Njue v Ondieki (Civil Appeal E006 of 2022)
[2024] KEHC 12591 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12591 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E006 OF 2022

RC RUTTO, J

OCTOBER 16, 2024

BETWEEN

ALEXIUS STEPHEN NJUE .... APPELLANT

AND

JOSEPH ARISA ONDIEKI .... RESPONDENT

(Being an appeal from the Judgment of Honourable M.W Wanjala (SRM) IN Civil Suit No. 574 of 2014 delivered on 25th November, 2022)

JUDGMENT

1. This appeal arises from Thika Chief Magistrate Court Civil Suit No 574 of 2014. The Appellant is aggrieved by the entire decision that held him wholly liable for the accident for failing to provide a safe working environment and proceeded to award general damages of Kshs 600,000/-, special damages of KShs.2,000/- costs of the suit and interest.

2. The facts of the case are that the respondent filed suit by way of a plaint dated 22nd July 2014 before the subordinate court claiming general damages for fracture of the right femur upper 1/3 sustained in the cause of his employment; special damages of Kshs.2,000; costs and interest of the suit.

3. The respondent's case was that, on 26th July 2013 while in the cause of his employment at the appellant premises known as Europe Apartments, while building an apartment block on its 4th outer wall, was issued with a temporary ladder which broke causing him to fall on the ground and sustain injuries. Further, that there was an express or implied term of an existing contract between them and the appellant had a statutory and or contractual duty to take all reasonable precautions for the safety of the respondent. He alleged that the appellant acted negligently. To support its case, the respondent called 2 witnesses.

4. In opposing the claim as set out in the plaint, the appellant filed a defence. He denies that the respondent has ever been his employee as alleged because he failed to meet the criteria established to

qualify as an employee by failing to produce any employment contract. That the appellant was not candid from where he fell from whether it was the 3rd or 4th floor of the building.

5. The appellant denied the assertion that the respondent worked for him. He stated that he used the services of an approved contractor by the name Daniel Njuguna whom they had written a contract. That Daniel Njuguna mobilized his equipment and "fundis" and kept a record of his workers. To support his case, the appellant called one witness Isaya Mwaura Kogi who told the trial court that he was one of the workers at the construction site, he did not know the respondent, and no accident occurred on 26th July 2013 as alleged. The appellant urged the court not to believe that the respondent worked at the construction site of the Appellant's apartment.

6. Upon the parties concluding the hearing of their respective cases, the trial court set out 4 issues for determination as follows;

   a. Whether or not the plaintiff was engaged by the defendant or his contractor during the construction of the house in issue.

   b. Whether or not there was an accident involving the plaintiff at the construction of the said building on 26th July 2013.

   c. what injuries did the plaintiff sustain, if at all.

   d. What damages if any should be awarded.

7. The trial court, upon analysing the parties evidence, made the following determination;

   a. That the Respondent worked at the construction of the Appellant's apartment and was involved in an accident on 26th July 2013 as alleged;

   b. There is nothing from the record to indicate that the Respondent contributed to the occurrence of the accident in any way. The Appellant is wholly to blame for the accident for failing to provide a safe working environment.

8. The trial court also observed that the Appellant did not submit on quantum but instead pointed out that the plaintiff's claim was an abuse of the court process and it ought to be dismissed. The court then proceeded to analyse authorities and awarded the Respondent general damages of kshs 600,000/= and proved special damages of Kshs. 2,000/=, costs of the suit and interest.

9. It is this holding of the court that has aggrieved the appellant herein prompting the filing of the appeal on ten grounds as follows;

   a. The learned magistrate erred in law and fact in finding that the plaintiff was an employee of the defendant.

   b. The learned magistrate erred in law and fact in basing his decision on circumstantial evidence.

   c. The learned magistrate erred in law and fact in basing his decision on mere allegations of coincidence of the accident and construction

   d. The learned magistrate erred in law and fact in failing to consider all evidence presented by the appellant

   e. The learned magistrate erred in law and fact in failing to appreciate the nature and purpose of the contract tendered as evidence in court.

f. The learned magistrate erred in law and fact in rewriting the contract between the parties and misdirected himself on the principle of vicarious liability.

g. The learned magistrate erred in law and fact in relying on his apparent strong personal opinion and a bunch in determination of the matter rather than on the tendered evidence.

h. The learned magistrate erred in law and fact and misdirected himself in failing to consider the prejudice that would be occasioned on the appellant pursuant to the orders of the impugned decision.

i. The learned magistrate erred in law and fact by failing to take into account the appellant submissions.

j. The learned magistrate erred in law and fact and as a result arrived at a wrong decision allowing the plaintiff claim with costs.

10. To support this appeal, the appellant relied on his submissions dated 17th October 2023 in which he sets out three issues for determination namely;

a. Whether the respondent was an employee of the appellant.

b. Whether the respondent is entitled to the reliefs sought.

c. The costs of the appeal.

11. On the first issue, the appellant merged grounds of appeal no 1-7 and submitted that the respondent did not prove that he met the criteria established to qualify as an employee. He stated that the respondent has never been his employee as alleged, since he failed to produce any employment contract. Reference was also made to the case of *Omusamia v Upperhill Springs Restaurant (cause no. 852 of 2017*) (2021) KLR (5 October 2021); Zarika Adoyo Obondo v Tai Shunjun & another [2020]eKLR to urge the court to find that the onus of proving the existence of a contract lies with the person claiming existence of employment.

12. The appellant submitted that it was his contractor who engaged the masons on site and Isaiah Mwaura Kogi, the appellant's second witness was one of the masons engaged. He stated that the respondent was not one of them and that his claims are unsubstantiated. He sought to rely upon the case of Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited [2013] eKLR.

13. It was the appellant's submission that the respondent could not have worked in a non-existent site. He submitted that the approval plans were approved in 2009 thus negating the allegations by the respondent that he started working on the site in 2006. He urged the court to take note of the contradiction in the respondent's evidence when he admitted that the construction could not have started before the approval plans were issued.

14. The Appellant submitted that if at all the Respondent worked at his site it was a project undertaken for his own personal needs. He relied on the case of Esther Njeri Maina v Kenyatta University [2020] eKLR to emphasize on this point.

15. On the second issue whether the respondent is entitled to the reliefs sought, the appellant joined grounds 8-10 and submitted that the respondent is not entitled to the orders sought since he was not an employee of the appellant and was not among the masons subcontracted by the main contractor. Reference was made to the case of Mary Mmbone Mbayi v Chandubhai Patel & Another (Industrial Cause No 761 of 2011).

16. The Appellant urged the court to take note of the contradictions. That the respondent was not candid as to where he fell from whether it is the 3rd floor or 4th floor of the building, the evidence that he fell from the 4th floor building was controverted during cross examination and examination in chief andthat there was no evidence that the appellant paid part of the hospital bill.

17. He urged the court to find that the claim by the respondent was an abuse of the court process and it ought to have been dismissed with cost.

18. On the other hand, the Respondent submitted on the following grounds; that the award of the trial court has not been appealed against and hence no need to disturb it; liability was not challenged as awarded by the lower court at 100% as against the defendant; the Appellant failed to call key witnesses, the contractor, thus giving rise to the finding of the trial court and what happens if the judgment of the lower court is set aside.

19. In his submission's the Respondent sets out the background of the case and summary of the parties' evidence as set out in the Record of Appeal. He states that the Appellant failed to bring Daniel Njuguna, the contractor, as a witness and that the register had gaps in that it had no name of the Apartment which was being constructed, signatures of the purported workers, seal or letter head of the contractor's company hence the Appellant's register was not conclusive and not credible.

20. The Respondent further submitted that the Appellant failed to adduce evidence and sought to rely on the case of Motex Knitwear Ltd vs Gopitex Knitwear Mills Ltd HCCC No. 843 of 2012 to urge the court to find that the defence was unsubstantiated. Also relied upon was the case of Trust Bank Limited vs Paramount Universal Bank Ltd & 2 Others Nairobi (Milimani) HCCS No. 1243/2001 to buttress the point that where a party fails to call evidence in support of its case, the party pleadings remain mere allegations.

21. He urged this court to find that he had on a balance of probability proved its case to support a finding that the Appellant was 100% liable for the injuries sustained.

22. It was the Respondent's further submission that the Appellant had not challenged the total award of kshs 642,810/- in his Memorandum of Appeal, that the he fails to state displeasure in the award hence the court should dismiss the appeal in its entirety. He contended that the prayers in the Memorandum of Appeal do not meet justice or finality of litigation as the superior court will be left with the question of what next? That is whether to re-open the lower court file, or invite new evidence? He thus prays for a finding that this appeal lacks merit, and the same be dismissed with costs.

Preliminary issue on Jurisdiction

23. This court will first address itself on the preliminary issue on its jurisdiction to deal with this matter. Following the directions issued by this Court on 5th July 2024 regarding the filing of submissions on the issue of jurisdiction, the Appellant filed their submissions on 12th July 2024, while the Respondent filed theirs on 8th August 2024.

Appellant's submissions

24. The Appellant submits that pursuant to Article 165 of *the Constitution* of Kenya, this court has unlimited original jurisdiction in criminal and civil matters. He submits that the High Court only lacks jurisdiction if parties were seeking an advisory opinion, or anything else which is reserved exclusively for the supreme court or parties were raising matters for the Environment and Land Court or the Employment and Labour Relations Court.

25. The Appellant submits that as a matter of procedure, the suit was instituted under the provisions of the Civil Procedure Rules, 2010 and judgment was entered against the Appellant. That because of the foregoing, an appeal has been filed and therefore the appeal can only fall under the jurisdiction of the Honourable Court as established under Article 165 and guided by Order 42 of the Civil Procedure Rules. The Appellant relies on the case of In the Matter of Interim Independent Electoral Commission [2011] eKLR.

26. The Appellant further submits that in the event that this court is stripped of jurisdiction to hear the appeal due to the nature of the claim and limitations therein for matters reserved for the Employment and Labour Relations Court, then the court should make a finding that similarly, the Chief Magistrates Court at Thika was a mistrial hence rendering the appeal null and void.

Respondent's submissions

27. The Respondent submits that the claim against the Appellant was filed in 2014 where the Respondent's action to file suit lay in common law. That later, in a Malindi suit, all WIBA cases were halted. He further submits that the trial court made an inquiry to the fact that it is a WIBA matter but parties agreed to continue with the hearing. That this was in tandem with the Supreme Court Petition No. 4 of 2019 where the court found that all WIBA matters filed prior to September 2017 had legitimate expectation to attain justice.

28. The Respondent further submits that the WIBA Practice Rules by the Chief Justice in the Kenya Gazette Notice No. 5476 of 24th April, 2023, gave parties and the lower court the impetus to perform and conclude the hearing of its matters filed on 23rd July 2014.

29. The Respondent further submits that it will not be proper to undo the work done by parties since the filing of the suit on 23rd July 2014 as it defeats the legitimate expectation of parties.

30. I have carefully considered the parties submissions. I have also carefully considered the authorities cited therein. I note that the cause of action in this claim lies in tort suffered in a place of work in the course of employment. The suit having been filed in July 2014, before the commencement of the WIBA Practice Rules by the Chief Justice Kenya Gazette Notice No. 5476 of 24th April, 2023, that gave parties and the lower court the impetus to perform & conclude the hearing of the lower court which was filed on 23rd July 2014.

31. Noting that the Respondent filed their suit at the lower court in July 2014, at this time, the High Court judgment of 2009 was applicable which had rendered the provisions of WIBA unconstitutional. It will therefore not be proper to penalize the litigants for relying on the declaration of nullity. I also note that the parties have a legitimate expectation to have the matter concluded within the same structure and channel it was heard. The matter having been filed before the Chief Magistrate as a civil court where all appeals arising therefrom are channeled to the High Court, I am convinced that it is only proper and just that this court proceeds to determine this appeal. In view of this, I dispense with the issue of jurisdiction, affirm this Court's jurisdiction and proceed to determine the Appeal on its merit.

Analysis and Determination

32. Being a first appellate court, this court is guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. Having considered the record of appeal, grounds of appeal, the submissions and the

authorities relied on by the respective parties, I opine that the sole issue for determination is: Whether the trial court erred in finding the appellant liable for the Respondent's injuries.

33. The Appellant in his submissions faults the trial court for finding that the Respondent worked at the construction of the Appellant apartment and was involved in an accident on 26th July 2013. The Appellant stated that the onus of proving the existence of an employment contract lied with the person claiming the existence of employment.

34. To prove employment, the Respondent testified that he was employed at Europa Apartments by the Appellant who was the owner. That he had worked for the Appellant for long, but did not have a written contract. That he used to be paid by the Appellant and that the Appellant manager kept the payment records.

35. He also alleged that on 26th July 2012, on the material day he was at the 3rd floor when the wooden ladder folded and made him fall where upon he was injured. He blamed the Appellant for not giving him protective gear and for not constructing a strong ladder. The Respondent's evidence was corroborated by Stephen Njoroge Ireri, PW2, who stated that he knew and had worked with the Respondent at Europa Apartments. That he was present when the Respondent was involved in the accident and he is the one who took him to the hospital. He faults the ladder for being constructed in a bad way. The supporting poles were not strong. He also stated that they did not have any letters of employment and were paid through the Appellant's manager.

36. The Appellant testified to the effect that the Respondent never worked for him. That he had a contractor by the name Daniel Njuguna and had signed a contract which was produced as an exhibit DEX2. That the contractor used to keep a record of the workers and he would pay them. That when he went through the record he did not find the Respondent's name. That the construction went on from 2009 to 2013 and by 2014 it was completed. That he was not aware of the incident until 2017 when auctioneers went to his home.

37. Sections 107 and 109 of the *Evidence Act* places the burden upon the Claimant to prove his claim. Further, the Court of Appeal case in Mbuthia Macharia V Annah Mutua & Ano [2017] eKLR that discussed the issue of burden of proof held that;

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore while both the legal and evidential burden initially rests upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case the incident of both the legal and evidential burden was with the Appellant."

38. Having analysed the evidence in this instant case, the non-contentious issues are that the Europa Apartments belonged to the Appellant and at the time the alleged accident occurred involving the Respondent, the building was still under construction. The dispute is whether the Respondent was indeed employed by the Appellant? The Appellant's position as deduced in his evidence is that he did not employ the Respondent, that he had a contractor named Daniel Njuguna whom he had signed a contract with, was the one responsible for employing, he kept the details of all employees and made payments to them. He also stated that Isaiah Mwaura Kogi, the appellant's second witness was one of the masons engaged by his contractor.

39. The Respondent on the other hand stated that he was employed by the Appellant which evidence was corroborated by that of PW2 who also claimed to have been employed by the Appellant.

40. This court also notes that, despite the Appellant alleging that it is the contractor who was responsible for employing, keeping records and making payments, he did not seek to join the contractor as a party to these proceedings. In this instance, the Appellant ought to have been guided by the provisions of Order 1, Rule 15 of the Civil Procedure Rules 2020 and joined the contractor as a third party. This would have enabled the trial court to determine who would bear the liability between the Appellant and the Contractor.

41. This was buttressed in the case of Benson Charles Ochieng & Another v Patricia Atieno [2013] eKLR where the court held that;

> The trial court could not have apportioned liability between the Appellants and a person who was not even a party to the suit. This court is unable to agree with the thrust of the Appellants' argument which was to the effect that the Respondent ought to be blamed for not enjoining the third-party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third-party into the proceedings. The decision of Oluoch -Vs- Robinson [1971] E.A. 376 is not therefore of help to the Appellants where they did not plead contributory negligence and where they failed to enjoin the owners of the third-party motor vehicle as a party to the suit. The appeal against the finding by the trial court on liability therefore lacks merit and is hereby dismissed.

42. Consequently, in the absence of evidence by the contractor, it is difficult for me, as it was for the trial court to absolve the appellant from liability. Though the respondent could not adduce an employment contract, there was testimony to corroborate that he was injured in the manner pleaded. Even if we were to accept the appellant's contention that the contractor is responsible for the people working at the site, it remains his obligation and responsibility as the contractor was the appellant's authorized person at the site. The contract between the appellant and his contractor adduced in evidence does not provide for liability for injury as it is only limited to provision of employees and provision of tools and equipment.

43. As for quantum, I note that the same was not challenged in the grounds of appeal or in submissions. I therefore do not have basis to interfere with the same.

44. In the end, I am not persuaded to set aside the finding by the trial court and see no merit in the Appeal. The same is disallowed. As for costs, the same follow the event.

Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF OCTOBER 2024

For Appellants:

For Respondent:

Court Assistant: