



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

(BIMA TOWERS)

APPEAL NO. 2 OF 2013

(ORIGINALLY MOMBASA HIGH COURT CIVIL APPEAL NO. 206 OF 2010)

**APPEAL FROM THE JUDGMENT OF HON T. GESORA, SENIOR RESIDENT MAGISTRATE
IN MOMBASA RMCC NO. 2886 OF 2007, *BENSON NYAGA NJUE V BLUE CAT PORT
SERVICES.***

BLUE CAT PORT SERVICES

APPELLANT

V

BENSON NYAGA NJUE

RESPONDENT

JUDGMENT

1. Benson Nyaga Njue (Respondent) sued Blue Cat Port Services (Appellant) in the Resident Magistrates Court sometime in 2007 seeking general damages, special damages, costs and interest arising out of injuries sustained in the course of work. It was pleaded that the Appellant had been negligent.
2. After trial, the trial Court pronounced judgment on 13 September 2010 and found the appellant 100% liable and awarded the Respondent Kshs 400,000/- general damages and Kshs 5,000/- special damages plus costs.
3. The Appellant being dissatisfied with the decision lodged an appeal in the High Court of Kenya at Mombasa and set out some 9 grounds of Appeal.
4. On 11 June 2013, Odero J. ordered that the Appeal be transferred to the Industrial Court of Kenya at Mombasa because the cause of action arose in the course of employment relationship. The 2010 Constitution had granted exclusive jurisdiction to the Industrial Court to deal with employment disputes.
5. The Appellant had filed written submissions on 5 December 2012 and the Respondent on 4 December 2012 and I therefore directed the parties to highlight the submissions on 11 November 2013. This was duly done.
6. Some of the 9 grounds of appeal are similar and therefore I will discuss them together.

Grounds 1, 7 and 8

7. The Appellant challenges the trial Court's findings and holdings that the Respondent was an employee of the Appellant, was in possession of a movement pass and, that the Appellant had an onus to disprove that the Respondent was its employee.
8. The Appellant's case and submission is that the Respondent's name did not appear in the daily/weekly list of casuals for the period when the accident allegedly occurred and as such was

- not an employee. The Appellant further submitted that section 107(1) and 109 of the Evidence Act were implicated. In short, it is submitted that it was upon the Respondent to prove the existence of facts which demonstrated that he was an employee of the Appellant.
9. The Respondent gave sworn testimony before the trial Court and stated that he had been employed by the Appellant as a casual turn boy and that he was issued with a movement pass number 044 (Pexh 1). The Appellant had objected to the production of the movement pass because it did not bear the name of the Respondent, but the objection was overruled. The Respondent in cross examination stated that he had worked as a turn boy for about 5 months and he even gave the name of his supervisor as Adam.
 10. The said Adam testified on behalf of the Appellant and he produced the daily/weekly casuals list (*Dexh 1*) and payment sheets (*Dexh 2*). The Respondent's name was not in the lists. He denied knowing the Respondent. He further stated that the Appellant's employees normally signed on a paper when they got paid and the paper would be retained.
 11. I have reviewed *Dexh 1* being the Appellants SOGIS (Casual Labour) Intake Form and the SOGIS Duties (Casual Labour) Payment Sheets. The Intake Form at pages 23-24 relate to Gang No. 2 under Robinson M. Aluoch for 9 February 2007. The Payment Sheet at page 25-26 relate to night shift payment for 9 February 2007. The Intake Form at pages 27-28 relate to Gang No. 1 under Godfrey O. Oluoch for 9 February 2007 night shift. The payment sheet at pages 29-30 relate to night shift for 9 February 2007. The Intake Forms at pages 31, 35, 39, 43, 47 and 51 relate to Gang 1 under Godfrey Oluoch for 9 February 2007, Gang No. 4 under John Makhoha for 9 February 2007, Gang No. 3 under James Nasiema for 9 February 2007, Gang No. 1 (night shift) under Caleb Omondi for 10 February 2007, Gang No. 2 (night shift) under Maurice Auma for 10 February 2007 and Gang No. 1 (day shift) under Richard Obimo for 10 February 2007 respectively. The requisite payment sheets were also produced.
 12. The evidence of the Respondent was that he was working on 10 February 2007 under a supervisor called Adam. It is apparent that the Appellant operated at least four gangs on 9 February 2007. The Court notes that the Intake Forms for the gang working under the said Adam on 9/10 February 2007 were not produced nor was there a denial that he was a supervisor.
 13. Ordinarily within the employment relationship/factory set up, it is the employer who keeps and maintains records. Section 38 of the Employment Act, cap 226 (now repealed was to the same effect).
 14. The Appellant's objection to the movement pass produced by the Respondent was that it did not have a name. But the Appellant in objecting to the same had a legal obligation to show what type of passes it was issuing to its employees and what features such passes had. It did not produce such before the trial Court.
 15. In my view, the trial Court came to a correct finding that the Respondent was an employee of the Appellant and these grounds of appeal must fail.

Grounds 3, 4, 5 and 6

16. Grounds 3, 4, 5 and 6 relate to the finding and holding on liability. The thrust of the Appellant's Defence and submissions on these grounds appears to be that the Respondent not being an employee of the Appellant at the material time could not have been injured as alleged and that the exact time and venue of the accident was not stated in the pleadings and evidence. It is submitted that if there is a finding in favour of the Respondent on liability, it should be on the basis of 50% contributory negligence.
17. In examination in chief, the Respondent stated that the accident occurred on 10 February 2007 at a go down within terminal 2 when a sack *which was on the roller that conveys sacks fell on me* while in the Plaintiff it was pleaded that an *entire stack of sacks negligently and/or carelessly arranged by the defendant's servant and/or agent disintegrated and fell on the plaintiff*.
18. The Appellant finds fault with the discrepancy as between the pleadings and the testimony.
19. It is true that the Plaintiff was inelegantly drafted but the apparent discrepancy is not of such a magnitude to lead to a conclusion that there was no accident causing injuries to the Respondent.
20. In the view of the Court, the clue to unraveling the question of liability is to examine the particulars of negligence set out in the Plaintiff and the evidence from both parties. The Respondent pleaded that the Appellant failed to provide a safe system of work, exposed the Respondent to

- risk, failed to provide protective gears and failed to take reasonable precautions for the safety of the Respondent.
21. To buttress its pleadings regarding the Appellant's culpability, the Respondent stated in examination in chief that he blamed the Appellant for exposing him to danger and for not providing safety gear. In cross examination, the Respondent stated that he did not ask for safety gear.
 22. It is unfortunate that the parties did not adequately address the issue of negligence before the trial Court. The only evidence is that the Respondent was not issued with safety gear and that he did not ask for the same.
 23. Despite the observation, it is the responsibility of an employer to provide an employee with safety gear and not wait for the employee to ask for the same (see *Mumende v Nyalii Golf & Country Club* (1991) KLR 13 relied on before the trial Court).
 24. The parties in this case did not interrogate before the trial Court the type of safety gear which should have been provided and how such gear would have prevented the accident.
 25. Further, the Appellant did not provide any evidence of the safety systems it had put in place as required by the Factories Act (now repealed). Nor did it plead in the alternative any contributory negligence on the part of the Respondent. The submissions on this aspect have no foundation.
 26. In the circumstances, the Court is unable to interfere with the trial Court's finding on liability.

Grounds 2 and 9

27. The Appellant challenges the award of Kshs 400,000/- general damages and Kshs 5000/- special damages as excessive.
28. The special damages consisted of Kshs 3000/- for doctor's expenses and Kshs 2000/- for medical report as claimed in the Plaint. The Appellant has not demonstrated why the Court should interfere with the award.
29. On general damages, the Appellant has submitted that it submitted before the trial Court that an award of Kshs 200,000/- would have been sufficient.
30. Before the trial Court, the Respondent cited and relied on the case of *Jackson Radoli v Systematic Suppliers Co Ltd*, Mombasa High Court Civil Case No. 925 of 1991 (judgment on 2 August 1995) where the Plaintiff had sustained a fracture of the left tibia/fibula and was awarded Kshs 490,000/- as general damages for pain and suffering and loss of amenities.
31. The Appellant on the other hand cited and relied on the cases of *Ruth Kadide Mwakuwanda v Danida/PIV Project & Another*, Mombasa High Court Civil Case No. 64 of 1993 (judgment in 1994) where the Plaintiff was awarded Kshs 130,000/- general damages for pain, suffering and loss of amenities for comminuted fracture of the right tibia; *Joseph Masese v Peter Wanganga*, Nairobi High Court Civil Case No. 2927 of 1990 (judgment in 1994) where the Plaintiff was awarded Kshs 140,000/- for fracture of the left tibia and *Mulwa Musyoka v Wadia Construction*, Nairobi High Court Civil Case No. 1321 of 1997 (judgment in 2004) where the Plaintiff was awarded Kshs 150,000/- general damages for pain, suffering and loss of amenities for fracture of the left femur.
32. Out of the case law cited by the parties before the trial Court, the most recent was the judgment in the *Wadia Construction* case in 2004. The decision under challenge was pronounced in 2010. None of the parties saw it necessary to cite to the Court more recent/updated authorities where similar injuries had been sustained.
33. In conclusion, therefore the Court finds no material reason to interfere with the award of the trial court. The upshot is that the Appeal by the Appellant against the decision of Hon T. Gesora delivered on 13 September 2010 is dismissed with costs of the Appeal to the Respondent.
34. If the decretal sum was deposited in a joint interest earning account as consented to by the parties on 8 October 2010 it should be released to the Respondent and or his Advocates.

Delivered, dated and signed in open court in Mombasa on this 21st day of March 2014.

Radido Stephen

Judge

Appearances

Mr. Oduor instructed by Omondi Waweru

& Co. Advocates

for Appellant

Mr. Chekaka instructed by Gachiri

Kariuki & Co. Advocates

for Respondent