



REPUBLIC OF KENYA



KENYA LAW
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**Makau v Plumbing Systems Limited (Civil Appeal 144 of 2015)
[2024] KEHC 3110 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 144 OF 2015**

MW MUIGAI, J

MARCH 7, 2024

BETWEEN

HENRY WAMBUA MAKAU APPELLANT

AND

PLUMBING SYSTEMS LIMITED RESPONDENT

(Appeal arising out of the Decree of the Chief Magistrate Court at Machakos (M.K Mwangi-Ag. SPM) delivered on 14th August 2015 by Honorable Simiyu in Machakos CMCC No. 986 of 2012)

JUDGMENT

Trial Court Proceedings

The Plaintiff

1. Vide a plaint dated 19.12. 2012, the Plaintiff claimed that he was an employee of the Defendant company and it was express and/or implied term of contract between the Plaintiff and the Defendant that it was the duty of the Appellant to take all reasonable precautions for the safety of the Plaintiff while he was at work and not expose him to risk of damages or injury.
2. The cause of action is said to have arisen on 1.10.2012 when the Plaintiff in the course of work while constructing a wall within the Company's premises while on top of a ladder, the ladder slid as a result of which the Plaintiff fell from the second floor landing on broken stones. He averred that he sustained serious injuries on the left hand, chest, neck, back, groin and had a dislocation on the right hip joint. He also averred that he suffered pain and loss and this was caused by negligence, carelessness, breach of statutory duty and breach of Contract on the part of the Appellant.
3. The Plaintiff sought for an award of the following from the Trial Court:
 - a. General damages.



- b. Special damages of Kshs. 4,000/=.
- c. Cost of the suit.
- d. Interest.
- e. Any other relief deemed fit to grant by this Honorable Court.

The Defence

4. The Defendant in his defense dated 2nd April, 2013 wherein he denied all the contents of the Plaintiff contending that if the Plaintiff suffered any such injuries as alleged in the Plaintiff, then they were contributed to by the plaintiff's negligence. In addition, he averred that the accident was inevitable notwithstanding the exercise of all reasonable care and skill on the part of the Plaintiff. He prayed that the suit be dismissed with costs.

Hearing

5. PW1 was Henry Wambua Makau a casual labourer, testified that the Defendant was his employer and they were not given terms of employment. It was his testimony that on 1.10.2012, he was working on a construction site; they were putting up a go down wall, he was up the ladder about 35 meters above the ground and the ladder moved. He said he was injured on hand, neck, back and left leg and was rushed to hospital.
6. He said he informed Kurji, the supervisor and was rushed to Shalom hospital and then Machakos Hospital. He blamed the Defendant for the accident giving him a ladder without support. It was his testimony that again he was not given helmet and boots. Later, he was seen by Dr. Mwaura who examined him and prepared report He prayed that he be compensated his costs and damages. He produced a medical note, medical report, receipt and demand letter.
7. It was his testimony upon cross-examination that he had worked for the Defendant for about four (4) months. Further, that they would report to work and sign in a book kept by the Defendant and that there two other workers. He told the trial court that the Defendant took him to the hospital .According to PW1 he had used the ladder for two (2) days and they did not have support for the ladder. He said that Kurji was present when he was injured and when he fell he could not stand up immediately. He also stated that upon arrival at Shalom hospital, he could not speak and that his medical report is correct.
8. That marked the close of the Plaintiff's case.
9. The Defendant did not call any witness.

The Trial Court Judgment

10. By a Trial Court judgment dated 14th August,2015, the Trial Court awarded the Plaintiff a sum of Kshs. 250,000/- as general damages and Kshs. 3,000/- as special damages together with costs and interest. Liability was apportioned at 10:90 for the Plaintiff as against the Defendant.

The Appeal

11. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated and filed in court on 14th September,2015 sought the following prayers that:
 - a. Spent.



- b. The Judgment and decree of the Chief Magistrate’s Court made on August, 2015 in Machakos CMCC No. 986 of 2012 be set aside.
 - c. This Court dismisses the said suit with costs to the Appellant and/or makes an appropriate judgment and determines the suit finally.
12. The Appeal is brought on the grounds that:
- a. The Learned Magistrate erred in law and fact in wrongly deciding that the defendant was liable for the accident subject matter of the suit in the absence of the evidence to that effect and disregarding the evidence and submissions for the Defendant/Appellant in that regard.
 - b. The Learned Magistrate erred in law and fact in finding that the Plaintiff was employed by the Defendant at the material time in the absence of evidence to that effect and disregarding the submissions for the Defendant/Appellant in that regard.
 - c. The Learned Magistrate erred in assessing general damages in the sum of Kshs. 250,000/= for the injuries suffered by the Plaintiff/Respondent.
 - d. The said assessment and award of general damages is manifestly excessive and inordinately high as to amount to a miscarriage of justice.
 - e. The said assessment and award is out of keeping with other Kenyan awards for comparable injuries.
 - f. There was no good or proper basis for the said assessment of damages.
13. The Appeal was canvassed by way of written submissions.

Appellant’s Submissions

14. The Appellant in its submissions dated 12.09.2023 raised the following issues for determination:
- a. Whether the Respondent proved there was an employer-employee relationship between the parties.
 - b. Whether the Appellant was liable for the accident and whether the damages awarded were excessive and inordinately high.
15. As to whether the Respondent proved there was an employer-employee relationship between the parties, counsel placed reliance on the case of *Zarika Adoyo Obondo v Shunjun & Another* [2020] eKLR, and submitted that the Respondent never adduced any evidence to show that at the time the cause of action arose he was an employee at the Appellant’s premises. Opining that the Respondent clearly stated in his testimony that he did not have an employment contract or any document to support his allegations but instead alleged that all documents were maintained by the Defendant.
16. Counsel further quoted the following cases to buttress his point on contract of employment, *Casmur Nyankuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR and *Christine Kalama v Jane Wanja Njeru & Another* [2021] eKLR, submitting that despite the onus being on the Respondent to prove existence of the employment relationship, the Learned Magistrate in his judgment did not take this into account and proceeded on the basis that there existed an employment relationship between the Appellant and the Respondent without any proof of the same.



17. As to whether the Appellant was liable for the accident and whether the damages awarded were excessive and inordinately high, counsel opined that the trial court failed to consider that it was not the ladder provided to the Plaintiff that collapsed or broke, it was not defective but it is the Plaintiff who failed to take sufficient measures to ensure his safety in the performance of his duties by securing the ladder properly prior to commencing his work, knowing well enough that the nature of his work was inherently risky.
18. It was averred that in holding that the Appellant breached the duty of care and was negligent for failure to take all reasonable precautions for his safety or provide him with adequate and suitable plant appliances, submitting that the trial Court failed to consider that the Respondent was never an employee of the Appellant and the Appellant had no adequate and suitable appliances, all which the Appellant does avail its employees. To bolster this argument counsel relied on the case of *Mastermind Tobacco (K) Limited v John James Muthee*, High Court Civil Appeal No. 66 of 2001.
19. It was the Appellant's contention that the Respondent's testimony that he had worked for the Appellant's premises for a period of three months only serves to prove that indeed a safe working environment had been provided. Averring further that the injuries suffered by the Respondent did not warrant the award of Kshs. 250,000/- and that the award by the trial judge was excessive and inordinately high. Counsel further placed his reliance on the case of *Justine Nyamweya Ochoki & Another v Juma Karisa Kipingwa* [2020] eKLR, where the trial court made an award of Kshs. 300,000/- as general damages for injuries sustained in the nature of blunt object injury to the lower lip, blunt object injury to the chest and blunt object injury to the left wrist. On Appeal, the said award was substituted with Kshs. 150,000/- for reasons that the award of quantum by the trial Magistrate was on a higher side and did not take into consideration the fact that the Respondent sustained soft tissue injuries

Respondent's Submissions

20. The Respondent in his submissions dated 27.10.2023 submitted on three grounds. As to whether the Respondent proved that there was an employer-employee relationship between the parties, it was submitted that this honorable court ought not to disturb the lower court's decision in finding that there was indeed an employer-employee relationship as this finding was purely that of fact. Counsel relied on the cases of *Ephantus Mwangi & Another v Duncun Mwangi Wambugu* CA 77 of 1982, *Mwanasokoni v Kenya bus Services Limited* No 35 of 1985 and *North End Trading Company Limited [Carrying on the Business under the registered name of Kenya Refuse Handlers Ltd v City Council of Nairobi]* [2019] eKLR.
21. As to whether the Appellant herein was liable for the accident, counsel submitted the liability of an employer towards his employee is injured in the course of employment as their duty of care which is placed upon the employer to provide safe system of work. During the trial the Respondent confirmed that he was given a faulty ladder that he had used only for 2 days prior to his accident. Opining that the Appellant in turn did not tender an evidence that was contrary to that of the Plaintiff/Respondent and as such the Respondent's evidence was to be believed fully.
22. As to whether the quantum awarded was inordinately high, it was submitted on behalf of the Respondent that in an appeal against assessment of damages an appellate court must be careful not to interfere with the trial court's discretion unless certain conditions are met. Reliance was made on the case of *Kemfro Africa Limited t/a "Meru Express Services [1976] & Another v Lubia & Another (No 2)* Civil Appeal No. 21 of 1984 [1985] eKLR and *Stanley Maore v Geoffrey Mwenda NYR* CA Civil Appeal No. 147 of 2002 [2004] eKLR,



23. It was submitted that the Appeal lacks merit and it is their prayer that the same be dismissed in its entirety with costs to the Respondent together with interest at the Court's rates from the date of judgment of the lower court.

Determination

24. This Court has considered the Trial Court record, the memorandum of Appeal and the submission of the parties.
25. This Court is reminded that it did not have the occasion to listen to the witness who testified in this case and has a duty to re-evaluate the evidence before the court and make its own finding. This court is guided by the holding in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court stated that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

26. Accordingly, this court upon evaluation of the record and evidence before it finds that the issue of special damages, cost, interest and liability is not contested. The Appellant only takes issue with the issue of the Respondent being its employee and the quantum that was awarded to the Respondent of Kshs 250,000
27. It is trite law that he who alleges must prove, this is provided for in section 107 of the *Evidence Act* which provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
28. In addition, Section 109 of the same Act stipulates that “ the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.”
29. In this Appeal, the Appellant bears the burden of proving that the grounds in the memorandum of Appeal. However upon perusal of the Trial Court record, it is noted that the Appellant in this case did not call any witness and only relied on its submissions and defence to support its case. It has been said previously by this court that the defence is made of mere statements which do not form evidence and further that submissions are not pleadings. The evidence of the Respondent thus remains uncontroverted. This point was buttressed in the case of *In Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* [2012] eKLR, where the court stated as follows:

“What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No. 834 of 2002 Justice Lesiit, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”



Again in the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

30. Also in Grace Kanini v Kenya Bus Services Nairobi HCCC No. 4708 of 1989 the Court stated that:

"Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident."

31. It is trite law that parties are bound by their pleadings. In the Plaint, the Respondent contends that the cause of action arose on 1.10.2012 at his work place and he was taken to Shalom Community Hospital. He has produced a referral note from Athi River Shalom Hospital dated 1.10.2012. The same date is also captured in the medico-legal report dated 20.10.2012 from Kinoo Medical Clinic. They both indicate that the Respondent fell from a ladder and height respectively.

32. The Appellant contends that the Respondent has not proven that he was an employee however his presence at the Appellant's premises has also not been disputed. With that and in the absence of any evidence of any evidence to counter that of the Respondent, the Respondent is taken to be an employee of the Appellant as the evidence of the Respondent remains uncontroverted.

33. As regards the issue of damages, the injuries sustained by the Respondent were on the left hand, chest, neck, back, groin and he had a dislocation on the right hip joint. This evidence has not been contested. As per the medical report dated 30.10.2012 from Kinoo Medical Clinic the injuries sustained were corroborated and it indicated that;

"Henry Makau sustained injuries at his work on 01/10/2012. He received treatment at Athi River Shalom Community Hospital.

Healing -right hip is incomplete.

- i. He has a limping gait and pain- right hip on exertion
- ii. He sustained dislocation- right hip plus soft tissue injuries
- iii. Prognosis is fair"

34. The Trial Court award Kshs 250,000 as general damages. For this court to interfere with the award, the certain conditions must be met. In the case of Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 the Court of Appeal held that:

"The appellate Court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in



cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

35. The Court of Appeal in the case of *Kemfro Africa Limited t/a “Meru Express Services [1976]” & another v Lubia & another (No 2) [1985]* eKLR stated as follows with regards to interference with an award of damages;

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

36. In this case, no evidence has been tendered to show that the Trial magistrate proceeded on a wrong principle or misapprehended the evidence in some material respect or left out of account a relevant factor.
37. I have considered the authorities relied upon the parties in the Trial Court and those cited in the Appeal submissions and find that the award was not inordinately high and was sufficient in the circumstances.

Disposition

38. In the end, the Appeal fails and is dismissed with costs to the Respondent.

JUDGMENT DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Lundi - for the Appellant

No Apperance - for the Respondent

Geoffrey/patrick - Court Assistant(s)

(Judge Bereaved)

Judgment Released To Registry on 26/3/2024.

M.W.MUIGAI

JUDGE

