

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. 93 OF 2003

ONYANGO MUKASAAPPELLANT

VERSUS

AFRO MEAT CO. LTD.....RESPONDENT

(Appeal from Original Winam RM Civil Case No. 456 of 2002)

JUDGMENT

This is an appeal from judgment and decree of the Resident Magistrate's Court Winam in RMCC No. 456 of 2002 delivered on 13th June 2002.

On 28th October 2002 , Onyango Mukasa, the appellant, brought an action at the Resident Magistrate's Court, Winam , against M/S Afro Meat Co. Ltd, the respondent seeking damages for an injury he sustained on January 2002, while working at the roof of a house in the course of his employment with the respondent. The appellant attributed the cause of the said accident to the breach of statutory duty on the part of the respondent and a failure to take all reasonable precautions for his safety while working. The appellant averred that he suffered pain, loss and damage as a result of the said accident and gave particulars of the statutory duty breached by the respondent, and the negligence to the respondent. The appellant also gave particulars of the injuries, and damages he incurred.

The respondent filed a defence and denied all the claims made by the appellant. In particular the respondent denied that at the material time the appellant was its employee and denied an existence of any alleged term of the contract which was said to have been breached by it. The respondent further denied that the appellant fell from a ladder as a result of negligence and breach of statutory duty on its part. The respondent further averred that if any accident occurred it was solely caused or substantially contributed to by the negligence of the appellant.

The case was eventually tried before W. Mokaya, Resident Magistrate who in her judgment delivered on 13th June 2003 dismissed the said suit on the ground that I was not proved on the balance of probabilities and that prompted the appellant to lodge this appeal.

In his submission Mr. Omwenga for the appellant stated that the learned magistrate misdirected herself by holding that there was nothing on record to prove that the appellant was at the material time an employee of the respondent. It was his contention that exhibit P4 which was a payment voucher for a sum of Kshs. 2500/- to the appellant by the respondent proved the existence of the employee – employer relationship between the appellant and the respondent. He claimed that the magistrate erred in claiming that the exhibit was not conclusive evidence. Mr. Omwenga further claimed that the learned magistrate had erred in holding that the failure of the respondent to join the 3rd party was not vital to the defence.

The appeal was opposed by Mr. Omollo for respondent who submitted that the learned magistrate did not misdirect herself when she held that the appellant had not proved its case on the balance of probabilities. According to Mr. Omollo sections 107 to 110 of the Evidence Act place the burden of proof of any fact on the person who makes the allegations who was the appellant in this case. He contended that Exhibit P4 which was payment Voucher did not establish that the appellant was an employee of the respondent. According to Mr. Omollo there was uncontroverted evidence that the appellant was a casual employee of DW3 a private contractor who had assigned to work at the house from which he fell down and that that evidence is corroborated by evidence of DW1 and DW2 . He also claimed that the issue of the 3rd Party notice could not issue in this case.

As indicated above the appellant had sued the respondent seeking damages from the respondent on the claim that he was employed by it on the material date. It was therefore incumbent upon him to prove that he was the employee of the respondent on 7th January 2002. It was also his responsibility to establish the respondent's liability so as to succeed. Having carefully perused the evidence adduced by witnesses the appellant did not prove to the required standard that he was an employee of the respondent. On the contrary there was unchallenged evidence of DW3 a private contractor who had been engaged by the Managing Director of the respondent to repair his leaking house that the appellant was his casual employee at the material time. The issue of a thirty Party Notice did not arise because the respondent did not admit liability and had not expected DW3 to indemnify it. The respondent had categorically denied that there was any contract of employment between the appellant and it. I agree that the payment voucher produced as Exhibit P4 was not conclusive evidence as to the alleged relationship as found by the Magistrate.

In the result I find that this appeal does not have any merit and accordingly I dismiss it.

Dated and delivered this 4th May 2004.

B.K. TANUI

JUDGE