REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. 53 OF 2016

BETWEEN

SAVANNAH INTERNATIONAL LTD……………….……......….APPELLANT

AND

RUTH ASUKO OLUSALA……………………….…………….RESPONDENT

(Being an Appeal arising from the judgement and Decree of the Honourable Esther K. Kimilu, P.M. delivered on 12/07/2016 in Naivasha CMCC No. 743 of 2014).

JUDGMENT

1. The instant appeal arose from the **Chief Magistrate's Court at Naivasha Civil Case No. CMCC No. 743 of 2014** wherein the Plaintiff (Respondent herein) sought legal redress for damages sustained at the Defendant's (Appellant's) work place on 11/04/2014 under two broad headings, being Particulars of Negligence by the Defendant's agent/supervisor and Particulars of breach of contractual obligations by the Defendant.

2. The background to the case is that the plaintiff, an employee of the Defendant was out harvesting flowers from a greenhouse and while carrying out her duties one of her colleagues stepped on the wagon thus splashing chemical liquid on the Plaintiff's face and in the process sustained face injuries.

3. The defendant opposed the Claim vide a Defence articulating that the Plaintiff's negligence rested her the liability of injuries suffered due to the allegation that the incident was never reported to the Defendant nor its supervisors: And for the failure to take precaution if indeed the accident happened as alleged.

4. The trial court awarded liability at 80:20% in favour of the Plaintiff with general damages of Kshs.300,000/- less 20% liability and with special damages of Kshs.5,850/- totaling KShs.245,850/- which judgment prompted the instant appeal.

Grounds of Appeal

5. The Appellant raised 11 grounds of appeal, which I have condensed into five namely.

> ***1. That the case was not proved on a balance of probabilities.***
>
> ***2. That the Respondent did not prove that she was injured at the Appellant's work place.***
>
> ***3. That Respondent utterly failed to prove the nexus between her injuries and the Appellant's negligence.***
>
> ***4. That a higher percentage of contributory negligence ought to have been apportioned on the Respondent.***
>
> ***5. That the damages awarded were inordinately high.***

Submissions

Appellant's submissions

6. The Appellant filed its written submissions on 19/10/2021 in which it clustered various grounds of appeal under the heads below:

(a) Whether the Trial Magistrate erred in finding by rendering a decision in favor of the Respondent in CMCC SUIT No.743 of 2014 and

(b) Whether the learned trial Magistrate erred in law and in fact by awarding awards to the Respondent that were inordinately high.

Whether the trial magistrate erred in finding by rendering a decision in favor of the Respondent in CMCC SUIT No.743 of 2014

7. Under this head, the Appellant submitted that the Respondent did not meet the threshold required which is on a balance of probabilities by proving that she did in fact incur her injuries while at the workplace. The Appellant placed reliance on Section 107 of the Evidence Act, Cap 80, Laws of Kenya while citing the authority of Lord Denning J. in **Miller vs Minister of Pensions as quoted in Juliana Mulikwa Muindi v Board of Management Yangua Mixed Secondary School & another [2018] eKLR** where it was held that a case must carry a reasonable degree of probability, but not so high as is required in a criminal case where the court on the evidence before it can decidedly put it as probable or improbable and which party bearing the burden of proof is deemed improbable will lose.

8. With this argument the Appellant submitted that the Plaintiff tendered only one document that elucidated treatment and that all other documents produced by the Respondent were post the accident date and did not therefore establish her case in respect to the accident. The Appellant contended that the Respondent’s testimony was uncorroborated, utterly failing to prove and establish a nexus between her injuries and the Appellant's negligence. Therefore, the trial magistrate found for the Respondent based on insufficient and uncorroborated evidence.

9. The Appellant further contended that documents bearing the date 11/04/2014 contradicted the Respondent’s testimony which established that she did not attend work on 11/04/2014 having not signed the mandatory morning and afternoon registers produced as exhibits. The Appellant added that the Muster Roll further confirmed her non-attendance on 11/04/2014. That therefore, that Respondent provided no evidence whatsoever to counter this evidence.

10. It was the further submission of the Appellant that for an accidental claim to be proven, it is necessary to set out the pre-conditions that need to be established. Regard was had in **Mwanyale V Said t/a Jomvu Total Service Station** as quoted in **Kreative Roses Limited v Olpher Kerubo Osumo[2014] eKLR** where it was stated that an employee should be willing to take risks associated with the work, the exercise of due care and skill, and that the danger of the work engagement does not automatically make the employer liable.

11. It was further submitted that the injuries sustained outside the workplace environment were not covered by the employer, hence the Appellant was not obligated to pay damages. Further that the Respondent underwent a post-employment procedure before termination which saw the issuance of a clearance certificate which attested to her not suffering injury within the course of employment of which she claimed in her testimony she understood the contents of the said certificate.

12. In view of the foregoing, the Appellant submitted that the Respondent did not prove liability on a balance of probabilities.

Whether *the learned trial magistrate erred in law and in fact by awarding awards to the Respondent that were inordinately high*

13. Under this head, the Appellant argued that the award on damages was manifestly excessive hence it amounted to an erroneous estimate. Arguing consistency in the award for chemical induced conjunctivitis, the Appellant moots that an award for Kshs150,000/- would have sufficed with reliance on the homogeneity of awards in comparative injuries in **Kigaragari v. Aya (1985) KLR 273** where the Court of Appeal **(Hancox, Nyarangi,JJA. and Platt,Ag. JA) held that;**

> ***“In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.”***

14. Further submissions were put on **Francis Simiyu Waiswa vs Smauel Kairo Magadi [2007] eKLR**. In the case, the Plaintiff therein suffered similar injuries and was awarded Kshs. 110,000/= as general damages for pain, suffering and loss of amenities.

15. Reliance was also had on the cases of **Stephen Mureithi Wahome V Peter Njoroge Gathuri & Others Nairobi HCCC No. 3579/85 (Buttler Sloss)** where it was awarded KShs. 150,000.00 for blunt injury to the left eye, multiple bruises on the left parietal region and multiple soft tissue injuries with good recovery. The plaintiff complained of recurrent headaches, inability to properly see with the left eye; **Wondernut [K] Limited v Caleb Odhiambo Olago [2016] e KLR** where, the Respondent whilst using a sharpening machine suffered traumatic left eye conjunctivitis and the trial Court granted him Kshs. 70,000/ as General Damages and Kshs. 2000/ in special damages. On Appeal the Court found the amount granted as comparatively fair; and **Hannah Wanjeri Njuguna v Anestar Secondary School [2020] eKLR** where the Appellant had sustained injuries on the left eye where the first layer in her left eye also came out requiring treatment. Upon appeal the learned Judge set aside an award of 100,000/= and substituted it with an award of Kshs; 150,000/= as sufficient compensation.

Respondent’s submissions

16. The Respondent in her written submission addressed five of the eleven grounds namely grounds 5,6,7,9 and 11. She contended in rebuttal as follows:

17. *Under ground 5 that the occurrence of the accident at the work place was uncorroborated*, the Respondent pointed out that on the day of the accident, the Respondent after suffering a chemical spill at the Appellant’s work place informed her immediate supervisor by the name

Frank. That on this, the trial court held that the Defence witness had failed to challenge the Plaintiff's evidence on record.

18. The Respondent further contended that The Appellant's Witness, DW-1 did not produce any document to confirm that she was on duty on the 11th April, 2014. The Respondent contended that the Appellant's Witness, DW-1 did not explain where the supervisor was and why he was not called as a witness with reliance on the authority **of Nguku Vs Republic (1985)e KLR** where it was held that the failure to call such a reliable witness can lead the court to draw a conclusion that his evidence would be unfavorable to the Defendant's case. More reliance was put on the authority of **Civil Appeal No 67 of 2007, Njuca Consolidated Co. Ltd Vs Elijah Ombati Matoke (2010) eKLR** where the Appellant's witness evidence was disregarded for failure to show by documentation that he was on duty on the respective day.

19. *On ground 6 which deals with the finding of the lower court that it was in error in its judgment in finding that the Appellant was substantially to blame for the accident despite overwhelming evidence having been tendered by the Appellant to the contrary,* the Respondent submitted that the Attendance Register of which she was not the maker, had cancellations which DW1 could not explain. The Respondent contended that the court also noted that the attendance register was neither signed nor produced in court by the maker. It was further alluded that the Register was unreliable as it showed the first entry as 7/3/2014 and the second as 8/4/2014. That as such, the documents produced by the Appellant's witness did not assist their case. The Respondent relied on the **Njuca case** (supra) where the court stated that where statements adduced are neither signed nor bear official origin may be deemed dubious and thus unreliable.

20. *As to ground 7 that the lower court erred by failing to find that the Respondent failed to prove the nexus between her injuries and the Appellant's negligence,* the Respondent contended that the Appellant had a statutory duty to provide her with goggles which duty it did not discharge and hence it should be held liable for the injuries which the Respondent sustained. Reliance was placed on the case of **Eastern Produce (k) Ltd (Savani Estate) v Gilbert Muhunzi Makotsi [2013] eKLR** where this Court held that the expectation of a safe working environment and protective gear would prevent injury from happening, which in this case was not provided for.

21. *As to ground 9 that the learned magistrate erred in law and in fact by failing to consider that the totality of the evidence adduced by the Appellant was sufficient to dismiss the suit,* the Respondent submitted that the learned magistrate properly arrived at her finding because it was the duty of the Appellant to take all reasonable precaution for the safety of its employees and not to expose them to a risk of damage or injury. The Respondent cited page 69 of the Record of Appeal where the learned magistrate observed that the Appellant ought to have taken care so as to avoid chemical exposure to mitigate an accident.

22. *As to ground 11 that the learned trial magistrate erred in law and in fact by awarding the Respondent an inordinately high ward,* the Respondent rebutted the same by submitting that the trial court considered the inflation, the rising cost of living and the fact that the Respondent had not gone to a specialized hospital or buy spectacles as recommended. The Respondent urged the court to rely on the **Civil Appeal No.913/2004 Nairobi Spinners and Spinners Ltd- Vs Alex Andayi** which was a more recent case than the one cited by the Appellant **(Francis Simiyu Waiswa Vs Samwel Kairo Magadi (2007) eKLR**.

23. Finally, it was urged that the appeal be dismissed with costs.

Summary of evidence

24. The Respondent who was the Plaintiff in the court below called two witnesses, herself as PW2 and Dr. Omuyoma as PW1. She testified that she was a casual labourer of the Appellant and in this regard produced a pay slip for the month of April, 2014 dated 30/4/2014. It was her testimony that on the material date, she reported as usual and was on her way to disinfect her tools when her colleague hit the wagon containing the disinfectant which spilt chemicals into her right eye causing her injuries. Her supervisor named Frank referred her to the personnel office who noted the injury and referred her to a Dr. Khan in Naivasha town who in turn referred her to further expert treatment.

25. The Plaintiff testified that she continued to lose sight and went to Nakuru Provincial Hospital, and later attended PW1's facility. The Plaintiff then issued a demand letter to the Appellant which precipitated her dismissal. She blamed the Appellant for failing to provide protective gears like eye goggles and a safe environment to work in.

26. PW2 relied on eight documents as per Plaintiff's list of documents, namely a demand letter and certificate of postage, treatment from Karagita Health Centre, Treatment note Form and receipts from Rift Valley Provincial General Hospital, Receipt from Elementaita Pharmaceutical Ltd, Two seasonal contracts, treatment from Naivasha optics, pay slip for the month of April, 2014, Medical Report by Dr. Omuyoma and receipt of KShs 5000/.

27. PW1, a medical doctor examined the Plaintiff on 1.12.2014. He testified that the Plaintiff sustained chemical conjunctivitis of the right eye and complained of partial sight in the eye. He diagnosed her with remarkable reduced visual acuity with a permanent disability of 20%. He assessed the injury as grievous harm.

28. The Appellant/Defendant relied on the testimony of DW1, Everlyn Chemjor, its Human Resource Manager. She testified that she also used to deal with the attendance of employees at work. She testified that the Respondent used to work for the Appellant company as a general worker. It was her case that the Respondent was not on duty on11/4/2014, the date she claims she was injured. That although her name was on the Attendance Register, it was indicated against her name that she was sick. That as such, she could not have been injured at the work place. She produced the Attendance Register in evidence as well as the Muster Roll the month of April, 2014.

29. As regards the injury, she testified that the Respondent reported to her on 12th April, 20214 to have been injured and showed her a treatment card. She stated that the Respondent could not have been injured by a chemical because general workers do not work in the chemical field; the same is left to the spray team.

30. PW2 went on to testify that the Respondent left employment on 20/1/2015 without any claim of injury and was cleared accordingly as per the post-employment examination. She produced a clearance certificate as an exhibit.

31. PW2 relied on D. Exhibit 1(a)-a letter from the Defendant and pay slip-D. Exhibit 1(b).

Analysis and determination

32. This is the first appellate court whose duty is reanalyze the evidence adduced before trial court and come up with its own independent conclusions. In doing so however, the court must take into account that it has neither seen nor heard the witnesses and give due regard for that. This position was emphasized in the case of ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)*** in the following manner:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

33. I have considered the evidence adduced in the court below as well as the respective rival submissions made before this court after which I have demarcated two issues for determination, namely:

> **a)** ***Whether the Respondent produce evidence that established that she suffered the accident at the Appellant's premises on 11/04/2014 and whether such evidence was controverted by the Appellant.***
>
> ***b) Whether the quantum awarded was inordinately high in the circumstances.***

Whether the Respondent produced evidence that established that she suffered the accident at the Appellant's premises on 11/04/2014 and whether such evidence was controverted by the Appellant

34. Under this head, the Respondent's case is that she was injured at the work place after the chemical spilt on her face as she and other workers were sterilizing knives whilst the Appellant's case was that the Respondent was off duty on the material day.

35. In **LAWI WEKESA WASIKE v MATTAN CONTRACTORS LIMITED[2016]eKLR** the court stated that –

> ***''the practice of an employer failing to keep a record of its employees casual or permanent, on contract terms or open contracts is an act against its interest. Such a practice works against such an employer. It is contrary to the law. Such a record should be maintained at all material times pursuant to part X of the Employment Act and particularly at section 79 ...these provisions are set out in mandatory terms. They are to be adhered to without exception ... to keep such a record would vilify the respondent and or help the court assess the exact relationship between the claimant and respondent. The court is left with the evidence of the claimant and the respondent without any record, the evidence of the claimant is to the believed''***

36. In **Stephen Wasike & Another v Security Express Ltd [2006]eKLR** the court stated that –

> ***''A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that he who alleges must prove.''***

37. The Respondent in her Plaint claimed she suffered a chemical spill to her right eye and in her examination in chief and re-examination she gave evidence of her supervisor, a man named Frank whom she reported to immediately after the said accident. She stated verbatim as recorded at page 61 of the record of appeal,

> "***…I knew procedure for staff who is involved in accident. We used to report to our supervisor. Personnel used to write down accident to her. I reported to frank –supervisor who sent me to personnel. ..I was told by personnel I cannot be taken to Lions Hospital because it is expensive…the documents were retained by the company…When personnel received demand letter, I was dismissed from work...***''

38. From the foregoing, I note that the evidence was uncontroverted by the Appellant and that the said supervisor, Frank and an officer from personnel was not called as a witness.

39. It is trite that the standard of proof required herein is on a balance of probabilities. So then, the question is, what amounts to proof on a balance of probabilities? **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** **[2010] 1 KLR 526** stated that:

> ***"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."***

40. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the Court of Appeal held that:

> ***"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are***

equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow."

41. Therefore, the Appellant had the duty of disproving the alleged facts constituting: the informing of the supervisor and the personnel office together with the negligence on the part of the Respondent. The exception to this rule however is where the doctrine of *res ipsa loquitor* applies.

42. The Appellant submitted that the Plaintiff submitted only one document that elucidated treatment and that all other documents produced by the Respondent were post the accident date that did not establish her case in respect to the accident. From the record it is uncontroverted by the Appellant that the Appellant retained all documents by the personnel office of the Appellant. In **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR** the court stated as follows:

> ***"Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:***
>
> > *'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'*
>
> ***Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."***

43. The Appellant did not call the supervisor nor a witness from the personnel office who (by judicial notice) is the contact person of the Appellant on the ground who would have shed more light as to the happenings of the 11/04/2014 and thus the Appellant had custody or was in control of evidence by such Supervisor which it failed to produce in which case the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.

44. Furthermore, it is interesting that the Appellant alleged that the Respondent was off duty on the material date, the 11th April, 2014 the date on which PW2 testified she (Respondent) was sick. My view is that it could not have been a coincidence that PW2 had gone for treatment on the date she was injured. What is further doubtful in vindicating this position is the Attendance Register adduced by the DW1. The same is clearly cancelled against the name of the Respondent which in my view was intended to create the perception of her absence from duty on this date. If truly she was absent, why didn't the register remain clean like for other employees? This begs more than meets the eye.

45. No doubt the court cannot rely on such register to persuade it that the Respondent was not on duty on the material day. My take is that she must have gone to be treated for the injury after which the register was cancelled to show her absence. I therefore have no reason to disprove the evidence of the doctor, PW1 that indeed PW2 sustained the injured. I also have no reason not to believe that the Respondent was injured at the work place.

46. On the above grounds, I find no fault in the learned trial magistrate's conclusion on liability. On the contributory percentage, the same was well grounded on account that the Appellant being well aware that it deals with chemicals should have provided protective gears to the Respondent. It should shoulder the 80% liability.

Whether the quantum awarded was inordinately high in the circumstances.

47. The Respondent's medical report intimates that she suffered a permanent disability of 20% due to partial vision in the right eye. The lower court awarded KShs 245,850/ after subtracting contributory negligence.

48. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards, but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in ***Simon Taveta Vs. Mercy Mutitu Njeru [2014] eKLR*** thus:

> ***"The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past".***

49. In **P.J. Dave Flowers Limited v Ben Wabomba Walubukha [2018] eKLR** where the facts of this case are closely tied to this appeal in that the Respondent suffered injuries in the sub conjunctival haemorrhage of the eye bilaterally, he had occasional pain on the injured site and suffered photophobia of the eyes bilaterally, the High Court upheld the lower court's decision in its award of KShs.180,000/-.

50. In **Civil Appeal 58 of 2018 - West Kenya Sugar Co. Ltd v ENW (Minor suing through next friend, guardian and father SWS)** where the injuries sustained were greater than in the instant case, that is swelling on left side of the face, bruises on the nose and bleeding, her left eye had been infected with oedema and had traumatic conjunctivitis with reduced vision with an incapacity at 13%, the High Court upheld the lower court's award of KShs 224,000/=.

51. I am heavily persuaded by the case of in **P.J. Dave Flowers Limited v Ben Wabomba Walubukha [2018] eKLR** which well compares with the instant case.

52. In totality therefore, this appeal cannot see the light of the day. I find the same as unmeritorious and I dismiss it in its entirety. The Appellant will pay the cost of this appeal and of the suit in the court below at 80%.

DATED AND DELIVERED AT NAIVASHA THIS 27TH OCTOBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr.Kinuthia for the Appellant.*

2. *No appearance for the Respondent.*