Milimani Holdings Limited v Nyamosi (Employment and Labour Relations Appeal 21 of 2022) [2023] KEELRC 490 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 490 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL 21 OF 2022

HS WASILWA, J

FEBRUARY 28, 2023

BETWEEN

MILIMANI HOLDINGS LIMITED ..... APPELLANT

AND

JULIUS OYOGO NYAMOSI ..... RESPONDENT

JUDGMENT

1. This appeal arose from the judgement of the Chief Magistrates Court at Nakuru, honourable B Kalo, in Nakuru CMCC no 551 of 2013 , delivered on August 15, 2017, where the appellant was the defendant and the respondent was the plainitff. The grounds of the appeal are as follows;-

    1) That the learned trial magistrate erred in law and fact in failing to properly evaluate the evidence adduced thereby finding the appellant liable for the alleged accident in the absence of evidence to support such finding.

    2) That the learned trial magistrate erred in law and fact in finding the appellant liable in negligence when there is no evidence of any contractual relationship (employment) between parties and when there was no evidence of any falling on the part of the appellant if at all there was the alleged accident.

    3) That the trial magistrate erred in law and in fact in finding the appellant liable for an accident whose account is incredible and if at all does not establish negligence on the part of the appellant or liability at all.

    4) That the learned trial magistrate erred in law in shifting the burden of proof and thereby held the appellant liable merely because the appellant never presented any evidence in refutable yet the respondent's case was not established in the first place.

5) That the learned trial magistrate erred in law and fact by finding the appellant liable in the absence of any evidence as to its duty of care in respect of the duty and the causal connection between the default and the alleged injury of the respondent.

6) That the judgment of the trial court is entirely unreasonable, untenable and contrary to law, principle and facts of the case presented before that trial court.

2. The appellant sought for the following orders:-:

a) That this judgement/ decree of the honourable court delivered on August 15, 2017 (erroneously dated July 4, 2017) be reviewed or set aside and in its place substituted judgement/ decree that is reasobale and derivative of proper evaluation of evidence on record.

b.) The respondent be ordered to bear costs of this appeal.

Brief facts.

3. The respondent herein was employed by the appellant as a general worker and to prove this he presented a card titled "Casual Labour Card". That it was an implied term of that contract of employment between the respondent and the appelant to provide a safe working environment. On or about January 21, 2013, while the responent was performing his duties given by his supervisor, Mr David, an accident occurred, where he was hit by a building stone which fell from third floor of the contruction building causing him to fall down on another stone injuring his chest area and sustained serious soft tissue injuries to the chest. In this he produced receipts of the medical expenses, outpatient card from PGH, and medical-legal report by Dr Obed Omuyoma. The respondent blamed the appellant for failing to provide safe system of work, exposing the respondent to risky assignment without warning and not issuing adequate protective gear. On cross examination he testified that the building under construction was Milimani apartment belonging to the appellant but that the contractor was one James Kadogo, that came with his employees and equipments. He also confirmed that the employment card was not stamped by the appellant.

4. The appellant in his defence denied employing the respondent and stated that it is a purely investment company and any of their construction projects are undertaken by independent contractors. It stated that there is no employment relationship between the appellant and the respondent herein. It further stated that if any accident occurred, then the respondent herein was to blame for being negligent and failing to take care of his safety.

5. Directions were taken for the appeal to be canvassed by written submissions with the appellant filing on January 10, 2023 and the respondent on February 7, 2023.

Appellant' submissions.

6. The appellant submitted from the onset that the respondent was not their employee and argued that the casual labour card produced as evidence did not bear any name or stamp of the appellant, for the court to infer any employment relationship. It was submitted further that the responent admitted in cross examination that he was not paid by the appelant despite working for 21 days till the time of the accident.

7. The appellant submitted that the respondent ought to have proved its case of employment relationship as required under section 107(1)&(2) of the *Evidence Act*. Further that since the respondent stated in cross examination that he was working with 8 other people including a foreman that rushed him to hospital after the accident, he ought to have called any one of the said employees to corroborate his case.

In this they relied on the case of *Nandi Tea Estate Limited V Eunice Jackson Were*[2006] eklr where the injured employee sued the defendant seeking compensation for injury sustained at work after falling in a hole while taking tea from the farm for weighing. On that scenario Ibrahim J held that;-

> " The burden of proof was on the plaintiff to prove that she was on duty on the material day. It is not enough to prove that she was employed as a casual worker from time to time. If the plaintiff truly worked on the said day, then she ought to have produced evidence that she was paid for her services on the material day. No such evidence was proved. The plaintiff could also have called as a witness any other casual employee who was on duty on April 10, 1999. The plaintiff did not produce any evidence documentary or otherwise that she was on duty on April 10, 1999, did work and was paid for it. Had she done so, she would have proved her case on a balance of probability.The plaintiff could also have called any eye-witness who saw her fall at the defendant's plantation on the material day. The existence of the injury and her being attended at Nandi Hills Hospital on the said date is not proof that the injuries were sustained at her place of work. I am of the view that the learned magistrate erred by not explaining the basis upon which he found that the plaintiff had proved her case on a balance of probability. What evidence led him to decide that the plaintiff was injured while on duty? I see none. I find that the learned magistrate made his finding on the basis of no evidence."

8. It was submitted that since the respondent did not prove any employment relationship with the appellant, the case should have been dismissed on that ground. Further that the respondent admitted in cross examination that the appellant had employed a contractor that came with his tools and employees who included the respondent, therefore the finding by the court that there was employment relationship was erraneously arrive at. For this proposition, the appellant relied on the case of *Devki Steel Mills Limited v John Mbuvi Mackenzie* , where Prof Justice Joel Ngugi (as he then was)held that;-

> " I agree wholly with the reasoning by Justice Mabeya."A work place injury claim is predicated firstly on the employment relationship between the parties".

9. The appellant also cited the case of *Twin River 1 Estate v Teresia Mutheu Nzui* [2018] eKLR where the court held that;

> " For the reasons set out above, the court finds that the respondent has not on a balance of probabilities proved that she was at work on the material day and that she was in the course of employment and her duty given by the appellant injured as alleged, so as to support a claim for damages in negligence. Although the respondent may well have suffered injury to her left arm on the March 27, 2017 as indicated in the treatment notes and medical report produced for the respondent, the same was not demonstrated by cogent evidence to have been occasioned in the course of her employment with the appellant so as to give rise to a duty of care, which in any event was not shown to have been breached, owed to the respondent by the appellant."

10. Accordingly, it submitted that the treatment notes and the medical-legal report prepared by Dr Obed Omuyoma, which was tenddred in evidence goes to prove the injuries sustained by the respondent but not the place where the accident occurred. To emphasize on this point the appelant relied on the case of *Lomolo[1962] Limited v Anam Kwangulei* [2019] eKLR.

11. It was further submitted that since the respondent did not prove any employment relationship with the appellant, the issue of negligene that resulted to prayer for damages must fall because for a claim of negligence to succeed , the alleger must prove; duty of care, breach of that duty of care and that the

injury suffered came as a result of the breach of that duty of care. From that, he argued that since the employment relationship was not proved, the subsequent elements of negligence that presupposes the duty of care should follow suit and fall.

12. The appellant submitted that the trial court shifted the burden of prove and held the appellant liable for failing to call witnesses to refute the responent's case instead of requiring the respondent to prove his case to the required standard. In this, they relied on the case of *Charterhouse Bank Limited (Under Statutory management) v Frank N Kamau*[2016] eKLR, where the court held that;

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examinationand the evidence adducedby the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the Court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified."

13. In conclusion, the appellant prayed for the appeal to be allowed and the trial court's decision set aside and substituted with dismissal of the entire suit.

Respondent's submissions.

14. The respondent submitted that he was issued with Casual Labour Card by the appellant who required the production of the same each morning before they began the duties for the day. It was argued that all documents were produced by consent of the parties as such formed part of the evidence to ascertain the fact that the respondent was employed by the appelant, got injured during the cause of his employment and was due for compensation for the injuries sustained.

15. He submitted that the appellant did not deny owning the building which was under construction when the respondent was injured but alleged to have engaged a contractor to erect it. He argued that the appelant did not adduce any evidence in form of agreement or contract with the contractor to support its allegation and affirm the suggestions that the building was constructed by an Independent contructor.

16. It was also submitted that the failure by the appellant to call any witness and or produce any documents in support of their case, left the case of the respondent uncontroverted as was held *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu*[2012] eKLR where the court held that;-

> "Again in the case of *Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS no 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

17. In conclusion, the respondent submitted that the trial court did nor err in arriving at its conclusion, because the evidence adduced was against the appellant and the scales of justice tilts in favour of the respondent. He thus urged this court to dismiss the appeal and uphold the decision of the trial court.

18. I have examined all the averments and the submissions of the parties herein. This is a 1st appeal to this court and this court is therefore mandated to re-examine the evidence on record afresh.

19. From the record of this case the respondent herein filed his case before the CM's court on June 25, 2013.

20. In the plaint before court, the claimant respondent pleaded negligence against the appellant for failing to take any or any adequate precautions for his safety while at work.

21. The plaintiff also averred that he was exposed to a dangerous working environment and was not provided with any proper and safe system of work.

22. The plaintiff submitted that the respondent appellant herein breached the contract of service and the statutory duty of care.

23. The appellant was served with the memorandum of claim and entered appearance on November 01, 2013 and also filed a defence on November 22, 2013.

24. This case proceeded for hearing in the presence of both parties on May 09, 2017 whereby the respondent herein gave his evidence and indicated that he was on duty working for the appellant herein when he was injured. He produced his medical card as exhibit plus the medical report. He also produced a 'casual employment card' as exhibit to show he was working for the appellants.

25. At the end of the plaintiff's case, the respondent appellant offered no evidence. In the judgment of the lower court the learned magistrate made a finding that since the respondent failed to call any evidence, the plaintiff's case remained uncontroverted.

26. The learned magistrate relied on *Trust Bank Ltd v Paramount Universal Bank Limited & 2 others*, Nrb [Milimani] HCCC No 1243 of 2001 quoted in *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* [2012] eKLR where the Court held that;-

> " where a party fails to call evidence in support of it's case that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged".

27. The trial court also made a finding that the appellants herein owed the plaintiff a duty of care which they failed to do hence no injury and the finding that they were liable.

28. The appellants herein have submitted that the respondent failed to prove he was an employee of the respondent and hence this claim cannot stand against the appellants.

29. In establishing that he was an employee of the appellants, the respondent produced a casual employment card which he stated was issued to him by the appellants.

30. The respondent also produced his medical report from Dr Obed Omuyoma where he explained that he was injured while on duty at the appellant's premises. This report was produced by consent of the appellant an indication that its contents were admitted.

31. In the court's finding the evidence adduced by the respondent plaintiff remained uncontroverted.

32. This is the position of the law in Janet Kaphiphe Ouma & Another v Marie Stopes International [Kenya] Kisumu HCCC no 68 of 2007 Ali Aroni J (As she then was) citing the decision in *Edward Mwuga through Stanley Muriga v Nathanie D. Schuter* [A No. 23 of 1997] stated as follows;

> " In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein". The evidence of the 1st plaintiff and that of the witness remains uncontroverted and the statement in the defence therefore remains mere allegation - section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

33. That being the position, and the appellant having submitted no evidence and having supported the respondent's case by consent, there is no evidence before me to dislodge the respondent's case.

34. The case remained uncontroverted and it is upon this basis that the Hon trial magistrate found in favour of the respondent.

35. I find no reason to find otherwise nor to any basis to tamper with the finding of the trial court.

36. I find the appeal lacks merit and I dismiss it with costs to the respondent in both this appeal and in the lower court.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF FEBRUARY, 2023.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oteyo holding brief for Mwangi for appellants – present

Mboga for respondent – present

Court assistant – Fred