. There is no allegation that he was not wearing shoes for him to panic that his feet were in danger of being burnt by the hot flying sparks. He also dangerously stood on a loose piece of wood and should have foreseen that he could lose balance if he did not stand on it carefully. He was in control of the work system and methods as an experienced welder. He did not explain how a safety belt would have prevented the metal bars from falling. The metal bars must have fallen when he lost balance and fell done on the board.

In the light of the foregoing I do hereby hold that the Trial Magistrate ought to have considered possibility or degree of contributory negligence. From the above facts, I also hold that the plaintiff contributed to the accident happening and he was contributorily negligent. I assess the said contribution at 30%. I, therefore, apportion liability at 70% as against the Third party and 30% as against the Plaintiff.

The Learned Magistrate awarded a sum of Kshs.270,000/= as general damages. I therefore, do hereby allow the appeal of the First Appellant and set aside the judgment of the trial magistrate and his findings on liability and quantum in respect of the First Appellant. Instead, I do hereby find the Third party liable for the accident and the plaintiff contributorily liable for the same. On the basis of the aforesaid finding and apportionment, I do hereby dismiss the Second Appellant's appeal and vary the judgment as against it. I do enter judgment in favour of the Respondent as against the Second Appellant/Third party in the sum of kshs.189,000/= as general damages. I also award the sum of shs.2000/= as special damages making a total of kshs.191,000/=. The Third/Second Appellant party shall pay the costs of the suit on the said amount together with interest on the total awarded sum at court rates from the date of judgment. The Second Appellant shall pay the costs of its appeal to the Respondent. The Respondent (plaintiff) shall pay the costs of the suit and this appeal to the First Appellant (defendant).

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 15th DAY OF NOVEMBER,2006

M.K. IBRAHIM

JUDGE