REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.158 OF 2016

PIUS BENEDICT MUSANGO.....APPELLANT

VERSUS

CRYSTAL MOTORS K. LTD.....RESPONDENT

(Appeal from the Judgment of Honourable N. Obura (Mrs), Principal Magistrate at Nairobi delivered on 11th March, 2016 in CMCC No. 4351 of 2013)

JUDGMENT

The Appellant who was the plaintiff in the case before the trial court filed a plaint dated 15th July 2013, against the Respondent claiming both special and general damages arising out of an accident that occurred on the 24th April, 2013.

It was averred that, on or about the said date, the Appellant was in the lawful course of his duties with the Respondent, when due to breach of contract of employment by the Respondent and/or its servants/employees, the Appellant was involved in an accident and was seriously injured. That, as a result of the injuries, the Appellant suffered loss and damage of which he holds the Respondent liable.

The particulars of the Respondent's, and its servants/employees or agents negligence, injuries and special damages are set out in paragraph 4 of the plaint.

The Respondent filed a statement of defence on the 2nd October 2013 in which, it denied the Appellant's claim. In particular, it denies that the Appellant was its employee or that there existed a contract of employment between them.

In the alternative, the Respondent averred that the accident was wholly caused and/or substantially contributed to, by negligence on the part of the Appellant. The particulars of negligence on the part of the Appellant are set out in paragraph 4 of the defence. Further, and in the alternative, and without prejudice, the Respondent averred that any such occurrence as the Appellant may prove, without admitting negligence on its part, was due to inevitable accident. The Respondent denied that the Appellant suffered any injuries, special damages and/or any other loss. The particulars of negligence are also denied.

The Appellant filed a reply to defence on the 11th day of October 2013 in which, he joins issues with the Respondent in its statement of defence save where the same consists of admissions. The Appellant denies the particulars of negligence attributed to him by the Respondent and reiterates that the doctrine of *Res Ipsa Loquitor* is applicable and not the doctrine of *volenti non fit injuria.*

At the hearing, the Appellant testified as PW1. It was his evidence that he was working for the Respondent and his work entailed welding and repairing the vehicles' bodies. He was employed by the Respondent in the month of February. He stated that on the material day, he was assigned to cut some parts on the top of a vehicle's body and was using a ladder and a grinder. The ladder slipped and he fell and he was cut by the grinder, thus sustaining injuries to the head, fingers and left side of the hip. That the ladder was being held by one Mwandulu who, without informing him, left and as a result, the ladder slipped and he fell. He was taken to Provide International Health Care at Embakasi where he was treated. He was also treated at Mutomo Health Centre. He stated that he was not given a letter of employment and that they used to be paid every fortnight but no payment vouchers were issued. He denied that he was negligent.

On cross-examination, he stated that he was employed on Monday 13th February, 2013 and that he was not supplied with boots or other safety gear. That, the co-worker who was holding the ladder for him left without informing him and that is why he fell.

Dr. Antony Obiero Wandugu testified as PW2. He examined the Appellant on the 9th day of July 2013 and prepared a medical report for him. He stated that the injuries were the immediate result of the accident at his place of work. He charged Kshs.5,000 for court attendance and Kshs.2,000 for preparation of the medical report.

The Respondent called one witness, one Erick Mandaga, who is one of the directors of the Respondent. It was his evidence that they did not

know the Appellant as he was not their employee but rather, a stranger or trespasser, if he was in their premises. He stated that they have contractors on site and permanent employees but the Appellant was neither of the two. That they provide protective gear to their employees while the contractors take care of their workers to prevent any risks. He said that he was not aware of any duties assigned to the Appellant. He stated that he heard of the accident after about a week from one of the contractors namely, Ndina Kioni who told him that one of his employees working under him was injured and taken to hospital.

On cross-examination, he stated that he was the Director and Human Resources Manager and that they keep record of the employees. It was his evidence that they do not have designated hospitals where they take their injured employees but the contractors manage their employees.

Upon hearing the case, the learned magistrate dismissed it with costs. In her view, the Appellant failed to prove the fact of employment on a balance of probability and in absence of such proof then the issue of duty of care or liability does not arise.

The Appeal herein arises from that judgment, as the Appellant was dissatisfied with the same. He has listed four (4) grounds of Appeal, in his Memorandum of Appeal dated the 4th day of April 2016. The four grounds are as hereunder:-

(a) The learned magistrate erred in law and in fact by finding that the Appellant did not proof that he was employed by the Respondent thereby dismissing the Appeal.

(b) The learned magistrate erred in law and in fact in failing to consider and uphold the evidence and submissions of the Appellant and dismissing the case.

(c) The learned magistrate erred in law and in fact by failing to assess the quantum of damages that would have been payable to the Appellant had the court found in his favour.

(d) The learned magistrate erred in law and in fact in dismissing the appellant's suit which was against the weight of evidence on record.

The Appeal was disposed off by way of written submissions which the court has duly considered.

This being the first Appellate court, I have the duty to re-evaluate the evidence on record and come to my conclusion. See the case of **Zakayo Wanzala Makomere Vs. West Kenya Sugar Co. ltd (2013) eKLR** and also the case of **Selle V. Associated Motor boat Company Limited (1968) E.A 123**. In considering the four grounds of Appeal, the court will be seeking to answer the following questions;

1. whether the Appellant was an employee of the Respondent at the time of the accident.

2. whether the Respondent is liable for the occurrence of the accident.

3. whether the appellant is entitled to damages and if so, the quantum of such damages.

4. Who is liable for costs.

In his submissions, the Appellant contended that though he was employed by the Respondent he was not issued with a letter of appointment. The court was urged to take judicial notice of the fact that most casual labourers are never issued with letters of employment and/or salary slips. The court was asked to consider that the Appellant could remember the date he was employed and the name of a co-employee, one Mwanduli, who was assigned to hold the ladder for him. That, the Respondent did not by way of documentary evidence disprove the Appellant's assertions that they had employed him.

The Appellant also averred that though the Respondent alleged that he was employed by a private contractor, the Respondent did not produce any agreement between them and the said contractor. The case of **Simon Mburu Wanjiku Vs. Charels Wamugu Wamuti (2009) eKLR** was relied on, to support the contention that not every employee is issued with a letter of appointment. It was also submitted that the alleged contractor who had engaged the Appellant was not made a party to the proceedings before lower court.

On the part of the Respondent, it was submitted that proof of employment is through a written contract of service but an oral contract would suffice, subject to the same being in conformity with the provisions of the Employment Act, 2007. According to the Respondent, no evidence was tendered to support that allegation.

It was further submitted that, the legal burden of proof lay with the Appellant to proof his case as required under Section 107 (1) of the Evidence Act Cap. 80 Laws of Kenya.

The court has considered the submissions, the evidence on record is that the Appellant got injured while in the course of employment with the Respondent. It was his evidence that he was employed by the Appellant on Monday, 13th February 2013 and his work entailed welding and repairing the vehicles' bodies. On the material day, he was assigned to cut some parts on top of a vehicle's body and as he did that, while on a ladder, he fell after the person who was holding the ladder for him released it. From the evidence on record, it is not disputed that the Appellant was in the Respondent's premises on the 24th April 2013 when the accident occurred. It is also not in dispute that the Appellant was in the course of duty at the material time. The Respondent has denied that he was its employee as he did not have a letter of employment and has alleged that he was a trespasser. As rightly submitted by the Appellant, not every employee is given a letter of employment by his employer. The court in the case of **Simon Mburu Wanjiku Vs. Charles Wamugu** (supra) held;

"The trial magistrate appears to have laid undue emphasis on the need for a document to confirm the alleged employment. The trial magistrate ought to have taken judicial notice of the informal sector employment and the fact that most matatu drivers are employed as casuals (or daily contracts) and therefore a document would not be available. Further, even assuming that the Appellant was unable to prove that he was employed as a driver the fact that he had suffered injuries which were likely to affect his gainful employment was sufficient and the trial magistrate could even have assessed the loss of future earnings based on the minimum wages"

Secondly, the Respondent alleges that the Appellant was a trespasser but at the same time it states that he was employed by an independent contractor. It was the evidence of DW1 that the contractor, one Ndina Kioni, told him that one of his employees had been injured in the said accident. He further told the court that the said contractor told him that the Appellant was a relative who had gone to visit him. That being the case, the court notes that, at all material times, the Respondent had all the information regarding the accident. If indeed the Appellant was not their employee and that he was employed by an independent contractor as alleged, nothing would have been easier than to enjoin the said contractor as a party to the suit. That way, the Respondent would have sought indemnity in the event that it is held liable. This was not done. The Respondent cannot shift blame to a party who is not a party to the suit.

The court also notes that the Appellant gave very material evidence on his employment by the Respondent for example the exact date of employment. He also gave the name of the person who was holding the ladder for him. The court notes that the Respondent did not deny knowledge of the said person or the fact that he was their employee. It would also have been important for the Respondent, to produce a copy of the record for its employees. These are documents that could only be in its possession and I refuse its contention that by so doing, that would have amounted to shifting the burden of proof to it. I therefore hold that the Appellant was an employee of the Respondent and the learned magistrate erred in holding that he was not.

Having found that the Appellant was an employee, was the Respondent liable for the accident. The Appellant testified that he fell from a ladder after the person who was holding it for him left, after he was called. He contends that the Respondent was under duty to ensure that the ladder was well supported and the employee who was assigned that work ought to have been careful. He further testified that he had not been issued with protective gear/helmet. On the other hand, the Respondent submitted that it provides its employees with protective gears and helmet but the Appellant was not their employee.

Section 6(1) and 6(2) of the occupational safety and health Act Requires that every employer shall provide a safe working environment for its employees. The Appellant testified that he was not provided with any.

Though the Appellant blames the Respondent for the accident, he was also under duty to take care of his own safety when engaged in the said work. He ought to have taken extra care when he realized that the person who was supporting the ladder had left. He could have waited for him to return, before continuing with the work or request for a replacement. By continuing with the work, in those circumstances, he exposed himself to a risk which he knew or ought to have known. It was not his first day at work and therefore he knew the risks that the work he was engaging in, entailed.

In the premises, I find that both the Appellant and the Respondent were to blame for the accident. I do apportion liability at 30:70 in favour of the Appellant, that is to say the Appellant to bear 30% and the Respondent to bear 70%.

Having found for the Appellant on liability, it follows that he is entitled to damages. On special damages, a receipt of Kshs.2,000 was produced as exhibit 3(b). On general damages the Appellant produced a medical report by Dr. A.O. Wandugu. According to that report, the Appellant sustained cut wounds to the left side of the head above the ear, trauma to the left side of the chest, trauma to the left hand, both legs and the back. He was treated at Provide International and Mutomo Health Centre.

In the doctor's opinion, the injuries have resulted in chronic disability, pains in the affected areas, scars which are rather uncosmetic and chronic headaches. The injuries by their effects in connective tissues and affected joints have resulted in permanent weakness of both legs.

The Appellant has asked the court to make an award of Kshs.200,000 and has relied on the cases of **Simon Muchemi Atako & another Vs. Gordon Osure, Nairobi HCCA No. 180 of 2005** where the 2nd plaintiff was awarded Kshs.120,000 for similar injuries and that of **Kalenjin Auto Hardware Limited Vs. Philip Wakaba HCCA No. 75/2003** where Ibrahim J. upheld an award of Kshs.220,000 for similar injuries.

The Respondent did not submit on quantum of damages but maintained that, award of damages is a discretionary exercise and that the learned magistrate was right in failing to assess the same. They relied on the case of **Francis Ochieng & Another Vs. Alice Kajimba (2015) eKLR** and that of **Butt Vs. Khan (1981) KLR 349** among others.

I have considered the authorities cited by the Appellant and I find that the injuries sustained by the Appellant in this case were close to the ones sustained by the plaintiff in the case of **George Obare Vs. Francis Mbuvi HCCA 89/2007 (Machakos)** where a sum of Kshs.210,000 was awarded. A similar amount will suffice to compensate the Appellant for the injuries that he sustained.

In the end, the order made on 11th March 2016 in Milimani CMCC No. 4351 of 2013 dismissing the Appellant's suit with costs is hereby set aside and in its place, I enter judgment in favour of the Appellant as follows;

a) Liability at 30:70%

b) General damages of Kshs.200,000 subject to contribution making a total of Kshs.140,000/-.

c) Special damages Kshs.2,000/-

Total - Kshs. 142,000/-.

Special damages to earn interest from the date of filing and general damages from the date of the judgment.

The appellant shall get the costs of the suit and that of the Appeal.

Dated, Signed and Delivered at Nairobi this 18th day of October, 2018

……

L. NJUGUNA

JUDGE

In the presence of:-

……..For the Appellant

……For the Respondent