IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISRTY

AT MOSHI

CIVIL APPEAL No. 8 OF 2019

(C/f Civil Case No. 13 OF 2017 Resident Magistrates Court of Moshi at Moshi)

FRANCIS EUGEN POLYCARD ..... APPELLANT

VERSUS

M/S PANONE & CO.LTD ..... RESPONDENT

25th September & 13th October, 2020

JUDGMENT

MKAPA, J:

The appellant, Francis Eugen Polycard aggrieved by the decision of the Resident Magistrates' Court of Moshi at Moshi (trial court) in **Civil Case No. 13 of 2017** delivered on 14/6/2018 preferred this appeal containing nine grounds of appeal.

Brief facts leading up to this appeal is to the effect that, an explosion had occurred at the respondent's petrol and gas station located at Weruweru on 14/10/2012. It was alleged that the appellant was among the respondent's employees who suffered permanent burnt injuries on the face, head and hands. The appellant claimed that when the explosion occurred he was working as an assistant to the driver and they were off -loading oil from big tank to the small one and he just woke up and found himself admitted in hospital with burning wounds. He further

alleged that, he was being paid shillings 150,000/= per month as salary. After treatment the appellant claimed that the Regional Labour Officer Kilimanjaro Region, did assess his injuries and recommended to be paid shillings 987,000/= by the employer being statutory compensation for the injuries he had sustained while on duty. The respondent herein did not comply.

Thereafter the appellant filed a case in trial court claiming a total of shillings 215,000,000/= as damages for the injuries he had sustained on the ground that the explosion occurred due to respondent's negligence in maintaining safety at the work place.

At the trial court, the appellant failed to establish that he was employed by the respondent and the respondent denied to have employed him. He also failed to prove the fact that the explosion was occasioned by respondent's negligence and further that he suffered injuries at the respondent's premises thus the trial court decided in favour of the respondent. Dissatisfied, the appellant preferred this appeal on 9 grounds but later abandoned the first one. However, I will not reproduce the rest in verbatim but I will consider each one of them in the course of analysing the grounds appeal. On the date when this appeal was set for hearing parties agreed that the same be disposed of by way of filing written submissions. The appellant appeared in person while the respondent was represented by Mr. Julius Semali, learned

advocate. The appellant abandoned the first ground and proceeded to argue the remaining 8 grounds.

Submitting in support of the second ground the appellant submitted that, the trial magistrate erred in fact for not paying attention to an omission committed by the defendant's counsel in failing to specifically deny or deny by necessary implication each of the allegations claimed by the appellant in his plaint. He went on explaining that the respondent did not comply with the provisions of Order VII, Rule 3, of the Civil Procedure Code Cap 33. [R.E. 2002] by not addressing each paragraph in his plaint. Further that, the trial magistrate ought to have entered a judgment in appellant's favour as the respondent failed to adhere to the rules of pleadings.

On the 3rd ground, the appellant submitted that, the trial magistrate erred in holding that the appellant failed to discharge his duty in proving that he was respondent's employee. He argued that, the trial magistrate disregarded documentary evidence contained in the Notice of Accident which was filed together with the plaint which provided information that the appellant was respondent's employee.

Regarding the 4th ground, the appellant submitted that, the trial magistrate erred in law by shifting the onus of proving employee's status on him instead of the respondent who had negligently

refused to supply him with employment contract that would have helped him in his case. He further alleged the fact that he had been employed by the respondent for ten years, thus it was appellant's view that the respondent had the obligation to supply the appellant with employment contract as per section 15 (1) (e) of the Employment and Labour Relations Act, No. 6 of 2004.

As to the 5th ground, the appellant submitted that, the trial magistrate erred in holding that he had not only failed to prove that he was respondent's employee but also he was injured in the course of employment. He contended further that, proof of his employment with the respondent and medical report were dully filed in court together with the plaint. Thus, had the trial magistrate perused the records thoroughly she would have reached a different conclusion.

The appellant submitted on the 6th and 7th grounds jointly to the effect that, the trial magistrate erred in law in raising the issue of tendering and admission of medical report and accident notification *suo mottu* without giving the appellant opportunity to be heard contrary to the cardinal principle of natural justice.

Lastly, the appellant challenged the trial magistrate in holding that the appellant was not entitled to general damages since he failed to prove his claims. It was his further argument that the trial magistrate misapprehended the principles of law thus

reaching a wrong decision. He finally prayed for this court to dismiss the trial court's judgment with costs for lacking merit.

Submitting against the appeal Mr Semali faulted the appellant for not challenging the defect in the written statement of defence at the trial court as the same could not be challenged at the appellate stage. On the 3rd and 5th grounds Mr. Semali argued jointly to the effect that, the appellant did not comply with the requisite procedures in tendering exhibits by annexing copies of documents intended to be relied upon while prosecuting his case instead of tendering them and prayed for the same to be admitted as exhibits. It was Mr. Semali's argument that the trial court did not error in not relying on them since they were not tested in evidence. To support his argument he cited the decision in the case of **Abdallah Abass Najim V Amin Ahmed Ali** [2006] TLR 55.

Arguing on the 4th ground Mr. Semali submitted that, it is the requirement of the law under section 110 of the Evidence Act that, he who alleges must prove. Thus the onus of proving as to whether the appellant was employed by the respondent lied on the former and not the latter, thus, the trial court did not error in holding so.

On the 6th and 7th ground Mr. Semali argued that, the law is clear on which documents suffices to be tendered and admitted in civil

and criminal cases. Thus the doctor's report and accident notification report did not meet the required standards for admission and reliability as evidence. It was Mr. Semali's contention, that the trial magistrate did not err in not admitting the documents as argued by the appellant since they were not tendered before the court rather they were annexed to the plaint.

Turning to the last ground, the learned counsel for the respondent argued that the appellant claimed for specific damage but no proof was tendered during the trial to prove the quantum of damage claimed by appellant. Thus the trial magistrate did not err in deciding that the appellant failed to establish the damage he suffered. He finally prayed for the appeal to be dismissed with costs for lacking merit.

In rejoinder, the appellant basically, reiterated what he submitted earlier and maintained her prayer that his appeal be allowed.

Having considered both parties submissions for and against the appeal I think the question to be determined is whether there existed any employer-employee relationship between the appellant and the respondent in order for the appellant to qualify for the compensation sought.

I find it opportune for me to begin with the third ground of appeal as it is this ground which is challenging the finding of the trial court that the appellant was not an employer of the respondent. It is on record the fact that the Labour officer at Moshi had recommended the appellant to be paid shillings 978,000/=being compensation under the Workmen's Compensations Ordinance for the injuries which the appellant had sustained in the course of performing his duties as assistant driver to the respondent while the respondent denied to have employed the appellant.

It is well settled principle of law that the person who set up a plea of existence of a relationship of employer-employee relationship the burden would be upon him as illustrated under section 10 of the Evidence Act to the effect fact that ,*"he who allege must prove."* In the instant appeal it is undisputed the fact that in order for the appellant to be compensated by the respondent under the Workmen's Compensation Ordinance for the injuries which he had sustained in the course of performing his duties, he has to establish his employment relationship with the respondent. In trying to prove the said relation it is on record at page 13 of the trial court's typed proceedings while cross examined the appellant claimed that he was being paid shillings 150,000/= as monthly salary but did not provide any material evidence by tendering a salary slip, nor employment contract,

not even an attendance register evidencing his attendance at the work place as the respondent's employee. I have pointed out the above different tests in establishing the appellant's and respondent's working relationship as I believe it is not prudent to rely on a single test in determining such relationship. At the trial court the main documentary evidence which the appellant did argue extensively was a medical report from KCMC hospital and the accident notification which were attached to the plaint but never tendered in court as exhibits. The appellant claimed that the said report was signed by the respondent's officer. However, my perusal of the said document namely Notice of Accident to be given by the employer under section 3(1) of the Accident and Occupation Disease (notification) Ordinance, has revealed the fact that the said form does not bear the name of the employer as a signatory and the same was an uncertified photocopy. More so, the documents were attached to the plaint and not tendered as evidence before the court for the respondent to be given a chance to challenge. In **Japan International Cooperation Agency (Jica) V Khaki Complex Limited** [2006] TLR 343 the Court had this to say;

> *"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record of suit".*

In the circumstance, I have no hesitation to come to a conclusion that the appellant has failed to establish the fact that there existed an employer /employee relationship between the appellant and the respondent for him to qualify for payment of compensation for the burnt injuries he claimed to have sustained in the course of executing his duties with the respondent (employer). As the appellant was not an employee of the respondent as was found by the trial court, the whole prosecution case collapses. This ground alone suffices to dispose of the appeal. More so, I feel that it is not necessary to dwell on discussing the remaining grounds. Consequently, I dismiss the appeal in its entirety.

Dated and delivered at Moshi this 13th day of October, 2020

S.B. MKAPA
JUDGE
13/10/2020