



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
APPEAL NUMBER 9 OF 2019

BETWEEN

MASS INVESTMENTS LIMITED.....APPELLANT

AND

STEPHENSON MASILA KYALORESPONDENT

[From the Judgment of the Hon. S.R.M I. Ruguru, delivered on 12th July 2017, in Mombasa C.M.C.C No. 2300 of 2014]

BETWEEN

STEPHENSON MASILA KYALO.....PLAINTIFF

VERSUS

MASS INVESTMENTS LIMITED DEFENDANT

Rika J

C.A.: Andrew Mwabanga

Sherman Nyongesa & Mutubia Advocates for the Appellant

IRB Mbuya & Company Advocates for the Respondent

JUDGMENT

1. Before the Trial Court, the Respondent herein sought and obtained Judgment against the Appellant, in damages for work injury.
2. He was awarded general damages for pain and suffering at Kshs. 800,000, special damages at Kshs. 2,000 – total at Kshs. 802,000. He was allowed the prayer for costs and interest.
3. The Appellant challenges the Judgment, relying on 6 Grounds of Appeal, contained in the Memorandum of Appeal, dated 23rd May 2019. These may be abridged as follows: -
 - a. The Trial Court erred in finding the Respondent to have proved his case to the required standard.
 - b. The Trial Court erred by relying on a letter dated 29th August 2014, to conclude that the Respondent was employed by the Appellant.
 - c. Appellant’s Pleadings were not considered.
 - d. The Trial Court erred in finding that the Respondent was injured at work, and that the Appellant was liable in negligence.

e. The Trial Court erred by finding that the Appellant had duty to provide safety to the Respondent, while the Respondent was not an Employee of the Appellant.

f. Lastly award of damages was excessive.

4. The Appellant proposes that the Appeal is allowed with costs, and Judgment and/or decree made by the Trial Court, is set aside. There are no other Grounds of Appeal contained in the Memorandum of Appeal.

5. Parties appeared in this Court on 18th October 2019, when they recorded a consent order, to have the Appeal considered and determined on the strength of the Record of Appeal. They confirmed filing of their Closing Submissions at the last mention in Court on 24th September 2020. The Court has carefully gone through the Record of Appeal, and ***Finds***: -

I. Part of the issues before the Trial Court, were similarly brought before this Court [ELRC], in ***Stephenson Masila Kyalo v. Mass Investments Limited [2018] e-KLR***.

II. The present Respondent sued the Appellant in a Claim for unfair termination. One of the issues dealt with in the Cause was whether the Respondent was an Employee of the Appellant. The letter of 29th August 2014 was contested in the Cause.

III. This Court found, like the Trial Court from which this Appeal originates, that the Appellant employed the Respondent. The letter of 29th August 2014 was found to have been issued by the Appellant to the Respondent.

IV. The Trial Court cannot be faulted for having concluded that there was an employment relationship between the Parties. This Appellate Court tried the same fact, between the same Parties, represented by the same Advocates, and reached the same conclusion.

V. Ground [b] of the Memorandum of Appeal is not sustainable.

VI. If the Respondent was an Employee of the Appellant as affirmed by this Court, it would follow that the Respondent owed him a duty of care, whenever the Respondent undertook assignments given to him by the Appellant.

VII. The Trial Court ably cited Halsbury Laws of England 4th Edition, Vol. 6, in concluding that an Employer is under duty to take all reasonable care for the safety of his Employees in all circumstances...so as not to expose them to unnecessary risk.

VIII. The Respondent was burnt severely when the Fuel Truck belonging to the Appellant, exploded while it was being welded. The Appellant was aware of the fault in the Fuel Truck, and would be expected to know that welding was likely to result in a fire. The Respondent was advised by Appellant's Staff that the Truck had thoroughly been cleaned, and engaged in welding work on the strength of this information. The Trial Court was convinced that the Appellant did not provide a safe system of work. The Respondent marshalled evidence establishing that he was an Employee of the Respondent; he gave evidence, to establish he was injured in the course of his duties; and provided the Court with medical proofs. The Trial Court did not err in concluding that the Respondent established his Claim to the required standard.

IX. There is no merit in Grounds [a] [d] and [e] of the Memorandum of Appeal.

X. Did the Trial Court disregard the Appellant's Pleadings? The Record does not suggest so. At page 90 of the Record, lines 4-6, the Trial Court pays due regard to the Pleadings filed by the Appellant. At line 20, the Trial Court indicates it considered carefully the Pleadings filed by both Parties. The evidence adduced by both Parties was considered by the Trial Court. The Appellant has not demonstrated what relevant aspect of its Pleadings was left out in the Judgment of the Trial Court. Ground [c] of the Memorandum of Appeal as listed above, is rejected.

XI. The last Ground is on quantum of damages. The Appellant proposed award of general damages at Kshs. 200,000 before the Trial Court. The Respondent urged the Trial Court for an award of Kshs. 900,000. In the view of the Court, the decision cited by the Respondent, ***J.S. [Suing as Father and Next-Friend of K.S. v. Kenya Power & Lighting Co. Limited [2015] e-KLR***, was much more relevant to the Respondent's case, than the decisions cited by the Appellant. The Respondent suffered 1st, 2nd and 3rd degree burns on the right side of the head and chest; burns on right forearm, right arm, and right hand; and burns on the abdomen. An award of general damages at Kshs. 800,000 was within range of damages awarded in similar cases.

XII. The last Ground of Appeal has no merit

6. The Appeal on the whole has no merit. It is dismissed, with costs to the Respondent.

Dated and delivered at Mombasa this 6th day of October 2020

James Rika

Judge