REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 45 OF 2017

(CORAM: F. GIKONYO J.)

KENYA NUT COMPANY LIMITED.....APPELLANT

Versus

SARAH NANJALA WAMBOGO.....RESPONDENT

(An appeal from the judgment of the Hon. M. Kinyanjui

delivered on 12.1.2017 in Kandara RMCCC No. 170 of 2015)

JUDGMENT

[1] The appellant who was the defendant in the trial court was sued by the respondent for special damages of Kshs.3, 500/-, general damages, costs of the suit, interest and any other relief deemed fit for injuries sustained while in the employment of the appellant. On 12/1/2017 the trial court entered judgment in favour of the respondent as follows:

a) **Liability ……..……. 70%**

b) **Special damages ……. Kshs. 3,500/-**

c) **General damages …… Kshs. 200,000/-**

d) **Total …… Kshs. 143, 500/-**

e) **Cost of the suit plus interest**

[2] The appellant being aggrieved by the decision filed his appeal and cited seven (7) grounds which may be summarized into two issues: **that the trial magistrate erred in his apportionment and assessment of liability and damages, respectively**.

Submissions

[3] The appeal was canvassed by written submissions. The appellant submitted that learned magistrate ignored glaring inconsistencies in the respondent's case and disregarded the principle that parties are bound by heir pleadings. Consequently, the trial magistrate erred in finding that the respondent had discharged her burden of proof and shifted it to the appellant. As for the damages, the Appellant argued that the award was inordinately high taking into account the injuries sustained were of soft tissue in nature.

[4] The respondent on the other hand submitted that the trial court did not err in its findings as she had proved her case on a balance of probabilities during the trial. Thus, the appeal lacks merit and ought to be dismissed with costs to her.

ANALYSIS AND DETERMINATION

[5] As the first appellate court, this court should evaluate, assess and analyze the evidence on the record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

[6] Arising from the pleadings, evidence and submissions of parties are the following issues for determination:

a) **Whether the trial court erred in its finding on liability**

b) **Whether the trial court adopted wrong principles in assessment of damages.**

Of liability

[7] Liability in such cases is assessed upon the evidence and facts of the case. In this case, the burden of proof fell on the Respondent as the person who alleged negligence or breach of statutory duty on the part of the Appellant; see S**ection 107 and 108 of the Evidence Act**. The Respondent was to proof her case on a balance of probabilities. What evidence was adduced? And dose it prove the case to the stated standard?

[8] According to **PW1 Sarah Nanjala Wambogo,** on 14/5/2014 she was assigned to work in the shamba belonging to the appellant, specifically to cut the fence. She was given a panga that was defective. As she was cutting the fence, the wooden handle fell off and she was cut by the panga on the right leg. She was taken to the company clinic and later went to Thika Nursing Home. She was treated and discharged on the same day.

[9] The appellant called no witness but in their defence dated 18/12/2015 they denied that the respondent was their employee. They also averred that, at all material times, they took reasonable precautions for the safety of their employees.

In the course of employment

[10] The respondent alleged that she got injured while working for the appellant. She produced her pay slip as proof of employment (*Exh. No.4*). In spite of it not being current as it is dated January 2013 the evidence that she was an employee of the Appellant at the material time was not rebutted in court. Therefore, the trial magistrate did not err when he found that the respondent was an employee of the appellant.

[11] Was she injured in the course of employment? The respondent alleged to have been injured while working for the appellant on 14/5/2014. In her statement she stated that she was injured while clearing grass using a slasher. In court, she testified that she was using a panga to cut a fence. According to the appellant these matters are material but the trial court ignored the principle that a party is bound by her pleadings. The treatment note she produced is by Thika Nursing Home (*Exh. No. 1*) as that is where she went to seek treatment. But, according to the Appellant the treatment note bear no record of reference or the injuries sustained by the respondent or the appellant's stamp.

[12] A party is indisputably bound by his or her pleading and must adduce evidence to support that party's case. The statement filed talks of a slasher whilst she talked of a panga in her sworn testimony. This inconsistence does not however diminish the central issue at hand and which has been proved by evidence; that the respondent was injured while in employment with the Appellant.

Negligence and breach of statutory duty

1. In matters of safety at work, the Appellant owed the Respondent a statutory duty of ensuring her safety as an employee in the workplace. Section 6 and 13 of the **the Occupational Safety and Health Act** sets out the employer's as well as employee's obligations. These two sections were considered by the Court of Appeal sitting in Nyeri in the case of **Purity Wambui Murithii v Highlands Mineral Water Co. Ltd, [2015] eKLR** where it stated as follows:

"Section 6(1) of the Occupational Safety and Health Act provides:-

"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further Section 13(1)(a) of the Occupational Safety and Health Act provides:-

"13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

[13] The employer ought to have provided her with protective working gear, reasonable and safe tools of work. According to **Section 101 of the Occupational Safety and Health Act No. 15 of 2007** the employer ought to provide the employee with protective clothing and appliances. **PW1** told the court that she was not provided with protective clothing and appliances which could have minimized the risk of injury. **PW1** also told the court that when she discovered that the equipment was faulty she brought that fact to the attention of the supervisor who told her to either work or leave. She opted to work. The Respondent proved the equipment she was given was faulty. The evidence show that the wooden handle of the tool she used to work with fell off as a result of which she was injured. Good tools of work will not have their

handles fall off.

Duty of employee

[14] But, under the **Occupational Safety and Health Act**, the employee also bears the duty of care to herself; to take safety precaution while working. By bringing to the attention of the supervisor of the fact of faulty tool she used for work is testimony that she knew the dangers of working with such equipment or tool. Despite knowing the risks of working with faulty equipment she opted to continue working.

[15] In this case, fairness demands looking at the matter from the standpoint of the duty borne by each party and the actions taken or not taken by each party. This is a perfect case for contributory negligence. But in what proportion?

Apportionment of liability

[16] When the Respondent brought to the attention of the supervisor of the faulty equipment, she was given an ultimatum to either work with the equipment or leave. Prudence demands that the employer should have provided her with an efficient or better equipment as well as protective gear. Such was irresponsible behavior of the appellant in safety matters of its employees. It did not do so; instead, the supervisor gave her an ultimatum to work with the faulty equipment or leave employment. Such is quite unbecoming conduct of an employer who should provide safe working tools to employees. I have stated that the Respondent ought also to have taken precaution when she decided to work with a faulty equipment. But, looking at the two streams of evidence and the circumstances of this case, the Appellant should bear substantial contributory negligence. Accordingly, I find that the trial magistrate did not err when he apportioned liability at 70: 30 in favour of the respondent.

Shifting burden of proof

[17] The Appellant seems to suggest that the trial court shifted the legal burden of proof to them. Courts have said time without number that legal burden of proof remains on the party alleging. But evidential burden will shift as prima facie evidence is adduced by a party, to the party who would fail if no further evidence is adduced. Such party is said to bear evidential burden to rebut the evidence by the other party. These two concepts should not be confused to mean the same thing or to be used interchangeably. But both constitute the general concept of burden of proof.

[18] In the face of the prima facie evidence I have analyzed above, the Respondent created evidential burden on the appellant who would fail if no further evidence is adduced. The Appellant did not adduce any evidence or call witnesses to rebut the evidence by the Respondent. Their defence therefore remained mere statements of facts without any proof. See the case of **Linus Nganga Kiongo & 3 others v Town Council of Kikuyu[2012] eKLR** G. V. Odunga J stated that:

> **"Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."**

Quantum of damages

[19] Before I tackle this issue, I will settle one matter: the treatment chit. The treatment chit produced evidences that the Respondent went to hospital for treatment. In spite of the note not making reference to the injuries, it is provided a basis for her claim that she went to the Hospital for treatment. The medical chit was admitted in evidence. The medical report (*Exh. 3*) provides the details of the injuries. As an argument was made, I should state that, it is not necessary that the treatment chit should bear the stamp of the appellant especially because the Respondent was not treated by the appellant. Secondly, **PW1** stated that she was given fare to go to the hospital and so she was the one who took herself to hospital and not by the appellant. Accordingly, the respondent proved that she was injured at the work place on the material day and sustained the injuries that were proved by way of medical evidence.

[20] On quantum; the appellate court ought not to interfere with the assessment of damages by the trial court except where the trial magistrate acted on wrong principles of law or the award is so high or so low as to be an erroneous estimate of the damages to which the plaintiff is entitled. This general principle was articulated in the case of **Butt v Khan [1981] KLR 349** where it was held per Law, JA as follows:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

[21] The respondent pleaded that she suffered a cut wound on the right leg lower third. The medical report confirmed this and concluded that the respondent suffered trauma due to significant pain and loss of blood. The report stated that, due to the injury she was not able to perform her duties effectively for three (3) weeks and that the numbness she had was mild and not significant.

[22] The trial court relied on the case of **Catherine Wanjiru Kingori & 3 others v Gibson Theuri Gichubi[2005] eKLR** where an award of Kshs. 300,000/- was given to the 1st plaintiff for injury on the left ankle, injuries on the legs and injuries on the chest. The 2nd plaintiff was awarded Kshs. 100,000/- for injury on the back. The 3rd plaintiff Kshs. 350,000/- for multiple tissue injuries, injury on the left elbow joint and injuries on both ankles. The 4th plaintiff awarded Kshs.100, 000/- for injury on the neck and headache.

[23] In **Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR** the high court set aside the award of Kshs. 300,000/- and awarded Kshs. 100,000/- for soft tissue injuries to the lower right leg and to the back.

[24] The injuries sustained by the Respondent were soft tissue injuries. In light of the foregoing cases and the nature of the injuries sustained, the award of Kshs. 200,000/- was excessive. An award of Kshs. 100,000/- would be fair compensation for the injuries suffered.

[25] As a result, I set aside the assessment of damages by the lower court. In its place, I award Kshs. 100,000 in general damages. The amount awarded in special damages was not challenged and remains as awarded by the trial court. The award herein is subject to 30% contributory negligence. Each party to bear its own costs.

Dated and signed at Meru this 14th day of November 2019

F. GIKONYO

JUDGE

Dated, signed and delivered in open court this 27th day of November 2019

L. NJUGUNA

JUDGE