



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

APPEAL NO. 3 OF 2019

MASITA MUSA ONWONGAAPPELLANT

VERSUS

RAFLO SERVICES COMPANY LIMITED.....1STRESPONDENT

KASOLINE SERVICES LIMITED.....2ND RESPONDENT

RULING

(Being an appeal from the judgment and decree of Honourable Principal Magistrate J. Mwaniki in Keroka in SRMCC No. 147 of 2011 delivered on 13th September 2016)

1. The Appellant (Plaintiff in the lower court) was injured while in the course of employment in a construction site on 23.6.2011 and he was treated at Masimba Sub County Hospital before being transferred to Kisii Level 5 Hospital. Thereafter he sued the 1st respondent to recover damages for the injuries suffered alleging that he was injured while in the course of 1st respondent's employment. However, the 1st respondent denied liability and averred that the appellant was never employed by it as at the time of the said accident.

2. The 1st respondent obtained leave to join the 2nd respondent as a third party to the suit contending that the appellant was employed by the 2nd respondent when the injuries were sustained. The 2nd respondent never entered appearance and therefore participated in proceedings to defend itself.

3. During the hearing the appellant testified as Pw1 and told the court that on 13.6.2011, he was on duty building the DC's Office while in the course of employment by the 1st respondent. He had worked there for one month. On the said date, he was molding a window while standing on a wooden table when the foreman stepped on the table to show him how to do the job. As a result, the table broke and they fell down. The appellant suffered a fracture on his left hand and he went to Masimba Hospital and Kisii Level 5 for treatment. Thereafter he saw Dr. Ogando Zoga who prepared a Medical Report for him. He also produced treatment notes as Exhibit 1-4.

4. He blamed the supervisor for the accident for stepping on the table before strengthening it. He maintained that the 1st respondent was his employer at the time of the accident because the site had Sign Board with the name of Raflo Services Limited. He stated that the supervisor at the site was a Mr. Kennedy.

5. The 1st respondent's Supervisor and director Mr. Andrew Moindi testified as Dw1. He testified that he successfully applied for a tender from the Ministry of Public Works to construct a block at Masaba South District in December 2009. He was then given a contract to do the job in 6 months but he finished it within 5 months. He did the job between January and April 2010 when he handed over the premises to the client and got a handing over certificate dated 26.8.2010. He also produced a Certificate of Completion dated 17.10.2012 which confirmed that there was no accident during the said contract period.

6. Dw1 further stated that as at the time of the appellant's accident, he was employed by the 2nd respondent at the same site but their contract was under the Provincial Administration. He produced list of his employees to prove that the name of the appellant was not among his staff during his contract period at Masaba South District. He contended that both respondents had Sign Boards at the site but explained that Sign Boards are normally paid for by the client who also has the duty to remove them.

7. After hearing the appellant and the 1st respondent, the trial court found no merits in the appellant's claim and dismissed it with costs in his judgement delivered on 13.9.2016.

The appeal.

8. The appellant was aggrieved and brought this appeal on 17.10.2016 before the High Court at Nyamira but the same was transferred to this court on 24.1.2019 by consent on account of Jurisdiction. The appeal is premised on the following grounds:-

- a. That the Learned Trial Magistrate erred in law and fact by failing to make any determination and or finding concerning the third Party (2nd respondent herein).
- b. That the Leaned Trial Magistrate erred in law and in fact by failing to determine the real issues before him.
- c. That the Trial Magistrate erred in law and fact by failing to recognize Order 1 Rule 9 which provides that no suit shall be defeated for reason of mis-joinder or non-joinder of parties.
- d. That the Learned Trial erred in Law and in fact in failing to evaluate the evidence and pleadings concerning the third party who was joined for purposes of compensation.
- e. That Learned Trial Magistrate erred in law and in fact by applying wrong principles of the law and thus arrived at a wrong conclusion.
- f. That the Learned Trail Magistrate erred in law and in fact by giving more credence to the evidence of the 1st respondent and giving no reasons as to why the appellant's evidence was not credible.
- g. That the Leaned Trial Magistrate erred in law and in fact by misapprehending the appellant's evidence.
- h. That the Learned Trial Magistrate erred in law and in fact by allowing the Respondent's claim as prayed and thus in essence awarding the Respondent remedies that were not legally available.
- i. That the Learned Trial Magistrate erred in law and in fact by failing to assess the general damages that would have been awarded to the appellant.

9. On the basis of the above grounds the appellant prays for the appeal to be allowed with costs and more specifically, the impugned judgment to be set aside and general damages awardable to him be assessed. He also prays for the matter to be referred for a re-trial.

16. The appeal came up for directions on 9.11.2021 when counsel for the appellant and the 1st respondent agreed to dispose the appeal by written submissions. Again the 2nd respondent did not enter appearance in this appeal and therefore it did not participate in the proceedings.

11. The appellant adopted his written submissions earlier filed in the High Court on 24.1.2019 but the respondent did not file any submissions. He argued ground a, b and c together, ground d, e, f and g together while h was argued separately.

12. The appellant submitted that the law regarding Third Party proceedings in civil litigation is as provided by Order 1 Rule 15-19 of the Civil Procedure Rules. He contended that the 1st respondent joined the 2nd respondent as a Third Party in order to contribute to or indemnify it of damages sought. Consequently, according to the appellant the trial court ought to have framed issues concerning the third party and the 1st respondent and make the appropriate determination.

13. He further submitted that Dw1 had admitted in his evidence that his Sign Board was at the site when the accident occurred but contended that the 2nd respondent was the one constructing the premises. He contended that the trial court failed to evaluate the evidence on record and further failed to give reasons why he disregarded his evidence in favour of that of the respondent. He submitted that the trial court further ignored his submissions on the authenticity of the documents produced by the respondent. According to him Dw1 never produced Certificate of incorporation or any document to show that he was a Director of the respondent. Further, he contended that the documents produced were not signed and the trial court disregarded that issue without giving reasons.

14. Finally, the appellant submitted that the trial court failed to follow the cardinal rule of awarding general damages even where a suit is dismissed. Therefore he prayed for the appeal to be dismissed with costs.

Mandate of this court

15. This being a first appeal, my duty is well cut out, namely, to review and re-evaluate the evidence and draw my own conclusions to test whether the decision reached by the trial court should stand. The said mandate has been restated by the Court of Appeal in numerous decisions including *Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212* where it held inter alia that:

“On a first appeal from the High Court, the court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

16. Having considered the pleadings, evidence, submissions and the impugned judgment, the following issues arose for determination:

- a. Whether the trial court erred by failing to determine the issue of liability between the defendant and the third party (the respondents herein)

- b. Whether the trial court erred by failing to assess the general damages payable even after finding that the defendant (1st respondent) was not liable.
- c. Whether the appeal should be allowed.
- d. Who bears the costs of the appeal?

Liability between the defendant and the third party

17. The appellant submits that the trial court erred by failing to frame the issue between the defendant and the interested party in the impugned judgment. I have carefully considered the court record and the impugned judgment and confirmed that although the trial court acknowledged that the defendant joined a third party, he never made any determination of the issues raised by the defendant against the third party.

18. It is clear from the record that by a Chamber Summons dated 4.8.2014, the defendant (1st respondent) sought leave to issue a Third Party Notice against Kasoline Services limited out of time. On 19.8.2014, the parties consented to the application for amending defence and sought for third party directions. The court never recorded the consent and instead fixed the matter for mention on 4.9.2014 and again on 2.10.2014 when the parties recorded a consent that the liability between the defendant and 3rd party would be decided at the hearing.

19. According to the record, the court never gave leave to the defendant to serve third party notice but the notice was served upon the 2nd respondent herein. Evidently, the court's directions given by consent of the parties, were given without the third party's appearance in the proceedings in answer to the third party notice. The question that begs for answer is, what does third party proceedings entail.

20. Order 1 rule 15 and 17 provides as follows:

“15. (1) Where a defendant claims against any other person not already a party to the suit (herein after called the third party) –

a. That he is entitled to contribution or indemnity; or

...he shall apply to the Court within fourteen days after the close of pleadings for the court to issue a notice (hereinafter called a third party notice) to that effect, and shall be applied by Summons in Chambersex parte supported by affidavit.

(2) A copy of such notice shall be filed and served on the third party according to the rules relating to the service of a summons.

17. If a person not a party to the suit who is served as mentioned in rule 15 (herein after called the “third party”) ... must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice.”

21. My interpretation of the above provision is that the third proceedings proceedings is a matter between the defendant and the third party. The said proceedings have a strict procedure for commencement which was not followed in this matter. It is also clear that if the third party fails to enter appearance after service of the Notice, like in this case, he is presumed to have accepted to settle the entire claim by the defendant as set out in the third party notice if a decree is passed against the defendant after trial or even by consent. The corollary to the foregoing is that, if the suit is dismissed against the defendant, the matter ends there because the claimant has made no claim against the third party.

22. Flowing from the above, really, I do not find merit in the contention that the trial court ought to have determined the claim between the defendant and the third party who did not even enter appearance. Why do I say so?

23. First, considering the procedure set out in Order 1 rule 15 and 17 aforesaid, there was no valid third party notice issued by the trial, and therefore there was never third party joined to the primary suit.

24. Secondly, even if there was valid third party proceedings, I would still hold that the said ground of appeal has no merits because, upon finding by the trial court that the appellant did not prove his case against the defendant in the primary suit, there was no decree upon which to determine apportionment of liability between the defendant and the third party. Consequently, the trial court did not err by his failure to make a determination of the claim between the defendant and the third party.

25. As regards the alleged failure by the trial court to evaluate the evidence on record and give reasons why he accepted the defendant's evidence and not his evidence, I also find no merits in that contention. I have considered the judgment by the trial court and noted that the learned Magistrate properly summarized the evidence by two sides and at page three he evaluated the evidence and reached conclusion that the appellant did not prove employment relationship with the defendant at the time when he suffered injuries.

26. I have also considered the same evidence and especially the List of Workers dated January 2010, the certificate of completion dated 26.8.2010 and letter dated 17.10.2012 which effectively rebuts the oral allegations by the appellant that he was injured while in the course of

employment by the 1st respondent on 23.6.2011. There is no way he would have been in the 1st respondent's employment in a project which was completed more than a year before the accident.

27. Finally, the allegation that the trial court had a duty of assessing the general damages payable to him after finding no merits in the suit is also absurd. The appellant did not cite the specific provision of the law or any precedents to back that contention. Accordingly, I find that the court is not obliged to exercise its discretion in vain.

28. Having found that all the grounds of the appeal have no merits, I dismiss it with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3TH DAY OF FEBRUARY, 2022

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE