



Case Number:	Civil Appeal 67 of 2009
Date Delivered:	22 Dec 2016
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Abida Ali-Aroni
Citation:	George Wamalwa John v Ellis Ominde T/A Marrel Academy [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered in favour of the appellant
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL APPEAL NO. 67 OF 2009**

**[Being judgment arising from Bungoma CM'S civil case**

**No. 67 of 2009**

**GEORGE WAMALWA JOHN.....APPELLANT**

**VERSUS**

**ELLIS OMINDE t/a MARREL ACADEMY.....RESPONDENT**

**JUDGEMENT**

1. This is an appeal arising from the judgment of Hon. F. Kyambia RM in Bungoma CMCC No. 67 of 2009. In the said suit the appellant **George Wamalwa John** had sued **Ellis Ominde t/a Marell Academy** for damages arising from an accident involving the plaintiff as he constructed pit latrine at the defendant's school citing breach of duty of care by an employer to an employee and seeking for special and general damages.

2. The appellant filed suit vide a plaint dated 10<sup>th</sup> March, 2007 where he cited particulars of negligence.

3. In a statement of defence dated 30<sup>th</sup> March, 2007 the defendant denied the allegations of negligence and the injuries sustained. In the alternative he pleaded that if any injuries were sustained at all, it was due to the appellant's own negligence. He sought to have the plaint dismissed.

4. The trial court upon hearing the parties found that the appellant had not proved his case on a balance of probabilities and dismissed the case.

5. Being dissatisfied with the judgment the appellant preferred this appeal on the grounds that;

i. The learned trial Magistrate erred in both fact and law in dismissing the appellants claim without regard to the testimony and submissions on record.

ii. The honorable Magistrate erred in law and fact when presiding over a matter that was not properly transferred to him by the Resident Magistrate.

iii. That the Honorable learned trial Magistrate erred in fact when he held that a mere signing of the workman compensation forms by the respondent was not evidence of negligence.

iv. The honourable learned trial Magistrate erred both in law and fact when he failed to hold that the place where the accident occurred was exclusively owned/managed and supervised by the respondent.

v. The learned trial Magistrate erred in law and fact when he failed to take into consideration the fact that equipment and tools that the appellant used in carrying his work were provided for and supplied by the respondent.

vi. The learned trial Magistrate erred both in law and fact when he failed to appreciate that the appellant was injured and he suffered damages while at the respondent's place for the benefit of the respondent.

6. The appellant's counsel filed his written submissions on 11<sup>th</sup> May, 2015 and also submitted orally at the hearing of the appeal.

7. The respondent relied on oral submissions at the hearing.

8. This being the first appellate court it has to consider the evidence afresh; analyze and evaluate the same in order to arrive at an independent decision see **Selle vs. Associated Motor Boat Company Ltd. [1968] EA 123.**

9. **PW1 George Wasilwa John** testified that he was employed by the defendant at his business premises known as Marell Academy in Bungoma and on 15.8.2005 while he was working on plastering a septic tank with others including **PW2** and one Rogers Kadenya. While inside the pit with **PW2**, Rogers Kadenya dropped mortar in a bucket weighing about 20kg, which hit the plaintiff who lost consciousness and found himself at the Bungoma District Hospital where he was admitted between the 15<sup>th</sup> of August, 2005 and 21<sup>st</sup> August, 2005. That he paid kshs. 1,540/= as charges. He was later examined by Dr. Mulianga Ekesa and paid Kshs. 2,000/= for the report. He earned kshs. 250/= a day. After the injury his employer sent him to the labour office and filled the Workman Compensation. He received injuries on the head, right shoulder and neck. He blamed his employer for failing to avail proper working gear. He was not permanently employed as he received his dues weekly. He was not an independent contractor.

10. **PW2 Chrispinus Okumu Wanjala** He is a mason and known to the appellant and the respondent the owner of Marrel Academy where they were constructing a pit latrine.

He recalled that on 15.8.09 at about 9.00 a.m. he was with the appellant in the pit as they were plastering the wall, they were on different sides. He was engaged by Marell Academy on weekly basis so was the appellant. Mortar was being lowered down the pit using a rope, the bucket hit the appellant on the back and he lost consciousness. They removed the appellant from the pit and took him to hospital where the respondent's wife worked. The rope cut because it was weak further they had not been supplied with protective gear by the respondent. The appellant could not have prevented the accident as he was hit on the back. They supervised themselves. He was called for the job by the appellant. The appellant would receive money from the respondent and transmit to them.

11. **PW3 Dr. Mulianga Egesa**, works for Bungoma District Hospital and consults on the side. He examined the appellant on 15.8.2005. He found that appellant had sustained injuries to the lower back and right shoulder joint.

On examination the appellant complained of pain in areas of injury, he had sustained no fracture. He formed the opinion that the injuries were soft tissue and expected the appellant to heal with time. He charged kshs. 2000/=. He also filed the Workman Compensation form.

12. On his part the respondent Ellis Ominde admitted being the owner of Marrel Academy but denied knowing the appellant. He also admitted that pit latrines were being constructed at the site. However he contended that one Rogers Kadenya had been introduced to him and he had entered into a verbal agreement with him. He paid a deposit and supplied material and tools. He denied having contracted the appellant. He paid money to Kadenya who in turn employed the appellant. He further contended that Kadenya was responsible for injuries of any of the people he employed. As regards the stamp and



Medical report	<u>Kshs. 2,000/=</u>
<b>Total</b>	<b><u>Kshs. 152,000/=</u></b>
Less 40%	<u>Kshs. 60,800/=</u>
<b>Total</b>	<b><u>Kshs. 91,200/=</u></b>

ii. Costs of the trial and the appeal.

iii.

**DATED at BUNGOMA this 22nd day of DECEMBER, 2016.**

**ALI-ARONI**

**JUDGE.**



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