



Simiyu v Jagerry (Civil Appeal 80 of 2022) [2024] KEHC 5323 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

CIVIL APPEAL 80 OF 2022

DK KEMEL, J

MAY 17, 2024

BETWEEN

MOSES WAFULA SIMIYU APPELLANT

AND

CHATAMBE JAGERRY RESPONDENT

*(An appeal from the Judgement and decree of Hon. Munyekenye (SPM) in
Webuye SPMCC No. 223 of 2016, dated and delivered on 17th August 2022)*

JUDGMENT

1. The principal claim in a Plaint dated 6th December 2016, was for the award of damages, costs and interest arising out of a work-related accident which involved the Appellant. According to the Appellant, he was an employee of the Respondent when on or about 12th November 2016, he was lawfully on duty at the Respondent's premises under its instruction when he slid and fell while packaging hot liquid sugar into glasses. The Appellant averred that the accident was as a result of breach of their expressed and/or implied terms of contract of employment by the Respondent prompting the lower court suit.
2. The matter proceeded to full hearing and on conclusion, the trial court held that the Appellant failed to prove his claim on a balance of probabilities and proceeded to dismiss his claim with costs to the Respondent.
3. The Appellant was aggrieved by the decision of the lower court and has appealed to this court vide his memorandum of appeal dated 16.9.2022 wherein he raised the following grounds:-
 - i. That the learned trial magistrate erred in both law and fact when she failed to find that the testimony of the Appellant was uncontroverted hence occasioned a miscarriage of justice.
 - ii. That the learned trial magistrate erred in both law and fact when she failed to analyze, consider and consider the submission and case law filed by the Appellant.



- iii. That the learned trial magistrate erred in both law and fact when she failed to find that the Appellant had proved his case on a balance of probability.
4. The Appellant prays that this court sets aside the Judgement of the trial court and substitute the same with an order allowing his claim in the trial court with costs and costs in this appeal be awarded.
5. The appeal proceeded by way of written submissions but that it is only the appellant who complied. In the Appellant's submissions dated 2nd January 2024, Counsel submitted that the learned magistrate erred when she held that the Appellant failed to prove that he was employed by the Respondent yet the 2nd medical report by Dr. P.W Oketch prepared by the Respondent's doctor asserted that the Appellant was the Respondent's employee. He further submitted that the Respondent failed to avail any witnesses to testify in support of their defence leaving the Appellant's evidence uncontroverted. He relied on the following cases:
 - i. Motex Knitwear Limited v Gopitex Knitwea Mills Limited Nairobi (Milimani) HCC No. 834 of 2002.
 - ii. Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (Milimani HCCS No. 1243 of 2001)
 - iii. Karuru Munyororo v Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988.
 - iv. Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCC No. 68 of 2007.
 - v. Interchemie E.A Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani) HCC No. 165B of 2000.
 - vi. Drappery Empire v Attorney General Nairobi HCCC No. 2666 of 1996.
6. Counsel for the Appellant submitted that the Appellant pleaded *res ipsa loquitur* in his Complaint thereby discharging the burden and in the absence of any explanation from the Respondent, the blame squarely lies on the Respondent. He relied on the case of Uchumi Supermarket Limited & Another v Boniface Ouma Were [2021] eKLR. He urged this court to find that the trial court erred when it held that the Appellant failed to prove his claim on a balance of probability and find that he was indeed injured while on duty.
7. The Respondent did not file any written submissions as directed by this court.
8. I have considered the appeal, the Appellant's submissions and the trial court's record. I have also considered the impugned judgment and the decisions relied on. This being a first appeal, parties are entitled to this court's reconsideration, reanalysis and reevaluation of the evidence afresh and its own conclusion on that evidence. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.
9. In Williamson Diamonds Ltd and another v Brown [1970] EA 1, the Court held:

“The appellate Court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial Court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
10. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the Court of Appeal stated that the primary role of a first appellate court



is to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way.

11. PW1, Moses Wafula Simiyu, testified that he resides in Matete and wished to adopt his recorded statement dated 6th December 2016 and the list of documents dated 6th December 2016 as his evidence in chief which the trial court adopted. According to him, he slipped and fell inside a cooking pot “karai”. He testified that he was never given any gumboots, gloves, helmet or overall and that the place of work was wet and that he was bare feet at the time of the incident. He got injured on the right foot. He told the court that he has not healed well and that he cannot work for a long time. He added that he prayed for compensation for the injuries sustained, costs of the suit and further treatment.
12. The trial court considered the evidence and submissions by parties, delivered a brief judgment, holding that the Appellant failed to prove his claim against the Respondent on a balance of probabilities and dismissed the same with costs to the Respondent.
13. I have considered the evidence on record as well as the Appellant’s submissions. In this appeal, the Appellant testified that he was in the employment of the Respondent. Since his claim was premised on employer/employee relationship, it was up to him to bring fourth irrefutable and credible evidence to buttress that assertion. Such evidence, in my view, was not tendered. The assertion by the Appellant’s counsel in their submissions that the medical report by Dr. P.W Oketch had indicated the appellant as an employee of the Respondent is without any merit since it was the duty of the Appellant to place evidence of employment with the Respondent. In any case, the Respondent did not avail evidence in defence as that could have been a window for the Appellant to benefit from anything alluding to him being indicated as an employee of the Respondent.
14. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase “Onus Probandi” and when we talk of burden we sometimes talk of onus.
15. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
 - 1.Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
 - 2.The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
16. Section 107 of [Evidence Act](#) defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) refers to the legal burden of proof.
17. Section 109 of the [Evidence Act](#) exemplifies the Rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.



18. The question therefore is whether the Appellant herein discharged the burden of proof that he was an employee of the Respondent herein.
19. The Appellant did not avail any evidence to that effect in form of document or witnesses to warrant the same to controverted by the Respondent that he had employed him. As a casual labourer, it is not expected that he would be issued with a formal letter of employment nor employment card as argued by the trial magistrate, but in the absence of any evidence for example a sign in a register, to indicate that he clocked in at the premises at that time as instructed by the Respondent, i am satisfied just like the learned magistrate was, that the Appellant was not an employee of the Respondent.
20. There is clear doubt that the Appellant was injured as he worked at the Respondent's premises and just like the learned magistrate therefore, i am also satisfied that the Appellant failed to avail any evidence proving his claim that he was an employee of the Respondent to warrant this court to find his claim on negligence both statutory and at common law against the Respondent on a balance of probabilities. Even though the Respondent did not tender evidence, the burden of proof did not in any way shift to the Respondent. It was the burden of the Appellant to discharge before the trial court.
21. In the result, it is my finding that the appeal lacks merit. Accordingly, it is dismissed with costs to the Respondent.

DATED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF MAY 2024.

D.KEMEI

JUDGE

In the presence of:

Wekesa for Bw'Onchiri for Appellant

Miss Mutuna for Masinde for Respondent

Kizito Court Assistant

