REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 18 OF 2011

BUDS AND BLOOMS LTD.....APPELLANT

VERSUS

NOLEGA LITAVA SHITOMBOLE.....RESPONDENT

JUDGEMENT

1. The appeal herein arises from a suit filed by the respondent against the appellant seeking damages for the injuries he sustained on 18th February 2001 while working for the appellant/defendant.

2. After hearing, judgment was delivered on 19th January, 2011, where the court awarded the respondent special damages of 2,500 and general damages of Kshs. 70,000/=, making a total of 72,500/=.

3. The appellant aggrieved by the learned trial magistrate's decision on quantum, appealed vide a memorandum of appeal dated 18th February 2011. In its memorandum of appeal, the appellant raised nine grounds of appeal which are as follows:

a. That the learned trial magistrate erred in law and fact in failing to find that the plaintiff's claim is based on the tort of negligence was time-barred.

b. That the learned trial magistrate erred in law and fact in finding that the plaintiff had proved the case on a balance of probabilities that she was on duty on the material date of the averred accident and as such failing to accordingly consider the strong rebuttal evidence to the contrary as led by the defense.

c. That the trial learned magistrate erred in law and fact in failing to find that the plaintiff's evidence on record was at variance and as such the plaintiff could not prove her case to the required standards based on the scanty contradictory evidence.

d. That the learned magistrate trial magistrate erred in law and fact in finding that the plaintiff proved his case on a balance of probability yet the plaintiff never adduced any evidence of injury considering that the doctor conceded that his report did not fully tally with the treatment card, which was also not produced in evidence.

e. That the learned trial magistrate erred in law and fact in failing to consider and analyze the strong rebuttal evidence led by the defense witness clearly showed that the plaintiff was not injured as alleged.

f. That the learned trial magistrate erred in law and fact in holding that the respondent's account of the incident giving rise to this suit made out a case for negligence against the appellant notwithstanding the fact that the plaintiff neither established causation nor did the aspect that could be attributed to negligence against the Appellant.

g. That the learned trial magistrate failed to appreciate the totality of the evidence before him and the submissions made on behalf of the appellant.

h. That the learned trial magistrate erred in applying erroneous standers of proof and failed to appreciate that the respondent had failed to discharge the burden of proof placed upon him as a matter of law.

i. That the learned trial magistrate erred in assessing general damages at Kshs. 70,000/= and failed to apply the principles applicable in award of damages and comparable award made for similar injuries.

4. Parties agreed to proceed by way of written submissions.

APPELLANTS SUBMISSIONS

5. The appellant submitted that the respondent's claim is time-barred under the limitations of actions **Act Cap 22**. In its submissions, it averred that the claim is time-barred as the cause of action arose in 2001 and the plaint was filed in the year 2004, and there was no leave granted by the court to file the suit out of time he relied upon the case of **Afro Spin Vs Fidelis Gori NKU HCCA No. 60 of 2005.** It further submitted that the particulars of breach of the contract were not pleaded and there was no evidence adduced in court and thus general damages are not awardable for breach of contract.

6. The appellant further submitted that the evidence adduced by respondent is contradictory and the respondent failed to produce the initial treatment note as what was produced was a medical report from **Dr. Omuyoma** who treated him 3 years after the accident had happened.

7. The appellant submitted that the suit was brought after 3 years in violation of the **Limitation of Action Act**; that the suit was filed on 1st April 2004 while the injuries were sustained on 18th February 2001 and for the respondent to remedy the error she would have sought leave of the court before filing the suit.

8. Further that the respondent failed to prove that she was on duty at the time of the accident and the signed list produced by the appellant showed she was absent from work on the date she claimed the accident happened. Appellant further submitted that the respondent failed to prove that she got injuries on the said date by failing to produce the initial treatment notes as evidence.

9. Appellant urged the court to find the doctor's report to be hearsay as he relied on cards that have not been adduced as evidence in court.

RESPONDENT'S SUBMISSIONS

10. The respondent submitted that the claim was that of breach of contract and not based on tort of negligence and under **Section 4 of the Limitations of Actions Act** provides that actions on contract can be brought before the lapse of 6 years and thus the filing of the suit was not time-barred; that she proved her case as per the law and supported the judgment of the trial court.

ANALYSIS AND DETERMINATION

11. Selle & Another Vs Associated Motor Boat Co.Ltd & others (1968) EA 123 where the court stated as follows:-

> **"…An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"**

12. In view of the above, I have considered grounds of appeal, proceedings before the trial court and submissions filed herein and consider the following as issues for determination: -

a. Whether the suit is time barred?

b. Whether the Respondent proved her case on a balance of probabilities

c. Whether the trial magistrate erred in awarding general damages to the Respondent

(i) Whether the suit is time barred

13. The respondent's argument is that it based on contract; she argues that the appellant had contractual duty to provide safe working environment for the respondent and that **Section 4 of Limitations Act Section 4** provides that suits based on contract should be brought before the lapse of 6 years.

14. I note from record that the cause of action arose on 18th February 2001 and the suit was filed on 1st April, 2004, that is a period of 3 years and around 42 days. This is therefore within the stipulated period of 6 years. That ground of appeal cannot therefore stand.

(ii) Whether the respondent proved her case on a balance of probability

15. From the lower court proceedings, the respondent testified that on 18th February 2001 whilst on duty at the appellant place of work an accident occurred whereby chemicals burned her causing burns on her left arm and chest, she said if she had been given protective gear, she would not have been injured. She blamed the appellant/defendant for the injuries. She said she was first treated at the appellant's clinic. Her evidence was corroborated by the medical report of **Doctor Omuyoma** who confirmed that she sustained the injuries. He relied on treatment notes from Christine Clinic to prepare his report. He testified that at the time he examined the respondent after 3 years, she had fully healed as she had sustained soft tissue injuries. In her testimony in court, the respondent showed court the treatment chit.

16. From the foregoing it is not therefore true that she was not able to produce initial treatment notes and failed to prove injury.

17. In respect to being on duty, the document shown to her indicate that she was not on duty on 18th February, 2001; she said was not in original form and the other document for payment she confirmed it indicated she was paid from the whole week. From the foregoing, evidence on record show that the appellant failed to sufficiently challenge the respondents evidence to the effect that she was on duty on 18th February, 2001 and was injured**. Dr. Omuyoma** showed court the initial treatment notes he relied on to prepare medical report.

18. From the foregoing, I find that the respondent proved that she was injured. I however note from record that the respondent had worked for the appellant from 1996. She was therefore an experienced employee and was expected to know the likelihood of being injured while working without protective gear and the need to exercise extra care. In view of that, a smaller percentage of liability should have been apportioned to the respondent. I find 20% liability appropriate.

(iii) Whether this court should interfere with damages awarded by trial court

19. There is no dispute that the respondent sustained soft tissue injuries which had healed at the time **Dr. Omuyoma** examined her. She also confirmed that that she had fully healed. I have compared her injuries with injuries suffered in the cited authorities and find the award reasonable and see no reason to interfere save for contribution as observed above.

20. FINAL ORDERS

1. **Appeal partly succeed.**

2. **Liability apportioned at 20:80 in favour of plaintiff.**

3. **Damages awarded by trial court to be subjected to apportionment of liability.**

4. **Each party to bear own costs of appeal.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 25TH DAY OF FEBRUARY 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Ms. Chelule H/B for Mr. Murimi counsel for appellant

Mr. Mboga counsel for respondent