REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 59 OF 2018

(FORMERLY NAIROBI HIGH COURT CIVIL APPEAL NO. 305 OF 2018)

ISUZU EAST AFRICA LIMITED (FORMERLY GENERAL MOTORS

EAST AFRICA LIMITED)……..……APPELLANT

VERSUS

JOSEPH LIKOE NYANGWESO……...RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrates Court (Hon. E. Wanjala) given at Nairobi on 11th June, 2018 in Nairobi CMCC Civil Suit No. 4270 of 2015)

JUDGMENT

1. This appeal challenges the entire Judgment of the Senior Resident Magistrate at Nairobi in Civil Suit Number 4270 of 2015 dated 11.6.2018. In that suit the Respondent in his Plaint filed on 28th July, 2015 contended having been employed by the Appellant and that on or about 8th May, 2015, while in the course of his lawful duties at the Appellant Company he slid and fell and sustained serious injuries on his head, left knee, shoulder and chest. The Respondent attributed the occurrence of the said accident to negligence, carelessness, breach of statutory duty and breach of contract on the part of the Appellant.

2. In her defence Appellant denied the allegations made in the Plaint and in particular that the Respondent was her employee and that an accident occurred on 8th May, 2015 involving the Respondent herein and that the injuries sustained by the Respondent were not sustained in the course of the Respondent's duties in the Appellant premises.

3. After hearing the both parties and upon consideration of the facts of the matter, the evidence on record and submissions, the trial magistrate found the Appellant 100% liable for the injuries sustained by the Respondent and awarded him Kshs. 300,000 as General Damages and Kshs. 3,000 as Special Damages plus costs and interest of the suit from the date of the Judgment.

4. The Appellant was aggrieved by the said Judgment and appealed on the following ground:

a) The learned Magistrate erred in fact and law by only taking into account the Respondent's written submission and without reason completely disregarded the Appellant's Written Submissions dated 3rd April, 2018 and filed on 5th April, 2018

b) The Learned Magistrate erred in fact and law by finding that the Respondent was a casual labourer in the employee of the Appellant.

c) The Learned Magistrate erred in fact and law by failing to appreciate the Respondent's medical report dated 15th July, 2015 that indicated that the Respondent was injured while constructing a building with General Constractors Company Limited.

d) The Learned Magistrate erred in fact and law by finding the Respondent was injured while at the Appellant's premises when no evidence was tendered in support.

e) The Learned Magistrate erred in fact and law by overlooking the testimony of DW1 and thus failing to appreciate the nature of business and operations the Appellant engages in.

f) The Learned Magistrate erred in fact and law in irregularly shifting the burden of proof to the Appellant by holding that the Appellant ought to have provided details of its Constructors (if any) and/or enjoin the said Contractors as parties to the suit.

g) The Learned Magistrate erred in fact and law by finding that the Respondent's allegation that he had not been provided with appropriate safety gear had been proved.

5. The Appellant prayed that:

i. This Appeal be allowed.

ii. Judgment and Decree of the Chief Magistrates Court (Hon. E. Wanjala) given at Nairobi on 11th June, 2018 be set aside.

iii. Costs of this Appeal be provided for.

6. The parties agreed to disposethe Appeal by way of Written Submissions and each party filed its respective submissions to the Appeal.

Appellant's Submissions.

7. It is submitted on behalf of the Appellant herein that the Respondent failed to discharge the burden of proof during the trial of this matter as provided under Section 107, 108 and 109 of the Evidence Act. It is further submitted that the Respondent failed to discharge the burden of proving that he was injured by the negligent act or omission of the Appellant. For emphasis, she relied on Halbury's Laws of England, 4th Edition at Page 662 and Clerk and Lindsell on Torts 18th Edition at page 600 at Paragraph 4 that outlines the essentials on an action on breach of statutory duty.

8. The Appellant further contended that the Respondent failed to prove that he was indeed employed by her and urged that there was no duty of care owed by her to the Respondent. The Appellant further contended that during cross examination the respondent confirmed that his medical report dated 15th July, 2015 clearly indicated that the Respondent was injured while constructing a building with General Contractors Company Limited. For emphasis the Appellant cited the cases of **Smith Vs Baker (1891) A.C 325 at 362** and **Boniface Muthama Kavita Vs Carton Manufacturers Limited (2015) e KLR.**

9. The Appellant urged that the Respondent's failure to draw a nexus between himself and the Appellant herein in terms of an employer-employee relationship only meant that he could not sustain any attribution of negligence against the Appellant herein. For emphasis he relied on **Kay Construction Company Limited Vs Malezi Muthama (2002) eKLR** and **Arthur Gitonga Gitau Vs RWW (Suing through father and next friend CW (2019) eKLR.**

10. Finally, the Appellant submitted that the trial Court erred in granting the orders she gave and urged this Honourable Court to allow its Appeal setting aside the Judgment and Decree issued in Nairobi on 11th June, 2018.

Respondent's Submissions

11. The Respondent on the other hand submitted that from the evidence on record as well as his oral evidence that he was injured while in the lawful course of his assigned duties while at the Appellant's premises as a result of unsafe system of work while working for the Appellant.

12. The Respondent further submitted that he met the threshold of requirement and proved before the trial Court that he was a casual worker. The Respondent further contended that the list of the employees as availed by DW1 during the hearing did not have any date so as to prove to the trial court that he was not the Appellant's employee at the time of the alleged accident.

13. The Respondent further submitted that the Appellant failed to discharge the burden of proof as provided under Section 107 (1), 109 and 112 of the Evidence Act. To buttress this argument the Respondent relied on the Court of Appeal decision in the cases of **Jennifer Nyambura Kamau Vs Humphey Mbaka Nandi (2013) eKLR** and **Kirugi & Another Vs Kabiya & 3 others (1987) KLR 347.**

14. On quantum the Respondent submitted that taking into account the evidence adduced at the trial court, the severity of the injuries he suffered and the written submissions of both parties and the authorities cited therein the award was justified and that this Court should not interfere with the same. For emphasis the Respondent relied on the cases of **Easy Coach Limited Vs Emily Nyangasi (2017) eKLR**, **Lucy Ntibuka Vs Bernard Mutwiri & Others, Meru HCCC No. 17 of 1983** and **James Mwaro Shadrack Vs Ali Zulekha & 3 Others (2017) eKLR.**

15. The Respondent further submitted that the sum awarded as damages was not inordinately and unjustifiably high to warrant this Court to interfere with the same. He urged this Honourable Court to be guided by the principles upon which an Appellat Court will disturb an award for damages as set out in the case of **Butt Vs Khan (1977) 1 KAR** as follows:

> ***"An Appellant Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

16. In conclusion the Respondent submitted that the instant Appeal has no merit and therefore urged this Honourable Court to dismiss the same with costs to the Respondent.

Issues for determination

17. This being a first appeal, the court has jurisdiction to consider and re-evaluate the evidence as per the principles set out in **Selle Versus Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** where the Appellate Court held that:

> ***"Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part 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."***

18. After careful consideration of the material presented to the court and the rival submissions, and guided by the said principles, I have collapsed the grounds of appeal herein into the following issues for determination;

a) Whether the Respondent was an employee of the Appellant.

b) Whether the Respondent was injured in the cause of his employment with the Appellant.

c) Whether the appellant was liable the injuries sustained by the respondent

d) Whether the quantum of damages awarded by the Hon. Learned Trial Magistrate should interfered with.

(a) Whether the Respondent was an employee of the Appellant

19. The Appellant submitted that the Respondent did not discharge his burden of proving employment relationship between her and himself as required under Section 107 and 108 of the Evidence Act. She further contended that the Respondent failed to adduce any evidence to prove employment relationship between him and her such as a contract of service, an appointment letter, a payslip or even call a witness to attest to the assertion that such employment relationship existed. She urged that in the absence of an employer-employee relationship between herself and the Respondent, she did not owe him any duty of care as the same could only accrue if an employment relationship existed.

20. On the other hand, the respondent submitted that the Trial Magistrate correctly found that he was employed by the Appellant on 8th May, 2015 when he was injured. He further contended that the trial court was right in finding that the Appellant did not prove that he was not her employee, since she failed to produce a proper record of her employees covering the period when the Respondent was injured. According to him the list of employees adduced by the Appellant as exhibit did not bear any date. He was consistent in his pleadings, evidence and submissions that he was employed by the appellant, and that he was injured while in the course of his duty.

21. I have carefully considered the pleadings, evidence and submissions on the question of the employment relationship between the parties herein. It is trite law that he who alleges the existence of a fact must prove. The foregoing adage is enacted under Section 107 and 108 of the Evidence Act, thus the burden of prove rests on the party who alleges. The said burden remains with the alleging party until it is shifted by sufficient evidence that supports the existence of the alleged fact or set of facts.

22. The question that arises is whether or not during the trial of the suit the respondent adduced sufficient evidence to prove on a balance of probability he was employed by the appellant under a contract of service on the fateful day. The appellant was categorical in her pleadings and the testimony of the DW1 that the respondent was never her employee and she did not owe him any duty of care.

23. The Respondent never produced any written evidence of employment or called any witness to confirm that he was indeed employed by the appellant on the fateful day. I therefore find that the respondent failed to discharge his burden of proving employment relationship between him and the appellant and proceed to return that the trial court erred both in law and fact in finding that the respondent was employee of the appellant on the fateful day. I further find that the trial court erred in law and fact by shifting the burden of proof when she found that the appellant had failed to prove by employment record that the respondent was not her employee on the fateful day. In my view the default to produce the employment record did not make the respondent an employee of the appellant.

(b) Whether the Respondent was injured in the cause of his employment with the Appellant.

24. Based on the foregoing view, I do not hastate to hold that the respondent did not adduce any sufficient evidence to prove that he was injured in the course of his employment by the appellant. Consequently, I return that the trial court erred both in law and fact by finding that the respondent was injured while in the course of his employment by the appellant.

(c) Whether the appellant was liable for the injuries sustained by the respondent

25. In view of the finding herein above that the respondent did not prove employment relationship with the appellant, and that he was not injured while in the course of employment by the appellant, I further find that the appellant was not liable for the injuries sustained by respondent. Accordingly, I return that the trial court erred in law and fact by finding that the appellant was 100% liable for the injuries sustained by the respondent on the fateful day.

(d) Whether the quantum of damages awarded by the Hon. Learned Trial Magistrate should interfered with.

26. In view of the finding that there was no employment relationship between the parties herein and that the respondent did not sustain injuries in the course of his employment by the appellant, I find and hold that the issue of quantum of damages did not arise. Consequently, I

return that the trial court erred both in law and fact by condemning the appellant to pay the respondent the assessed damages plus costs.

Conclusion and disposition

27. I have found that the trial court erred both in law and fact by finding that the respondent had discharged his burden of proving employment relationship with the appellant and that he was injured while in the course of his employment by the appellant. I have further found that the trial court erred both in law and fact by finding that the appellant was 100% liable for the respondent's injuries and further by condemning her to pay the respondent Kshs 303,000 plus costs and interest. Consequently, I allow the appeal by setting aside the whole judgment of the trial court and replacing it with an order dismissing the suit. The appellant is awarded cost of the appeal.

Dated, signed and delivered in open court at Nairobi this 17th day of January, 2020.

ONESMUS N. MAKAU

JUDGE