



Ngumbau v Pindoria Holdings Limited (Employment and Labour Relations Appeal 33 of 2018) [2024] KEELRC 2777 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2777 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 33 OF 2018
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

ONESMUS KIOKO NGUMBAU APPELLANT

AND

PINDORIA HOLDINGS LIMITED RESPONDENT

(Being an Appeal from the judgment of the Senior Resident Magistrate's court at Kajiado in Kajiado SRMCC No. 276 of 2016 delivered on 6th July 2017 by Hon. S.M Shitubi (Ms) (Senior Resident Magistrate)

JUDGMENT

1. The Appellant being dissatisfied by the part of the judgment and decree of the Senior Resident Magistrate Hon. Shitubi (Ms) delivered on 6th July 2017 filed this appeal vide a memorandum of appeal dated 21st July 2017 on the grounds that: -
 1. The learned trial magistrate erred in fact and law in the way she weighed the evidence before the court to determine the issue of liability that the Appellant did not prove that he was employed by the Respondent hence not entitled to Kshs.130,000/= awarded as general damages.
 2. The learned magistrate erred in fact and law by apportioning liability at 0% against the Respondent on account of lack of proof of employment on the part of the Appellant yet the Respondent neither called any witness nor produced any documents to dispute employment.
 3. The learned magistrate erred in law and in fact by failing to substantially and adequately consider the Appellant's submissions.
2. The Appellant prays for that:



- a. The Appeal be allowed and the Respondent be held 100% liable for the accident that befell the Appellant
 - b. The Appellant be awarded costs for this court and the court below.
3. Both parties canvassed the appeal by written submissions.

Appellant's submissions

4. The Appellant submitted that he testified in the trial court that he had worked for the Respondent for 13 months in which he was regularly being paid on a monthly basis.
5. The Appellant submitted that the legal principle is that the absence of documents and certificates does not necessarily mean that an employment contract does not exist. In *Jacob Ayiga Maruja & Another V Simeon Obayo* (2005) eKLR the court emphasized that many people, especially those who are illiterate, do not have documents or certificates and yet earn their livelihood.
6. The appellant submitted that the respondent denied the appellant's employment status through its statement of defence dated 20th May 2016 but failed to call any witnesses to support the denial during the hearing. The appellant relied on the case of *Donoghue V Stevenson* [132] UKHL Lord McMillan explained the doctrine of negligence as follows:

“The law takes no cognizance of, carelessness in the abstract. It concerns itself with carelessness only where there is a duty of care where failure in that duty has caused damage.... the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and the party complaining should be able to prove that he has suffered damage in breach of that duty.”
7. The Appellant submitted that negligence has three (3) elements that must be satisfied including the existence of a duty of care, breach of the said duty of care and damages as a result of breach.
8. The Appellant submitted that there was a duty of care owed to him, and that the duty was breached, resulting in his injuries. The Appellant further submitted he has proven his case and that the Respondent should be held 100% liable for the accident. The Appellant relied on section 3(1) and (2) of the *Occupier's Liability*, *James Finlay (K) Ltd V Joseph Ombati Nyaanga* [2017] eKLR and *Jamal Ramadhan Yusuf & another V Ruth Achieng Onditi & another* [2010] eKLR in support of that proposition.
9. The appellant submitted being the first appeal this Honourable Court has a duty to look at the evidence and judgment in a view to reaching its own conclusion relying on Section 78 of the *Civil Procedure Act* which requires that a first appellate court “to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusion”.
10. In *Peter M. Kariuki V Attorney General* [2014] eKLR the court held that as a first appellate court, it has a responsibility to review the evidence presented in the trial court. It must evaluate the evidence independently and draw its own conclusions, ensuring that the decisions made by the trial judge are consistent with the evidence provided.
11. It is in the Appellant's submission that he has proven the issue of employment and liability and thus this appeal should be allowed.
12. The Appellant submitted that the learned magistrate would have awarded Kshs.130,000/= in general damages and Kshs.3,000/= in special damages had the Appellant proven the important aspect of



employment. In *Bigot Flowers (K) Limited V David Nyongesa Okiya* [2016] eKLR where the court considered a 6-year inflation in adjusting the award.

13. The Appellant submitted that an award of Kshs.200,000/= in general damages and special damages will be sufficient compensation.
14. The Appellant submitted that the costs follow the event relying on *Jasbir Singh Rai & 3 others V Tarlochan Singh Rai & 4 Others* [2014] eKLR in support of the proposition.

Respondent's submissions

15. The Respondent submitted that in the trial court the appellant did not prove three key points: his employment by the Respondent, his injury during lawful duty, and that the injury was due to the Respondent's negligence or lack of care.
16. The Respondent submitted that the Appellant failed to provide any documentation to support his claims regarding employment or injury. The Respondent pointed out that the Appellant did not demonstrate how it was responsible for the injury caused by a falling board while the Appellant was working independently. Furthermore, the Respondent did not direct or control the Appellant's actions, and there was no indication that the Respondent caused the board to fall. Therefore, the Respondent contended that there was no basis for the liability claim.
17. The Respondent submitted that the burden of proof lies with the Appellant, who must prove his employment and injury claims. The Respondent argued that the Appellant cannot avoid the responsibility and blame the trial magistrate for his own failure to provide evidence.
18. The Respondent submitted that the trial magistrate correctly concluded that the Appellant failed to prove his case. The Respondent also submitted that any deficiencies in the evidence were the Appellant's responsibility, not the trial court's as it applied the correct standard and justifiably dismissed the case.
19. The Respondent relied on the case of *Ribiru V Ndung'u (Suing on Behalf of the Estate of the Late Joram Ndung'u Mwaniki) & 2 others (Civil Appeal 37 of 2023)* [2024] KEHC 339 (KLR) (25 January 2024) (Judgment) where the court held that the standard to review on the first appeal involves reconsidering and re-evaluating evidence to draw independent conclusions, acknowledging the trial court's advantage of observing witness testimony, and avoiding different results solely because the appellate court would decide differently on initial hearing.
20. The Respondent submitted that the trial magistrate considered all relevant circumstances and evidence correctly, reaching the right conclusion. Therefore, the Respondent urges the court to dismiss the appeal with costs.

Analysis and determination

21. The main issue of determination is whether the appeal before this Honourable Court is merited.
22. As this is a first appeal, the court has a responsibility to review and assess the evidence presented in the trial court. It must evaluate the evidence and draw its own conclusions based on the circumstances. The court should also keep in mind that it did not have the opportunity to see or hear the witnesses testify and must account for that fact in its evaluation.



23. In *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself, and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif vs Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270). [emphasis added].

24. In this instant case, the Appellant was injured in the course of work and reported the matter to the Respondent. The Respondent did not report the matter to the Director of Occupation and Safety Health as provided under Section 22 of the *Work Injury Benefits Act* which provides as follows:

- (1) Subject to the provisions of this section, an employer shall report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.
- (2) For the purposes of this section, an accident includes any injury reported by an employee, to his employer, if the employee when reporting the injury, alleges that it arose out of and in the course of his employment and irrespective of the fact that the employer is of the opinion that the alleged accident did not so arise out of and in the course of employment.
- (3) An employer shall, at the request of an employee or the dependant of an employee, furnish the employee, or dependants with a copy of the notice of the accident furnished by the employer to the Director in respect of a claim for compensation by such employee or dependant.
- (4) An employer who fails to comply with subsection (1) commits an offence.
- (5) The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.

25. The Law is that he who alleges must prove. It is regrettable that the appellant has absolutely no proof that he was employed or had an employer/employee relationship with the Respondent. It would be presumptuous for a court of law to make a decision where there is no proof whatsoever of any relationship. The court holds that It is trite law that an employer and employee relationship must be proved with cogent evidence. It is not sufficient to allege a relationship with no iota of any tangible evidence.

The court is ready to accept any iota of evidence that would point out that the appellant worked for the respondent. But mere allegation cannot be basis to hold an employer liable.

26. In the case of *Public Service Commission & 4 Others V Cheruiyot & 20 Others (Civil Appeal 119 & 139 of 2017)* (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) the court held: -

- “3. None of the Petitioners demonstrated an existing employee-employer relationship with any of the respondents or with any public entity. The 1st



Petitioner at the hearing conceded that he did not have an employee-employer relationship with any of the respondents.”

27. If there is no employer-employee relationship, that means this court has no jurisdiction to try the matter. The court therefore holds that the trial magistrate was right in his findings that the appellant failed to prove the important aspect of employment. The court in conclusion finds the appeal has no merits and is dismissed accordingly.

28. The court orders the respective parties to meet their costs of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

