



**China National Aero-Technology International Engineering Corporation v Mbui & another
(Suing as the Administrators of the Estate of the Late George Ojwang Juma - Deceased)
(Civil Appeal E184 of 2021) [2024] KEHC 538 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E184 OF 2021

DAS MAJANJA, J

JANUARY 31, 2024

BETWEEN

**CHINA NATIONAL AERO-TECHNOLOGY INTERNATIONAL
ENGINEERING CORPORATION APPELLANT**

AND

NANCY ADHIAMBO MBUI 1ST RESPONDENT

GORDON OMOLLO JUMA 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE GEORGE
OJWANG JUMA - DECEASED**

*(Being an appeal from the Judgment and Decree of Hon. E.Wanjala, PM dated 12th March
2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. 6958 of 2018)*

JUDGMENT

Introduction and Background

1. This is an appeal against the judgment of the Subordinate Court finding the Appellant 100% liable for fatal injuries the Deceased sustained at the Appellant's construction site situated near Old Mathare Primary School. It awarded the Respondents Kshs. 120,000.00 for general damages, Kshs. 3,675,480.00 for loss of dependency, costs and interest.
2. In their case before the Subordinate Court, the Respondents claimed that the Deceased was employed by the Appellant at his construction site as an electrician. That it was an express or implied term of the employment contract that the Appellant would take all responsible precaution for the safety of the Deceased and not to expose him to the risk of damage or injury which it knew or ought to have known.



- That it was required to provide a safe and proper system of working in order to enable him carry out his work in safety and also provide effective supervision of the same.
3. The Respondents averred that on 12.01.2017, while in the course of the said employment, the Deceased fell from a defective ladder causing him fatal injuries. As a result of the Appellant's negligence and/or breach of duty, the Respondents sought damages under the *Law Reform Act* (Chapter 26 of the Laws of Kenya) and *Fatal Accidents Act* (Chapter 32 of the Laws of Kenya), special damages and funeral expenses of Kshs. 1,325.00, costs and interest.
 4. In its response, the Appellant denied that it knew the Deceased or employed him at the construction site. It blamed the electrical sub-contractor for the accident as it was responsible for the workmanship on the site and for observing safety measures while on the site. The Appellant averred that it was the sub-contractor who had employed the Deceased was responsible for supervising, instructing and paying his employees including the Deceased and thus solely responsible for the Deceased's fatal injuries.
 5. The Appellant averred that it reported the accident to the police and notified the Director of Occupational Health and Safety. That the independent sub-contractor equally notified the office of the accident and that purely on basis of goodwill and humanitarian grounds, the Appellant opted to assist the family of the Deceased with burial plans by contributing Kshs. 200,000.00. The Appellant reiterated that it never employed the Deceased at any time, a fact that was borne by its payment records for the period of May and June 2016.
 6. The matter was set down for hearing where the Deceased's wife and one of the Respondents, Nancy Adhiambo Mbui (PW 1) testified. The Appellant called its Human Resource Officer, Joseph Mathenge Kamau (DW 1). In its judgment rendered on 12.03.2021, the trial court identified three issues for determination; whether the Deceased was an employee of the Appellant, who was liable for the accident and the quantum of damages, if any.
 7. On the Deceased's employment with the Appellant, the trial court held that since the Appellant did not plead the issue of forgery of the employment documents, it would not deal with it but based on the documentary evidence presented by both parties, it was convinced that the Deceased was an employee of the Appellant. The court held that the Appellant did not present any evidence to demonstrate that the Deceased was an employee of the sub-contractor. That since the Appellant is the one who introduced the aspect of the third party through a sub-contract to which the Deceased was not a party to, then the burden was on to it to prove that the Deceased was employed by the sub-contractor and as such, it should have applied to join the subcontractor to the proceedings. The trial court held that the Appellant had not challenged that it breached the duty of care that it owed to the Deceased by assigning him a defective scaffolding ladder which caused him to fall to his death. It further held that there was no evidence to show that the Deceased contributed to the occurrence of the accident hence the Appellant was fully liable for the accident.
 8. On quantum of damages, the trial court awarded Kshs. 20,000.00 for pain and suffering as the Deceased died on the spot based on *M N (suing on behalf of a minor, L K, Deceased) v Paul Kiptoo* [2016]eKLR. The court awarded Kshs. 100,000.00 for loss of expectation of life as the Deceased was aged 41 years based on *Bendeta Wanjiku Kimani v Changwon Cheboi & another* [2013]eKLR. In determining the damages for loss of dependency, the trial court relied on the payroll form to find that the proposed salary therein was Kshs. 30,629.00. It applied a multiplier of 15 years taking into account the Deceased's age at the time of death and that the retirement age in Kenya is 60 years. In support of the 2/3 dependency ratio, it accepted the chief's letter produced as proof that the Deceased was married with three children.



The Respondents were thus awarded Kshs. 3,675,480.00 calculated as follows: Kshs. 30,629 x 12 x 15 x 2/3. The court declined to award special damages for lack of proof.

9. Based on the decision I have outlined, the Appellant grounded its appeal on the memorandum of appeal dated 08.04.2021. The appeal has been canvassed by way of written submissions which are on record and which I shall make relevant references to in my analysis and determination below.

Analysis and Determination

10. The role of the first appellate court is settled. It is to independently re-evaluate the evidence before the court of first instance and reach its own conclusions keeping in mind the fact that the trial court interacted first hand with the parties (see *Selle v. Associated Motor Boat Co.* [1968] EA 123).
11. The Appellant is aggrieved with the trial court's findings on its employment relationship with Deceased, its liability and the award for loss of dependency. On the Deceased's employment, the Appellant submits that the trial court ignored compelling evidence which proves that the payroll and the employee application form relied upon by the Respondents were forgeries. That there was no evidence to show that the Deceased's employment application was ever received and/approved, that the Deceased had signed an alleged contract with the Appellant which was in the Respondent's house but was conveniently not filed before court, that the payroll does not bear the approval of the Appellant, that the NSSF number appearing on the payroll was different from the one indicated in the employment application form, that the payroll was not stamped by the Appellant as is the case with all its salary sheets, that the KRA PIN number appearing on the pay slip belongs to James Kinyanjui and not the deceased, that the Respondents did not adduce any evidence to confirm whether the account number provided in the payroll belonged to the deceased, that much as the payroll and the application form have the Appellant's name written on them, they did not originate from the Appellant, that the Appellant's employees' approved records for the months of May, June and December 2016 and January 2017 do not include the Deceased's name and that the salary sheets were approved by the bank, and salaries were paid via the respective cheques and there is no complaint from any employee over non-payment of their salaries. The Appellant submits that it is incomprehensible how despite the foregoing irregularities and inconsistencies in the Respondents' documents, and the proof of forgery, the court proceeded to find that the deceased had been employed by the Appellant.
12. The question of whether the Deceased was an employee was one of fact and was dependent on the evidence on record. Section 107(1) and (2) of the *Evidence Act* (Chapter 80 of the Laws of Kenya) provides that, "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist," and that, "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". Section 109 therein goes further to stipulate that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence.
13. The assertion that the Deceased was an employee of the Appellant was made by the Respondents. To prove this, the Respondents produced an Employee application form under the Appellant's letterhead signed by the Deceased on 06.05.2016 and a payroll form that indicated that his net pay was Kshs. 30,629.00. The Appellant has termed these forms as forgeries that were full of inconsistent information. Let me first state that I agree with the Appellant that contrary to the lower court's findings, the Appellant indeed pleaded that these documents were forgeries at para. 3 of the its Statement of Defence. However, allegations of forgery must not only be pleaded but proved and to a standard higher than a balance of probabilities which is the civil standard of proof (see *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, *Kinyanjui Kamau v George Kamau* [2015] eKLR). The Appellant's contention that



the said forms were forgeries because the entries therein were inconsistent or incorrect or that they bore no stamp was not sufficient to prove that they were forgeries. DW 1 admitted in his testimony that the said forms were under the Appellant's letterhead and that the same were to be filled and returned to the Appellant. If I understand the Appellant correctly, all they were disputing is that they were not filled by the Deceased and returned to the Appellant for approval. They did not really dispute the forms themselves. With this admission alone, I find that the said forms produced by the Respondents were not forgeries as claimed by the Appellant. The incorrect or inconsistent information in the forms or absence of a stamp therein do not negate the fact of the forms' existence and genuineness. As the court stated in *Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan]* ML HCCC No. 571 of 2015 [2017] eKLR, ".....not all agreements need be in writing. An agreement will be deemed duly formed and binding where the consideration is present and accepted having been offered. An agreement need not be in any special form or in writing unless statute expressly provides for it: see for example the *Law of Contract Act* (Cap 23), the Hire Purchase Act (Cap 507), the *Bills of Exchange Act* (Cap 27) and the *Marine Insurance Act* (Cap 390). Where therefore parties reach an agreement on all the terms of contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is essential is the legal minimum to create a contract. These are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. The reason is that the law does not require commercially sound terms or sensible terms. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain." It is also trite that an employment contract may be oral as provided under section 2 of the *Employment Act*.

14. In any event, even with the Appellant's denial of the Deceased's employment, it does not dispute that he was working at its site at the time of the accident. However, it introduced an assertion that the Deceased, though employed at its site, was actually an employee of its sub-contractor. With this introduction, I agree with the trial court that the onus fell on the Appellant to prove that indeed the Deceased was employed by the sub-contractor. The Appellant admitted in its evidence that it could not prove that the Deceased was employed by the sub-contractor. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings (see *CMC Aviation Ltd v Cruisair Ltd. (NO. 1)* [1978] KLR 103; [1976-80] 1 KLR 835). In the absence of such evidence and with the employment forms not being satisfactorily challenged, I cannot fault the trial court for reaching a conclusion that the Deceased was indeed employed by the Appellant and not the sub-contractor. This ground by the Appellant fails.
15. Turning to the issue of liability, the Respondents' claim that the Deceased fell off a faulty ladder at the Appellant's site was not controverted. The Appellant did not lead any evidence that the said ladder was issued by anyone else other than the Appellant. There was also no evidence that the Deceased contributed to the accident. While it is true that the mere occurrence of an accident does not automatically make an employer liable, an employer has the duty of ensuring that the working environment is quite conducive and does not expose any employee to the risk of injury. Any accident which occurs during the course of employment and which cannot be attributed to the employee's own negligence will normally call into question the employer's working environment (see *Twiga Construction Company Limited v Vincent Muruli NRB HCCA No. 526 of 2017* [2021] eKLR). For these reasons, I find that the Subordinate court did not err in finding the Appellant fully liable.
16. Turning to the issue of damages, it is trite that an award of damages is an exercise of discretion of the court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure (see *Butt v Khan* [1978] eKLR). In awarding damages



for loss of dependency, the trial magistrate used the multiplier approach in arriving at the ultimate amount. The court correctly adopted the net pay of Kshs. 30,629.00 as the multiplicand as evidenced by the employment form produced by the Respondent. The multiplier and dependency ratio, being grounded on fact, were also reasonable and in exercise of sound discretion in the circumstances as they were reflective of the evidence of the age of the Deceased, the size of his family and the unchallenged evidence that he was the sole breadwinner. This ground by the Appellant also fails.

Disposition

17. It is evident from the findings above that the appeal lacks merit. It is dismissed. The Appellant shall pay the Respondents costs of the appeal assessed at Kshs. 80,000.00.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

JUDGE

Mr Kibore instructed by Lesinko Njoroge and Gathogo Advocates for the Appellant.

Mr Kiptanui instructed by Waiganjo Wachira and Company Advocates for the Respondent.

