Bamburi Cement Limited v Kikungu & another (Appeal 14 of 2020) [2022] KEELRC 13302 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13302 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL 14 OF 2020

MA ONYANGO, J

NOVEMBER 28, 2022

BETWEEN

BAMBURI CEMENT LIMITED .... APPELLANT

AND

MUNYAO KIKUNGU .... 1ST RESPONDENT

NAIROBI KEEN KLEENERS LIMITED .... 2ND RESPONDENT

(Being an appeal from the judgment of Hon. Kasiangani (Ms.) Resident Magistrate) delivered on 10th May 2017 at the Chief Magistrate Court at Machakos in CMCC No. 1138 of 2011 – Munyao Kikingu v Nairobi Keen Kleeners Limited & Bamburi Cement Limited)

JUDGMENT

1. The appeal herein arises from the judgment and decree of Hon CK Kasiangani (MS) Resident Magistrate delivered on May 10, 2017 in Machakos CMC No 1138 of 2021 in which the Learned Trial Magistrate found in favour of the 1st Respondent herein and awarded him general damages in the sum of Kshs 100,000/-, special damages of Kshs 2,000/- and costs.

2. The suit was commenced by a plaint dated November 23, 2021 in which the 1st Respondent alleged that he was injured while in the course of employment with the Appellant and the 2nd Respondent herein.

3. In the plaint, the 1st Respondent avers that he was employed by the 2nd Respondent as a casual labourer and deployed to work at the Appellant's premises at Athi River. That on or about April 22, 2008 while the 1st Respondent and his co-workers were lifting a heavy metal plate, it slipped and crushed the 1st Respondent's right middle finger.

4. The 1st Respondent attributed the injury to the breach of employment contract both by the Appellant and the 2nd Respondents. He listed the particulars of injury to include failure by the Appellant and 2nd

Respondent to maintain a safe system of work, provide proper plant and appliances, proper protective clothing, overhead crane and to ensure the heavy metal plate was free of slippery matter and exposing the 1st Respondent to danger.

5. In its statement of defence dated March 7, 2012, the Appellant pleaded that the suit was statute barred under the *Limitation of Actions Act*. It denied any employment relationship between the Appellant and 1st Respondent alleging that the 2nd Respondent was an independent contractor.

6. As part of its evidence, the Appellant produced an agreement for provision of labour services between the Appellant and 2nd Respondent dated June 28, 2006 in which the 2nd Respondent is described as a service provider whose responsibility was to provide the following services: clinker and gypsum offloading; cleaning at plant, yard and landscaping; and grass and garden maintenance.

7. In the judgment, the Learned Trial Magistrate found the Appellant and the 2nd Respondent herein joint and severally liable.

8. In the memorandum of appeal, the Appellant raises the following grounds of appeal:

    i. The Learned Chief Magistrate erred in law and in fact in finding that the appellant is liable and apportioned liability at 50-50 between the 1 and 2nd defendant when this finding was not supported by the weight of the evidence before the Court.

    ii. That the learned Magistrate erred in law and fact in finding the 2nd defendant vicariously liable to the Plaintiff, notwithstanding that the claim would be time barred by virtue of section 4 subsection 2 of the *Limitation Act*, in a claim for breach of contract of employment.

    iii. That the learned Magistrate erred in law and fact in finding in finding that the Plaintiff was an employee of the 2nd Defendant.

    iv. That the learned trial Magistrate erred in law and in fact in apportioning the liability between the 1st and 2nd defendant despite the clear terms of the contract between the 1st and 2nd defendant which states that the 2nd Respondent would fully indemnify the Appellant.

    v. That the learned trial Magistrate's award of Kshs 100,000/- to the plaintiff by way of general damages is excessive, harsh and unjustified given the nature of the injury suffered by the 1° Respondent.

    vi. That the learned Magistrate erred in law and fact by failing to consider adequately or at all the issues raised in the 2" defendant's submissions dated April 11, 2017 for the judgment pronounced on 30th August 2017.

9. The appeal was originally filed at the High Court Machakos but was transferred to this Court by DK Kemei J by a ruling dated and delivered on July 28, 2020 on grounds of jurisdiction.

10. The parties disposed of the appeal by way of written submissions. The Appellant and 1st Respondent filed submissions. The Appellant filed on October 19, 2019 and the 1st Respondent on October 14, 2019. The Appellant was granted leave to file supplementary submissions which were filed on November 22, 2021. The 2nd Respondent did not file.

11. The issues for determination in my view are the following:

i. Whether the suit is statute barred;

ii. Whether the Learned Trial Magistrate erred in finding that the Appellant was jointly liable for the injury sustained by the 1st Respondent.

iii. Whether the quantum awarded by the Learned Trial Magistrate was excessive.

Jurisdiction Of This Court

12. The Appellant submits that this Court, hearing a first appeal exercises its original jurisdiction and may interfere with the conclusions of the Trial Magistrate on both law and fact.

13. Indeed, the *Employment and Labour Relations Court Act* gives this Court appellate jurisdiction from decisions of Magistrates when exercising jurisdiction in respect of employment matters.

14. In a first appeal as the instant appeal, the Court has an obligation to consider and re-evaluate the evidence adduced before the Trial Court and to make its own conclusion. In doing so, the Court may only interfere with the findings of fact of the Trial Court where it was based on a misapprehension of the evidence or that the Trial Court acted on a wrong principle in reaching the finding. Refer to *Kenya Revenue Authority v James Omondi Were* [2020] eKLR and *Selle & another v Associated Motor Boat Company Ltd & Another* (1968) EA 123.

Limitation

15. It is the Appellant's submission that the suit was statute barred at the time it was filed. This ground of appeal was not raised in the memorandum of appeal. Parties are bound by their pleadings; submissions are not pleadings and cannot be a platform for raising new grounds of appeal that were never raised in the memorandum of appeal.

16. The foregoing notwithstanding, the Appellant raised a preliminary objection in the Trial Court on the issue of limitation. The Court delivered a ruling on July 16, 2013. The Appellant did not file any appeal against the ruling which dismissed its notice of preliminary objection. The issue is thus res judicata having been heard and dismissed by the Court.

Liability

17. It is the Appellant's submission that the Trial Court erred in law and fact in apportioning liability at 50:50 between the Appellant and the 2nd Respondent.

18. The 1st Respondent on the other hand submits that the Appellant's liability arose from its failure to ensure the heavy metal plate was free of slippery matter and failure to avail an overhead crane despite request having been made for the same. That it is these acts of omissions that exposed the 1st Respondent to danger.

19. It is common ground that the 1st Respondent was an employee of the 2nd Respondent. It is further common ground that the 2nd Respondent was engaged by the Appellant to provide cleaning services in its premises.

20. In the agreement for cleaning services between the Appellant and the 2nd Respondent it is expressly provided that the 2nd Respondent is a service provider. The title of the agreement is "Agreement for Provision of Labour Services".

21. The Agreement provides that the service provider, the 2nd Respondent, avails all staff for safety training by the Appellant, provides all safety wear to its employees, insure all its employees, provide

the employees with working tools, provide training to all its supervisors and be fully responsible for training and supervision of its employees.

22. Paragraphs 4.1, 4.2, 4.3, 4.5, 4.7 and 4.9 of the agreement specifically provide –

> "4.1 Prior to the commencement of the Services to be rendered under this Agreement the Service Provider shall avail all its employees involved in the performance of this Agreement for a safety induction training to be carried out by the Company's Safety Officer. Provided that it shall be the sole responsibility of the Service Provider at all times to ensure the safety of its employees
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> 4.2 The Service Provider shall provide safety wear to its employees that must be of a standard approved by the Company's Safety Officer who shall certify any such safety wear before use.
>
> 4.3 The Service Provider shall ensure that the following safety wear is used by its employees at all time during the course of duty: safety shoes that as a minimum must have metal toe cap, helmets, overalls, dust masks, aprons, eye goggles, hand gloves and where necessary, auditory protection.
>
> 4.5 It shall be the responsibility of the Service Provider to provide all the working tools required for any of the specified services The Service Provider shall ensure that any tools used to perform a task are the proper tools, for the task and that such tools are maintained at their normal state of service.
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> 4.7 The Service Provider shall provide training to its supervisors and shall be fully responsible for training and supervision of its employees. The Service Provider shall ensure that such training is sufficient and cover pertinent risks and hazards likely to be encountered in the plant and show how these should be avoided.
>
> 4.9 The Service Provider shall be committed to satisfy all the legal and statutory requirements as per the *Employment Act*, the Regulations of Wages and Conditions of *Employment Act*, the Workmen's Compensation Act, Factory's Act, The *Environmental Management and Coordination Act* 1999 and any other statutory enactments in this respect together with the Company's Environmental and Safety Policy."

23. From the foregoing, it is clear that the 1st Respondent had full responsibility over its employees' health and safety while engaged in the provision of services to the

Appellant within the Appellant's premises.

24. The Learned Trial Magistrate therefore erred in both fact and law in finding the Appellant contributorily liable for the injury suffered by the 1st Respondent. The 2nd Respondent was wholly responsible for its who were however working at the Appellant's premises.

Quantum

25. It is the Appellant's submission that Kshs 100,000/- awarded to the 1st Respondent by the Trial Magistrate was excessive taking into account the nature of the injury sustained in the industrial accident. The 1st Respondent sustained soft tissue injury to the right middle finger, being a deep cut wound.

26. It is the argument of the Appellant that the 1st Respondent did not suffer permanent damage to his hand. It relied on the decision of Wendoh J in *Timsales Limited v Penina Achieng Omondi* [2011] eKLR reducing an award of Kshs.100,000/- to Kshs 60,000/-.

27. As has been rightfully pointed out by the 1st Respondent, the Appellant did not make any submissions on quantum in the lower Court. What this Court is mandated to do on a first appeal is to consider the evidence that was available before the trial Court, not new evidence that was not presented to the Court. Having not presented any evidence before the Trial Court on quantum, it is my view that the Appellant is estopped from doing so at this stage.

28. The Appellant cannot fault the Trial Court for arriving at the quantum it did when the Appellant did not present any figure to the Trial Court to rebut the submissions of the 1st Respondent.

29. I will therefore not disturb the quantum awarded by the Trial Magistrate being Kshs 100,000/-.

30. In conclusion, I find that the Learned Trial Magistrate erred in holding that the Appellant was jointly liable with the 2nd Respondent for the injuries sustained by the 1st Respondent and in apportioning liability at 50:50 between the Appellant and the 2nd Respondent.

31. For this reason, I will set aside the apportionment of ability at 50.50 between the Appellant and the 2nd Respondent and substitute therefore an order that the 2nd Respondent, being the employer of the 1st Respondent, is solely liable to pay general and special damages to the 1st Respondent as awarded by the Trial Court.

32. The Appellant's costs shall be borne by the 2nd Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 28TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

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