



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 10 OF 2018

(Before Hon. Justice Mathews N. Nduma)

PETER ONYANGO OCHIENGAPPELLANT

VERSUS

CEMENT CENTRE LIMITED..... RESPONDENT

J U D G M E N T

1. The Appellant filed suit against the Respondent claiming general damages, special damages, interest and costs arising from an injury sustained in the course of employment. From the witness statement of the appellant the injury occurred on 28th November, 2012 while working as an employee of the Respondent. He was cut by iron sheets on the left foot while loading iron sheets into a lorry. The Appellant blamed the Respondent for failure to provide protective clothing.
2. The suit was dismissed by Hon. A. Odawo, Senior Resident Magistrate Kisumu by a Judgment delivered on 7th September, 2016.
3. The Appellant aggrieved by the decision of the trial court filed an appeal on the grounds that the decision of the trial court was against the grain of evidence adduced before court; in applying a standard of proof higher than that applicable in civil proceedings; in failing to appreciate the seriousness of the injury; by misapprehending the law applicable and taking into account extraneous factors not placed before court.
4. In his sworn testimony the Appellant testified that on 28th November, 2012, he sustained a cut by an iron sheet on the left leg while he was loading a lorry while working as an employee of the Respondent. He testified that he had no protective clothing including gloves, boots, gumboot's or helmet which if he had worn would have prevented the injury. He was treated at Kisumu District Hospital and produced treatment notes. He produced a medical report by Dr. Okombo who examined him after treatment. The report was dated 24th August, 2013. The Appellant paid Kshs.1,500 for the report. The Appellant sought for damages, interest and costs of the suit. Under cross examination the Appellant failed to produce documents to show that he was employed by the Respondent but insisted that he was working for the Respondent.
5. PW 2 was Dr. Okombo who examined the Appellant. He testified that he had examined the Appellant who had reported that he suffered leg injury while working at cement centre while loading iron sheets into a lorry. He was injured on the left index finger and left foot. The injuries were soft tissue injuries. The Doctor recommended further treatment and plastic surgery. He had suffered 50% incapacity. The Doctor charged Kshs.1,500 for the medical report and Kshs.3,000 for the court attendance. Receipts were produced as exhibits 3 and 4 respectively. The Doctor was adamant that the Appellant had suffered soft tissue injuries and the leg was swollen and had cut wound on the left index finger.
6. In the statement of defence the Respondent denied that the Appellant was its employee and all other particulars of claim. In the alternative, Respondent pleaded that if the accident occurred at its premises, then the Appellant was its sole author and the injury cannot be attributed to any negligence on the part of the Respondent.
7. When the matter came for defence hearing, the Respondent did not call any witness but offered evidence of DW 1 in CMCC 91/13 to apply to this case save for the date of accident to read 28th November, 2016. The evidence was said to have been admitted by consent according to the Record of Appeal.
8. The evidence by DW 1 was to the effect that the Appellant was not their employee. That the Respondent did not employ casuals but dealt with permanent employees and independent contractors. That DW 1 was an accountant employed by the Respondent.
9. The trial magistrate relied on the evidence of DW 1 to find that the Appellant did not prove that he was an employee of the Respondent in terms of section 107 (1) of the Evidence Act. The Learned Magistrate found that a muster roll produced by DW 1 did not include the

Appellant as an employee of the Respondent.

10. The Trial Magistrate found that it was not proved therefore that the Respondent owed the Appellant duty of care and that the said duty of care had been breached.

11. In short, the whole case turned on the basis that the Appellant did not have any employment documents and did not bring a witness to corroborate his assertion that he worked for the Respondent and was injured in the course of duty.

12. In the absence of any documentary evidence from the Appellant and lack of any corroborative evidence from another person called by the Appellant, I cannot fault the finding by the Learned Trial Magistrate that the Appellant had failed to show that he had any employment relationship with the Respondent and that he had sustained injury in the course of employment by the Respondent.

13. The Respondent had sufficiently rebutted the evidence adduced by the Appellant by producing its muster roll which did not show that the Appellant ever worked for it.

14. Accordingly, the court having analyzed the primary evidence before the trial magistrate as it is mandated to do while hearing first appeals, concurs with the findings of fact and law by the learned magistrate.

15. Consequently, the Appeal lacks merit and is dismissed with no order as to costs.

Judgment Dated, Signed and delivered this 17th day of January, 2019

Mathews N. Nduma

Judge

Appearances

Ouma Anyumba & Co. for Appellant

Onsongo & Co. Advocates for Respondent

Chrispo – Court Clerk