



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO 12 OF 2018

MUEMA

THOMAS

KIKWEMBE.....PLAINTIFF

VERSUS

DWA ESTATE LIMITED.....DEFENDANT

JUDGMENT

THE CLAIM

Muema Thomas Kikwembe (hereinafter referred to as the plaintiff) filed this suit on 30/1/2018 vide a plaint dated 17/1/2018. The plaintiff sued Dwa Estate Limited (hereinafter referred to as the defendant) on account of an industrial accident that allegedly occurred on 30/10/2015 at Dwa Estate Limited, while the plaintiff was in the course of his employment with the defendant. The plaintiff averred that it was a term of the contract of employment between him and the defendant and/or it was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while he was engaged upon his work, not to expose him to a risk of injury that it ought to have known, to provide and maintain safe and adequate working conditions to enable the plaintiff carry out his work and to provide and maintain a safe and proper system of work.

The plaintiff further averred that on the material day, he was painting a house when the ladder he was standing on slid and fell down on the blocks, thereby occasioning serious

injuries to the plaintiff. That the said injuries and loss of damage were occasioned to the plaintiff by reason of the negligence and/or breach of statutory duty and/or breach of the said contract of employment on the part of the defendant, their servants or agents. The plaintiff pleaded the following particulars of negligence and/or breach of statutory duty of care:

- a) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged upon the said work;
- b) Exposing the plaintiff to a risk of injury or damage of which they knew or ought to have known;
- c) Causing or permitting the plaintiff to carry out the said work without any or any adequate safety gear/clothing knowing the same to be dangerous;
- d) Failing to take any or any adequate measures to ensure that the place where the plaintiff carried out his work was safe;
- e) Failing to provide or maintain a safe and proper system of work or to instruct their workmen including the plaintiff to follow that system.

The plaintiff further pleaded the particulars of injuries sustained as well as those of special damages and prayed for judgment against the defendant for:

- a) General damages;
- b) Special damages for Ksh. 3,300/=;
- c) Costs of the suit and interest.

THE DEFENDANT'S DEFENCE

The defendant entered appearance on 29/5/2018 and filed a statement of defence on the same day. The defendant denied the allegations contained in the plaint and in particular denied that the plaintiff was its employee, denied the existence of a contract of employment between the defendant and the plaintiff, denied that it was its duty to take all reasonable precautions for the safety of the plaintiff while engage upon the said employment and denied the occurrence of the accident. The defendant further denied the particulars of injuries and special damages pleaded by the plaintiff as well as the particulars of negligence and/or breach of statutory duty.

In the alternative, the defendant averred that the accident was solely caused by the plaintiff. The defendant pleaded the following particulars of negligence as against the plaintiff:

- a) Working without due care and attention;
- b) Failing to put on the necessary wearing apparel while working;
- c) Failing to be observant while working;
- d) Failing to heed to proper working instructions;
- e) Being careless in the circumstances;
- f) Exposing himself to the danger of being injured;
- g) Causing the said accident.

The defendant prayed that the plaintiff's suit be dismissed with costs.

THE EVIDENCE

The Plaintiff's Case

The plaintiff testified and called one other witness in support of his case. The plaintiff adopted his statement as part of his testimony in-chief. His testimony was that on 30/10/2015 he was working at Dwa Estate in the course of his employment with the defendant and was injured while painting a house. That the ladder he was using slid, causing the plaintiff to fall and sustain injuries. That the plaintiff was hospitalized after the incident. The plaintiff produced several documents in support of his case. PW 2 Doctor Cyprianos Okoth Okere testified that he examined the plaintiff and prepared a medical report. He produced the medical report and payment receipt for the report.

The Defence Case

The defendant did not call any witness.

MAIN ISSUES FOR DETERMINATION

In my view, the main issues for determination are as follows:

- i. Whether the plaintiff was an employee of the defendant at the material time;

- ii. Whether the plaintiff was on duty in the defendant's employment on 30/10/2015;
- iii. Whether the plaintiff was involved in an industrial accident on 30/10/2015;
- iv. Whether the defendant is liable for the accident;
- v. Whether the plaintiff sustained injuries and suffered loss as a result of the accident;
- vi. Whether the plaintiff is entitled to damages and if so, the nature and quantum thereof;
- vii. Who should bear the costs of this suit?

THE PLAINTIFF'S SUBMISSIONS

The plaintiff relied on a copy of his payslip produced in evidence and submitted that it was proof of existence of the contract of employment between him and the defendant. The plaintiff relied on his evidence as well as the provisions of the Occupiers' Liability Act and submitted that the defendant owed the plaintiff a duty of care, acted in breach of the duty of care and that the plaintiff suffered damage as a result of that breach. That there is no proof that the plaintiff was supplied with personal protective equipment by the defendant. The plaintiff urged the court to find the defendant 100% liable and relied on the following authorities:

- a) ***Garton Limited v Nancy Njeri Nyoike [2016] eKLR;***
- b) ***Jamal Ramadhan Yusuf & another v Ruth Achieng Onditi & another [2010] eKLR.***

On quantum, the plaintiff submitted a sum of Ksh. 700,000/= in general damages and relied on the following authorities:

- 1) ***Nobel Trading Company v Ongaro [2024] KEHC 16754 (KLR)***

The plaintiff and respondent in the appeal herein sustained a fracture the right femur and fracture of the right distal radius. The trial court awarded Ksh. 1,500,000/= in general damages on 18/5/2022. On appeal, the award was reduced to Ksh. 700,000/= on 16/8/2024.

2) Slok Construction Limited v Erick Odhiambo Odongo [2022] eKLR.

The plaintiff and respondent in the appeal herein sustained a fracture of the left femur. The trial court awarded Ksh. 2,000,000/= on 10/1/2020. On appeal, the award was reduced to Ksh. 700,000/= on 31/1/2022.

The plaintiff further prayed for special damages of Ksh. 3,300/= as well as costs of the suit and interest.

THE DEFENDANT'S SUBMISSIONS

The defendant heavily relied on its statement of defence and witness statements filed in a bid to argue its case. The defendant submitted that the payslip produced by the plaintiff indicated that he was an employee of Cosmas and Sons Investment Limited and not an employee of the defendant. That there is no credible evidence linking the Plaintiff to an employment relationship with the defendant. The defendant urged the court to find that the correct employer was Cosmas and Sons Investment Limited and not the defendant. The defendant submitted that PW 2 Dr. Cyprian Okoth Okere who produced the medical report did not produce documents to support his claim of the amount of Ksh. 200,000/= for the removal of the implant.

The defendant contended that the doctor is not an orthopedic surgeon and therefore, the medical report statements should be deemed as speculative and lacking in evidential foundation. The defendant relied on the authority of ***Hassan Noor Mahmoud v Tae Youn Ann [2001] [2001] KEHC 44 (KLR)***. The defendant urged the court to take the evidence of the doctor with a lot of caution and find it insufficient to support the claim for general damages.

On quantum, the defendant proposed a sum of Ksh. 300,000/= in general damages and relied on the following authorities:

- a) **Michael Adeka Khaemba & 2 others v Rassangylo Muli Kumuyu [2018] eKLR**, where the Respondent sustained a fracture of the right femur and on appeal, the respondent was awarded Kshs.200,000/=;
- b) **Reamic Investment Limited v Joaz Amenity Samuel [2021] eKLR**, where Kshs.350,000/= was awarded in 2021 where the Plaintiff sustained open left femur

fracture, abrasion on the left knees, face, neck, right upper imp and left upper lip as well as a contusion on the anterior chest.

For special damages, the defendant submitted a sum of Ksh. 3,300/= as what had been pleaded and proved. The defendant further submitted that costs should follow the event.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence on record and given due regard to the submissions made by the parties. It is the duty of the plaintiff to establish or prove negligence on the part of the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the Evidence Act which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of *Kirugi & Another v Kabiya & 3 Others [1987] KLR 347*, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

Liability

Was the plaintiff an employee of the defendant at the material time? In his plaint, the plaintiff indicated that he was an employee of the defendant at the material time. Under Kenyan law, an employee has been defined under Section 2 of the Employment Act as:

“Employee” means a person employed for wages or a salary and includes an apprentice and indentured learner.”

An employer has also been defined under the same section to mean;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”

Therefore, an employee and an employer may enter into a contract of service as;

“... an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies.”

In his statement which was adopted as part of his testimony in-chief, the plaintiff did not state that he was an employee of the defendant at the material time. He only stated that he was in the lawful course of employment within the defendant's premises. When the plaintiff was cross-examined by counsel for the defendant, he admitted that he had been employed by Cosmas & Sons Limited, which had a contract with the defendant herein. The plaintiff further admitted that his contract of employment was with Cosmas & Sons Limited and not with the defendant. Indeed, the copy of the payslip produced in evidence by the plaintiff confirms that he was being paid by Cosmas & Sons Limited.

Given the circumstances, can it be said that an employee-employer relationship existed between the plaintiff and the defendant? Can it be said that Cosmas & Sons Limited acted as an agent of the defendant? In the authority of ***Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] KEELRC 244 (KLR)***, the court held:

“In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise ‘employment’ as against what constitutes ‘service’ in case of contracts of service as contrasted with contracts for service. They include the following:

- a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.***
- b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.***
- c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for***

another person, the employer, who takes the ultimate risk of loss or chance of profit.

- d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.*

These tests are however not to be seen exclusively by themselves as they only serve as a guide based on the facts of each case. They are however a good guide to the issues as in this case.”

In the South African case of *Stein v Rising Title Productions (2002) 23 ILJ 2017*, a clear distinction between an employee and an independent contractor was drawn in the following words:

“The main distinction between an employee (servant) and an independent contractor appears to lie in the fact that the former undertakes to render personal services to the employer, while the latter undertakes to perform a certain specified piece of work or to produce a certain specified result for the employer. Unlike an employee, an independent contractor is generally not subject to the control or the instructions of the employer as to the manner in which he or she performs the work or produces the result. Although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the ‘dominant impression’ of the relationship is that of a contract of employment... The application of the dominant impression test thus requires a topological approach, according to which the right of control is not an indispensable requirement of the contract of service, but one of a number of indicia, the combination of which may be decisive. Other indicia which have been identified in the South African case law are: the nature of the work; the existence or non-existence of a right of supervision on the part of the employer; the manner of payment (eg, whether the employee is paid a

fixed rate or commission); the relative dependence or freedom of action of the employee in the performance of his or her duties; the employers power of dismissal; whether the employee is precluded from working for another, whether the employee is required to devote a particular amount of time to his or her work; whether the employee is obliged to perform his or her duties personally; the ownership of the working facilities and whether the employee provides his or her own tools and equipment; the place of work; the length of time of the employment; the intention of the parties, etc.” (Underlining mine)

Applying the control test posited in the above authorities, I find nothing to suggest that the defendant exercised such control over Cosmas & Sons Limited with reference to the manner of performance of the contracted works so as to constitute it a servant or agent of the defendant. The plaintiff did not produce in evidence the contract between Cosmas & Sons Limited and the defendant so as to tell whether it was a contract of service or for service. The plaintiff did not even allege that this employer was under the control of the defendant in the performance of the contracted works. In the authority of *Kenya Pipeline Company Ltd v Ndegwa & another [2023] KECA 226 (KLR)*, the Court of Appeal held:

“For the avoidance of doubt, control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. However, the right need not be unrestricted (see Mackenna, J. in Ready Mixed Concrete (South East) Ltd. vs. Minister of Pensions and National Insurance [1968] 2 QB p.497). In our considered view, the dominant impression” was that the 2nd respondent was not an employee or servant of the appellant, but an independent contractor.”

Given the evidence on record, I find nothing to suggest that Cosmas & Sons Limited was subject to the control or the instructions of the defendant as to the manner in which it was obligated to perform the contracted works. There is also no evidence to show that the plaintiff was under the control and instructions of the defendant, in the performance of his duties. What comes out clearly is that there was no employer-employee relationship between the defendant and the plaintiff herein. The plaintiff was an employee of an

independent contractor. It has not been controverted that the accident occurred at the defendant's premises.

It has also not been controverted that the plaintiff was on duty at the defendant's premises on the material day and that he was involved in an accident. I will disregard submissions making reference and placing reliance on the statement of defence and witness statements filed by the defence. This is because the defendant did not call any witness in support of its case. In the authority of *John Wainaina Kagwe v Hussein Dairy Limited [2013] KECA 488 (KLR)*, the Court of Appeal had this to say:

“As already stated, the respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability.” (Emphasis supplied)

In the same breath, the mere filing of witness statements without calling the witnesses to testify does not add value to the case of the party filing the statements. Furthermore, submissions cannot take the place of evidence. In *Daniel Toroitich Arap Moi & another v Mwangi Stephen Muriithi and another [2014] eKLR* the Court of Appeal held that:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

What is to be determined is whether the defendant, not being an employer of the plaintiff at the material time, is liable in negligence or breach of statutory duty as claimed. An independent contractor is defined in *Black's Law Dictionary*, 9th Edition as:

“One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it”.

As already indicated, my finding is that Cosmas & Sons Limited was an independent contractor. In *Kenya Power & Lighting v Okeyo & another [2022] KEHC 11297 (KLR)*, it was stated that the general rule is that an employer who has employed an independent contractor to undertake services or work on his behalf is not responsible for any tort committed by the contractor or in the course of his work. That the employer is also not liable for the tortious act committed by the contractor's employees.

In *Charlesworth in Negligence*, 4th Edition, Sweet and Maxwell, it is stated that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. It is further stated:

“Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable.”

Similarly, in *Board of Governors St. Mary's School v Boli Festus Andrew Sio [2020] KECA 952 (KLR)*, the Court of Appeal held that the general rule is that an employer who has employed an independent contractor to undertake services or work on his behalf is not responsible for any tort committed by the contract or in the course of his work. The employer is also not liable for the tortious act committed by the contractor's employees. The court further observed that there were exceptions to the general rule as follows:

- a) An employer is liable for his own act or neglect and accordingly, if he contracts with an independent contractor to do an act which he is not entitled to do or to perform a duty which is thrown upon him by law he will be liable for the way in which the contractor has performed the duty. That duty cannot be delegated;

- b) If the employer has contracted an independent contractor to do an act which is unlawful or the employer is not entitled to do such as a public or private nuisance or a trespass the employer will in that case be liable if there is resulting damage;
- c) If the employer had contracted independent contractor to perform a task which involves special risks of damage the employer then becomes liable for the acts;
- d) When the employer is under the absolute duty which attaches ownership of dangerous things he is liable for the resulting damage.

In my view, the plaintiff's case does not fall under any of the exceptions to the general rule. The mere fact that the work was being carried out in the defendant's premises does not warrant a finding of culpability on the part of the defendant. The plaintiff ought to have sued Cosmas & Sons Limited. No causal link has been established between the accident and the defendant herein. I see no reason why the defendant should be held vicariously liable for the accident. For avoidance of doubt, no liability is attached to the defendant.

Quantum

The practice of the courts is that even where the court dismisses a claim for general damages, the trial court is obliged to assess the quantum of damages that it would have awarded had the claim been proven. The position has been upheld time and again by the superior courts. For instance, in the case of *Gladys Wanjiru Njaramba v Globe Pharmacy and another [2014] eKLR*, the court observed that:

"It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissal of the suit. This position is confirmed by the Court of Appeal in the case of Mordekai Mwangi Nandwa versus Bhogals Garage CA No. 124 of [1993] (UR) Where the court held that the that damages be assessed even if the case is dismissed does not imply writing an alternative judgment."

The position was affirmed by the Court of Appeal in the case of *Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR*.

On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:

- 1) Damages should not be inordinately too high or too low;
- 2) Damages should be commensurate to the injury suffered;
- 3) Damages should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered;
- 4) Awards in past decisions are mere guides and each case depends on its own facts.

I have considered the medical evidence on record. The plaintiff sustained a fracture of the left femur. I have further considered the authorities relied upon by the parties. On my part, I have considered the following authorities:

- a) ***Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR*** wherein Ksh. 800,000/= was awarded for a fracture of the mid-shaft femur with 4% permanent disability;
- b) ***Kiautha v Ntarangwi [2022] KEHC 10595 (KLR)*** wherein Ksh. 800,000/= was awarded on appeal on 30/6/2022 for multiple soft tissue injuries and a fracture of the mid-shaft femur;
- c) ***Jacaranda bodaboda operators & another v Nyasero [2023] KEHC 23806 (KLR)*** wherein an award of Ksh. 750,000/= was made on appeal on 17/10/2023 for a fracture of the femur;
- d) ***Okoth v Sunday & another [2025] KEHC 2136 (KLR)***: The plaintiff and appellant in the appeal sustained lacerations on the occipital scalp, cut wound on the forehead, Blunt injury to the chest, Blunt injury to the back, Lacerations on the right wrist & right hand and fracture to the left femur. Permanent disability was assessed at 3%. The trial court awarded Ksh. 400,000/= on 7th May, 2024. On appeal, the award was enhanced to Ksh. 700,000/= on 13/2/2025.

Had the plaintiff established negligence or breach of statutory duty as against the defendant, I would have awarded Ksh. 700,000/= in general damages as proposed by the plaintiff. I would also have awarded special damages of Ksh. 3,300/= as pleaded and proved.

DISPOSITION

In summary, I hold that the plaintiff has failed to prove his case on a balance of probabilities as against the defendant. Consequently, I proceed to dismiss the plaintiff's suit with costs to the defendant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 22ND DAY OF
DECEMBER, 2025.**

**Y.A SHIKANDA
SENIOR PRINCIPAL MAGISTRATE.**