



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 829 OF 2018

Formerly Civil Appeal No. 632 of 2016 in the

High Court of Kenya at Milimani Law Courts, Nairobi

(Being an appeal against the judgment and decree given

on 13.10.2016 by the Hon. E.K.Usui, Senior Principal Magistrate

in Civil Suit No. 6852 of 2012 at Milimani Commercial Courts, Nairobi)

CASEMENT INDUSTRIES LIMITED.....APPELLANT

- VERSUS -

PATRICK KITHOME MUTULUKI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The appellant, Casement Industries Limited, filed the memorandum of appeal on 17.10.2016 through Gakuru & Company Advocates. The appellant prayed for orders as follows:

- a) The appeal is allowed with costs to the appellant.
- b) The judgment delivered on 13.10.2016 and orders therefrom be set aside.
- c) The Honourable Court be pleased to make such further or other orders as it may deem just in the circumstances.

The appellant is dissatisfied and aggrieved by the judgment and order of the Hon. E.K. Usui, Senior Principal Magistrate in favour of the respondent for payment of Kshs. 703, 000.00 as awarded in the judgment plus interest thereon of Kshs. 84, 360.00 and costs of Kshs. 126, 170.00. The grounds of appeal are as follows:

- 1) That the learned Magistrate erred in finding that the plaintiff was the defendant's employee whilst the plaintiff was unable to provide proof of such employment.
- 2) The learned Magistrate erred in stating that the defendant denied knowing the plaintiff, the defendant's witness admitted having known the plaintiff as a self-employed fitter and not his employee.
- 3) The learned Magistrate erred in finding that payment of the plaintiff's medical bill inferred employment. The defendant offered an explanation on the circumstances of the payment.
- 4) The plaintiff claimed that he was employed by the defendant in 1981. The learned Magistrate overlooked in her judgment that the plaintiff could not provide the most rudimentary proof of employment for 14 years.
- 5) The learned magistrate erred in not subjecting the plaintiff's case to a balance of probabilities.

The appellant filed the submissions to support the appeal on 27.02.2019 and the respondent, Patrick Kithome Mutuluki, filed submissions on 18.01.2019 through Musili Mbiti & Associates.

The **1st issue** for determination is whether the learned Magistrate erred in finding that the plaintiff was the defendant's employee whilst the plaintiff was unable to provide proof of such employment. It is submitted that section 2 of the Employment Act (Cap.226) defines an employee as an individual employed for wages or salary and includes an apprentice and an indentured learner. It is further submitted that the respondent failed to prove that he ever earned a wage or salary from the appellant and he was therefore not the appellant's employee. Thus, the appellant had no liability in the circumstances. For the respondent it was submitted that the respondent testified that he worked for the appellant from 1981 until 23.05.2005 when he sustained severe bodily injuries when he fell from a top of a building after the ladder he was using broke off.

The Court has revisited the trial Court's record. The respondent pleaded in the plaint thus, "**2. At the material times hereto the plaintiff was employed by the defendant as a fitter and was lawfully acting as such in the course and within the scope of the said employment.**" Further, the respondent (plaintiff) pleaded that on or about 23.05.2005, the plaintiff was lawfully working in the course of his employment at the defendant's premises at Nairobi or at an authorised site when the defendant by its directors, supervisors or servants negligently and in breach of its statutory duty assigned the plaintiff duties as a fitter wherein he fell from a top of a building he was working on and as a result sustained serious bodily injuries. The plaint set out particulars of breach on the part of defendant's agents or supervisors to include:

- a) Assigning the plaintiff duties without due care and attention.
- b) Exposing the plaintiff to risk of damage or injury which they knew or ought to have known.
- c) Failing to provide a safe place of work.
- d) Failing to provide a safe place of work.
- e) Failing to provide any protective devices or providing protective devices that were defective.

The plaint further set out the particulars of breach of contractual obligations by the defendant pursuant to statute to include:

- a) Failing to fully instruct the plaintiff as to the dangers involved in the said work and precautions to be observed.
- b) Failing to provide any or adequate supervision.
- c) Failing to provide any protective devices.
- d) Providing protective devices which are defective.

The appellant in the defence filed on 23.04.2015 pleaded that the plaintiff had never been its employee and accordingly had no contractual or other obligation to the plaintiff as was alleged. Further the appellant stated in the amended defence that it had been incorporated in 1998 as such could not have employed the plaintiff on 01.12.1981 as was stated in the plaintiff's witness statement. The appellant denied liability for the accident and pleaded that if any accident occurred it arose due to the negligence of the plaintiff including:

- a) Operating equipment without due care and attention.
- b) Failing to take any or adequate precautions for his safety.
- c) Failing to wear protective devices as required by law.
- d) Failing to heed rules and regulations when working on equipment.

The appellant exhibited its certificate of incorporation showing it was incorporated on 26.11.1998. The respondent testified that he was employed on 01.12.1981 by a company then known as Aluminum Casement Limited. Further, his evidence was that the director (who was not named Kamau) created Casement Industries Limited. Further he had worked for 24 years and he was paid by vouchers he had given to his advocates. Further, the employment ended on 23.05.2005 when he sustained the injuries in issue. He denied that he was a sub-contractor working under the main contractor one John Were who had since died as at the time of hearing of the suit.

The Court has carefully considered the evidence. It is clear that the plaintiff, now respondent, failed to show that he was paid a wage or a salary. While alleging he was employed by the defendant in 1981, he admitted that the defendant did not exist in 1981 and he established no relationship between the defendant company and his alleged 1981 employer, Aluminum Casement Limited. The respondent gave no evidence about his supervisors that may have also been the appellant's employees. While admitting that he knew John Were whom he was working with as at the time of the accident, he did not offer evidence of the relationship between the said John Were and himself or the appellant. It was also clear from the evidence that the respondent alleged he was paid by vouchers in his advocates' custody but the same had not been produced or filed or the figure of the wage or salary stated. While testifying that he was promised terminal dues, there was no claim for such dues or evidence that the same had been paid. The Court has considered that analysis and returns that on a balance of probability, the appellant has established that the learned trial Magistrate erred in finding that the parties were in employer-employee relationship. Indeed, this Court returns that the appellant did not exist on the date of the alleged commencement of employment relationship between the parties,

the wage or salary due was not established at all, and the particulars and terms of the alleged employment and then termination of the alleged employment were not established at all.

To answer the **2nd issue** for determination, the Court returns that the learned Magistrate erred in stating that the defendant denied knowing the plaintiff because the defendant's witness admitted having known the plaintiff as a self-employed fitter and not his employee. The Court has revisited the record of the evidence by the defence witness (DW) one David Kamau. He stated, **"....I have come to know the plaintiff....I knew the plaintiff after the accident. The plaintiff was a freelance fitter..."** The Court returns as much.

To answer the **3rd issue** for determination, the Court returns that learned Magistrate erred in finding that payment of the plaintiff's medical bill inferred employment. As submitted for the appellant, the appellant offered an explanation on the circumstances of the payment. DW testified that he connected the respondent to John Were (deceased) and who had been given work to fit some windows. John Were (deceased) was not the appellant's employee. John being a contractor had assigned the respondent to work as at the time of the accident. John had called DW to request assistance from DW and DW rendered assistance resulting in a medical bill of Kshs. 150,000.00 which the appellant paid to be refunded by the said John. But John died in 2006. DW denied providing tools to John during John's undertaking of works but that the appellant manufactured and sold new aluminium ladders. The Court therefore returns that the learned Magistrate erred in finding that the payment of the medical bill established by inference, employer-employee relationship between the parties.

To answer the **4th issue**, the Court returns that as submitted for the appellant, the respondent had failed to establish the claims in the suit on a balance of probability as per the material on record before the trial Court.

To answer the **5th issue**, the Court returns that third party proceedings did not apply in the instant case as envisaged in Order 1 rule 15 of the Civil Procedure Rules and as submitted for the respondent because the purported third party John Were (deceased) had since died and further, it was not the appellant's case that John Were (deceased) was liable as the main contractor, but that the main contractor John Were (deceased) had sub-contracted (and not employed) the respondent.

In conclusion, judgment is hereby entered for the appellant against the respondent with orders:

- 1) The appeal is allowed with costs of the appeal to the appellant.
- 2) The judgment given on 13.10.2016 subject of the appeal together with the decree and all consequential proceedings flowing from the judgment and decree are hereby set aside.
- 3) The suit before the trial court and subject of the appeal is dismissed with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday 15th March, 2019.**

BYRAM ONGAYA

JUDGE