Mwathi v Kewal Contractors Limited & another (Appeal 70 of 2018) [2022] KEELRC 23 (KLR) (21 April 2022) (Judgment)

Neutral citation: [2022] KEELRC 23 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 70 OF 2018

K OCHARO, J

APRIL 21, 2022

FORMERLY MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 439 OF 2013

BETWEEN

PETER GICHURU MWATHI ..... APPELLANT

AND

KEWAL CONTRACTORS LIMITED ..... 1ST RESPONDENT

KENYATTA UNIVERSITY ..... 2ND RESPONDENT

JUDGMENT

1. Through CMCCC No. 439 of 2013 [formerly Nairobi HCCC. No. 235 of 2012], the Appellant impleaded the Respondents jointly and severally for:
   a. General damages for pain and suffering.
   b. Damages for loss of expectation of life.
   c. Damages for loss of earnings.
   d. Future medical expenses, nursing care and physiotherapy.
   e. Cost of equipment i.e. wheelchair, ripple air mattress and Hydraulic bed etc.
   f. Cost and interest of the suit.
   g. Interest on all above.
2. At all material times to the suit, the Appellant was an employee of the 1st Respondent [Kewal Contractors Limited], a contractor who had been engaged by the 2nd Respondent to construct a "Students Centre" within its premises.

3. The suit hereabove mentioned arose from a work place accident which occurred on the 19th May 2009, when in the course of his employment at the said construction site, as such an employee of the 1st Respondent, the Appellant fell from the 2nd floor of the building, as a consequence sustaining severe personal injuries, namely;

    i. Spinal Compression Fracture L4 and L5.

    ii. Incomplete fracture at L3 and C4.

    iii. Power grade 0 in both lower limbs.

    iv. Post-traumatic stress disorder.

    v. Blunt neck injury.

    vi. Head injury leading to loss of consciousness for 7 days.

4. The Appellant attributed the occurrence of the accident, and resultant injuries to negligence and or breach of duty of care on the part of the Respondents, their servants, employees and or agents. In the pleadings he particularized the negligence and a breach of duty against each of them specifically.

5. Consequent to service of summons to enter appearance upon them, the 2nd Respondent entered appearance, and filed a statement of defence dated 29th June 2012, wherein it denied the Appellant' s cause of action and entitlement to the reliefs he had sought against it. The cornerstone of its case being that it could not be liable to the Appellant under the doctrine of vicarious liability as there was a contract of employment between him and the 1st Respondent.

6. In accordance with the rules of procedure, the Appellant filed a reply to the 2nd Respondent's Defence on the 26th July 2012.

7. The 1st Respondent neither entered appearance nor filed a statement of defence, consequently an Interlocutory Judgment was entered against it on the 31st July 2012 on those aspects of the claim that ordinarily required a formal proof before a final judgment, and a final judgment of Kshs. 300,000 [Three hundred and fifty thousand] shillings being the special damages that were sought in the pleadings.

8. Therefore, at the close of pleadings, the matter got destine for a formal proof against the 1st Respondent, and hearing on merit on the case between the Appellant and the 2nd Respondent.

9. The matter subsequently proceeded as above mentioned on the 26th August 2014 and 3rd December 2014 for the Appellant's and Respondent's cases respectively, before Hon. R. A. Oganyo [SPM].

10. Through her Judgment delivered on the 23rd April 2015 the learned trial Magistrate rendered herself on the liability and quantum aspects of the Appellant's case. On liability, she did find that the 2nd Respondent was neither liable for the occurrence of the accident nor the accident injuries to any extent or at all. Therefore, her Judgment on liability was 100% against the 1st Respondent. As regards quantum the learned trial Magistrate concluded that the Appellant was entitled to:

    a. Kshs. 3,000,000 – General damages for pain and suffering.

    b. Kshs. 1,728,000 as damages for nursing case.

    c. Kshs. 1,036,800 under the head loss of earnings.

    d. Kshs. 1,003,500 for medical equipment.

e. Special damages of Kshs. 332,022.

f. Damages for loss of consortium – Kshs. 350,000.

The Appeal

11. Aggrieved by the Judgment of the learned trial Magistrate, the Appellant filed this Appeal assailing the same on the following grounds:

i. The learned trial Magistrate erred in law and fact in failing to find both Defendants liable in view of the concrete evidence tendered to demonstrate the same.

ii. The learned Magistrate erred in law and fact in holding, that liability against the 2nd Defendant was not proven without analyzing and stating the basis for her finding and the evidence thereof.

iii. The learned Magistrate erred in law and fact in failing to appreciate the Plaintiff's case against both Defendants especially the 2nd Defendant thereby arriving at a wrong and erroneous conclusion by dismissing the Plaintiff's suit against the 2nd Defendant.

iv. The learned trial Magistrate erred in law and fact in failing to find for the Plaintiff against the 2nd Defendant when there was legal and evidential justification of the same.

v. The learned Magistrate erred in law and fact in failing to appreciate the Plaintiff's case and evidence against the 2nd Defendant which evidence was corroborated by documentary evidence availed to Court by the 2nd Defendant.

vi. The learned trial Magistrate erred in law and fact in failing to appreciate the long-established principle of stare decisis decision, bringing the law into confusion and arriving at an erroneous finding / decision / conclusion in particular relating to liability.

vii. The learned trial Magistrate erred in law and fact in in basing her decision on irrelevant principles and precedents.

viii. The learned trial Magistrate erred in law and fact in failing to appreciate that the evidence adduced in Defence was incongruous with pleadings, composed of hearsay, tendered by an incompetent witness, contradictory and discreditable.

ix. The learned trial Magistrate erred in law and fact in dismissing the Plaintiff's suit against the 2nd Defendant despite his establishing his case on a balance of probability and setting a higher bar of proof in a civil matter.

x. The learned trial Magistrate erred in law and fact by proposing that since the Plaintiff had obtained Interlocutory Judgment against the 1st Defendant then that was the only party liable and the Plaintiff could not therefore sustain his claim against the 2nd Defendant.

xi. The learned trial Magistrate erred in law and fact by determining the whole of the Plaintiff's case as one of vicarious liability yet that was not the only ground upon which the Plaintiff was basing his claim against the 2nd Defendant on.

xii. The learned trial Magistrate erred on all points of law and fact in as far as her decision is concerned.

Submissions

12. This Court did direct that the Appeal be canvassed by way of written submissions. The parties i.e. the Appellant and 2nd Respondent complied. Their respective submissions are on record.

The Appellant's Submissions

13. Counsel for the Appellant submitted that the 2nd Respondent wanted to construct a "students centre" at its premises, and consequently sought for the services of a contractor [1st Respondent]. An agreement dated 10th December, 2007 executed by them, ensued. That it was inter alia a term of the agreement that the 1st Respondent was to construct the centre within a period of 40 weeks. The project was supposed to be handed over to the 2nd Respondent on the 30th June, 2008.

14. The Appellant who was hired by the 1st Respondent as a labourer sometimes in 2008 was injured on 19th May, 2009 [way outside the completion time aforementioned] when he fell from the 2nd floor of the unfinished building. He sustained serious injuries that confined him to a wheelchair for life. Life of a young man who was then 20 years changed to the worse. He got reduced to a disabled person and became a subject of wanton misery. At the age of 32 years now, he heavily depends on his family and well-wishers for survival.

15. Counsel for the Appellant identifies two issues as those that present themselves for determination in this Appeal, and made a submission on each of them. The issues identified are:

    i. Whether liability was correctly awarded.

    ii. Whether the Appeal is deserving and meritorious.

    On the 1st issue it was submitted that the Appellant denies not that at the material times he was in the employment of the 1st Respondent. That however its composition and/or capabilities are relevant and worth considering.

16. It was submitted on the composition and or capabilities, that the 1st Respondent was a company that allegedly won the tender for construction of the students' centre. This is reflected in the minutes of the Tender Evaluation Committee – TENDER NO. KU/TNDR/S/23/2007/08.

17. It was argued that in awarding the tender to the 1st Respondent the 2nd Respondent, only gave weight to bidding amount, that the 1st Respondent was the lowest contract bidder. Not considering key factors like the it not having a physical address at the commencement of the contract. The 1st Respondent did not have crucial documents. The 2nd Respondent fell into the trap of the 1st Respondent's lowest bidding, without considering the other factors. Liability should attach against the 2nd Respondent.

18. Counsel stated that initial documents produced by a contractor require critical analysis for determining suitability of the contractor. That was not the case in this matter. The contractor's performance bond that was tendered in evidence before the trial Court did not bear the contractor's signature, rendering it a mere print-out. The Appellant's claim would have been settled on strength of the bond, by the 2nd Respondent pursuant to clause 16.0 thereof.

19. He contended that according to the 2nd Respondent's document [Exhibit], the Technical Evaluation for construction of students' centre – main works, the contractor was supposed to furnish the 2nd Respondent with a couple of documents to wit, Current Business Licence, VAT Certificate and Tax Compliance, List of details of 3 similar works undertaken [within 5 years] with confirmation letters from clients, Audited Financial Statements, proof of access to credit from financial institutions

[minimum 20 Million]. Conformity to Bill of Quantities. The 1st Respondent only provided the Bill of Quantities. This is a serious indictment on the 2nd Respondent. It awarded a tender to a non-deserving entity. The events leading to this case flow from the 2nd Respondent's decision. The 1st Respondent couldn't provide proof of its financial soundness, could not proof they had undertaken such works before to know how to secure sites among other defaults. The 2nd Respondent would not have picked the 1st Respondent as a contractor in the 1st place.

20. The agreement and conditions of contract for Building Works at clause 11.0 provided for Liability Against Injury to Persons and Property. Clause 11.1 provided:

> " The contractor shall be liable for and shall indemnify the employer against any expenses, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or death of any person arising out of or in the course of or caused by the carrying out of the works, unless the injury or death is due to the act or neglect of the employer or of any person for whom the employer is responsible."

21. On the insurance, counsel further stated that according to clause 12.2 of the agreement, the contractor was required to produce for inspection by the 2nd Respondent, documentary evidence that the insurance required are properly maintained as well as the policies. Clause 12.4 required that the insurers to be picked by the 1st Respondent, be approved by the Architect of the 2nd Respondent. The contractor was supposed to deposit the policies with the Quantity Surveyor plus receipts to confirm premiums paid.

22. He argued that clause 12.5, commanded that if the contractor [1st Respondent] failed to insure the workers, the employer [the 2nd Respondent] was to take out insurance and deduct the money that was to be due to the former.

23. Counsel contended that it clearly emerged even from the evidence of the 2nd Respondent's witness that the 1st Respondent did not take out the insurance cover. That it did not deposit any policies and receipts with the 2nd Respondent. The 2nd Respondent did not take out the insurance and seek indemnity from the 1st Respondent. The 2nd Respondent failed its role. It is liable.

24. Counsel further submitted that the 1st Respondent was incompetent, it took it more time than was agreed to complete the construction, it had no physical address, and didn't have enough cash – flow. One wonders how in the 1st place it was awarded the tender. The director of the company whom were of Indian origin vanished into thin air.

25. That the 2nd Respondent was actively involved when the construction was on and its engineers were frequently inspecting the sites and were supposed to comment on the safety issues.

26. It was submitted that the agreement that were between the 1st Respondent and 2nd Respondent was binding on both of them as regards the necessary measure that were to be taken to ensure the safety of labourers. The 2nd Respondent was expected to thoroughly vet the 1st Respondent on it suitability to be awarded the contract. Citing the holding in *Gatobu M. Ibuutu Karathoo s/o Christopher Mureithi Kabul* [2014] eKLR, where the Court cited the Court of Appeal decision in *National Bank of Kenya Limited v Pipelastic Samkokt [K] Limited and another* [2002] E.A., counsel stated that a Court of law cannot rewrite a contract for parties.

27. As regards the duty of care owed by an employer to a worker, counsel cited the holding in *Van Daventer v Workmen's Compensation Commission* [1962] 4 SA, thus:

> " An employer owes a common law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances in each particular case. A master is in the first place under a duty to see that his servants do not suffer through his personal negligence, such as a failure to provide a proper and safe system of working and a failure to provide proper and suitable plant ....."

28. As regards the 2nd issue counsel submitted that the appeal herein is meritorious. The 1st Respondent had no extension of contract to place them at the site where the accident occurred in 2009. The failures by the 2nd Respondent hereinabove stated renders it liable.

The Respondent's submissions

29. The Respondent's counsel argued that the issue of the competence and suitability of the 1st Respondent's qualification for the construction project was adequately dealt with in the learned trial Magistrate's Judgment. The 1st Respondent conducted due diligence when awarding the tender to the 1st Respondent following a competitive open tender process.

30. That contrary to the Appellant's submissions, the delay in completion of the project was occasioned by financial constraints as was explained by the 2nd Respondent's witness through his evidence, not incompetence on the part of the 1st Respondent.

31. It was argued further that at the time of entering the said agreement / contract, the 1st Respondent had proved its financial capabilities and also qualifications to carry out the works.

32. Counsel further submitted that the Appellant failed to tender convincing evidence before the learned trial Magistrate to prove liability on the part of the 2nd Respondent. On the other hand, the 2nd Respondent proved that it had exercised all reasonable care that was expected of it, when awarding the tender to the 1st Respondent. That the learned trial Magistrate correctly relied on the decision in *Tracio Maina Mwangi v Evan Mwecha & another* [2014] eKLR where the Court held: -

> " ..... An independent contractor may not hold a hiring party liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the construction work."

33. He further argued that the 1st Respondent was an independent contractor and it owed the Appellant a duty of care as his employer, to provide a safe work environment.

34. Counsel for the Respondent further submitted that in his own testimony, the Appellant stated that he was an employee of the 1st Respondent and that he was under its instructions, when the accident occurred. That therefore there is no dispute as regards whose employee the Appellant was. That according to clause 41.3 of the 2nd Respondent's exhibit 2 [the agreement], it is clear that the 2nd Respondent had no say in the running of the said site. That therefore the trial Court was right in finding that the 1st Respondent was in charge of the site and all its workers.

35. It was further submitted that the Appellant's contention that the 1st Respondent did not have any insurance cover at the material time lacks merit, as the Appellant was paid a sum of Kshs. 115,758, by the insurers of the 1st Respondent, a fact that was considered in the learned trial Magistrate's judgment.

36. On ground 6 of the Appellant's memorandum of appeal, counsel submitted that the trial Magistrate based her decision on the Tracio case [supra], and therefore it cannot be argued that she was not a respecter of the long-established principle of stare decisis.

37. As regards grounds 7 and 8, it was submitted that the trial Court's conclusion on the relationship between the Appellant and the Respondent was one that was based on the evidence by the Appellant and the 2nd Respondent's witness.

38. As regards the assailed competence of the 2nd Respondent's witness, counsel submitted that the same was not challenged at the hearing. It cannot be raised at this forum.

Determination

39. This Court's mandate as the first Appellate Court was stated in *Selle & another v Associated Motors Bolt Limited* [1968] E.A. 123, as follows: -

> "..... An appeal to this Court from a trial by the High Court is by way of a 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 conclusion though it should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's finding 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 demeanor of a witness is inconsistent, with the evidence in the case generally."

40. I shall therefore proceed to consider the issues in this Appeal by re-evaluating the evidence that was adduced before the trial Court.

41. From the onset it is imperative to state that the Appellant has over split the grounds of his Appeal. With due respect, a not very impressive way of crafting an appeal. No wonder the Appellant's counsel opted to argue the appeal, not ground by ground but generally. Without any fear of contradiction, I am of the view that the grounds of appeal revolve around three issues, namely the liability of the principal employer [read the 2nd Respondent] on acts and omissions of on independent contractor [the 1st Respondent], the appreciation and application of the evidence before the trial Magistrate by the Magistrate, and whether the learned trial Magistrate correctly applied the relevant standard of proof in the matter before her.

42. From the material that were placed before the learned trial Magistrate, and the submissions by counsel for the parties in this appeal, no doubt, there is no dispute that the 1st Respondent was an independent contractor and the 2nd Respondent the hirer. The Respondent had pleaded before the trial Court.

> "10. Further the 2nd Defendant cannot be liable to the Plaintiff under the doctrine of vicarious liability, by virtue of their being a contract of employment between the Plaintiff and the 1st Defendant."

This was the fulcrum of the 2nd Respondent's defence against the Claimant's claim on liability before the learned trial Magistrate. She got persuaded that the defence had to succeed, she consequently held:

> " All in all, I find that the 2nd Defendant is not vicariously liable for the acts or omissions by the 1st Defendant which directly caused the Plaintiff injuries herein. Therefore, the claim should ordinarily fail at this juncture."

This Court as a 1st Appellate Court has had to consider the Appellant's pleadings that were filed before the lower Court, the evidence that he tendered before the learned trial Magistrate, and his counsel's submissions, and get them to advancing a position that due to its own commissions and omissions the 2nd Respondent should face tort liability for the actions of the independent contractor, the 1st Respondent. What the Appellant advanced was that there are exceptions to the general rule that employers are not liable for an independent contractor's negligent acts or misconducts. That in the matter there were circumstances present that placed the matter under the exceptions, and away from the general rule.

43. A careful consideration of the analysis that the learned trial Magistrate accorded the material that was place before her, brings it out that she did not consider at all whether the circumstances of the matter were in character that could compel a departure from the general rule so as to allow liability of an independent contractor [1st Respondent] to attach against the [2nd Respondent]. She just considered the general principle in ignorance of the exceptions thereto that the Appellant was placing reliance on in his claim. In the manner of analyzing the matter before her, and considering the principle[s] of law applicable, the learned trial Magistrate fell in error therefore.

44. Having said this, I now turn to consider the exceptions to the above-mentioned general rule and whether they were or any of them applicable in the Appellant's matter, so as to attract liability of the 1st Respondent to visit on the 2nd Respondent.

45. The 2nd Respondent herein took a position that since the 1st Respondent was an independent contractor, the former cannot be held responsible for the negligence of the latter. In this position the Respondent sought fortification in the Court of Appeal decision in *Board of Governors of St. Mary's School v Bill Festus Andrew Sio* [2020] eKLR, where the Court stated:

> " Likewise, a building owner who engages an architect whom he reasonably believes to be competent is not in general responsible for the negligence, since he has no control over the manner in which the architect does his work."

46. My understanding of this statement by the Court of Appeal is that it is restating the general rule, and is in no way in ignorance of the exceptions thereto. The invocation of "not in general responsible" is all indicative of this.

47. With due respect to counsel, he did a selective reading of the decision. In the decision while admitting that there are exceptions to the general rule, the Court stated:

> " There are exceptions to the general rule. 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 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. The duty cannot be delegated. 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 public and private nuisance or a trespass the employer will be in that case be liable if there is a resulting damage. If the employer had

contracted independent contractor to perform a task which involves special risks of damage the employer becomes liable for the acts. When the employer is under the absolute duty which attracts ownership of dangerous things, he is liable or the resulting damage – see Clerk and Lindsell on Tort 18th Edition page 249-259 and Charlesworth on Negligence 4th Edition page 78 – 85."

48. The historical perspective of vicarious liability has changed and this was aptly captured in *Barclays Bank PLC [Appellant] v Various Claimants [Respondents]* [2020] UKSC 13, by Lady Hale, thus:

> "1. The law of vicarious liability is on the move" so stated Lord Phillips of worth Matravers in *Various Claimants v Child Welfare Society* [2012] UKSC 56 [2013] 2 AC 1, generally known as Christan Brothers at para. 19. The question raised by the current case, and by the parallel case of *WM Morisson Supermarket PLC v Various Claimants* [2020] UKSC 12, is how far that move can take it. Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make one pay for the fault of the other. Historically, and having aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been broadened. That is the subject matter of this case. The second is the relationship between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of the tortfeasors' employment, but that too has now been somewhat broadened. That is the subject matter of the Morrisons' case."

49. In sum the exceptions to the general rule that an employer is not liable for an independent contractor's acts or negligence are; the employer was negligent in selecting or retaining an independent contractor; the tasks assigned to an independent contract are non-delegable; or an independent contractor's work is ultra-hazardous or inherently dangerous.

50. At paragraph 8 of the plaint, the Appellant pleaded:

> " The said injuries loss and damage were occasioned to the Plaintiff by breach of contract of employment and the terms thereof and by reason of negligence on the part of the 1st Defendant its servants and/or agents, and by reason of negligence and or breach of the duty of care on the part of the 2nd Defendant, its servants, employees and or agents.
>
> .....

Particulars of negligence and/or breach of the duty of case on the part of the 2nd Defendant, its servants, employees and/or agents.

(i). Failing to carry out any or adequate investigations and/or appropriate steps in order to satisfy itself that the 1st Defendant was a competent contractor.

ii. Failing to carry out any or adequate investigations and/or appropriate steps in order to satisfy itself that the work at aforesaid construction site was being undertaken in a safe and suitable manner.

iii. Failing to contract a competent contractor.

iv. Permitting the said construction site to become and/or remain unsafe.

v. Permitting and/or allowing the contractor – 1st Defendant herein to remain on the construction site when he did not have a valid workmen's compensation insurance.

vi. Commencing construction work in its premises without taking out necessary contractors All Risk Insurance."

51. Those averments were buttressed by the contents of Appellants witness statement dated 18th May 2012 and in his oral testimony in Court. The Appellant asserted that the Respondent was negligent in selecting the independent contractor [1st Respondent] and therefore it shall be proper in law for it to be held liable for the torts of the latter.

52. When analyzing whether an employer negligently selected or retained an independent contractor Courts will often consider; whether the employer examined the independent contractor's background, experience, and competence before hiring the contractor [due diligence], whether the work lies within the competence of the average person or is work that can be done properly only by persons possessing special skill and training - [The nature of the work]; and the danger to which others will be exposed if the contractor's work is not properly done.

53. The Appellant, before the learned trial Magistrate, and in his submissions in this Appeal heavily placed reliance on the terms and conditions of the Agreement of contract for Building Works that was executed by the 1st and 2nd Defendant to demonstrate that there were specific competencies that were required of the independent contractor, before the contract would be awarded to it, and executed between them. That too there were competencies that were required of the contractor [1st Respondent] to maintain during the currency of the contract works, but which the 2nd Respondent negligently and or as a result of a breach of duty of care, did not bother about. The result thereof being a loss and damage to the Appellant.

54. According to the Appellant, the 2nd Respondent was under an obligation under the contract, to ensure that at all material times during the currency of the contract, the contractor [1st Respondent] maintained an insurance against injury to persons and property. On this, he placed reliance on clause 12.1 which provided:

> "12.1 without prejudice to his liability to indemnify the employer under clause 11.0 of these conditions, the contractor shall maintain and shall cause any sub-contractor to maintain;
>
> "12.1.1 such insurances as are necessary to cover the liability of the contractor and as the case may be, of such contracts in respect of personal injuries and deaths arising out of or in the cause of or caused by carrying out the works, and 12.2.1 such insurance as are necessary to cover the liability of the contractor or as the case may be of such sub-contractor, in respect of injury or damage to property real or personal arising out of or in the course of or by reason of the carrying out of works and caused by any negligence, omission as default of the contractor, his servants and agents or, as the case may be, of such sub-contractor, his servants or agents.
>
> 12. 2. As and when is reasonably required to do so by the Architect, the contractor shall produce and shall cause any sub-contractor to produce for inspection by the employer, documentary evidence that the insurance required by sub-clause 12.1.1 and 12.1.2 are properly maintained but on occasion, the employer may require to have produced for inspection, the policy or policies and the receipts in question. [emphasis mine].
>
> 12. 5. should the contractor or any sub-contractor make default in insuring or in continuing to insure as provided in sub-clause 12.1.1, 12.1.2 and 12.3 of these conditions, the employer may himself insure against any risk with respect to which the default shall have occurred and may

deduct a sum equivalent to the amount paid by him in respect of premiums from any money due or to become due to the contractor."

55. I have carefully considered the above-stated conditions of the Agreement and hold that considering the nature of the works that were to be undertaken thereunder, the conditions were not for ornamental purposes. They threw upon the 2nd Respondent some mandatory obligation[s] to superintend the maintenance of the insurance against injury to persons and property by the 1st Respondent, and where there was default in insuring or in continuing to insure, to take out the insurance itself against the risk.

56. The provision of clause 12.5 reinforces the Court's view that the condition of taking out the cover by the 1st Respondent was mandatory, and a fundamental one, otherwise there cannot be any justification for the contract to place the burden of taking out the insurance, on the 2nd Respondent whenever the contractor defaulted.

57. The Appellant testified before the trial Court that as at the time of the accident, there was no valid insurance cover to cover the risk like the one that did befall him. He tendered a debit note from Cannon Insurance [Kenya] limited, that clearly indicated the insured as Kewal Construction Limited, and the expiry date as 10th June 2008.

58. The Respondent's witness was cross-examined on the issue of the insurance, all that he was able to say was that the 1st Respondent had a valid insurance at the time of the accident. He did not place any document before the trial magistrate, though he said that the documents in prove thereof were with the institution [2nd Respondent]. To this Court these were bald assertions which were without prove. I hold that there was no cover at the time of the accident.

59. The 2nd Respondent's witness under cross-examination before the lower Court, stated that it was a duty upon the 2nd Respondent to inspect the policies, however, he would not tell whether or not the 2nd Respondent discharged this duty.

60. The witness further testified that the 1st Respondent started having cash flow problems within the 1st year of the contract. Consequently, the 2nd Defendant Respondent decided to terminate its contract with the 1st Respondent on 2nd June, 2009. The 2nd Respondent invoked the termination clause.

61. It is apparent that the termination occurred almost 21 days after the accident. That the contract was terminated before the 1st Respondent would complete the contract works on account for a failure to so do, due to liquidity challenges, reinforces my view that the 2nd Respondent selected an incompetent contractor. The Appellant was never compensated. The 1st Defendant disappeared to thin air after he was paid whatever he was by the 2nd Respondent.

62. By reason of the premises, I am impelled to conclude that the 2nd Respondent cannot escape liability for the loss and damage that the Appellant suffered. The learned trial Magistrate ought to have found the 1st and 2nd Respondents jointly and severally liable for the same.

63. In the upshot, the learned trial Magistrate's Judgment on liability is hereby set aside. In place thereof Judgment is hereby entered against the 1st and 2nd Respondents, jointly and severally for the Appellant's loss and damage. Since there was no cross-Appeal on the quantum assessed by the learned trial Magistrate, the same stands. Costs of the Appeal shall be in favour of the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF APRIL, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Keya the for Claimant.

Mr. Kabuthi for the Respondent.

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.

OCHARO KEBIRA

JUDGE