



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
APPEAL NO. 3 OF 2018

(Originally Kisumu High Court Civil Appeal No. 41 of 2017)

CHARLES RAFAEL OTIENO

APPELLANT

v

NDERE GINNERIES

RESPONDENT

(Being an Appeal from the judgment and decision of the Hon. B. Kasavuli (SRM)

in Original Winam SPMCC No. 352 of 2008 delivered on 31st March 2017)

JUDGMENT

1. Charles Rafael Otieno (Appellant) sued Ndere Ginneries Ltd (the Respondent) before the Winam Magistrates Court alleging breach of duty of care/negligence.
2. In a judgment delivered on 31 March 2017, the Magistrate found that the Appellant had not proved on a balance of probability that the Respondent was a limited liability company or that he was an employee of the Respondent. The suit was dismissed.
3. The Appellant was aggrieved and he filed a Memorandum of Appeal contending
 1. **THAT** the learned trial Magistrate erred in law and fact in making a decision that the Respondent was not rightfully sued as there was no evidence tendered on record to prove the same.
 2. **THAT** the learned trial Magistrate erred in law and fact in relying on oral evidence on assertion that the Respondent was not a legal entity.
 3. **THAT** the learned trial Magistrate erred in law and fact in failing to appreciate the evidence of the Appellant with regard to the working conditions provided by the defence.
 4. **THAT** the learned trial Magistrate erred in law and fact in failing to appreciate that the evidence on record with regard to the nature of the injuries sustained by the Appellant.
 5. **THAT** the judgment was against the weight of the evidence offered before the Court.
 6. **THAT** the judgment is totally failed to appreciate the submissions of the Plaintiff/Appellant and the authorities quoted therein.
4. On 31 January 2018, the High Court, citing lack of jurisdiction, transferred the Appeal to this Court.
5. Pursuant to Court orders issued on 2 November 2020, the Appellant filed his submissions on 16 November 2020 while the Respondent filed its submissions on 24 November 2020.
6. In its submissions, the Appellant condensed the Grounds of Appeal into 4.

Whether the Respondent was rightfully sued

7. In the initial Plaintiff, the Appellant described the Respondent as Ndere Gineries Ltd, a limited liability company incorporated under the Companies Act.

8. However, when the Respondent raised the question of its capacity to be sued, the Appellant filed an Amended Plaintiff which now described the Respondent as *Ndere Gineries*, a business entity.

9. In the Judgment under challenge, the trial Magistrate noted that the evidence before her was that the Respondent was not a legal entity nor a limited liability company.

10. The trial Court did not make any reference to the changed description of the Respondent in the Amended Plaintiff.

11. For a long time, the law has been that a business entity should be sued in the name of the proprietor.

12. However, that position appears not legally tenable anymore.

13. For one, Article 260 of the Constitution has expanded the definition of *person* to include *other body of persons whether incorporated or unincorporated* while Article 258 contemplates such unincorporated persons suing and being sued.

14. Secondly, the definition of *employer* in section 2 of the Employment Act, 2007 has also been widened to include *agent, foreman, manager or factor* of the employer suggesting that within the employment relationship, the strict company juristic doctrine does not apply.

15. During re-examination, the Appellant testified that the Respondent was owned by a cooperative union.

16. The Respondent's first witness was the chair of a cooperative union who testified that the ginnery had been leased to an entity called Dominion Farm which was the employer of the Appellant but disclosed that he did not have lease documents.

17. The Court has re-evaluated the evidence before the trial Court. It was the Respondent which was privy to the lease arrangements with Dominion Farms but it did not produce any records to confirm the relationship.

18. The Court is therefore of the view that the trial Court fell into error of both law and fact.

Employment relationship

19. The Appellant testified that he was not issued with a written contract but that the Respondent kept attendance registers and payroll records.

20. The Respondent's witness admitted that there were workers at the ginnery but that he was not in office when the accident occurred.

21. The trial Court found that the Appellant was not an employee because he failed to produce any documents or call corroborative evidence from his colleague who witnessed the accident.

22. The duty of maintaining employment records is placed upon the shoulders of employers by the Employment Act, 2007.

23. Sections 2 and 9 of the Employment Act, 2007 also contemplates oral contracts.

24. In the view of this Court, the trial Court fell into error in concluding that the Appellant was not in a contractual relationship with the Respondent when it was the responsibility of the Respondent to produce records (attendance registers), its witness having admitted that there were workers at the ginnery.

Injury in the workplace

25. The Appellant called a clinical officer who attended to him within 1-hour of the accident. The officer produced medical records.

26. The Court is satisfied that the Appellant was involved in an accident in the workplace.

Liability

27. The Respondent owed the Appellant a duty to maintain and ensure a safe working environment. The Appellant's testimony that the machine he was using was faulty and used to be covered with a sack was not controverted.

28. The Court is satisfied that the Respondent was in breach of its statutory duty of care and therefore liable to the Appellant.

Quantum

29. The trial Court indicated that it would have awarded the Appellant general damages of Kshs 200,000/-.

30. In his submissions before this Court, the Appellant sought Kshs 1,500,000/-. The Appellant cited the case of Mombasa High Court Civil Case No. 133 of 1998, *David Mwawughanga Kingaga v Narcol Aluminium Rolling Mill Ltd* ; Mombasa High Court Civil Case No. 350 of 1996, *Samuel Kazungu v Umoja Rubber Industries Ltd* and *City Engineering Works (K) Ltd v Venatsio Mutua Wambua* (2016) eKLR.

31. The Appellant's degree of injury was placed at 10% by his doctor. The Respondent in the *City Engineering* case had a degree of injury assessed at 40% - 45% permanent incapacity.

32. In its submissions, the Respondent urged that Kshs 200,000/- general damages would have been adequate.

33. Considering the material on record, the Court is of the view and finds that general damages of Kshs 75,000/- would be fair.

Conclusion and Orders

34. In light of the foregoing, the Court sets aside the judgment of the trial Court and substitutes with judgment for the Appellant in the sum of Kshs 75,000/-.

35. The Appellant took a casual approach to the prosecution of his case before the trial Court. Each party to bear own costs of both the trial and the Appeal.

Delivered through Microsoft teams, dated and signed in Kisumu on this 11th day of December 2020.

Radido Stephen

Judge

Appearances

For Appellant Otieno, Yogo, Ojuro & Co. Advocates

For Respondent Kimanga & Co. Advocates

Court Assistant Chrispo Aura