



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 47 OF 2012

HANCOX ABWAO OZUMBA.....APPELLANT

-VERSUS-

NYATI ANIMAL FEEDS (K) LTD.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable B.J. Ndeda (Mr.) (Senior Resident Magistrate) delivered on 16th January, 2012 in CMCC NO. 1173 OF 2010)

JUDGMENT

1. The appellant who was also the plaintiff in CMCC NO. 1173 of 2010 instituted a civil suit against the respondent herein by way of a plaint dated 5th November, 2010. The appellant pleaded that he was at all material times an employee of the respondent and that on or about 8th May, 2010 while undertaking his employment duties of building a go-down, he fell from a height measuring about 15 metres and sustained serious injuries.

2. The appellant blamed the respondent for the accident, claiming that the said respondent failed or otherwise neglected to provide a safe working environment, thus breaching its statutory duty of care owed to him by virtue of the contract of employment entered into between the parties. Consequently, the appellant sought for compensation by way of general and special damages plus costs of the suit and interest on the same.

3. In its statement of defence, the respondent denied the particulars of negligence and/or breach of statutory duty of care. The respondent also denied the applicability of the doctrine of *res ipsa loquitur* pleaded in the plaint.

4. Furthermore, the respondent vehemently denied that the appellant was its employee or that it owned the go-down where the appellant is alleged to have been working on the material day, stating that the same was instead owned by an independent contractor by the name Eastex Ventures Limited.

5. When the suit came up for hearing, the appellant testified as the sole witness in support of his case. The respondent equally relied on the evidence of one (1) witness in support of the defence case. At the close thereof, parties put in their respective written submissions.

6. The learned trial magistrate delivered his judgment in the absence of both parties, essentially dismissing the appellant's suit with costs. The learned magistrate further indicated that in the event the respondent were to be found liable in any way, he would have awarded general damages of Kshs.300,000/= and Kshs.2,000/= as special damages.

7. The aforesaid judgment has triggered the appeal now before this court. The appellant has established seven (7) grounds of appeal in his memorandum of appeal dated 15th February, 2012 namely:

(i) THAT the learned trial magistrate gravely erred in fact and in law by not finding the respondent liable without assigning any reasons whatsoever for such finding.

(ii) THAT the learned trial magistrate gravely erred in fact and in law when he completely failed to comment even in passing on the appellant's submissions and authorities tendered in support of his case.

(iii) THAT the learned trial magistrate gravely erred in fact and in law by failing to consider that the appellant having pleaded *res ipsa loquitur*, there was a duty on the part of the respondent to disprove the contention as to negligence, which it did not do.

(iv) THAT the learned trial magistrate gravely erred in fact and in law by failing to give legal meaning to the effect of the appellant's uncontroverted evidence on causation and in particular, the appellant's evidence that the respondent knew the appellant's employer whom it intended to join in the court case but failed to do so.

(v) **THAT the learned trial magistrate gravely erred in law by seeking from the appellant a standard of proof beyond a reasonable doubt while clearly accepting a standard of proof on a balance of probabilities from the respondent.**

(vi) **THAT the learned trial magistrate accepted hearsay and illegally admitted evidence from DW1.**

(vii) **THAT the learned trial magistrate completely erred in fact and in law when he accepted DW1's evidence and thus improperly reached an erroneous finding.**

8. Following the directions issued by this court on 5th April, 2019 the parties filed written submissions on the appeal. The appellant began by submitting inter alia, that while the respondent raised the defence that the go-down belonged to an independent contractor by the name 'Eastex Ventures Limited', it did not tender any evidence to prove its existence or seek to enjoin the said entity to the suit, and yet the learned trial magistrate appeared to make a finding that Eastex Ventures Limited was the appellant's true employer. The appellant's issue with this approach is that the learned magistrate chose to accept the respondent's arguments in the absence of proof while simultaneously requiring the appellant to prove employment by way of evidence. The appellant added that his plea of *res ipsa loquitur* was not sufficiently displaced by the respondent.

9. Being convinced that his case failed on the sole basis of failure to avail documentary evidence as proof of employment, the appellant has called upon this court to take judicial notice that many are Kenyans who carry out their employment duties without documentary evidence of employment.

10. On its part, the respondent brought forth the argument that the burden of proof at all material times lay with the appellant, notwithstanding the respondent's ultimate decision not to enjoin Eastex Ventures Limited to the suit as a third party. It is the respondent's submission that the burden of proof was at no point discharged by the appellant and could therefore not have shifted to the respondent.

11. In response to the appellant's submission on judicial notice, the respondent took the viewpoint that the appellant had utterly failed to make any reference to the purported contract or to illustrate the manner in which the same had been breached, going further to submit that the *res ipsa loquitur* doctrine has no place in the proceedings.

12. I have taken careful consideration to the rival submissions filed before me alongside the cited authorities. As required, I have equally re-evaluated the evidence adduced before the trial court and studied the resulting decision. It is clear that the grounds of appeal solely touch on the issue of liability. I will begin by addressing the first four (4) grounds contemporaneously.

13. Turning to the proceedings before the trial court, the appellant testified that while building a go-down at the respondent's site in the lawful course of his employment on the material day, the plank of wood being used as a makeshift ladder broke, causing him to fall and sustain serious injuries. PW1 was careful to add that he was never issued with protective gear in the performance of his duties.

14. The witness further stated that he was a casual labourer who was paid via cash and that he was never issued with employment documents, adding that he worked alongside about 15 other persons, including a man by the name Reuben Otieno, and that his immediate boss was called Solomon.

15. In his evidence, DW1 (Joseph Okeyo Odira) a supervisor at the respondent company at all material times, denied the appellant's employment with the respondent, producing copies of the relevant payroll records to support his testimony. The said witness maintained that the construction that took place at the purported go-down was undertaken by Eastex Ventures Limited.

16. In his submissions filed before the trial court, the appellant argued that by virtue of the respondent's failure to enjoin the alleged Eastex Ventures Limited as a third party, its defence ought to be dismissed. The appellant also urged the trial court to find the respondent 100% liable.

17. The respondent in opposition submitted that the appellant had utterly failed to prove employment, urging the trial court to dismiss his case as a result.

18. The learned trial magistrate, upon considering the rival positions, rendered the decision that the appellant had failed to prove that he was at all material times employed by the respondent, adding that the payroll tendered into evidence by the respondent does not bear the appellant's name, which affirms that he was not its employee. Consequently, the learned magistrate dismissed the appellant's case on that basis.

19. From the foregoing, I have observed that the learned trial magistrate gave reasons for arriving at his decision, contrary to the arguments brought forth by the appellant in support of ground (i) of his appeal.

20. On the subject of proof of employment, the appellant admitted to having no documentary proof of employment before the trial court. In this respect, he has urged this court to consider the approach taken by the Court of Appeal in *Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR* thus:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

21. Given the nature of his employment as a casual labourer, it would be unreasonable if not unjust to expect him to avail copies of pay slips or an employment contract since the same were never issued to him in the first place. In any event, many casual employees on a temporary basis in this country are known not to sign employment contracts or receive pay slips.

22. In view of the foregoing, I am satisfied that the appellant had proved his employment on a balance of probabilities, which means that the burden then shifted to the respondent to prove otherwise. I am well aware that DW1 produced a copy of the payroll and that the appellant's name did not appear therein. While in ordinary circumstances, this may be used to support the claim that the appellant was not its employee, I must reiterate that the said appellant was a casual employee, making it plausible that he was not required to sign the payroll. It was also not clarified by DW1 whether the payroll applied to all employees or strictly to those on a permanent basis.

23. There also arose the argument relating to Eastex Ventures Limited, which company the respondent claims independently constructed the go-down. According to the appellant, the company's Manager at the time was a Mr. Sharma whereas his immediate boss was known as Solomon. Going by the arguments brought forth by the respondent, the go-down was owned by a person named Mr. Sharma. In addition, DW1 explained in his evidence that not only was the go-down situated next to the animal feeds belonging to the appellant, but that there were two (2) different persons sharing the name 'Sharma', one of them associated with the respondent.

24. From the foregoing and notwithstanding the respondent's argument that the owner of the go-down was not one and the same person as its director, it is admitted that they shared a similar name; a fact to which the appellant would not necessarily have been privy to. Moreover, it is noteworthy that the respondent did not enjoin Eastex Ventures Limited as a third party as earlier intended or at the very least adduce any evidence; oral or documentary; to support its averments as to the existence of Eastex or its ownership of the go-down.

25. As it stands therefore, I am persuaded that the appellant discharged the initial burden of proof and having done so, the burden shifted to the respondent to prove otherwise. There is no indication that the respondent adduced sufficient evidence to disprove the argument that it was truly the appellant's employer at all material times. The law of evidence is well settled that "He who alleges must prove." Furthermore, Sections 107, 108 and 109 of the Evidence Act essentially establish the burden of proof which requires a person who asserts a fact to prove that such fact exists. This has been reinforced in *Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR* and *Eunice Wayua Munyao v Mutilu Beatrice & 3 others [2017] eKLR* cited by the respondent. The respondent was legally obligated to prove that the facts asserted by itself truly existed but it did not.

26. The doctrine of *res ipsa loquitur* was also pleaded in the plaint though the trial court did not touch on it in delivering its judgment. Needless to say that the said doctrine was accurately described by the Court of Appeal in *Fred Ben Okoth v Equator Bottlers Limited [2015] eKLR* as follows:

"Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence...The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type of category of accidents involved."

27. I have already established that the appellant in this instance met the required standard of proof by showing on a balance of probabilities that he was at all material times an employee of the respondent and that the injuries sustained were more likely than not the result of negligence on the part of the respondent. On its part, the respondent did not adduce any sufficient evidence to rebut the allegations of negligence made against it, which allegations had been proved. Going by this argument, I am convinced that the learned trial magistrate did not appreciate the applicability of the *res ipsa loquitur* doctrine in this instance, thus erring in his finding that the appellant had not proved his case against the respondent. I consequently find merit in grounds (ii), (iii) and (iv) of appeal.

28. On the flip side and in addressing ground (v) of appeal specifically, I am alive to the fact that the standard of proof in civil cases is the balance of probabilities. Upon perusing the impugned judgment, I am satisfied to note that there is nothing to indicate that a different standard of proof was applied by the learned trial magistrate. This ground therefore fails.

29. Equally, grounds (vi) and (vii) of appeal essentially challenging the evidence of DW1 were not discussed or at all demonstrated in the appellant's submissions.

30. Before I pen off, I wish to comment that the award on quantum was in no way challenged on appeal and I see no reason to address my mind to it.

31. In the end, I will allow the appeal and make the following consequent orders:

- a) *The judgment delivered on 16th January, 2012 is hereby set aside in respect to the finding on liability.*
- b) *The appellant's case before the trial court is hereby allowed with costs.*
- c) *The appellant is entitled to general damages in the total sum of Kshs.302,000/= as would have been awarded by the trial court. The general damages to earn interest from the date of this judgment.*
- d) *The appellant shall also have the costs of this appeal.*

Dated, signed and delivered at NAIROBI this 4th day of July, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent