



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
AT NAIROBI  
CAUSE NO. 1192 OF 2018

*(Formerly Kiambu High Court Civil Appeal No. 99 of 2017)*

Before Hon. Lady Justice Maureen Onyango

SIMON MUTUA MUTISYA.....APPELLANT

VERSUS

MANDEEP SINGH CONSTRUCTION (K) LIMITED.....1<sup>ST</sup> RESPONDENT

MATELEC KENYA LIMITED.....2<sup>ND</sup> RESPONDENT

*(Being an appeal from the decision of the Principal Magistrate, in Chief Magistrate's Court Thika,*

*the Hon. Principal Magistrate C. A Otieno Omondi, dated the 16<sup>th</sup> day of June 2017*

*in Chief Magistrate Court at Thika Civil Case No. 408 of 2015.)*

**JUDGMENT**

This appeal was originally lodged at the High Court of Kenya in Kiambu and later transferred to this court for hearing and determination by dint of the directions issued on 6<sup>th</sup> July 2018.

On 16<sup>th</sup> June 2017, Hon. C. A. Otieno Omondi (Principal Magistrate) delivered a judgment in Thika CMCC 408 of 2015, dismissing the Appellant's claim for failing to establish who his employer was. Aggrieved by this decision, the Appellant filed this appeal which is based on the following grounds of appeal:-

- 1. The learned Magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.*
- 2. The Learned Magistrate misdirected herself in finding that evidence adduced by Appellant was conclusive that the Appellant was indeed an employee of the Defendants yet concluded that the Appellant failed to establish who his employer was.*
- 3. That the Learned Magistrate erred in law and in fact by finding the Appellant's case unmeritorious and dismissing the same.*
- 4. That the Learned Magistrate failed to appreciate the evidence and submissions of the Learned Counsel for the Appellant by dismissing the Appellant's suit.*
- 5. The Learned Magistrate erred in fact and in law by dismissing the Appellant's case on a technicality.*
- 6. That in all the circumstances of the case, the Learned Magistrate failed to do justice before her and the findings of the Learned Magistrate are insupportable in law or on the basis of the evidence adduced.*

He seeks the following reliefs from this Court-

- a. The appeal be allowed.*

- b. *The judgment dismissing the Appellant's suit be set aside.*
- c. *The proposed award by the Learned Magistrate be upheld.*
- d. *In the alternative to the above, the Court do grant the Appellant award subject to the evidence adduced.*
- e. *The Orders made by the Learned Magistrate in the Subordinate Court as to interest and costs be set aside.*
- f. *The Appellant be awarded the costs of this Appeal in the Subordinate Court.*
- g. *The Court be pleased to give further or other orders it may deem appropriate to grant.*

Parties agreed to have the appeal dispensed with through written submissions. Only the Appellant filed his submissions.

### **Analysis and Determination**

I have carefully considered the memorandum of appeal as well as the record of appeal and find that the grounds of appeal can be summarised into the following –

- a. *Whether the Learned Magistrate failed to consider the evidence adduced on behalf of the Appellant.*
- b. *Whether the Learned Magistrate misdirected herself in finding that the evidence adduced by the Appellant was conclusive proof of an employment relationship between the Appellant and the Defendants, yet concluded that the Appellant had failed to establish who his employer was.*
- c. *Whether the orders sought by the Appellant should be granted.*

In dismissing the claim, the trial Court observed as follows: -

*“On liability, I have considered the Plaintiff's evidence that he was an employee of the 1<sup>st</sup> Defendant (Mandeep Singh Construction (K) Limited) which had been given work by the 2<sup>nd</sup> Defendant (Matelec Kenya Limited).*

*He buttressed his evidence by producing his job card serial No. 01/01/139 ... which number was indicated in his national identity card. This evidence is similar to that contained in his witness statement. I note that the plaint at paragraph 5, the Plaintiff indicated that at all material times, he was the employee of the 2<sup>nd</sup> Defendant (Matelec Kenya Limited) which was a subcontractor while the 1<sup>st</sup> Defendant (Mandeep Singh Construction (K) Limited) was the main contractor at Thika Power Plant site. The evidence presented by the Plaintiff before the court and which was in tandem with his witness statement was therefore at variance with that indicated in his plaint. Given this contradictory evidence. It is not clear who the Plaintiff's employer was. It was important for the Plaintiff to establish on a balance of probabilities who his employer was as this was the company that owed him a duty of care for which if the court found been breached, the employer would be liable for the accident of 15<sup>th</sup> May 2012*

*Having failed to establish who his employer was, the Plaintiff's suit cannot stand as parties are bound by their pleadings. It is therefore dismissed with no order as to costs as the defendants did not enter appearance and/or file a defence...”*

I have examined the plaint, the proceedings, the Appellant's witness statement. At paragraph 4 of plaint, the appellant pleaded as follows –

*“At all material times the 1<sup>st</sup> Defendant was the main contractor at its Thika Power Plant site and the 2<sup>nd</sup> Defendant was its sub contractor in the said site tasked with the responsibility of laying concrete foundations for the 1st Defendants construction works.”*

Paragraph 5 of the Appellant's plaint, he pleaded as follows –

*“At all material time relevant to this suit the Plaintiff was employed as a casual labourer by the 2<sup>nd</sup> Defendant in the capacity of a concrete mixer for the 1<sup>st</sup> Defendant's construction works.”*

Further, at paragraph 6 of the plaint the Appellant pleaded as follows –

*“It was an implied term of the contract of employment between the 1<sup>st</sup> Defendant and the Plaintiff that it was the duty of the Defendants to take all reasonable precautions for the safety of the plaintiff while he was engaged upon the said employment, not to expose the Plaintiff to any risk, damage or injury which they knew or ought to know or have known and to provide a safe and proper system of working and effective supervision of the same.”*

He gave particulars of injury at paragraphs 8 of the plaint as –

i) *Blunt injury on the right wrist.*

ii) *Blunt injury on the left hip.*

In both the witness statement and in his evidence, the claimant testified that he was employed by the 1<sup>st</sup> Respondent, Mandeep Singh and not the 2<sup>nd</sup> Respondent Matelec Kenya Limited. In both the witness statement and in his testimony in court, the claimant was consistent that he was employed by the 1<sup>st</sup> Respondent who was the subcontractor of the 2<sup>nd</sup> Respondent. It therefore would appear that his Counsel confused the two when drafting the claim. It is not correct in the circumstances to make a finding that the claimant did not prove who his employer is.

The claimant's Access Control Card which he provided as part of his evidence for proof of employment relationship contains the names of both companies but the serial no. is "**Mandeep S/N. 01/01/139**" implying that he was an employee of Mandeep Singh Construction.

The medical report produced by the Appellant further confirms that he was an employee of Mandeep and not Matelec.

The pleadings about the liability of the Respondent attaches liability on both Respondents so that it really does not matter which of the two was the main contractor and which one was the subcontractor.

Under Section 54(1) of the Labour Institutions Act, both the main contractor and the subcontractor are jointly liable.

Section 6 of the Occupational Safety and Health Act also assigns liability to a main contractor or an occupier of premises whether or not such occupier is the employer. Section 108(1) further assigns liability to the owner of premises.

More importantly, in this suit, there was no defence filed by either of the Respondents. Mandeep Singh Construction filed a Memorandum of Appearance through S. Ogeto Ongori and Company Advocates but no defence. Judgment was entered against both respondents in default of defence. The only role of the Magistrate was therefore to assess damages, for which the Appellant adduced evidence which proved he had been injured when bags of cement which had been stacked carelessly fell on him when he was sent to collect a bag of cement from the store. He further adduced medical reports and treatment records which confirmed he had been injured.

For the foregoing reasons, I would agree with the Appellant that the Learned Magistrate misdirected herself in finding that there was no employment relationship between the Appellant and the 1<sup>st</sup> Respondent when indeed her role was to confirm if the Appellant suffered injury as alleged and to assess damages. By so misdirecting herself the Learned Magistrate reached the wrong conclusion.

For the foregoing reasons, I would allow the appeal, set aside the order of the Learned Magistrate dismissing the suit and in place thereof enter judgment against the 1<sup>st</sup> Respondent in favour of the Appellant in terms of the proposed damages as assessed by the Learned Magistrate as follows –

1 General damages..... Kshs.150,000

2 Special damages..... Kshs.8,500

3. The Appellant shall have costs both in the Magistrate's court and in the Appeal.

4. Interest shall accrue at court rates from date of judgment at the lower court

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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.

**MAUREEN ONYANGO**

**JUDGE**