REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CIVIL APPEAL NUMBER 14 OF 2015

BETWEEN

RISING STAR COMMODITIES LIMITED…….....…… APPELLANT

AND

DANIEL AKWERA …….....…… RESPONDENT

[An Appeal from the Judgment and Decree of the Hon. Senior Resident Magistrates' Court at Mombasa [Mr. M.O. Kizito], dated 16th September 2010, in Civil Case Number 1761 of 2007]

BETWEEN

DANIEL AKWERA …….....…… PLAINTIFF

VERSUS

RISING STAR COMMODITIES LIMITED ……..... …….DEFENDANT

Rika J

Court Assistant: Benjamin Kombe

Kishore Nanji Advocate for the Appellant

Gachiri Kariuki & Company Advocates for the Respondent

JUDGMENT

1. The Respondent was a Plaintiff in Mombasa Senior Resident Magistrate's Court Civil Case Number 176 of 2007. He brought that Suit against his Employer, the Appellant herein, for work injury, claiming general damages; special damages; costs; interest; and any other suitable reliefs. He was granted general damages at Kshs. 65,000; special damages at Kshs. 5,000; costs; and interest.

2. The Appellant was dissatisfied with the Judgment of the Trial Court and filed Mombasa High Court Civil Appeal Number 222 of 2010, seeking to have the Judgment overturned. The Appeal was transferred by the High Court to the Employment and Labour Relations Court on jurisdictional grounds, and assigned the current registration number.

3. The Appellant lists 6 Grounds of Appeal which can be reduced to the following:-

- The Trial Court erred in law in not dismissing the Respondent's Action.
- The Trial Court erred in holding the Appellant liable on the ground that there was inconsistency between paragraph 4 of the Appellant's Statement of Defence and the evidence of DW1 and DW2.
- The Trial Court erred by failing to appreciate the exhibit produced by DW1.
- The Trial Court erred in both law and fact in finding the Respondent to have sustained injuries at the Appellant's premises.
- The Trial Court did not pay regard to the Respondent's failure to produce the initial treatment notes as exhibits.

4. The Appeal was heard on the 23rd June 2016. This is nearly 10 years after the original case was filed. The hearing date was taken with the consent of both Advocates. The Respondent did not however participate in the hearing.

5. The Appellant submits 2 issues arise in this Appeal: one, whether the Respondent was employed by the Respondent; and two, whether he was injured on the alleged date, in the course of employment.

6. Paragraph 3 of the Respondent's Plaint stated he was at all material times, employed by the Appellant. Paragraph 4 was that on or about 25th October 2005, he was loading bags of sugar when the pallet he was using crumbled, causing the Respondent to fall and sustain serious injuries.

7. The Appellant denied employing the Respondent at any material time, at paragraph 2 of the Defence. Paragraph 3 denied the injury. Cross-examined, the Respondent alleged he was treated on 25th October 2005. When shown the treatment notes, he accepted they indicated he was treated on 26th October 2005. If he had injuries on 25th October 2005, he would be expected to remember when, where and how he was treated.

8. The Respondent stated on cross-examination that he incurred Kshs. 10, on medical expenses. His Witness, Dr. Ashraph, accepted Kshs.10, was insufficient to cater for medical expenses. The Doctor told the Trial Court he relied on treatment notes prepared 2 years before. He did not see any injuries on the Respondent. No Witness was called from the treatment dispensary by the Respondent, to produce the treatment notes. The Appellant had questioned the genuineness of the treatment notes. It was incumbent upon the Respondent to call their author.

9. The Trial Court erred in holding there was inconsistency between the Appellant's pleadings and evidence. DW2 stated the Respondent never worked at the Appellant's premises on the material day. There was no inconsistency. The Trial Court relied on paragraph 4 of the Statement of Defence, which was to the effect that the Respondent caused or contributed to the occurrence of the workplace accident. This was stated without prejudice, a fact overlooked by the Trial Court in concluding there was inconsistency in the Appellant's position.

10. The Appellant had availed to the Court a list of all its Employees. The Respondent was not on the list. It was for the Respondent to prove he was an Employee of the Respondent. The Appellant relies on ***NAI Court of Appeal Civil Appeal Number 60 of 2003, between Malelu Muthama v. Kay Construction***

Company Limited, where it was held that the Employee must show he was in the employment of the alleged Employer, when he got injured.

11. As stated at the outset, neither the Respondent, nor his Advocates attended Court when the Appeal was heard. The Court does not have the benefit of hearing the Respondent's position on the Appeal. Based on the record and the submissions made on the part of the Appellant, ***the Court Finds:-***

i. The Appellant denied in its Statement of Defence, that the Respondent was its Employee. The 2 Witnesses who gave evidence for the Appellant, denied that the Respondent was Appellant's Employee at any material time. Lists of Casual Employees who were engaged by the Appellant on the material day were availed to the Court. Once the fact of employment was denied by the Appellant, it fell upon the Respondent, before all else, to establish that he was engaged by the Appellant as a Casual Loader, on the 25th October 2005.

ii. Cross-examined, the Respondent told the Trial Court he did not have any document to show he was engaged by the Appellant on the 25th October 2005.

iii. The Trial Court found in favour of the Respondent, on the question whether the Respondent was employed by the Appellant. The finding was based on paragraph 4 of the Statement of Defence, which stated the accident was caused or contributed to by the negligence of the Respondent. The Court agrees with the submission of the Appellant that the Trial Court erred in law and fact by holding a statement made without prejudice, and as an alternative line of defence, to be an admission that the Respondent was an Employee of the Appellant. In the view of this Court, the Appellant was merely giving an alternative line of defence in event the Respondent surmounted the first hurdle of establishing he was an Employee of the Appellant. The alternative line of defence was clearly stated to be without prejudice.

iv. The evidence of DW1 and DW2 that they did not know anyone called Daniel Akwera, hired by the Appellant on 25th October 2005, should therefore not have been affected by the contents of paragraph 4 of the Statement of Defence. It was for the Respondent to show he was employed by the Appellant and was injured in the course of work.

v. The Court of Appeal in ***Malelu Muthama v. Kay Construction Company Limited*** endorses the position that the Employee must prove the fact of employment, where in particular employment has been denied by the alleged Employer. In the case which gave rise to the above cited Appeal, the Administrative Manager of the Employer had produced computer print outs of all their Employees, in which the Claimant Employee's name was missing. It was a case similar to the one before this Court, where Casual Worker lists did not have the name Daniel Akwera. The Court fully adopts the principle in ***Malelu Muthama v. Kay Construction Company Limited.***

vi. Other grounds of Appeal are peripheral but not without merit. The Respondent claimed he was treated on 25th October 2005. The treatment notes showed treatment was on 26th October 2005. He told the Trial Court he incurred a shockingly small sum of Kshs. 10 in treatment, a figure which astounded even his Witness Dr. Ashraph. The Witnesses for the Appellant testified their Employees who were injured in the course of duty were normally referred to Aga Khan Hospital for treatment. The Respondent was treated at a backstreet dispensary. The authenticity of the treatment notes was disputed by the Respondent. The treating Witness was not called to vouch for the treatment notes. The medical report was prepared by Doctor Ashraph based on the disputed treatment notes, and years after treatment. The Doctor himself told the Court he did not notice any scar on the Respondent's shoulder. These pieces of evidence raised issues of truthfulness, credibility, consistency and reliability, on the part of the Respondent and his entire case. They, seen together with the main issue concerning his employment as at the time he alleges to have been injured at work, convinces this Court that there were fundamental flaws in the Judgment of the Trial Court. ***The Appeal has merit and is allowed, with no order on the costs***.

Dated and delivered at Mombasa this 29th day of September 2016

James Rika

Judge