



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO 75 OF 2010**

**EQUATOR FLOWERS (K) LTD.....APPELLANT**

**VERSUS**

**OMARI NYABOGA.....RESPONDENT**

*(An Appeal arising out of the Judgment and decree of Hon. I. Maisiba RM delivered on 23<sup>rd</sup> April, 2010 at Eldoret Chief Magistrate's Court Civil Case No. 687 of 2009)*

**JUDGMENT**

The Respondent was the original Plaintiff and the Appellant the Defendant in the original trial in **Eldoret Chief Magistrate's Court Civil Case No. 687 of 2009**. The Respondent instituted the said suit in the trial court for general and special damages on account of the Appellant's alleged breach of its statutory duty to provide him with a safe working environment. The trial court, in a judgment delivered on 23<sup>rd</sup> April, 2010 held that the Respondent was able to prove to the required standard of proof on a balance of probabilities that the Appellant was 100% liable for the injuries sustained by the Respondent, and awarded the Respondent general damages of Ksh.150,000/- and special damages of Ksh.500/- as well as costs of the suit.

The Appellant being dissatisfied with the said judgment filed an appeal challenging the judgment of the trial magistrate and raised several grounds of appeal. The Appellant faulted the trial magistrate for finding in favour of the Respondent when the Respondent was never injured in the course of his employment. The Appellant was aggrieved that the trial court based its finding on irrelevant matters. The Appellant challenged the trial magistrate's finding that the Respondent proved his case to the required standard of proof. The Appellant was also of the view that the award of damages by the trial court was inordinately high and excessive for the injuries allegedly suffered.

During hearing of the appeal, counsel for the Appellant argued that the Respondent was required to prove negligence. He stated that proof of injury alone does not mean that the Appellant was negligent. He maintained that the Respondent did not adduce any evidence to connect the Appellant to the injuries that he sustained. He submitted that the Respondent had worked for the Appellant for many years and therefore ought to have applied due diligence and skill in the performance of his duties. Learned counsel relied on **Section 13 of the Occupational Safety and Health Act** which requires an employee to ensure his safety at the workplace. He asserted that the Appellant's witnesses informed the court that the Respondent had been supplied with protective gear. On the material day, the Respondent had the protective gear but failed to use it. On quantum, counsel for the Appellant argued that Ksh.150,000/- awarded to the Respondent as general damages was inordinately high and that an amount of Ksh. 30,000/- would be sufficient for injuries allegedly sustained by the Respondent. He therefore prayed that the appeal be allowed.

Counsel for the Respondent, while opposing the appeal, stated that the Respondent was working for the Appellant when the accident occurred. The Respondent produced medical reports and treatment chits from the Appellant's doctor. He added that the Appellant took the Respondent to hospital. He asserted that the Appellant failed to provide a safe working environment for the Respondent. The Respondent was required to work even though it was drizzling on the material day. He was not provided with any protective gear. Learned counsel submitted that the Appellant failed to provide any proof that protective apparel was provided to the Respondent. On quantum, the Respondent's counsel averred that the judgment on quantum should not be disturbed and that the appeal ought to be dismissed with costs.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. In the case of **Stanley Maore -vs- Geoffrey Mwenda – Nyeri Court of Appeal Civil Appeal No. 147 OF 2002 (unreported)**. **It was held that:**

*“The duty of the Appellate court is to re-evaluate the evidence, assess it and make its own independent conclusion as if it has not seen or heard the witnesses.”*

In the present appeal, the issues for determination are whether the Respondent proved that he was injured while at work at the Appellant's premises and secondly, if the first issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment for purposes of compensation.

As regards an action in negligence, it is stated in **Halsbury's Laws of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to what is required to be proved in an action such as the Respondent's:-

***“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.”***

Therefore, the Respondent has to prove that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, he also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Appellant, and to show that he was also not negligent in the performance of his duties.

This statutory duty stems from **Section 6(1)** of the **Occupational Safety and Health Act, 2007** which requires every occupier to ensure the safety, health and welfare at work of all persons working in his/her workplace. In addition, **Section 10(2)** of the **Work Injury Benefits Acts, 2007** provides that an employer is liable to pay compensation in accordance with the provisions of the **Act** to an employee injured while at work.

In the present appeal, the Respondent's evidence that he was employed by the Appellant and that on the day of the accident, he was carrying out duties assigned to him in the course of his employment, was not disputed or controverted by the Appellant. His supervisor, Arthur Kipkemboi (DW1), confirmed that indeed the Respondent was an employee of the Appellant and that he had reported to work on the material day. DW1 also stated that he instructed the Respondent to repair the greenhouse roof on that day. Therefore there existed an employer-employee relationship on the material day hence the Appellant owed the Respondent a statutory duty of care.

It is also not disputed that the Respondent was injured on the material day while carrying functions assigned to him by the Appellant. The Respondent stated that he was repairing a greenhouse roof when he slipped and fell down sustaining soft tissue injuries on his right leg, right rib cage and ankle. He was treated by the Appellant's company doctor, Dr. Jakaiti. The Respondent produced treatment notes and a medical report from the said Dr. Jakaiti which proved the pleaded injuries.

It is however disputed whether the Appellant was negligent and in breach of his statutory duty in failing to provide a safe working place for the Respondent, and therefore liable for the accident. The evidence in this regard by the Respondent was that he was not provided with any protective gadgets such as a helmet, safety belt and a hook which would have prevented the Respondent from sustaining the injuries. DW1, Arthur Kipkemboi, stated that the Respondent was provided a harness and a helmet but he did not use them. He however did not provide any evidence to show that the same were actually provided. DW2, Thomas Kipkeni, produced a list showing protective gears allegedly given to the Respondent. This court however notes that the Respondent's signature does not appear in the said record to confirm he indeed received the listed items. The list is dated November, 2005 while the accident occurred in August, 2006. The same therefore does not prove that the Respondent was provided with safety apparel on the material day. This court is mindful that the Appellant failed to provide tangible evidence to rebut the Respondent's allegations.

The duty to exercise due care and skill falls on the Appellant where the risk is foreseeable or circumstances leading to the injury are within the knowledge of the Appellant. In the instant case, owing to the nature of the Respondent duty of repairing the greenhouse roof, the Appellant was required to provide safety apparel to protect the Respondent in the event of an accident. If the Appellant had provided the Respondent with a safety harness/belt to hold him while on the roof, the accident would have been averted. The accident was avoidable had there been a safe system of work, and proper working tools. The Appellant failed to prove the allegations that the Respondent was provided with safety apparel but failed to use it. The Appellant also failed to show what the Respondent could have done the work differently to avoid the accident.

Consequently, this court upholds the trial magistrate's finding that the Appellant shoulders liability at 100%.

On quantum, it is settled principle that ***“an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge or Magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect”***. (See **Kimotho & Others -vs- Vesters and Another Civil Appeal No.. 4 of 1984.**)

In this appeal, the Appellant's counsel submitted that an award of Ksh.150,000/- awarded to the Respondent as general damages was inordinately high and that an amount of Ksh.30,000/- would be sufficient for injuries allegedly sustained by the Respondent. The Appellant's counsel relied on **Sokoro Saw Mills Limited v. Grace Nduta Ndungu [2006] eKLR** where the court awarded Ksh.30,000/= for soft tissue injuries to the right hip joint and back.

The Respondent's counsel was of the opinion that the amount awarded by the trial magistrate should not to be disturbed.

In this Appeal, the Respondent suffered soft tissue injuries to the right leg, right rib cage and neck. After perusal of the trial court's judgment, this court notes that the trial court did not enumerate the principles relied on or how it arrived at the awarded amount of Ksh.150,000/- as general damages.

This court finds that the authority cited above by the Appellant is applicable in this case and the same will be relied upon. However, taking into account passage of time and inflation, this court awards general damages for pain, suffering and loss of amenities amounting to Ksh.

100,000/-.

In the premises therefore, the appeal is allowed as hereunder;

i. The appeal on liability is dismissed

ii. The appeal on quantum is allowed to the extent that the award of Ksh.150,000/- general damages by the trial magistrate is reduced to Ksh.100,000/-. The special damages of Ksh.500/- which was proved shall be paid to the Respondent.

iii. Each party shall bear the costs on this appeal.

iv. The Respondent shall however have costs of the suit in the lower court.

It is hereby so ordered.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2019**

**L. KIMARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 19<sup>TH</sup> DAY OF FEBRUARY 2019**

**HELLEN OMONDI**

**JUDGE**