Case Number:	Appeal 3 of 2019
Date Delivered:	07 Aug 2020
Case Class:	Civil
Court:	Employment and Labour Relations Court at Machakos
Case Action:	Judgment
Judge:	Maureen Atieno Onyango
Citation:	Colour Packaging Limited v Julius Nyerere Musili [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	Hon. C. Oluoch - SPM
County:	Machakos
Docket Number:	-
History Docket Number:	Civil Case 298 of 2016
Case Outcome:	Appeal dismissed.
History County:	Machakos
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MACHAKOS

APPEAL NO. 3 OF 2019

(*Formerly Machakos High Court Appeal No. 125 of 2017)*

Before Hon. Lady Justice Maureen Onyango

COLOUR PACKAGING LIMITED.....APPELLANT

VERSUS

JULIUS NYERERE MUSILI.....RESPONDENT

(Being an appeal from part of the Judgment in respect of liability of Hon. Senior Principal Magistrate

Ms. C. Oluoch delivered on 15th August 2017 at the Principal Magistrate's Court,

Mavoko Law Courts in PMCC No. 298 of 2016)

JUDGMENT

On 12th April 2016, the Respondent filed a suit at Mavoko Law Courts seeking the following reliefs–

a. Special damages of Kshs.3,000.00.

b. General damages for pain and suffering for breach of contract.

c. Costs of the suit.

d. Interest on (a), (b) and (c) at court rates.

e. Any other relief that this Court may deem fit and just to grant.

The Respondent's basis for instituting Mavoko CMCC 298 of 2016 was that around 7th May 2014, while in the course of employment at the Appellant's company, he was injured by a conveyor belt and sustained serious injuries on account of the Appellant's negligence.

The Appellant filed its defence on 24th August 2016 which majorly consisted of denials. In particular, the Appellant denied the existence of an employment relationship between it and the Respondent or that the Respondent was injured while in its employ. The Appellant also denied any negligence on its part and contended that the injury was solely attributable to the Respondent's negligence and prayed for the suit to be dismissed with costs.

The case was heard on 14th June 2017 where only the Respondent called witnesses, being, himself and Dr. Titus Nderitu who had examined him and prepared a medical report. Thereafter, judgment was delivered on 15th August 2017 wherein judgment was entered for the Respondent as follows–

a. Liability of 100% in favour of the Plaintiff;

b. General damages of Kshs.100,000.00; and

c. Special damages of Kshs.3,000.00.

Aggrieved by the judgment, the Appellant filed an appeal in Machakos High Court Civil Appeal 125 of 2017 which was later transferred to this Court pursuant to the ruling of the Odunga J. delivered on 18th November 2019. The Appeal was based on the following grounds–

a. The Learned Magistrate erred in law and in fact in finding that the Respondent had been employed by the Appellant at the time of the accident, yet the Respondent had failed to prove the same at the standard required by law.

b. The Learned Magistrate erred in law and in fact in relying on a medical report to find that the Respondent had been the Appellant's employee.

c. The Learned Magistrate erred in law and in fact in failing to recognize that the Respondent had a duty to discharge the burden of proof placed upon him as a matter of law even in the absence of evidence to the contrary.

d. The Learned Magistrate erred in law and in fact by shifting the burden of proof to the Appellant contrary to the provisions of the applicable law.

e. The Learned Magistrate erred in law and in fact in finding the Defendant 100% liable or to blame for the accident considering that the issue of the Respondent's employment by the Appellant had not been proved.

The Appellant therefore sought an award of the following orders–

a. That the Appeal herein be allowed and the judgment of the subordinate court be set aside and the suit in the subordinate court be dismissed with costs.

b. That the costs of this Appeal be awarded to the Appellant.

The parties agreed to canvass the appeal by way of written submissions with both parties filing the same. The Respondent contested the appeal through his written submissions.

The Appellant's Submissions

It is submitted that the Respondent failed to discharge his burden of proof as required by section 107 of the Evidence Act, and that the absence of a rebuttal did not lessen his burden to prove his case; and relies on the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another [2016] eKLR** where it was held that uncontroverted evidence must bring out the fault and negligence of a defendant, and a Plaintiff must prove its case on a balance of probability whether the evidence is challenged or not.

The Appellant submits that the Learned Magistrate erred in law and in fact by relying on the history outlined in the medical report, to establish the existence of an employment relationship as it has no particulars of any job description or terms of employment.

The Respondent's Submissions

The Respondent submits that the Appellant did not adduce any evidence or avail any witness to controvert the Respondent's evidence that he was the Appellant's employee. The Respondent further submits that the Appellant owed him a duty of care and were it not for the faulty machine and the Appellant's failure to provide him with protective gear, he would not have suffered the injuries.

It is the Respondent's submissions that the appeal is ill advised, bad in law and has succeeded in delaying the Respondent from enjoying the fruits of the trial court's judgment. He urged this Court to dismiss the appeal and uphold the trial court's award together with costs and interests from the date of the delivery of the judgment to date. He relied on the Court of Appeal decision in **Gichuki v TM-AM Construction Group (Africa); Nairobi Civil Appeal 152 of 2001 [2002] eKLR**, which had facts similar to his case.

Determination

I have considered the appeal, the evidence annexed in the record of appeal and the parties' submissions and I find that the issues for determination are –

a. Whether the Learned Magistrate erred in law and in fact by holding that there was an employment relationship between the Appellant and the Respondent.

b. Whether the Learned Magistrate erred in law and in fact for finding the Appellant wholly liable for the Respondent's injury.

c. *Whether the orders sought by the Appellant should be granted*.

The Appellant has submitted that the Respondent never adduced any evidence to show that he was indeed employed by the Appellant at the time of injury or that he was injured in the course of employment. It was the Appellant's position that though the Respondent was its employee as at August 2013, a pay slip was not conclusive evidence that he was the Appellant's employee as at May 2014.

I have examined the record of appeal and the contents of the trial court file and it is indeed true that the Respondent annexed a pay slip for August 2013, whereas the injury in question occurred around 7th May 2014. I further note that no evidence was adduced by the Appellant to controvert the Respondent's position that he had been the Appellant's employee at the time he was injured. The Appellant did not produce any evidence to prove that the Respondent was no longer its employee at the time of the accident. Further, its defence consisted of mere denials and lacked any account of facts from its own perspective.

Being the custodian of the employment records, the Appellant ought to have produced evidence showing when the employment relationship between it and Respondent ceased. The Appellant never stated that the Respondent left employment or when he did. It did not adduce evidence of termination of his employment. As such, the Learned Magistrate's finding that the Appellant had failed to controvert the Respondent's evidence that he was injured while in the Appellant's employ was sound in law and in fact.

The Appellant has submitted that it should not be held liable for acts which were unforeseeable. The Appellant submitted that the Respondent is fully liable for the injuries sustained as it exercised reasonable care and diligence as was reasonably expected, to ensure his safety.

From the Respondent's testimony it emerged that the machine he was operating had been defective and that the Appellant had failed to provide him with gloves despite his requests to be provided with the same. Indeed, the Appellant had that obligation as stipulated in Section 101(1) of the Occupation and Safety Health Act, 2007 which provides as follows–

Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.

Further, the Respondent stated that the injury occurred while he was removing papers from the machine as had been instructed by the manager. The Appellant never produced any documents or availed any witness to controvert the Respondent's testimony. Section 109 of the Evidence Act provides that–

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

It therefore follows that the Appellant ought to have adduced evidence to demonstrate that it had indeed exercised reasonable care and due diligence as was reasonably expected to ensure the Respondent's safety, and that the Respondent's injury had been on account of contributory negligence. By failing to do so, the facts alluded to in the defence remained mere allegations.

In light of the foregoing, I find that the Learned Magistrate's apportionment of liability was sound and proper in law and in fact, and the same cannot be faulted. In the case of **Kenya Knit Garments (EPZ) Limited v Patrick Muomo Mwololo [2018] eKLR** the Court observed as follows–

*"20. The case relied on by the Respondent's Counsel of **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR**, which cited the decision in **Mumias Sugar Co. Ltd vs Charles Namatiti** is applicable in this case. The Court of Appeal held thus:*

"An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."

21. In this case, the Hon. Magistrate correctly found that the appellant failed to produce its machine record book to show that the machine that the respondent was using on the day in issue had been checked to ascertain that it was in proper working condition.

22. The respondent's Counsel was of the view that if the respondent had been provided with gloves, he would not have been injured. DW1's evidence was to the effect that the respondent would not have been able to do the work he had been assigned if he was wearing gloves. That being so, then the appellant was under obligation to undertake maintenance of its machines to ensure that they were in good working condition."

For the foregoing reasons I find no reason to interfere with the findings and decision of the lower court.

The appeal is therefore dismissed in its entirety. The Respondent is awarded costs and interest in both this appeal and in the subordinate court.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE