REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 40 OF 2007

LEI MASAKU…………………………….............………APPELLANT

VERSUS

KALPAMA BUILDERS LTD……………................……RESPONDENT

(*An appeal from the original judgment and decree in Milimani PMCC No. 10213 of 2004 delivered on 11th December, 2006 by Hon. Mrs. D. Toigat (R.M.))*

JUDGMENT

1. The Appellant sued the Respondent seeking compensation following an industrial accident that occurred on 16th January, 2004. The trial court heard the case and came to the conclusion that the Appellant did not prove that he was an employee of the Respondent. The Appellant's claim was therefore dismissed.
2. Being dissatisfied with the trial court's judgment, the Appellant filed this appeal challenging the said decision on the following grounds:-

a. ***That the trial magistrate erred in law and in fact by not appreciating that the standard of proof in civil cases is on a balance of probability.***
b. ***That the trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arrived on a wrong conclusion that the Appellant was not an employee of the Respondent on the date of the accident.***
c. ***That the learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent did not call any witness to controvert or challenge the Appellant's evidence in relation to his employment as a casual worker.***
d. ***That the learned trial magistrate erred in law and in fact in not assessing quantum of damages even after dismissing the Appellant's case.***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses.(See: **Peter –v- Sunday Post (1958) at pg. 429**).
4. It was the Appellant's case that he was employed as a casual worker by the Respondent. That on the material day, he was assigned the duty of arranging stones by the supervisor one John Githinji. While doing so, he fell from the fifth to the fourth floor of the building that was being constructed and lost consciousness for some period of time. He sustained injuries that were assessed as blunt chest injuries, multiple laceration wounds on the right upper, forearm and upper back and blunt trauma right gluteal region. He was taken to Kenyatta National Hospital by Moses Munyao, Njuguna and other colleagues where he was treated. He stated that as a result of the said accident he is unable to do heavy work. He attributed the accident to the Respondent's failure to ensure a safe working place such as securing the area with iron sheets reinforced with nails. Throughout the

Appellant's examination he maintained that as a casual worker, he was never issued with any identification document by the Respondent and that employees used to sign against their names in a register. He denied being careless at the time of the accident. The Respondent closed its case without calling any witness.

5. The parties filed written submissions in this Appeal which were ably hi-lighted by learned Counsel on 5th November, 2014. It was submitted for the Appellant that the Appellant's evidence having not been challenged, he had proved his case on a balance of probabilities as required in civil cases. The trial magistrate's judgment was faulted for failure to assess damages.
6. The Respondent on the other hand submitted that the burden of prove was upon the Appellant to prove that he was an employee of the Respondent and it was therefore not mandatory for the Respondent to call any evidence. That the Appellant had admitted that he had not produced any evidence to prove his employment with the Respondent. As for the issue of the trial Magistrate's failure to assess damages, the Respondent submitted that that failure did not prejudice the Appellant in any way since he had failed to prove liability.
7. The Appellant testified on oath that he was a casual employee of the Respondent. That as such employee, he was not issued with any identification document by the Respondent but merely signed against his name in a register. That register was or must have been in the possession of the Respondent. That evidence given on oath was unchallenged and remained uncontroverted. To my mind, the evidentially burden thereby shifted to the Respondent to deny those facts. It was incumbent upon the Respondent to show that either there was no such a register of casual workers or if there was, the name of the Appellant was not appearing thereon. In my view, evidence in rebuttal was necessary. In the absence of such a rebuttal, the facts as presented by the Appellant and remained unchallenged and uncontroverted.
8. In this regard, having in mind that during cross-examination the Appellant remained firm on his evidence, the trial court was wrong in concluding that the Appellant had not proved that he was in the Respondent's employment. It was a misdirection to hold that the Appellant had not produced any document to prove employment. This is so because, the evidence on record was that no document of either identification or employment was issued to the Appellant by the Respondent. For the court therefore to hold that no document was produced to prove employment, it was a clear misdirection.
9. The trial court further fell into error when it held that the Appellant had failed to call any of his colleagues to testify on his behalf. Firstly, under Section 143 of the Evidence Act, Cap 80 Laws of Kenya, there is no requirement on the number of witnesses to prove a fact. It is the quality of evidence that matters and not the quantity. Secondly, the Appellant himself told the court that he had never met any of his said colleagues after the accident. The court does not seem to have considered that piece of evidence and if it did, it did not indicate why it did not believe the Appellant.
10. Accordingly, I am in agreement with the submission made on the part of the Appellant that the trial court misapprehended the standard of proof. It failed to appreciate that the Appellant's evidence had not been challenged and/or controverted. The evidentiary burden of proof having shifted to the Respondent who never discharged it, the Appellant had proved his case on a balance or probability.
11. In **Winfield and Jolowicz on Tort by W V H Rogers, 14th Edition, London Sweet and Maxwell at page 213** it is stated that:-

> ***"If a worker is injured just because no one has taken the trouble to provide him with an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."***

At page 215 -216 it is stated:

> ***"The employer must take reasonable care to provide his workers with the necessary plant and equipment and is therefore liable if any accident is caused through the absence of some item of equipment…"***

12. Fortified by the above sentiments and the finding in **Mumende Vs Nyali Golf & County Club**

(1991) KLR 13 in which the court was of the opinion that it is the employer's responsibility to ensure a safe working place for his employees, I find and hold the Respondent liable for the accident occasioned to the Appellant. I accordingly, set aside the trial court's judgment on liability and substitute it with the finding that the Respondent was 100% liable.

13. There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appellable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.
14. The Appellant produced a treatment card (P. Exhibit 1), receipts (P. Exhibit 2), Medical report by Dr. Kinuthia and a receipt thereto (P. Exhibit 3 (a) and (b) and a medical report by Dr. Wambugu B.M. (P. Exhibit 4) to support his claim as to the injuries he sustained.
15. Taking into account the extent of the Appellant's injuries, the rate of inflation on the Kenyan Shilling vis a vis the age of this case and the case of **Philip Munyao Musyoki-v- The Kenya Power and Lighting Co. Ltd, HCCC No. 1783 of 1989** wherein the Plaintiff suffered injuries of similar gravity to the Appellant's, I find that an award of KShs.100,000/= as general damages suffices. I therefore enter judgment for the Appellant for Kshs.100,000/= together with interest thereon at court rate from the date of judgment in the lower court until payment in full.. As for special damages, I award the Appellant Kshs. 2,720/= pleaded and proved. I also award the costs of the suit both in the trial court and on appeal to the Appellant.

It is so decreed.

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A. MABEYA

JUDGE

Dated, Signed and Delivered at Nairobi this 5th day of December 2014

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D. ONYANCHA

JUDGE