



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 516 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

TOBIAS OUMA OTIENO.....CLAIMANT

VERSUS

MATTAN CONTRACTORS LIMITED.....RESPONDENT

JUDGMENT

PREAMBLE

1. The Claimant's claim against the Respondent is for negligence and/or breach of duty causing serious injuries and hence suffered loss and damages. The statement of claim by the Claimant is dated 22nd February 2017.
2. The Respondent filed its defence dated 10th April 2017.
3. At the trial the Claimant testified on his own behalf and also called a Doctor who gave professional evidence on his behalf. The Respondent called its Accountant Nancy Kerubo Nyanguti who testified on its behalf.

Claimant's Case

4. The Claimant stated he was employed by the Respondent as a Painter.
5. He further states that on 30th September 2016 he was lawfully and carefully going about his duties when a grinding disc broke into pieces and cut his wrist and as a result he sustained bodily injuries.
6. He says the accident was occasioned by the negligence or breach of duty of contract of employment by the Respondent, its agents and/or representatives.
7. The Claimant avers in paragraph 6 of his memorandum of claim the grounds of negligence by the Respondent including failure to take adequate precautions on the safety of the Claimant and failing to provide safe working conditions. The other ground quoted by the Claimant among others is failing to provide adequate protective gear during his employment.
8. The Claimant claims that as a result of the said accident he sustained compound fractures of the left

ulna and deep cut on the left hand.

9. He prays for special damages amounting to Kshs.53,750/= and general damages as well as future medical expenses and costs of the suit. Finally he prays for interest on the above claims.

10. The second Claimant's witness was DR. CYPRIANUS OKOTH OKERE. Dr. Okoth in his evidence says he examined Tobias Ouma on 10th February 2017 who had an injury on the left ulna and a cut tendon on the back of the hand. He classified the injury as grievous harm.

11. He says he prepared a medical report which he produced as an exhibit in Court.

12. Dr. Okoth says the money required to treat the injuries was to be Kshs.250,000/=.

Respondent's Case

13. The Respondent witness is NANCY KERUBO NYANGUIT, the Accountant of the Respondent.

14. She explained that her job at the Respondent was to keep records of their employees and prepare their salaries.

15. The Witness said she had been working with the Respondent since 2015.

16. The Respondent's witness informed the Court that the Company would prepare the records of all employees both casuals and permanent staff and would request their NHIF and NSSF records as well as their account details with Equity Bank.

17. The Witness would then prepare the payroll. She produced the payroll for September 2016. She says from her records she did not see the name of the Claimant.

Claimant's Submissions

18. The Court had put the matter for mention before the Deputy Registrar you 24th August 2021 to confirm filing of the submissions of the respective parties.

19. The Claimant's submissions were not found on record by that day.

Respondent's Submissions

20. The Respondent main point in its submissions is that the Claimant was not its employee. The Respondent's contention is that the Claimant did not produce evidence viva voce or documentary to proof for their matter that he was employed by the Respondent.

21. The Court has taken into consideration the submissions and the cases referred to by the Respondent as well as the evidence and pleadings by the respective parties very critically.

Analysis and Determination

22. The issues for determination are:

(i) Was the Claimant an employee of the Respondent;

(ii) Did an accident occur on 30th September 2016 in the Respondent's premises involving the Claimant;

(iii) Who is to blame for the said accident;

(iv) Is the Claimant entitled to the prayers sought in the claim and if so what is the quantum?

(v) Who bears the costs of the suit?

23. This is a case of alleged injury at work place. The Claimant claims he was employed by the Respondent as a casual worker. The Respondent however denies that the Claimant was employed by them and the Accountant of the Respondent Nancy Kerubo stated that she used to keep the records of all the casual employees as well as permanent staff and would ask for their NHIF cards and NSSF. She produced records of the staff in July to October 2017. She also produced account details of those employees with Equity Bank and regrettably the name of the Claimant is not among those documents.

24. The documents produced show the jobs the employees were performing. The Claimant avers he was a casual worker but in his evidence he says he was a painter. In those job descriptions, there is no description of a painter.

25. The Claimant has not established proof that he was working for the Respondent. He did not state when he was employed by the Respondent and when or how he left the employment.

26. Even though he says some of his medical expenses were paid by the Respondent, he did not produce any evidence to confirm his claim.

27. He alleges that even though he used to work as a painter, he claims the accident occurred when he was welding and a grind disc broke and cut his wrist. The question whether the Claimant was an employee of the Respondent cannot be answered in the affirmative as there is no evidence to confirm the same.

28. Section 2 of Employment Act as submitted by the Respondent defines an employee as a person employed for wages or salary and includes an apprentice and indentured learner.

29. In the case of **Kenya Union of Commercial, Food and Allied Workers v Mwana Blacksmith Limited (Case 928 of 2020)**, it was observed that a Claimant claiming an employment relationship must prove the existence of an employment relationship. If the Claimant was an employee of the Respondent, he should have at least given evidence when he was employed, how he left the said employment and when and he could have produced any evidence to show he was so employed.

30. Ndolo J. in the above case observed that: -

“An employment relationship has serious implications on the parties. The Court must therefore be fully satisfied that it actually exists. A Claimant claiming employment rights must prove the existence of an employment relationship.”

31. In the case of **Mary Mmbone Mbayi v Chandubhai Patel & Another (Industrial Cause No. 761 of 2011)** the Court stated –

“Even in cases where there may be no documentary proof of an employment relationship or termination thereof, the Claimant retains the burden of proving their case through viva voce evidence.”

32. The Claimant has not attempted to prove in this case.

33. The Claimant also claims he was welding using a grinding machine. He has not given evidence as to why he was using a machine which he was not trained to use and if at all he informed the Respondent that he could not use the same.

34. The question as to whether the Respondent was to blame for the accident, that is assuming that indeed an accident took place at the Respondent’s premises on 30th September 2016 is also not proved.

35. The Court having found that the Claimant has failed to adduce evidence in support of the fact that he was an employee of the Respondent, I dismiss his claim for general and special damages against the Respondent and I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF SEPTEMBER 2021

ANNA NGIBUINI MWAURE

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 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 **Civil 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.

ANNA NGIBUINI MWAURE

JUDGE