REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 18 OF 2013

TWIN RIVER 1 ESTATE.....APPELLANT

VS

TERESIA MUTHEU NZUI.....RESPONDNET

(An appeal from the judgment of Hon. A. O. Opanga (Resident Magistrate) delivered on 17th January, 2013 in Civil Case No.6 of 2010 before the Senior Magistrate's Court at Yatta)

JUDGMENT

INTRODUCTION

1. The appellant (defendant) is an estate company that had allegedly employed the respondent as a casual worker. It was alleged by the plaintiff (respondent herein) that on or about the 27.03.2007 the respondent was lawfully engaged in her duties of loading bags of coffee onto a tractor at the appellant's farm in Ngoliba. In the course of loading coffee the tractor suddenly moved forward causing her to fall and she sustained a fracture displacement of the distal radius and ulna.

2. The (respondent) had averred that the accident was as a result of negligence on the part of the defendant's driver or it was breach of statutory duty of care on the part of the defendant.

> "*Particulars of negligence on the part of the defendant's driver /agent*
>
> *a) Driving without due care and attention*
>
> ***b) Failing to have any or sufficient regard for the plaintiff who was loading coffee onto the tractor.***
>
> *c) Driving the tractor off when it was not safe to do so.*
>
> *d) Driving off at an excessive speed in the circumstances.*
>
> *e) Failing to slow down, stop or in any way manage or control the tractor so as to avoid the accident and the defendant is vicariously liable for the fort of his driver lagent.*
>
> ***Particulars of breach of statutory duty of care.***
>
> *a) Failing and / or neglecting to provide a safe environment or system of work for the plaintiff.*
>
> *b) Deliberately exposing the plaintiff to danger, which the defendant knew or ought to have known.*
>
> *c) Failing to provide the plaintiff with safe working devices.*
>
> d) *Failing to train or introduce the plaintiff to other means of performing the said work*."

3. The defendant had filed its defence denying that the plaintiff was its employee and that she had been injured on 27.03.2007 in the course of her employment. The particulars of negligence attributed to them or against its driver or agent and the contention that they could not be held vicariously liable for the tort committed by the driver were also denied.

4. The plaintiff testified and called two other witnesses, a colleague at work who testified to have taken her to hospital (PW2) and a doctor from Thika District Hospital (PW3). It was the plaintiff's evidence that she was ***offloading*** coffee from a tractor when the driver moved forward; she lost control and fell down. The sack pulled her hands backward and she broke her left arm. Elizabeth Kanene (PW2) testified she was also offloading coffee from the tractor when the plaintiff was injured. Dr. Gerorge Kimiri Karanja (PW3) produced a medical report. He testified that the plaintiff went to hospital with a history of a road traffic accident on 27.3.2007 at the defendant's place of work. The plaintiff had a fracture, which was displaced on the left distal radius and ulna.

5. The defendant (appellant) availed two witnesses. Anna Wambui Ngugi (DW1) testified that the plaintiff (respondent) never reported to work on 27.3.2007. On 27.3.2007 workers picked coffee and there was no accident that was reported. Workers who picked coffee reported to work between 7.00 a.m and 9.00 a.m. She testified that whenever an employee was injured in the course of work the foreman would be informed and then the injured taken to either Ngoliba or Thika District Hospital depending on the nature of injury sustained.

6. Mutua Musyoki (PW2) adduced further evidence that he had worked as a clerk for the defendant (appellant) since 2010. He testified that when one got injured while at work it would be recorded in the occurrence book. He knew the plaintiff but she was not booked as a person who had been injured. An incident report book was produced as dex no. 1. On 27.3.2007, seventy one (71) people were paid and the plaintiff was not amongst them. The list of names of the wage earners was produced as Dex no. 2. On cross-examination, he testified that he had not carried a book that contained workers who reported on duty on the 27.3.2007, and that no one could leave his wages behind unless he was injured. The incident report book contained incidences that occurred from. 2.6.06 to 7.5.2010.

7. Parties filed submissions and the trial magistrate found that the plaintiff was at work and she had sustained injuries, and that the defendant had failed to provide safe working conditions or equipment to lift the heavy coffee bags and hence the defendant was wholly liable for the injuries sustained by PW1. The plaintiff was awarded general damages for Ksh.180,000/= and special damages of Ksh.10,150.

Memorandum of Appeal

8. The defendant was dissatisfied with the judgment and appealed therefrom setting forth the following specific grounds:

> *i."The learned trial magistrate erred in both fact and in law by holding the appellant wholly liable which finding was against the weight of evidence.*
>
> *ii.The learned trial magistrate erred in both fact and in law by ignoring the evidence tendered by the Appellant's witnesses, which demonstrated that the respondent was not injured while in the normal course of employment with the appellant on the material day.*
>
> *iii. The learned trial magistrate erred in both fact and in law by attaching undue weight to the testimony of the respondent vis a vis that of the Appellants' witnesses.*
>
> *iv. The learned trial magistrate erred in both fact and in law by ignoring the Appellants written submissions on the question of liability.*
>
> *v. The learned trial magistrate erred in both fact and in law by ignoring the fact that no evidence was tendered to prove the Appellant's description as given in the plaint and establish whether it (the appellant) had the requisite locus standi to be sued in its own name.*
>
> *vi. The learned trial magistrate's award of General damages for pain, suffering and loss of amenities is so manifestly excessive as to amount to an erroneous estimate of the loss suffered by the respondent.*
>
> *Reasons wherefore, the Appellant prays that the learned Magistrate's finding on liability and the award for both General damages for pain, suffering and loss of amenities be set aside as a whole and the same be substituted with an order dismissing the respondent's claim. The appellant also prays that it be awarded costs of both this appeal and the lower court proceedings."*

Submissions.

Appellant's submission.

9. The appellant urged that in her amended plaint she was asked to ***load*** coffee into the tractor whereas during trial she testified that she was ***offloading*** coffee. Further that it is trite law that parties are bound by their pleadings. In ***Galaxy Paints Company Ltd v. Falcon Guards Ltd*** C.A No. 219 of 1998, the Court of Appeal held that the trial court may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. The same was held in ***Gandy v. Caspair*** [1956] EACA 139 and in ***Fernandes v. People Newspapers Ltd*** [1972] EA 63. It was urged that there was a departure by the respondent on how she got injured while at work and urged the court to allow the appeal.

10. It was further submitted that the respondent and her witnesses had failed to state, and join, the driver's name thus vicarious liability could not stand. Yet the defence witnesses testified that the respondent was not at work on 27.3.07, which was backed by evidence.

11. On Grounds 2 and 3 the appellant urged that DW1 who was the supervisor testified that the respondent was not at work on the material day and her name did not appear in the list of the incident book produced by DW2 (the clerk). DW2 also produced a list of employees who were at work and were paid after the day's work. The respondent's and PW2' names were not in the list. It was urged that the trial court had made an assumption that since PW1and PW2 had gone to hospital as they had testified, then their names could not appear in the list of those paid at the end of work. The trial court had ignored DW1's evidence in cross-examination when he testified that:

"*if a worker leaves before time, she leaves the coffee to a fellow worker to collect the wages for her*."

12. PW1 and PW2 had not testified whether they had left their coffee with a fellow worker to collect wages on their behalf. It was also urged that the respondent had not proved or given evidence in instances when an accident would occur and fail to get recorded in the incident book. DW2's testimony was not shaken or contradicted on cross –examination.

13. Further, it was contended that the respondent's counsel had not opposed the production of the defence documents and therefore the court averred in discrediting them. The respondent's counsel could have applied to have the respondent recalled for purposes of clarifying any issues raised by the appellant's witnesses.

14. Further the court erred by disregarding their submission in regard to the analysis of the evidence tendered. The appellant could not be sued since it did not admit its description as set out in the plaint. In Nairobi HCCC No. 1043 of 1997 ***Matinyani Women Development Group v. Group Four Security Limited,*** the court held that a non- existent person could not sue. See also Nairobi HCCA No. 307 of 2006 ***Kiserian Isinya Pipeline Road Resident Association (KIP PRA) & 6 Ors. v. Jamii Bora Charitable Trust and Anor.***

15. The appellant further contended that the trial court erred by awarding an amount that was excessive at Ksh.180,000 for general damages of pain, suffering and loss of amenities. The doctor (PW3) testified he had examined the respondent who was in the process of healing. Finally, they urged the finding on liability and the award on general damages be set aside and the appeal be allowed with costs of both the lower court and high court.

Respondent's submission.

16. It was urged for the Respondent that the appellant during trial or in their submissions never raised an issue on whether the plaintiff was ***loading*** or ***offloading*** the coffee. The respondent in her evidence at page 10 paragraph 10 of the record of appeal testified that she had loaded coffee onto the tractor and she was asked to offload again. What was important was the driver's contribution to the accident since he moved the tractor forward. The nature of the case is industrial in nature and it did not warrant production of a police abstract. Failure to join the driver of the tractor was not fatal in establishing vicarious liability as was held in Nairobi Civil Appeal No. 177 of 1999 ***Samuel Ikuru Ndirangu v. Coast Bus Company Ltd***.

17. The appellant's witnesses (DW1) and (DW2), a supervisor and clerk, respectively, testified that they did not keep a record of workers who reported to work. The incident record book had been tampered with and they had prepared a new record, which omitted the respondent's name. The payment record did not bear her name, which confirmed she was not paid since she left early together with her colleague, and had left Beatrice, Beth and Mutua whose names were in the record of workers. It was urged that this was corroborated by the evidence by DW2 (clerk) who said the employee's names were recorded on the payment book when being paid their wages.

18. On liability the respondent urged that were it not for the negligence of the driver and the company's failure in offering a better system of work to ensure the heavy bags are lifted without risk of danger, the respondent could not have been injured.

19. They urged the appellant was a company, which could be sued, and in an application for stay of execution one John Mbuthia had described himself as a director of the appellant. The case in ***Matinyani Women Development Group,*** supra, cited by the appellant is not applicable since the court was informed during trial that it was not a company and therefore had no locus standi.

20. On general damages, the amount of Ksh 180,000/= was lower than what they had prayed for. The Court was referred to ***Patrick Kioko Nyundo v. Mavoko Town Council*** HCCC No. 481 of 1995. They urged the same be enhanced and the appeal be dismissed with costs.

Issues for determination

21. The court has referred to the proceedings of the lower court in the Record of Appeal, the submissions and authorities relied on by the parties and has framed the following specific issues:

a) Whether the respondent was at work on 27.03.2007; and if so, whether she was injured;

b) Whether the respondent was liable for the injury sustained by the respondent; and

c) If so, how much compensation would be adequate?

Determination

22. The appellant raised 6 grounds of appeal in its Memorandum of Appeal. This is a first appeal and the court is under a duty re-evaluate the evidence on record a fresh as was held by the Court of Appeal in ***Selle & Anor v. Associated Motor Boat & Co. Ltd & Anor*** [1968] EA 123. The court's duty is to evaluate and re-examine the evidence adduced in the trial court and make its own finding giving allowance that it did not have an opportunity to hear or see the witnesses. Further this court does not have to interfere with the lower court's decision on a finding of fact unless the same is founded on wrong principles of fact and or law, and or it was based on no evidence. See Law JA, Kneller & Hannox Ag. JJA in ***Makube v. Nyamuro*** [1983] KLR, 403 – 415, at 403 where it was held that:

"*A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."*

The Burden of Proof

23. In Halsburys, ***Laws of England,*** 4th Edition paragraph 662 (page 476) it is observed 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 duty, and an injury to the plaintiff between which and the breach of duty a casual connection must be established."*

24. The Evidence Act at section 107 (1) & (2) provides for the burden as follows:

> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

25. Section 108 of the Act on the incidence of the burden of proof is as follows:

> *"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*

Standard of proof

26. The standard of proof in civil cases is on a ***balance of probabilities***. The standard has been explained by Lord Nicholls in ***Re H (minors)*** (1996) A.C. 563 as follows:

> *"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."*

Proof of employment and injury in course of duty

27. The issue here is for the respondent to prove she was at work and whether she was injured while at work. For an act to be considered to be within the course of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible. In this case, however, the first consideration is whether the respondent was at work and acting in the course of her employment with the appellant.

28. .The respondent (PW1) testified to have been an employee of the appellant and she was injured in the course of her employment. This was disputed by DW1 who testified that though the respondent used to work for the appellant, she was not on duty on 27.3.2007. PW2 had testified that she was at work on 27.3.2007 and she escorted the respondent to seek medication. Her evidence that the accident occurred at 3.00 p.m. contradicts the hospital receipt which indicates the time as 23.01.10. If at all the injury was at that time as claimed by PW2 an explanation or evidence ought to have been given as to the occurrence of events from the time of accidence to time of treatment. This was disagreed by DW2 who testified that the respondent was not injured, and if she had been injured, her name could have appeared in the incident report book, which was produced as Dex no. 1. The court has referred to the exhibit and it shows accident reports from the 2/6/06 to 8/5/2010; the exhibit showed the nature of the incident and the date of the incident. For example, on 2.6.06 one Martine Mutua was injured at 8.00 a.m. by a panga when he was sharpening it using a file.

29. On the issue of the respondent being at work the respondent and her witnesses PW2 testified that they were present at work but they did not avail any document to show they were casual employees at the appellant's premises such as a gate pass. The respondent and her witness (PW2) did not even give the driver's name that allegedly moved the tractor and the respondent got injured. In addition, the Respondent's case left out crucial evidence of eye-witnesses who were allegedly present at the time of the accident as set out in the testimony of PW2 as to how the accident occurred, as follows:

> *"At 3.00 p.m when she went to off load coffee from the tractor. The driver drove it forward and Teresia fell down. She turned back to put the sack on her back. The tractor moved and she fell down. She didn't get up. I knew she was hurt. Anna and Mutua went to help her up. She was taken to hospital by myself and Anna. Beth remained behind. Anna is the supervisor. Beth and Mutua are coffee harvestors. We went on foot to Thika. We did not have money for treatment. She took us to son's house the following day. We slept at the casualty section in hospital. Her son gave money for treatment. I was a casual labourer. We used to be paid on daily basis that day I wasn't paid even Teresia wasn't paid. Beth followed us to hospital."*

Anna, the supervisor, and coffee harvestors Beth and Mutua were not called as witnesses, in view of the denial of the accident in the Defence (paragraph 7) dated 18/3/2010. It is improbable that a responsible person of the position of supervisor as Anna (who testified as DW1) could have witnessed the accident, helped the respondent up after the fall, only to fail to assist the injured to hospital, to record the incident in the Incident Book and, finally, deny the incident in her testimony before the court. In accordance with the decision of ***Re H (Minors),*** this serious allegation of dereliction of duty requires strong and cogent evidence to prove.

30. The Incident Book could have contained the respondent's name if at all she had been injured. No benefit of the appellant was shown in

failure to record the respondent's alleged incident despite irregular recording of events, (not according to chronological order), the Incident Book report shows recording of many accidents and incidents happening to their staff ranging from *"cut by panga left arm near the thumb when sharpening a file"* on 2/6/2006; *"attack by thugs while guarding Thika Pump"* on 19/8/09; *"Pinched by nail in factory"* on 11/4/2010; and *"foreign body in eye while picking cherry"* on 1/05/2010. Why would the incident of 27/3/2007 involving the respondent be omitted? The respondent, whose duty it is to prove the claim in negligence, did not provide any answers apart from the bare assertion by the respondent's counsel that the name could have intentionally been omitted by the appellant in order to show that the respondent was not at work and thus was not injured. Surely, the minuted attack by thugs on 7 members of staff at their staff houses, place of work – factory and at the office compound, on 7/8 – 5 2010 which is recorded in the Incident Book and also shown to have been reported to the 14 Falls Patrol Police Base would attract higher damages and, therefore, greater motivation to omit it from the Incident Book.

Proof of negligence

31. In the absence of a negligent act or omission the respondent is not discharging her burden of proof. The respondent did not inform the court the weight of the coffee bag she was carrying for the appellant to provide a machine, as she had testified. She also did not testify as to how the protective clothing she talked about in her examination-in-chief would have assisted to prevent the injury (if at all) she had sustained.

32. The respondent in her amended plaint had given the particulars of negligence on the part of the appellant's driver and or agent and the breach of statutory duty of care, which she had failed to demonstrate. It is this relationship of employer- employee that would create a duty of care. The employer is required to take all reasonable precautions for the safety of the employee to provide an appropriate and safe system of work, which does not expose the employee to an unreasonable risk. The respondent had pleaded the particulars of negligence and failure of duty of care but had failed to prove what the proper system was and in what relevant aspect it was not observed by the appellant.

33. There was no demonstration on a breach of duty of care on the part of the appellant. With respect, there was no evidential basis for the finding of the trial magistrate that –

> "*The appellant had failed to provide safe working conditions or equipment to lift the heavy coffee bags. In my view an equipment to lift heavy loads from a tractor was very crucial or else the plaintiff wouldn't have suffered injury."*

Departure

34. The appellant raised an issue on the variance of pleadings and the evidence. The amended plaint indicated that the plaintiff was ***loading*** coffee when she sustained the injury, ***which is different from her testimony***. At page 10 of the Record of Appeal, the respondent testified as follows:

> "*I went to work at 7:00 a.m. at 3.00pm we were told to take the harvested coffee to the tractor. It went away to the tractor. It went away and we proceeded on foot to the weighing place. We found the tractor had reached. We were told to* ***offload*** *the coffee*."

35. With respect, Counsel for the appellant has misapprehended the principle of departure. Order 2 Rule 6 of the Civil procedure Rules provides for Departure as follows:

> "**[Order 2, rule 6.] Departure.**
>
> *6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.*
>
> *(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."*

In this case, it appears only to be a matter of evidence not supporting the allegations in the pleading which is a burden of proof issue that goes to credibility of the witnesses and not departure from previously pleaded claims.

Objection on capacity to be sued

36. The appellant urged that there was no evidence tendered by the respondent on its name and whether it could be sued in its own name. It is the court's observation that throughout the proceedings, the appellant did not raise such an issue before the trial court. In ***Matinyani Womens Development Group,*** supra, the plaintiff had not been registered as an entity and the issue was raised before evidence of the witnesses was taken, which is different from the instant case since the appellants' director John Mbuthia Kamau swore an affidavit on 12.02.2013 deponing that:

> "*THAT I am a Director of the Defendant Company and I have the company's authority to swear this affidavit on its behalf*".

The appellant's objection as to capacity to be sued is not well taken on appeal.

Excessive damages

37. The Appellant on ground 6 urged Ksh.180,000 was excessive. The respondent testified to have been injured while at work and was

treated at Thika District Hospital. The treatment chit produced as Dex no. 1 and the medical report by Dr. Karanja dated 8/6/07 was consistent on a fracture "*Fracture displacement of left distal radius and ulna.*" I would consider an award of Ksh.150,000/- to be adequate compensation for a general fracture. However, in accordance with principle the appellate court will not interfere with an award of damages unless it is based on a wrong principle or it is inordinately high or low as to represent an erroneous estimate, (***Jivanji v. Sanyo Electrical Company Ltd.*** (2003) KLR 425) or the award is "manifestly inadequate" (***Ali v. Muhozozo*** (1983) KLR 602).

38. I do not find the damages excessive for the nature of alleged injury – fracture of distal radius and ulna. However, as liability has not been established by cogent evidence of negligence on the part of the appellant, that the respondent suffered injury while in the course of employment by the appellant and that the appellant was in breach of its duty of care to the respondent, nothing turns on the finding that the damages are not excessive.

Conclusion.

39. For the reasons set out above, the court finds that the respondent has not on a balance of probabilities proved that she was at work on the material day and that she was in the course of employment and her duty given by the appellant injured as alleged, so as to support a claim for damages in negligence. Although the respondent may well have suffered injury to her left arm on the 27th March 2017 as indicated in the treatment notes and medical report produced for the respondent, the same was not demonstrated by cogent evidence to have been occasioned in the course of her employment with the appellant so as to give rise to a duty of care, which in any event was not shown to have been breached, owed to the respondent by the appellant.

Orders

40. Accordingly, the court makes the following specific orders:

1. The trial court's finding on liability and the award of Ksh.180,000 on general damages for loss of pain and suffering is set aside and the suit in the trial court is dismissed.

2. The Respondent shall pay to the appellant the costs in the trial court and this court.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF NOVEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances:-

M/S Muchui & Co. Advocates for the Appellant.

M/S A.K Macharia & Co. Advocates for the Respondent.