REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

ELRC APPEAL NO. 259 OF 2018

(Before D.K N. Marete)

GITAU NGERO.....PLAINTIFF

VERSUS

DAVID KIMOLI MELI.....DEFENDANT

JUDGEMENT

This matter is originated by way of Memorandum of Appeal dated an appeal dated 5 th November, 2013. It comes out as follows;

1. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the Respondent had failed to proof his case to the required standard and further dismiss his case with costs to the Appellant.

2. THAT the learned trial magistrate erred in law and fact in falling to make a finding that the Respondent was not an employee of the Appellant.

3. THAT the learned trial magistrate erred in law and fact in failing to make a finding that the Appellant did not own cluff-cutter machine nor a maize plant in which the Respondent was allegedly cutting on the material day of the accident.

4. THAT the learned trial magistrate erred in law and fact in holding the Appellant 80% liable for the alleged accident whereas there was no sufficient evidence to that effect.

5. THAT the learned trial magistrate erred in law and in fact in holding the Respondent 20% liable for the accident instead of holding him wholly liable for the alleged accident.

6. THAT the learned trial magistrate erred in law and fact in disregarding the evidence of the Appellant on record hence resulting to a wrong decision.

7. THAT the learned trial magistrate erred in law and fact by falling to find that the evidence on record and the pleadings were at variance.

8. THAT the learned trial magistrate erred in law and fact in falling to take account of consideration of which she should have taken account.

9. THAT the learned trial magistrate erred in law and fact in awarding the Respondent special damages of Ksh. 30,000/= that was not specifically pleaded in the plaint and proved to the required standard in law.

10. THAT the trial magistrate erred in law and fact in making an award in general damages of Kshs. 250,000/= that was so excessive as to amount to an erroneous estimate of loss or damage.

11. THAT the learned trial magistrate erred in law and fact by overly relying upon the evidence of the Respondent which was not proved when awarding damages.

12. THAT the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.

13. THAT the learned trial magistrate erred in law and fact by overlying on the Respondent's submissions and legal authorities which were not relevant and without addressing her mind to the circumstances of the case.

14. THAT the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.

He prays as follows;

i. The appeal herein be allowed

ii. The judgment of the lower Court delivered on 7/10/2013 be set aside.

iii. The Respondent to pay costs in the lower Court and in this particular appeal.

The respondent in his written submission dated 10th December, 2018 rubbishes the appeal and avers that its lacks merit and should be dismissed with costs.

The issues for determination therefore are;

1. Whether the Respondent was an employee of the Appellant"

2. Whether there was any breach by the Appellant occasioning the Respondent injuries"

3. Whether the learned magistrate erred in awarding the plaintiff a sum of Ksh. 30,000/= as special damages without being pleaded and proved to the required standard of the law"

4. Whether the learned trial magistrate's decision ought to be disturbed and substituted with a proper filling"

The 1st issue for determination is whether the respondent was an employee of the appellant"

The appellant in his written submission dated 11th December 2018 submits that the respondent does not meet the criteria of an employee as is stipulated in the Employment Act, 2007.

This calls for a valid employment contract or written in all cases of employment. On this the appellant submitted as follows: -

"… He did not state when he was employment by the appellant and if so what were the terms of their employment contract and further the nature of the employment contract.

…, the appellant hereby wishes to draw this court's attention to the requirements of a contract of service as set out in Section 9 and 10 of the Employment Act, 2007. The provision thereto is basically that a contract of service for a period or a number of working days which amount in the aggregate to or equivalent of 3 months or more or that which provides for the performance of any specified work which could not reasonably be expected to be completed within a period….. or equivalent of 3 months shall be in writing.

…, Section 10 is distinct as it requires that an employee being a party in an employment contract ought to know his/her place of work hours, of work, form and duration of the contract, the remuneration, job description etc."

The respondent answers this issue for determination as a by the way in his analysis of his cardinal issue as to whether the respondents case was proved on a balance of probability. It's his submission that on the material day, 22nd September, 2005 he was present on duty cutting maize stalks using a grading machine. This is despite the fact he was employed by the appellant as a driver. The appellant had instructed him to place maize stalks into the grinding machine so that he could feed them on his cattle. He did not know how to operate the machine but had to pursue his employer's instructions thereby getting cut or injured on his left third (3rd) and fourth (4th) fingers.

The respondent further submits that the appellants did not in any way dispute or controvert his evidence on employment or injuries and therefore cannot do this on the eleventh hour. Further, the documents relied on and adduced by the appellant go out to advance the case that he (appellant) had been rightly sued.

This issue tilts in favour of the respondent. A case of no proof employment as submitted by the appellant is not sustainable. The respondent proved a case of employments on a balance of probabilities and I hold as such.

The 2nd issue for determination is whether there was any breach by the appellant occasioning the Respondent injuries" Here, the appellant reiterates and submits his case that the respondent was not his employee. He submits that on an issue negligence, there must be a corresponding duty of care on part of the part owing this duty of care to the other. He denies that in the instance case, this existed inter parties and possess, *how did he find himself at the grass cutting session"* This is answered by his submission that indeed it is the respondent who was in breach.

The appellant further submits in reliance of sections 107, 108 and 109 of the Evidence Act, chapter 80, laws of Kenya which sets out the parameters of burden of proof and allocates this to the respective parties in these proceedings. He submits that the respondent has fallen short of proving his case and therefore should lose it.

I do not agree with the appellant. To me, and accordance with the respondent's submissions, the respondents stated his case and proved it on a balance of probabilities. In any event, it is as simple.

The respondents sustained injuries on duty on the instructions and employment of the appellants. What further proof need he raise" On this kind of case, it was the appellant's onus to disapprove or rebut the case of the respondent. A case of negligence therefore ensued and the lower court was right in so finding.

The 3rd issue for determination is whether the learned magistrate erred in awarding the plaintiff a sum of Ksh. 30,000/= as special damages without being pleaded and proved to the required standard of the law" The appellant submits that the respondent pleaded for special damages as follows:-

(a) Medical report.…… Ksh. 2000/=

(b) Other medical expenses to be adduced and proved during the hearing hereof.

He therefore discounts the award of Ksh 30,000/= as special damages and submits that if at all the respondent should only have been awarded an amount of Ksh 2000/= subject to the requirements of the Stamp Duty Act.

The respondent did not address this issue in his written submission. However, its notable that during the trial the respondent during the trial adduced evidence on various medical examinations carried out on him and testified that he paid Ksh 30,000.00 for them. He produced a receipt, PMF I 5(b) in evidence, this, coupled with his plea at (b) above is to me adequate plea and satiates the appellants fears and adverse submission. The award of Ksh 30,000.00 by the lower court was therefore justified and in order

The 4th issue for determination is whether the learned trial magistrate's decision ought to be disturbed and substituted with a proper filling. The findings of the other issues above analyzed clearly brings out the answer to this. The appellants case and appeal collapse by the wayside. The appeal is not sustainable, or at all. The learned trial magistrate's decision remains sacrosanct and takes its way. Its unshakeable and not material for any disturbance or substitution.

I am therefore inclined to dismiss the appeal with costs to the appellant. The appellant shall bear the costs at the lower court and this appeal.

Delivered, dated and signed in this 20th day of December 2018

D.K. Njagi Marete

JUDGE

Appearances;

1. Mr. Oribo instructed by Omwenga & Company Advocates for the appellants

2. Mr. Mbabu instructed by Kitiwa & Company Advocates for the respondents