



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 117 OF 2015

SICHUAN CONSTRUCTION (EA) LIMITED.....APPELLANT

VERSUS

BONIFACE KOTIENO ODUORDEFENDANT

Being an appeal from the judgement of Honourable L. A. Mumassabba (Resident Magistrate delivered on 18th June, 2015 in the Principal Magistrate's Court at Mavoko in CMCC No.1055 of 2013 Boniface Otieno Oduor =Vs= Sichuan Construction (EA) Limited

JUDGEMENT

1. This appeal arises from the judgement of Hon L. A. Mumassabba Principal Magistrate in **Mavoko Civil Suit Number 1055 of 2013** dated 18/06/2015 wherein the Respondent was awarded general damages of Kshs.90,000/= for pain and suffering arising from injuries sustained by the Respondent while working at the Appellants premises. The trial court also held the Appellant solely liable in damages to the Respondent.

2. Being dissatisfied with the trial court's judgment, the Appellant filed this appeal on the following grounds:-

- (i) *The learned magistrate erred in law and fact in failing to consider the submissions by the Appellant dated 11/5/2015.*
- (ii) *The learned magistrate erred in law and in fact when she held that the Respondent had proved his case when the Respondent could not identify himself at the hearing.*
- (iii) *The learned magistrate erred in law and in fact in failing to consider the fact that the Appellant's list of documents dated 19/06/2014 was admitted by the Respondent which unequivocally showed that the Respondent was not an employee of the Appellant.*
- (iv) *The learned magistrate erred in law and in fact in holding that the defendant was in breach of its statutory duty of care towards the Respondent when the Respondent was not its employee.*
- (v) *The learned magistrate erred in law and in fact when he relied on the medical report by Dr. Cryprianus Okoth Okere dated 25/11/2013 which was discounted by the Respondent. The doctor who prepared the medical report was further not called in as the Respondent witness.*
- (vi) *The learned magistrate erred in law and in fact in relying on the extract of an authority by the Respondent which did not show how an assessment of damages was arrived at and failed to rely on full extracts of authorities submitted by the Appellant.*
- (vii) *The learned magistrate erred in law and in fact in holding that the Appellant failed to challenge the evidence presented by the Plaintiff when in fact the Respondent failed to identify himself at the hearing, name any of his co-workers or the Appellant's site he was employed to work at. The foregoing were evident at cross-examination.*
- (viii) *The learned magistrate erred in fact and in law in failing to recognize the inconsistencies manifested in Plaintiff's evidence.*
- (ix) *The learned magistrate erred in fact and in law where he ordered the Appellant to cater for the costs of the suit when there was no material evidence to show that the demand letter was sent to the Appellant.*

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses (see **SELLE =VS= ASSOCIATED MOTOR BOAT CO. LTD [1968] EA 123**).

4. The Respondent's case is that he was a causal worker at the Appellant's premises on the 5/11/2012 when a mirror fell onto him and

sustained injuries on the forehead. He was taken to Athi River Progressive Hospital for treatment and later examined by Dr. Cyprianus Okoth Okere who prepared a medical report. He blamed the Appellant for not providing him with protective gear. He produced treatment notes, medical report and demand letter and sought for compensation for the injuries sustained.

5. The Appellant did not call any witnesses but sought reliance on their list of witnesses.

6. Parties agreed to canvass the appeal by way of written submissions.

Appellant's submissions

7. Learned Counsel for the Appellant condensed the grounds of appeal into two, firstly that the Respondent failed to prove his case on a balance of probabilities and secondly that the trial court erred in its Application of the relevant laws.

It was submitted that the Respondent had not only failed to prove that he had been an employee of the Appellant but that he was unable to prove the alleged accident as the medical card was never produced and the medical report relied upon was prepared one year after the alleged accident.

It was also submitted that the trial court erred in rejecting the Appellant's exhibits which clearly showed the Respondent was never an employee of the Appellant. Reliance was placed in the case of **SIMON MUCHEMI ATAKO & ANOTHER VS GORDON OSORE [2013] eKLR** where the court of Appeal held that if documents are not objected to their admission the affected party is deemed to have admitted the contents and authenticity thereof.

Respondent's submissions

8. It was submitted for the Respondent that the Respondent's evidence was not controverted at all by the Appellant as it failed to present any witness in support of its case.

It was also submitted that issue of whether or not the Respondent was an employee of the Appellant and whether he was on duty on the 5/11/2012 was not controverted at all by the Appellant and therefore the appeal lodged lacks merit and should be dismissed with costs.

Determination

9. I have considered the evidence presented before the trial court and the submissions by the learned counsels for the parties herein, I find the following issues necessary for determination namely:-

- (i) Whether the Respondent proved his case on a balance of probabilities against the Appellant.***
- (ii) Whether the trial court properly evaluated the evidence presented before it.***
- (iii) Whether the damages awarded by the trial court was reasonable.***

10. As regards the first issue, it is noted that it is only the Respondents who tendered evidence and who was cross-examined at length by the Appellant's Counsel. The Respondent in addition to his evidence also relied on the medical report as well as a medical summary. It was the Respondent's evidence that he had been an employee of the Appellant and was on duty on the 5/11/2012 when he got injured. The Appellant in its statement of defence denied the assertions and relied on the statement of its witness as well as a duty roster for local workers between the 1/11/2012 – 7/11/2012 which did not indicate the name of the Respondent. I have perused the said duty roster and note that some of the names have been erased while others were not signed. The document further does not have an official stamp thereon so as to authenticate them. Again the Appellant opted not to call witnesses to give evidence regarding the authenticity or otherwise of those documents. As the Respondent has claimed that he was on duty on the 5/11/2012 then it became incumbent upon the Appellant to present concrete evidence to disprove the said assertions. The Respondent relied on the medical summary and medical reports and was extensively cross-examined thereon. It was therefore prudent for the Appellant to have called its witnesses so as to bolster its evidence and thereby controvert that of the Respondent. The production of the duty roster by the Appellant without calling a witness to back them up made the same to be just mere allegations as there was no witness to be tested on cross – examination thereon unlike the Respondent who offered himself to be cross-examined. The Provisions of Section 107 – 112 of the Evidence Act (Chapter 80 Laws of Kenya) places a legal burden upon a party who seeks to assert the existence of certain facts to prove the said facts. If indeed the Appellant had knowledge that the Respondent was not in its employment then nothing could have been easier than calling the relevant official to appear in court to defend the said assertion. Even though the Appellant has questioned the validity of the Respondent's medical summary and report made one year after the injury had occurred, I find the same should not be construed in a different light because it is not unusual for injured person to take time while recuperating before going for a medical report. It was the onus of the Appellant to avail evidence to the effect that the Respondent was not on its employment and was not injured at its place of work on the 5/11/2012. They did not do so and hence I find the Respondent's evidence uncontroverted. The Appellant as the Respondent employer was under a duty to ensure the working environment was not risky and since the Respondent was injured while at its premises, the Appellant who owed him a duty of care must be held solely liable in damages. The Respondent in his evidence claimed that no protective gear had been provided and therefore it was upon the Appellant to disprove the same by availing the protective gear register showing that the Respondent had been issued with such protective gear. I am therefore satisfied that the Respondent had proved his case on balance of probability against the Appellant.

11. As regards the second issue, and going by the observations above, it is clear that the trial court had properly evaluated the evidence presented before it. Indeed the evidence of the Respondents after strenuous cross-examination and with the absence of any evidence presented by the Appellant came out clearly that the Respondent who was a casual labourer of the Appellant had been injured at the

Appellant's premises. Even though the Appellant took issue with the Respondent's lack of memory to recall some of the workers or places, the same did not imply that he had not worked for the Appellant as it is not unusual at times for one not to remember certain things and issues. It was upon the Appellant to disprove the Respondent's claim that he had worked for it but it failed to do so.

12. As regards the last issue, it is noted that the Appellant did not challenge the quantum of damages that was assessed by the trial court in this appeal to this court. I will consequently not interfere with it.

13. In the result, it is the finding of this court that the Appeal herein lacks merit. The same is ordered dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at **Machakos** this **12th** day of **June, 2018**.

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D.K. KEMEI

JUDGE

In the presence of:

Kilonzo for Mueke for Appellant

No appearance for Ong'uti for Respondent

Josephine - Court Assistant