



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 28 OF 2008

SOCFINAF COMPANY LIMITED.....APPELLANT

VERSUS

JANE WAIRIMU.....RESPONDENT

(Being an appeal from the judgment and decree of Honourable A. Lorot (Mr.) (Senior Resident Magistrate) delivered on 10th January, 2008 in Gatundu SRMCC no. 1444 of 2004)

JUDGMENT

1. Jane Wairimu who is the respondent in this instance lodged a suit against the appellant vide the plaint dated 23rd November, 2004 and sought for general damages plus costs of the suit and interest on the same for negligence and/or breach of contractual/statutory duty of care.
2. The respondent pleaded in her plaint that she was at all material times an employee of the appellant working as a general worker since the year 1994 and that in the course of her employment with the appellant, she was continually exposed to harmful chemicals which resulted in injuries to her person over time, the particulars of which were set out in the plaint.
3. The respondent attributed her injuries to negligence and/or breach of the appellant's contractual and/or statutory duty of care by setting out their particulars in paragraph 6 of the plaint.
4. The appellant entered appearance on being served with summons and filed its statement of defence dated 6th January, 2005 and amended on 23rd March, 2005 to deny the respondent's claim.
5. At the hearing of the suit, the respondent testified while the appellant called three (3) witnesses.
6. Upon considering the evidence presented before the court and the written submissions filed by the parties, the trial court entered judgment in favour of the respondent and against the appellant in the following manner:

Liability	100%
a) General damages	Kshs.300,000/
b) Special damages	Kshs.6,500/
Total	Kshs.306,500/

7. Being dissatisfied with the judgment by the trial court, the appellant lodged this appeal against the respondent vide the memorandum of appeal dated 23rd January, 2008 and put forward the following grounds:

- i. THAT the learned trial magistrate erred in law and in fact in reaching a finding on liability against the appellant which finding was contrary to the weight of evidence adduced.***
- ii. THAT the learned trial magistrate erred in law and fact in failing to consider the appellant's evidence and submissions on the alleged claim which was not only vague but too remote to satisfy the legal requirements of proof on a balance of probabilities.***
- iii. THAT the learned trial magistrate erred in law and fact in reaching a finding on negligence when the evidence adduced did not support the same.***

iv. THAT the learned trial magistrate erred in law and fact in finding a nexus to the plaintiff's alleged injuries and claim without establishing the alleged chemical components that caused the same or a chemical analysis report on the alleged unknown and unidentified chemicals to establish any nexus or at all.

v. THAT the learned trial magistrate erred in law and fact in reaching a decision without the benefit of a chemical analysis report to verify whether the alleged chemicals which were not identified caused the alleged injuries to the plaintiff.

vi. THAT the learned trial magistrate erred in law and fact in failing to appreciate the medical opinion on the plaintiff's condition making the claim too remote in the absence of a chemical analysis report to the contrary.

vii. THAT the learned trial magistrate erred in law and fact in failing to appreciate the alleged claim to be bad in law from the onset in that it was vague on the alleged cause of action and it did not identify the alleged chemicals or at all.

8. The court gave directions for the parties to file written submissions on the appeal. Going by the record, it is apparent that the respondent did not file any documents nor did she participate in the hearing of the appeal.

9. In its submissions, the appellant contend that the trial court did not acknowledge that the respondent had not identified the specific chemicals that led to her alleged injuries and that she had further failed to prove that her injuries were the direct result of exposure to chemicals found in the appellant's premises. In this respect, the appellant cited the case of **Kenya Paper Mills Ltd v Anthony Kimani Mbugua [2019] eKLR** in which the court held that a plaintiff ought to have demonstrated that his illness was as a direct result of exposure to the chemicals in question.

10. The appellant equally contends that even after having been purportedly exposed to the harmful chemicals at the appellant's premises, she continued to work for the appellant for another six (6) years which would therefore give rise to liability on her part.

11. I have considered the submissions and authorities cited by the appellant on appeal. This being a first appeal, this court is enjoined to re-evaluate the evidence placed before the trial court. It is apparent that the appeal lies essentially against the finding on liability.

12. The respondent testified before the trial court that she worked for the appellant at all material times as a casual worker between 1994 and 2004 and that she had been issued with a job card which she produced as evidence.

13. The respondent testified that her job description entailed spraying herbicide and fertilizer on coffee crop while also weeding the coffee, and that over time the said chemicals caused her to develop health challenges in 1998 for which she initially sought treatment at the appellant's dispensary.

14. It was the evidence of the respondent that when her chest condition persisted, she was referred to Kiambu District Hospital for further treatment and that upon visiting the said hospital sometime in 2000, she was diagnosed with asthma.

15. It was also the evidence of the respondent that as per her doctor's prognosis, her ailment was the result of exposure to copper-based coffee spray, which she stated was applied by a tractor on the coffee plantation as she and her colleagues worked.

16. The respondent testified that the appellant did not provide her with any protective equipment, thereby putting her at risk of exposure. The above was echoed in cross-examination.

17. Regina Njeri Njai (DW1) testified that she worked for the appellant as an estate nurse and stated that she treated the respondent for asthma and explained that the doctor who treated the respondent at Kiambu District Hospital indicated that her asthmatic condition was made worse by exposure to cold, dust, chemicals and pollen.

18. In cross-examination, DW1 stated *inter alia*, that the appellant provides its workers with protective gear.

19. Stanley Njogu Mukina (DW2) stated in his evidence that he is the spraying supervisor at the appellant company and that the respondent never worked with sprays. The witness also stated that the appellant provided its spraying workers with gear including gloves, masks and gumboots, and that during the spraying exercise, the field would be vacated for 24 hours.

20. In cross-examination, it was his evidence that the women employees were never assigned with spraying duties since they would raise complaints of being affected by the chemicals.

21. Francis Kiingati Kamau (DW3) in his testimony stated that he was at all material times the manager of all supervisors at the appellant company and stated the averments of his counterparts regarding the procedure of the spraying exercise.

22. In cross-examination, DW3 stated that spraying was a dangerous activity which was undertaken in the absence of workers, who would ordinarily be moved to another block for a period of 24 hours.

23. In his judgment, the learned trial magistrate reasoned that whereas the appellant's agents had knowledge of the respondent's medical condition, they did not demonstrate any steps taken to ensure safer working conditions for her and hence found the appellant fully liable.

24. The law on negligence sets out the elements which ought to be proved for a claim of negligence and/or breach of statutory duty of care to

stand. For this purpose, I make reference to **Halsbury's Laws of England, 4th Edition at paragraph 662 on page 476** which reads as follows:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

25. Upon re-evaluating the evidence tendered before the trial court, it is not in issue that the respondent was at all material times an employee of the appellant, employed on a casual basis. It is also not in dispute that the respondent was at all material times assigned to work in the fields/farm at the appellant's premises.

26. It is further noted that from the evidence adduced by the respondent, it is more plausible than not that her health complications either developed out of or were exacerbated during the course of her employment with the appellant and while performing her assigned duties. The appellant on its part did not bring any credible evidence to contradict this position or to show that having prior knowledge of her health condition, took steps to provide a safer work environment or assign her duties that would not put her at risk of further exposure to any harmful chemicals.

27. I am satisfied that the respondent proved on a balance of probabilities that her ailment was as a result of negligence and/or breach of statutory duty of care by the appellant. To this extent, I concur with the finding of the learned trial magistrate that the respondent had proved her claim against the appellant to the required threshold.

28. However, my findings depart from those of the learned trial magistrate on the subject of apportionment of liability.

29. Upon re-evaluating the evidence tendered before the trial court, I find that the respondent had performed the same duties for a number of years and therefore she ought to have been aware of the risks involved.

30. Furthermore, whereas the respondent testified that she was not provided with any protective gear while working, she made no mention of any such requests being made to the appellant or for the re-assignment of different duties that would reduce her exposure to a harmful environment, given her prolonged history with asthma. I am therefore satisfied that the respondent voluntarily assumed the risks that would befall her in the course of her employment and reference is made to the provisions of **Section 13(1) of the Occupational Safety and Health Act No. 15 of 2007** which place the responsibility upon an employee to ensure his or her safety while at the workplace.

31. In the premises, I am of the view that the learned trial magistrate ought to have apportioned liability but did not. I will therefore apportion liability in the ratio of 70%: 30% in favour of the respondent.

32. It is also noted that the appellant challenged the respondent's claim for being bad in law. I find that this allegation does not stand since the issue ought to have been raised at the preliminary stages of the suit and cannot now be raised on appeal after the suit had been heard and determined on merits.

33. The upshot therefore is that the appeal partially succeeds.

Consequently, the trial court's finding on liability is hereby set aside and is substituted with apportionment of liability in the ratio of 70%: 30% in favour of the respondent.

34. For the avoidance of doubt, judgment on appeal is as follows:

Liability	70%: 30% in favour of the respondent
a) General damages	Kshs.300,000/
b) Special damages	Kshs.6,500/
Gross Total	Kshs.306,500/
(Less 30% contribution)	Kshs.91,950/
Net Total	Kshs.214,550/

35. The respondent shall have interest on special damages at court rates from the date of filing suit while on general damages will attract interest at court rates from the date of judgment until the date of payment in full.

In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party meets its own costs. However, the respondent should have costs of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER,

2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... FOR THE APPELLANT

..... FOR THE RESPONDENT