IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, GITHINJI & NYAMU, JJ.A)

CIVIL APPEAL NO. 60 OF 2003

BETWEEN

MALELU MUTHAMA.....APPELLANT

AND

KAY CONSTRUCTION COMPANY LTD.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Aganyanya, J.) dated 24th September, 2002

in

H.C.C.C NO. 361 OF 2001)
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JUDGMENT OF THE COURT

This is an appeal from the judgment of Aganyanya, J. (as he then was) delivered on 24th September, 2002. The genesis of this appeal is the plaint filed in the Chief Magistrate's Court at Nairobi in **Civil Case No. 7103 of 2000** in which the appellant herein ***MALELU MUTHAMA*** who was the plaintiff sued the respondent, ***KAY CONSTRUCTION CO. LTD***., seeking judgment for general and special damages. The pertinent paragraphs of the plaint were as follows: -

"3. At all material times the plaintiff was employed by the defendant.

4. It was a term of employment contract and or it was an implied term of contract and or a statutory duty that the defendant would take reasonable care of the plaintiff whilst so employed not to expose the plaintiff to a risk of bodily injury it knew or ought to have known and or to provide safe means of work and or a safe place of work.

5. In the alternative the defendant owed the plaintiff the common law duty of care.

6. On or about 30th July, 1999 the plaintiff was working with the defendant in the course of his employment when his left hand was caught and severely injured by a culvert he was laying with other employees.

7. The said accident was caused by the defendant or its employer's negligence or by breach of

contract or statute in that it or they:

(a) failing to provide a safe place of work or safe means of work.

(b) exposed the plaintiff to a risk of bodily injury the knew or ought to have known.

(c) failed to provide hand gloves or other safety devices.

8. Arising out of the said accident the plaintiff sustained severe injuries and has suffered loss and damage and claims damages for pain suffering and loss of amenities of life."

A defence was filed and the pertinent paragraphs of the defence were as follows: -

"2. The defendant denies the allegations made in paragraph 3 and puts the plaintiff to strict proof the employment contract between it and the plaintiff.

3. The defendant denies the allegations made in paragraph 4 and puts plaintiff to strict proof of the same.

4. Paragraph 5 is also denied.

5. The defendant denies paragraph 6 and puts the plaintiff to proof.

6. The plaintiff is a total stranger to the defendant and puts him to proof the contract in paragraph 7 of the plaint.

7. The plaintiff is put to proof paragraph 8 of the plaint."

The suit was placed before the learned Senior Resident Magistrate (Mrs. G.N. Ngari) for hearing. The appellant as the plaintiff testified on how he was employed as a casual labourer by the respondent and got injured while performing his duties. He was treated and it was on that ground that he sought to be compensated by the respondent. The appellant then closed his case.

Benson Karimi Gutu the Administrative Manager of the respondent gave evidence on behalf of the respondent. He testified that the appellant was not their employee and produced computer print out of all employees in which the appellant's name did not appear. Gutu went on to testify that the respondent had no work in places mentioned by the appellant.

In a judgment delivered on 17th July, 2001 the learned Senior Resident Magistrate found in favour of the appellant. The learned magistrate concluded her judgment as follows: -

"Issue is whether defendant was negligent as alleged. Being a construction (sic) he ought to have known more force was necessary to hold the culvert so as not to endanger its employees. Instead the supervisor instructed plaintiff to remove stone and some workers hold culvert by ropes yet it was too heavy for them. He is liable and subsequently the employer. I hold him 100% liable.

As regard damages sustained fracture of a middle finger lacerations on 2, 4 and 5th finger. He was treated at P.C.E.A Kikuyu hospital, Kisau medical clinic per hospital cards and receipts exhibited and later examined by Dr. Wambugu on 7/9/00 about a month after. This is quite soon and it explains why injuries were still fresh. A second medical report which later would have been of great assistance. Nevertheless his counsel suggested an award of Kshs.160,000 and defence Kshs.40,000. Both cited cases and I have considered their submissions as a whole and nature of injuries and find that an award of Kshs.140,000 under this heading is adequate. I also award medical expenses totaling Kshs.1100 per receipts and Kshs.1500 for medical report this appeal damages totaling Kshs.2600. I also award costs of this suit and interest at court rates. Rights of appeal."

The respondent was aggrieved by the foregoing and hence filed appeal in the High Court. That is the appeal that was placed before Aganyanya J. for determination.

The learned Judge considered what was urged before him and in the end came to the conclusion that the appellant had not proved his case and hence allowed the appeal. The learned Judge concluded his judgment thus: -

"When, therefore, the appellants complains that the respondent did not prove that he was employed by the appellant they had a valid point and I agree with them that the respondents' claim against the appellants was not proved on a balance of probabilities as required by law and that the learned Senior Resident Magistrate's order holding the appellant liable for the accident was not supported by the evidence. And if this was the position then the question of damages could not fall for a decision.

The appeal is allowed but since the respondent appears to have been a man of law (sic) class, I would direct that each party do bear his/its/their own costs of this appeal."

It is the foregoing that provoked this appeal in which the appellant, through his advocate, filed a Memorandum of appeal comprising the following grounds of appeal: -

"1. The learned judge erred in law in finding that the appellant had not proved his case on a balance of probabilities.

2. The learned judge erred in law in granting relief or reliefs not prayed for in the memorandum of appeal.

3. The decision was against the weight of the evidence and the law applicable thereof.

4. The learned trial judge failed to give reasons for departing from the findings of fact by the trial magistrate.

5. The learned judge failed to take judicial notice of the practice relating to casual employment in Kenya and in the construction industry in particular whereby casuals are employed at site and paid on daily or weekly basis and no formal records are kept or given to employees."

The appeal came up for hearing before us on 11th October, 2011 when Mr. N.K. Kaburu appeared for the appellant while Mr. F.N. Kimani appeared for the respondent.

In his submissions Mr. Kaburu pointed out that the appellant (as the plaintiff) gave evidence to the effect that he had been employed by the respondent which evidence was accepted by the subordinate court but overturned by the High Court. Having gone through the evidence and the law applicable Mr. Kaburu asked us to affirm the judgment of the Resident Magistrate.

On his part Mr. Kimani asked us to confirm the judgment of the superior court. It was argued that there was no employment of contract produced in evidence, as the appellant was unable to prove a contract of employment between him and the respondent.

What has given rise to this rather protracted litigation is an incident which the appellant claimed occurred on 30th July, 1999. We say so because that is the date given in the sixth paragraph of the plaint filed in the subordinate court. It was the appellant's case that on the said date while working as the respondent's employee he was injured. It was upon the appellant to prove on the balance of probability that on the material date he was an employee of the respondent and that while so employed he suffered injury for which the respondent was liable to compensate him. The learned Senior Resident Magistrate believed the appellant and entered judgment in his favour. But the respondent appealed to the High Court which allowed the appeal. We have considered the entire history of this matter, the submissions by counsel appearing for the parties and it is now our duty to determine the appeal remembering that this is a second appeal.

Having considered the judgment of the learned Judge we are satisfied that he re-evaluated the evidence,

assessed it and made his own conclusions but remembering that he had not seen nor heard the witnesses. That is how a first appeal has to be approached as stated in a line of decisions of this Court – see **SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] E.A 123**, **WILLIAMSON DIAMONDS LTD. V. BROWN [1970] E.A.1** and **ARROW CAR LIMITED V. BIOMOMO & 2 OTHERS [2004] 2 KLR 101.**

The learned Judge considered the record before him and was satisfied that the appellant had failed to produce any document to show that he had been employed by the respondent. We have carefully gone through the judgment of the learned Judge but we are unable to fault him on any of the grounds set out in the Memorandum of Appeal.

We have considered the authorities cited by Mr. Kaburu but these do not advance his case any further. We are in agreement with the learned Judge that the appellant failed to prove that he was in employment of the respondent when he got injured. The respondent was able to produce documents to show who were in its employment at the relevant time. This was a case of the appellant giving evidence in a bid to prove his claim and the respondent through its Administrative Manager showing that the appellant was not their employee. That being the case the learned Judge was satisfied that the appellant had failed to prove his case and on our part we are satisfied that the learned Judge cannot be faulted in reaching that conclusion.

In view of the foregoing we are satisfied that this appeal lacks merit and we accordingly order that the same be and is hereby dismissed but with no order for costs.

Dated and delivered at Nairobi this 18th day of November, 2011.

E.O. O'KUBASU
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JUDGE OF APPEAL

E.M. GITHINJI
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JUDGE OF APPEAL

J.G. NYAMU
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR