



**Magnate Ventures Limited v Muatha & another (Appeal 912 of 2022)
[2022] KEELRC 13581 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13581 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 912 OF 2022
B ONGAYA, J
DECEMBER 20, 2022
(FORMERLY HCCA NO. 634 OF 2017)**

BETWEEN

MAGNATE VENTURES LIMITED APPELLANT

AND

SIMON MUTUA MUATHA 1ST RESPONDENT

JAMES MAINA GITHI 2ND RESPONDENT

(An appeal from the Judgment of Hon. A.M. Obura (Mrs.) Senior Principal Magistrate delivered on 18.10.2017 in CMCC No. 6863 of 2013 at Milimani Commercial Courts, Nairobi)

JUDGMENT

1. The appellant filed the memorandum of appeal on November 29, 2021 through Kimondo, Gachoka & Company Advocates. The memorandum of appeal lists 17 grounds of appeal and the appellant prays for orders:
 - a. That the appeal herein be allowed.
 - b. That judgment delivered by Hon AM Obura (Mrs) Senior Principal Magistrate in Milimani CMCC No 6863 of Simon Mutua Muatha Vs Magnate Ventures Limited and James Maina Githii on October 8, 2017 and subsequent orders thereto be set aside.
 - c. That costs of the appeal be borne by the 1st and 2nd respondents.
 - d. Any other relief that the Court may grant.



2. The background to the appeal is that the 1st respondent filed on October 31, 2013 a suit against the appellant. The 1st respondent pleaded as follows. At all material times he was employed by the appellant. The appellant had the obligation to take all necessary precautions for safety of the 1st respondent while on duty. On July 29, 2012 at Muthaiga drive in the county of Nairobi the 1st respondent and other employees were putting up a bill board manually using a pulley attached to a metal pole when the 1st respondent was thrashed to the ground due to breakage of the pole. The 1st respondent suffered unconsciousness and damage. Further, by reason of the appellant's negligence, the 1st respondent suffered pain, injury and damages. The injury included fracture of the femur left leg and to the chest. The 1st respondent prayed for special damages of Kshs 2,000.00 for medical report, general damages, and interest.
3. The appellant filed a defence on December 23, 2013 and denied the 1st respondent's claims because it had never employed the 1st respondent. It denied that the accident took place as was alleged and the prayers made were unjustified. Further, the 1st respondent had been employed at a site in use by the appellant and at a time he was employed by a third party one James Maina Githii who was a contractor and not an agent, servant, or employee of the appellant. The appellant was not liable in negligence, vicariously or otherwise. The appellant pleaded it was none-suited and the suit be struck out against it. A third party notice was served upon James Maina Githii but who failed to enter appearance.
4. This being a first appeal the Court will reevaluate evidence and arrive at its findings with caution that it did not by itself take the testimonies by witnesses as was done by the trial Court. The Court has also considered the submissions by the parties.
5. The appellant in the submissions has categorised the issues for determination in the appeal as follows:
 - a. Whether the 1st respondent was ever an employee of the appellant.
 - b. Whether the appellant owes a duty of care to the 1st respondent.
 - c. Whether the appellant can be held liable for the acts or omissions of the 2nd respondent.
 - d. Whether there were material discrepancies from the evidence on record.
 - e. Whether the Court was justified to award general damages and costs of the suit in the manner that it did.
6. To answer the 1st issue for determination, the trial Court found that there was no evidence of the contractor under whom the appellant alleged the 1st respondent had worked under especially that the agreement exhibited showed the contractor relationship had been related to a period after the accident in issue. The trial Court further found that the evidence was that the accident occurred at the appellant's site and it related breaking of a pole supplied by the appellant. The appellant relies on a note signed by Dominic Matata receiving from James Maina Githii a sum of Kshs 70, 000.00 on October 17, 2012 but there was no evidence to link that payment towards establishment of employer – employee relationship. The Court has re-examined the material on record. The appellant exhibited the agreement showing Maina Githii would be engaged as a contractor from time to time. The Court considers that the trial Court erred in finding that the accident occurred outside the period the contract related to, the period being from time to time. The Court further considers that the 1st respondent had the burden to establish that as at the time of employment, he had been engaged by the appellant. The 1st respondent's testimony was that he was employed in 2013 but he gave no details of who of the defendant's directors or officers so employed him. While testifying that the company paid the hospital bills (meaning the



appellant), no such bills and payment receipts were exhibited. Confirming that the 2nd respondent was indeed a contractor, the 1st respondent testified (at page 112 of the record) that James was doing the appellant's work. His further testimony was that he did not recall the name of the boss and further, he did not know the appellant's managers. The Court finds that the evidence was that the 1st respondent knew the 2nd respondent did work for the respondent (within the contractor arrangement) and the 1st respondent failed to show that he had been employed by the appellant because the circumstances and the appellant's representative in the alleged oral employment contract was never established. The appellant's submissions that there was no employer-employee relationship is upheld. By that finding, the other grounds of appeal must succeed.

7. The Court has considered the contractor agreement between the appellant and the 2nd respondent and clause 10 required arbitration in event of disputes. The issue whether the appellant employed the 1st respondent arose out of that agreement and the appellant failed to invoke that clause which would have resolved the dispute one way or the other. In that consideration each party to bear own costs of the appeal and the suit in the trial court.
8. In conclusion judgment is hereby entered for the parties for orders:
 - a. That the appeal herein be and is hereby allowed.
 - b. That the judgment delivered by Hon A M Obura (Mrs) Senior Principal Magistrate in Milimani CMCC No 6863 of Simon Mutua Muatha Vs Magnate Ventures Limited and James Maina Githii on 8th October 2017 and subsequent orders thereto be and is hereby set aside.
 - c. Parties to bear own costs of the appeal and proceedings in the trial court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
TUESDAY 20TH DECEMBER, 2022**

BYRAM ONGAYA

PRINCIPAL JUDGE

