REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 361 OF 2001

KAY CONSTRUCTION COMPANY LTD. ……..APPELLANT

VERSUS

MALEZI MUTHAMA ……RESPONDENT

J U D G M E N T

On 7th September, 2000 the plaintiff, now respondent herein, filed a suit in the court of the Chief Magistrate at Nairobi and sought both special and general damages from the defendant, now appellants, on account of the injuries he sustained on 30th July 1999 while he was working with the said appellant.

The plaintiff blamed the appellant and/or their employees for negligence in that:

(a) they failed to provide a safe place of work and safe means of work;

(b) they exposed the plaintiff to a risk of bodily injury they knew or ought to have known.

(c) They failed to provide hand gloves or other safety devices.

That as a result of this accident the plaintiff had his hand caught and severally injured by a culvert which he was laying with other employees and that he suffered loss and damage. The appellant's defence to the suit was that the respondent was not their employee at the time of the accident.

The case was placed before the Senior Resident Magistrate on 29th May 2001 and 8th June 2001 for hearing when both parties testified.

What the respondent told the lower court was that he was employed by the appellant as a casual labourer and that on 30th July 1999 he was on duty at Miotoni Road Karen where he was fixing culverts.

A stone fell inside the culvert and the Supervisor told him to remove it.

But that when other workers tried to lift the culvert using ropes for him to be able to remove the stone, the said culvert fell on him injuring his right finger which was fractured.

That in the process, the 2nd, 4th and 5th fingers were lacerated.

In cross examination the respondent said he was employed at site but could not remember the name of the Indian who employed him and had no document to show he was employed by the

appellant.

A defence witness, one Benson Karimi Gutu, the Administrative Manager of the appellant, testified that the respondent did not work for them and that during 1999 July the defendant had no contract work or a project being carried out in Nairobi.

The witness produced computer print out for casuals during July and August 1999 and said the respondent was not amongst them. That there was no site at Karen where the respondent allegedly worked.

The learned magistrate wrote her judgment which she delivered on 17th July 2001 and awarded the respondent Kshs.140,000/= as general damages and Kshs.2,600/= special damages.

Arising from this decision the appellant has appealed to this court in a memorandum of appeal filed herein on 19th July 2001.

It cited 9 grounds of appeal all of which were intent on disputing the magistrate's finding that the respondent was the appellant's employee and/or showing that the learned magistrate only considered the evidence of the respondent, thus ignoring that of the appellant.

The appeal was placed before this court for hearing on 17th September 2002 wherein counsel for the parties appeared to submit either in favour or against it. Counsel for the appellant said that the appeal was against both liability and quantum.

He stated that throughout the trial the respondent produced no document to show or prove that he was an employee of the appellant or that the project the respondent alleged he was working on was not one undertaken by the appellant.

That the respondent could not give the name of the foremen who gave him the casual job. That the forms he alleged he signed when he was paid his wages were not produced and that he did not call any of the people he was working with to testify in support of his evidence.

According to counsel, the appellant filed a defence to deny that the respondent was its employee and this was elaborated by the administrative manager who testified in court.

That this witness enlightened the court on the proceedures used in hiring labourers and produced casual labour card and letter of temporary employment. That he liaises with all supervisor to ensure all casual's names are entered in the Register.

That the witness denied that the respondent reported this accident anywhere and that the respondent did not prove a contract of employment.

Counsel disputed the quantum of damages awarded by the court because it was not commensurate with the injuries sustained. He prayed that the appeal be allowed. Counsel for the respondent opposed the appeal and said this court can only interfere with the quantum awarded by a lower court if it is found not to be within reasonable limits since such an award is at the discretion of the court.

According to counsel the respondent was a casual labourer who was employed at site and his documents signed and kept there and not at the central office where the defence witness was based.

That the material produced by the defence witness were not for the date the accident occurred and that the magistrate noted this and that is why she found for this respondent.

Counsel submitted that the lower court did not believe the defence witness evidence that the appellant had no project or contract work in 1999 because of his revelation that it retained casual

workers that year.

According to him the complaints raised against the learned magistrate cannot stand the scrutiny because the said Magistrate fully considered the evidence of both parties, though the defence evidence was rejected. He prayed that this appeal be rejected.

In civil cases, it is the duty of the plaintiff to prove his/her claim on preponderance of probabilities. The evidence of the respondent is on page 6 of the record of appeal. It said nothing about the particulars of negligence set out in paragraph 7 of the plaint, assuming for one moment the respondent was an employee of the appellant.

He produced no document to confirm his employment to the appellant.

He knew the only evidence for him to show he was employed by the appellant were the forms he signed when earning his daily or weekly wages yet as he prepared to prosecute his case he did not see it fit to give a notice to the defendant to produce them during trial though he insisted these forms were kept by the said defendant.

It was the plaintiff's duty to do this and since he failed, he should not blame the appellants witness for producing blank forms or whichever forms and cards he produced to demonstrate that the respondent was not one of their employees.

There was no duty on the appellant to prove anything and it was not proper for the court to take failure by it to do this or not that as evidence in favour of the respondent. That the defence witness denied having any contract of work or that he had some casual workers during 1999 was not really evidence in favour of the respondent.

The respondent did not say the date he was employed or how much wages he was supposed to earn per day, week or month.

Apart from saying a driver called Jones took him to hospital in one, Richard's – supervisors motor vehicle, there was no evidence that he reported this incident to any officials of the appellant.

When, therefore, the appellants complains that the respondent did not prove that he was employed by the appellant they had a valid point and I agree with them that the respondents' claim against the appellants was not proved on a balance of probabilities as required by law and that the learned Senior Resident Magistrate's order holding the appellant liable for the accident was not supported by the evidence. And if this was the position then the question of damages could not fall for a decision.

The appeal is allowed but since the respondent appears to have been a man of low class, I would direct that each party do bear his/its/their own costs of this appeal.

Delivered this 24th day of September, 2002.

D.K.S AGANYANYA

JUDGE