



REPUBLIC OF KENYA
Mwanthi v Mbwana Construction Co Ltd

High Court, at Mombasa
March 6, 1991

Wambilyangah J

Civil Case No 626 of 1987

Employment law – master and servant relationship – applicable test for determining existence of relationship.

Employment law – delegation of work to a sub-contractor – whether delegation absolves the main contractor from liability.

Damages - general damages - assessment of damages for personal injuries - pain, suffering and loss of the amenities of life - compression fracture of lumbar vertebra, compound fracture of alcaenum and colles fracture.

The plaintiff sued the 1st and second defendants claiming compensation for injuries sustained as a result of falling from the 2nd floor of a storey building which was under construction.

During the trial a question arose as to whether there was a master servant relationship between the plaintiff and the 1st defendant since the 1st defendant had sub-contracted to the 2nd defendant the portion of the works in the performance of which the plaintiff was injured.

According to the plaintiff he had fallen while pulling wet concrete on a wheelbarrow. Evidence was given to show that the 1st defendant had not properly secured the site to avoid risk of falling. The plaintiff's injuries were described as a compression of lumbar vertebra, a compound fracture of the left alcaenum and a fracture of the right colles.

Held:

1. Whether or not in any given case the relationship of a master and servant exists is a question of fact. The test is whether the alleged servant was under the control or bound to obey the orders of the alleged master. If he is then the relation of master and servant exists.
2. Where a person delegates a task or duty to another, not being a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called an agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act.
3. Slipping was a foreseeable risk where wet cement and sand was being mixed and used. Therefore necessary precautionary measures ought to have been taken to prevent a fall from such a height.
4. The precautions should have been taken by the 1st defendant who were in charge of the entire structure

rather than the independent contractor.

5. For pain, suffering and loss of amenities, the plaintiff was entitled to an award of Kshs 93,000 reduced by 20% which represented the measure of his contributory negligence.

1st defendant found liable.

Cases

1. *Hill v Beckett* [1915] 1 KB 578

2. *Selle v Associated Motor Boat Co Ltd* [1968] EA 123

3. *Donoghue v Stevenson* [1932] AC 562; [1932] All ER Rep 1

4. *Mwambeyu, Bakari Rashid v Swaleh Abdalla Mohamed* High Court Civil Case No 601 of 1985 (Mombasa)

5. *Kilonzo, Benson Syala v Kimji Ramji & Company Ltd* High Court Civil Case No 108 of 1987 (Mombasa)

Texts

Hailsham, V et al (1936) Halsbury's Laaws of England London: Butterworths & Co Ltd 2nd Edn Vol 22 para 191

Statutes

No statutes referred to.

March 6, 1991, **Wambilyangah** J delivered the Judgment.

This is a case where liability is hotly contested. The plaintiff was an employee of the sub contractor (the second defendant) and that justifies the inclusion of the second defendant in the suit as a defendant. This renders the effort to make the 1st defendant also liable in damages for this injuries suffered by the plaintiff while doing the work for which he had been hired by the 2nd defendant an onerous one. If the plaintiff says he was an employee of the 2nd defendant, then he obviously had such master and servant relationship with the 2nd defendant. That is admitted in the plaint as well as in the evidence, which he gave to court. I am however unable to find that the plaintiff was also expressly employed by the 1st defendant when he was at the same time employed by the 2nd defendant. The question however is whether this finding is sufficient to absolve the 1st – defendant from being liable on account of their not having been the plaintiff's immediate employer.

In *Halsbury* vol 22 2nd Edition paragraph 191 we read as follows:-

“Whether or not in any given case the relation of a master and servant exists is a question of fact but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do but also the manner in which is to be done”.

In the case of *Hill v Birket* [1915] 1 KBS 78 it was said, inter alia, by Avery J:-

“There is no better working rule than laid down many years ago by Blackburn J in *R v Negas* (1873) 28 LT 646, where he said that the test is whether the alleged servant was under the control or and bound to obey the orders of the alleged master; if he is then the relation of master and servant exists”.

But the case of *Selle and another v Associated Motor Boat Co Ltd & others* [1968] EA 123, Sir Clement Lestang VP stated as follows:-

“Where, however, a person delegates a task or duty to another, not a servant, or employs another, not a servant to do something for his benefit or the joint benefit of himself and the other, whether the other person be called an agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be”.

There can be no doubt that this principle applies with all force to the facts of this case. What has therefore to be decided is whether the 1st defendant delegated to Ndungu the task which the plaintiff was performing when he got injured. There is no dispute that the 1st defendant had hired the 2nd defendant to do the part of construction which he himself had been engaged to do by the owner of the structure. There is no doubt therefore the work which the plaintiff was performing for the 2nd defendant was for the ultimate benefit of the 2 defendants. On the principle enunciated in the *Selle* case 1st defendant would also be liable.

The plaintiff's description of what caused him to fall is not as clear as would be expected. He said that he was pulling a wheelbarrow which was fully loaded with concrete mixture when fell down from the second story. While he may be blamed for slipping, the employer must have acted negligently when he assigned him to work in a spot from where he could have fallen from one story to another story. Slipping was a foreseeable risk where wet cement and sand was being mixed and used. Therefore necessary precautionary measures ought to have been taken to prevent a fall from such a height which would inevitably result in the sort of injuries such as the ones which were suffered by the plaintiff in this case. As a matter of fact the precautions should have been taken by the 1st defendant who were incharge of the entire structure rather than the so called independent contractor and this makes it impossible for them to escape liability even on the mere plain application of the principle on *Donoghue v Stevenson* [1932] AC 562 dealing with duty of care to neighbour. Of course the plaintiff himself ought also to have tried to avoid slipping but it must be appreciated that his work was so difficult and arduous that if he was to work productively and be able to supply sufficient mixture of cement and sand to the fundi who was using it he had to work hard and fast, and, therefore, slipping could not have been avoided. I therefore find as a fact that he got injured owing to falling from one story to another. In so falling he must have been exposed to an obvious risk. The employers did not take adequate precautions for the safety of this kind of employer who had to move heavy building material on wet and slippery surface. I therefore find that the defendants negligence to have been 80% whereas the plaintiff's contributory negligence was 20%.

The injuries which the plaintiff suffered were stated in the report of Mr Khandwalla who is an orthopaedic surgeon who examined the plaintiff. In his report he listed the following injuries:-

1. Compression fracture on lumber vertebra L2 – L3
2. Compound fracture of left alcaneum
3. Right colles fracture

According to the report of the surgeon, the plaintiff was admitted to the hospital and was advised to lie on a fracture board for fracture spine. The colles fracture was reduced and below elbow plaster applied for 6 weeks. The wounds on the right ankle was regious were cleaned and dressed and crape bandage was applied for 2 weeks. He was given injection of tetanus toxiod, analgesics and antibiotics. He was discharged on 4th September 1987. That report was complied on 10th September, 1987.

The second report on him was done on the 2nd November 1989. The surgeon reported as follows:-

“He was treated and has sufficiently improved from his injuries. However he still has occasional backache for which he may require analgesics.”

