



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL NO 45 OF 2019

(Originally Nairobi High Court Civil Appeal No. 573 of 2017)

WILBERFORCE ATSIAYA

APPELLANT

v

CROWN BERGER LIMITED

RESPONDENT

(Appeal from the decision of the Chief Magistrates Court at Milimani (the Honourable E.A. Nyaloti) dated 26th day of September 2017 in Civil Case No. 6798 of 2014)

JUDGMENT

1. Wilberforce Atsiaya (Appellant) sued Crown Berger Ltd (Respondent) before the Magistrates Court alleging breach of statutory duty (negligence) occasioned to him in the workplace.
2. In its *Defence*, the primary defence advanced by the Respondent was that the Appellant was not its employee.
3. In a judgment delivered on 26 September 2017, the Learned Magistrate found that the Appellant had failed to prove on a balance of probability that he was an employee of the Respondent. The suit was dismissed.
4. The Appellant was aggrieved and he filed a Memorandum of Appeal before the High Court contending that
 1. The Learned Magistrate erred in law and fact by finding that the Plaintiff did not prove his case on a balance of probabilities.
 2. That the Learned Magistrate erred in law and in fact in finding that the Plaintiff did not prove that there existed any contract between the Plaintiff and the Defendant.
 3. The Learned Magistrate erred in law and in fact in dismissing the Plaintiff's suit on the premise that there existed no contract.
 4. The Learned Magistrate erred in law and in fact by failing to appreciate the fact that casual workers are under no written contract.
 5. The Defendant in his submissions alluded that the Plaintiff was not an employee with them but never adduced a list of all the casual employees in his company.
 6. The Learned Magistrate erred in law in overlooking the fact that once a party denies a fact, the burden of proof shifts to the Defendant.
5. On 11 November 2019, upon the consent of the parties, the High Court transferred the Appeal to this Court for hearing and determination.
6. When the Appeal was placed before this Court for directions on 26 February 2020, the parties suggested and the Court directed the filing and exchange of submissions.
7. The Appellant filed his submissions on 13 March 2020 while the Respondent's submissions which should have been filed/served by 27 March 2020 were not on record (the Court had given a general extension up to 30 April 2020 due to COVID19 pandemic)
8. The Court has reconsidered, re-evaluated and analysed the record including evidence placed before the trial Court and the submissions filed herein.

9. The Court will keep in mind that it did not see the witnesses.

10. The primary issue is whether the Appellant proved on a standard of probability that he was an employee of the Respondent and/or had a contractual relationship with the Respondent within the meaning of the Occupational Health and Safety Act, 2007, or at all.

11. In his filed witness statement which was adopted as part of the evidence, the Appellant did not suggest let alone expressly assert that he was in an employment relationship with the Respondent.

12. In the extremely brief statement, the Appellant stated

....

On 6th February 2011 at around 9 pm, I went to have my supper at a canteen in the company's compound and as I was walking I fell into a sewerage drain and hurt my left. ...

13. While testifying before the Magistrates Court, the Appellant did not make any reference to the nature of the contractual relationship with the Respondent during examination-in-chief.

14. It was only during cross-examination that the Appellant stated that he

got injured while working for the Defendant. I have not been issued with an appointment letter. I was working as a casual in production. The Production Manager had given me a letter to open an account.

15. The Appellant was well aware in advance of the hearing that the Respondent had denied being in any contractual relationship with him. He now contends that it was upon the Respondent to demonstrate that he was not an employee as the burden had shifted to it in terms of section 10(7) of the Employment Act, 2007.

16. In rejecting the Appellant's plea, the trial Court considered that the Appellant had stated that he had an introduction letter issued to him by the Respondent's Production Manager to demonstrate an employment relationship.

17. In the view of this Court, it was incumbent upon the Appellant to lay an/some evidential foundation to the nature of his employment relationship with the Respondent before the Court could invoke section 10(7) of the Employment Act, 2007 since section 8 of the Employment Act, 2007 recognises oral as well as written contracts.

18. The Appellant did not even bother to disclose when the relationship with the Respondent started or when it ended, or whether he was still in employment by time of trial. He did not even attempt to reveal the name of any of his colleagues or supervisors. He could have called any colleague to attest to his being an employee.

19. To this Court, the Trial Court did not fall into an error of law or fact in concluding that the Appellant had failed to discharge the burden imposed on him to the required standard.

20. The counsel for the Appellant and to some extent the Respondent did not take the prosecution of their clients' cases before the Magistrates Court seriously. The pleadings and proceedings before that Court show a casual approach to the litigation.

21. The Court finds no merit in the Appeal. It is dismissed with no order on costs of the Appeal.

Delivered through video/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Appellant Ngugi & Co. Advocates

For Respondent Kairu Mbuthia & Kiingati Advocates

Court Assistant Judy Maina