REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 551 OF 2014

FAITH MUTINDI KASYOKA.....APPELLANT

VERSUS

SAFEPARK LIMITED.....RESPONDENT

(Formerly Milimani Commercial Courts CC 2696 of 2013).

JUDGEMENT

INTRODUCTION

1. In a Plaint dated 13/05/2013, the Plaintiff/Appellant lodged claim on 14/05/2013 seeking reliefs for General and Special Damages, loss of earnings, Costs and Interests.

2. The Appellant pleaded that she was an employee of the Defendant/Respondent. That it was implied in employment contract that the Respondent was to take contractual obligations and duty of care, take all reasonable presumptions of her safety as she engaged upon her work as a general worker/pet parker and not expose her to risk of any damage or injury which she knew ought to have known was unsafe and to provide work and/or safe proper system of working.

3. Thus between October 2010 and March 2013, she was instructed to work with production department who knowingly but ignorantly compelled her to work with the blowing machines in a dangerous environment in there was fumes and cold and in the process she started having chest pains which were aggravated by cold, strong smells and dust causing her a lot of pain, suffering, damages and loss. She also pleaded particulars of negligence, of injuries and special damages.

4. The Defendant filed defence on 20/06/2013 and denied the Plaintiff's claim and particularly that it was negligent, or was in breach of statutory duty as pleaded.

5. The matter was heard and the Plaintiff testified PW1 was a doctor and closed her case.

6. The Defendant/Respondent called DW1 Human Resource Assistant who adopted her statement and said that they never had complaint from any other employee at Defendant's company.

7. The trial court made judgment apportioning liability at 50:50% between the parties and awarded general damages Kshs. 100,000/= and Kshs. 3,000/= as special damages and Kshs. 10,000/= for doctor's attendance.

8. Being aggrieved by the above verdict, the Plaintiff/Appellant lodged instant appeal and set out 9 grounds.

9. However during submissions the Appellant compressed the same grounds and argued them in a bundle of 4 namely:-

i. ***Did the Learned Magistrate error in law and in fact by failing to analyse the entire evidence on record in arriving at her judgment?***

ii. ***Did the Learned Magistrate in particular consider the expert opinion of the medical doctor, whose evidence was uncontroverted?***

iii. ***Did the Learned Magistrate error in law and in fact by awarding the Appellant Kshs. 100,000/= subject to 50% liability devoid of any satisfactory grounds?***

iv. ***Is the Kshs. 50,000/= awarded by the Learned Magistrate commensurate to the injuries suffered by the Appellant herein?***

10. The parties agreed to canvass appeal via submissions. Both sides filed the submissions as agreed.

APPELLANT'S SUBMISSIONS

11. The Appellant submitted that if at all the audits were done, the Respondents did not comply since a simple protective gear such as a gas mask was not provided to the Appellant on request. Moreover, the Respondent is required to provide its employees, specifically the Appellant in this case, with protective gear without having been requested.

12. The Respondents did not provide any documentation to prove that audits had been undertaken, and its premises certified as a safe working environment.

13. It further did not produce any documentation to prove that protective gear was provided each and every time the employees report to their work station at the production department.

14. It is argued that if at all that was the case, then the Appellants condition would have been identified from the onset of her complaints and medical attention provided to the Appellant without the need for the said Appellant to inform the Respondent of her condition on several occasions.

15. Additionally, the Respondent did not produce any document to prove that the alleged periodic medical examinations had been carried out on individual employees, more specifically the Appellant, so as to prove that the Appellant condition was not as a result of the bad working environment at the Respondent's plant.

16. From the foregoing, it is submitted that the trial Magistrate erred in law and in fact in failing to take into consideration the evidence given by the Applicant through her written statement and the testimonies made in court.

17. The Learned Magistrate also failed to take into consideration the exhibits produced in court as proof that the bad working conditions at the Respondent plant was the cause of her ailment.

18. Further, the Learned Magistrate failed to consider the Respondent's witness did not produce any documents as per the alleged NEMA audits, to prove that the plant conditions were compliant with the Occupational Safety and HEALTH act.

19. More so, the Learned Magistrate failed to take into consideration that the Respondent did not produce any documentary evidence to prove that KEMRI and Dr. Ravi of Directorate of Safety and Health (DOSH) carried out periodic medical examinations to ascertain and ensure individual employee health status.

20. It is further submitted that the Learned Magistrate failed to consider the expert opinion of the medical doctor in totality by concluding that since the disease affects people who are generally pre-disposed to it and that the fumes are a trigger, the Respondent could not entirely shoulder liability for a disease which the Appellant is generally pre-disposed to.

21. To this extent, the Learned Magistrate in finding that the Appellant was partly liable to the occupational disease was erroneous. This is because, the doctor while testifying during trial, categorically stated that the continuous inhalation injuries to the lungs and the stomach and the chest pain and the congestion was the lasting effect of the chronic obstructive airway disease which was directly attributed to the prolonged exposure to the factory fumes and not other causes such as exhaust fumes.

22. He also testified that the disease that the Appellant is suffering from is not an infection. While giving his testimony, he advised that the Appellant should be provided with high filtration face masks while at the Respondent plant so as to prevent the disease as the Appellant was dealing with very poisonous gases.

23. Therefore, the decision that the Learned Magistrate arrived at to which she attributed the Appellant's disease to "cold (weather) which is an act of God and far from the Defendant's control" is erroneous and a failure on her part in considering the expert witness evidence. It is submitted that, the Appellant informed the officials of the Respondent of the situation who blatantly disregarded her concerns, and concluded that the Respondent was lying.

24. Even upon making the report by the Appellant and issuing the Respondent with the treatment notes, the Respondent did not supply her with any protective mask.

25. It is submitted that as an employer, the Respondent had a duty of care to its employee and it did not bring any evidence that the Appellant was offered a safe working environment.

26. Appellant relied on treatise of the **Winfield and Jolowicz on Tort, Seventeenth Edition, where it is opined, that** the nature of an employer's duty in summary is the duty to take reasonable care so as to carry on operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.

27. Also the provisions cited are **Section 3 of the Occupational Safety and Health Act (Chapter 514 of the Laws of Kenya) which** states as follows:-

2) ***The purpose of this Act is to:-***

a) Secure the safety, health and welfare of persons at work; and

b) Protect persons other then persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.

28. Appellant also relies on the case of ***Purity Wambui Muriithi –Vs- Highlands Mineral Water Co. Ltd (2015) eKLR which 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 the workplace."

29. Thus it is contended 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.

30. See also **Section 6(2) of the Occupational Safety and Health Act which** provides as follows:-

(2) ***Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes:-***

(a) The provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

(b) Arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) The provision of such information, instruction, training and supervision as it is necessary to ensure the safety and health at work of every person employed;

(d) The maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and agress from it that are safe and without such risks to health;

(e) The provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;

31. Citing **Sokoro Saw Mills Limited –Vs- Bernard Muthimbi Njenga Nakuru High Court Civil Appeal No. 38 of 1995** it is submitted that, the duty of the employer to provide a safe place of work to the employee, comprises,

"not merely to warn the employee against unusual dangers known to them….but also make the place of employment as safe as the exercise of reasonable skill and care would permit."

32. Thus it is argued that, the Respondent did not adduce evidence demonstrating the Appellant had been issued proper protective gear suitable to her role. It was not sufficient to offer the Appellant ear muffs. The measures adopted by the Respondent did not match the common law duty to take all reasonable steps to ensure the employee's safety.

33. Appellant relied on **Wilson & Clyde Coal Co. –Vs- English (1938) AC 579** which held that employers are under a duty to provide adequate material and a safe system of work.

34. The Learned Magistrate failed to adequately analyze the scope of the Employer's liability, for the acts of an employee carried out within the scope of employment. The Respondent as an employer did not demonstrate to have availed to the Appellant a safe system of work.

35. On quantum, it is argued that, Dr. Kinuthia stated that the Appellant will require prolonged follow-up to the said occupational disease. He testified that the Appellant's condition is life-long and it reduces the quality of life. The condition will not go away but can be controlled. The Appellant will have to see a doctor once a month and be on continuous medication.

36. At a minimum, the Appellant will spend about Kshs. 5,000/= per month adding up to Kshs. 60,000/= per year. If admitted, it will cost her Kshs. 100,000/= for each single admission. It is severe continuous and expensive condition.

37. Thus Appellant submit that the Magistrate left out the relevant factor that the Appellant will have to undergo various expenses as elaborated by the Doctor. Further, that the award of Kshs. 100,000/= given by the Learned Magistrate was too low, amounting to an erroneous estimate.

38. Appellant relied on authority of **Hibiro Mohammed Fukisha –Vs- Redland Roses Limited (2006)** where the Plaintiff had been employed by the Defendant, a floriculture company, as a sprayer and he remained in service in that capacity from 16th June, 1996 to February 1999 a period about 2½ years. He pleaded that he was retired on medical grounds.

39. Judgment in favour of the Plaintiff was awarded as follows:-

1) Special damages: Kshs. 5,000/=.

2) Compensation by virtue of the Workmen's Compensation Act (Cap. 236): Kshs. 3030x12x23=Kshs. 806,280/=.

3) Interest in item (1) hereinabove at court rates with effect from the date of filing suit.

4) Interest on item (2) hereof at court rates with effect from the date hereof.

5) 70% of the taxed costs of this suit to be borne by the defendant.

6) Interest on item (5) with effect from the date of filing suit.

40. **Appellant also cited Sylvester Oduor Othwila –Vs- Phoenix Aviation Limited (2014)** where the claimant, Sylvester Oduor Othwila, worked for the Respondent, Phoenix Aviation Limited, for close to four years. The work mostly consisted of spraying aircrafts in a closed hangar in order to guard against polluting the environment as a result of which the Plaintiff developed chest problems which led to termination of his employment.

41. He was awarded Kshs. 225,000/= plus costs and interest at court rates from the date of the award until payment in full.

RESPONDENT'S SUBMISSIONS

42. PW1 testified that he found that continuous inhalation of toxic fumes led to the chest pains, chronic airway disease complained of by the Appellant. He however testified that the same could also be caused by several causes and not only factory fumes. He further admitted that he relied purely on the information presented by the Plaintiff to arrive at his decision.

43. The Respondent submitted that, PW1's evidence fails to meet the test of objectivity, as it is neither empirical nor professional and the same should be taken with a pinch of salt.

44. The Respondent respectively submits that the evidence adduced by the Appellant does not prove that her chest pains were as a result of negligence or breach of statutory duty on the part of the Respondent.

45. The Respondent submits that the evidence tendered by the Appellant fails to provide any causal link between the injuries she sustained and the duty of care placed upon the Appellant in negligence.

46. The Respondent cites the case of **Timsales –Vs- Stephen Gachie (2015) eKLR** Musinga J. (in pages 1-6 of their authorities) which held that the defendant was not liable for injuries sustained by the Plaintiff relied on a passage found at 203 of **Winfield and Jolowicz on Tort (13th Edition),** which provides:

> ***"At common law, the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the Plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working the Plaintiff must plead, and therefore prove, what the proper system was and in what relevant respect it was not observed."***

47. In view of the foregoing, the Respondent submits that the Appellant has failed to prove her case and therefore no liability arises on the part of the Respondent.

48. On negligence, the Respondent refers court to the case of **Timsales Limited –Vs- Stephen Gachie (2005) eKLR** held; [pages 1-6]

> ***"Not every industrial injury is caused by negligence of an employer and unless a relevant statute imputes strict liability on the part of an employer, claimants must know that they must plead their cases properly and prove negligence and/or breach of statutory duty on the part of the employer sufficiently. A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so."***

49. On the issue of liability, the Respondent also cites the case of **Garton Limited –Vs- Nancy Njeri Nyoike (2016) eKLR** which held; [pages 7-22]

> ***"She therefore had knowledge of the dangers that were attendant and she too was under duty to be vigilant while working ….. I see no reason why I should interfere with that discretion. It was reasonable therefore I shall not disturb it."***

50. On the issue of reviewing damages upwards, Respondent cites the case of **Butt –Vs- Khan (1982-1988) KAR 1**, where the Court of Appeal stated that:-

> ***"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."

51. On burden of proof, Respondent also cited case of **Delphis Bank –Vs- Channan Singh Chatthe & Others (2014) eKLR** which cited with approval Mulla on the Code of Civil procedure Volume 2, 16th Edition where the writer commented on the Indian Evidence Act 1 of 1872 thus:-

"… burden of proof lies on that party who would fail if no evidence at all were given on either side, it is well settled law that a person who sets the law in motion and seeks a relief before the court, must necessarily be in a position to prove his case and get relief moulded by law."

52. Finally, reliance was made on the case of **Purity Wambui Murithi –Vs- Highlands Mineral Water Co. ltd (2015) eKLR** which held:-

"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."

53. Respondent argued that on standard of proof, it is also established that the standard of proof in civil cases is on a balance of probabilities. In discharging this burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. Only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.

54. This position was espoused in the case of **Wareham t/a A.F. Wareham & 2 Others –Vs- Kenya Post Office Savings Bank (2004) 2 KLR.**

DUTY OF THE FIRST TRIAL COURT

55. As a first Appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand.

56. The duty of the court in a first appeal such as this one was stated in **Selle & another –Vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –Vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)"

ON EVIDENCE

57. The Appellant PW2 recorded a concise statement giving a chronology of events leading to the diagnosis of the occupational disease, chronic obstructive airways disease, and the causes thereto.

58. While giving her testimony in the lower court, the Appellant informed the court that she started developing chest complications eight (8) months after she had been employed at the Respondent plant.

59. She stated that the complications were brought about by blowing machines in the production department which specialized in the making of plastic containers.

60. The environment in the said department was not safe for working due to the dust fumes and cold. The Respondent did not provide protective gear, being a gas mask, while knowing this state of condition.

61. The Appellant made complaints to the supervisors on the state of the working environment and the ailments that she contracted as a result of the said environment. They instead ignored her, stating that she was lying.

62. This left the Appellant with no option but to seek medical attention on her own after working hours due to the fact that the supervisors would not grant her leave.

63. They instead would have her take a pay cut for the days she had been admitted in hospital. The Appellant produced a contract as Plaintiff Exhibit 2(a) and the gate pass as Plaintiff Exhibit 2(b), showing the date of employment and continued access to the place of work. This is proof that the Appellant was employed by the Respondent.

64. The Appellant further produced treatment notes from the hospitals that she had attended as Plaintiff Exhibit 3(a) (b) and (c). On seeing

the health of the Appellant deteriorate, the Respondent's officials transferred her to another section of the company, where the conditions were better for the Appellant to work in.

65. However, the Appellant's health had already been compromised and she had to resign from work so as to attend to her health. This is proof that the Appellant contracted the occupational disease while working for the Respondent.

66. Dr. Moses Kinuthia, a medical doctor and a holder of Bachelor of Medicine and Surgery from the University of Nairobi, while giving his testimony in court, relied on his medical report produced as Plaintiff Exhibit 1 (a).

67. He averred that when the Appellant visited his clinic for an examination, she complained of chest pains and congestion. He also averred that the Appellant informed him that she had been continually exposed to manufacturing chemicals while on duty at Safepak Limited, the Respondent Manufacturing Plant, from October 2010 to March 2013.

68. On examination, he found that the Appellant had mild fine rhochi on anisculation in both lung fields, meaning that she had developed inhalation injuries to the lungs and the stomach. He then concluded that the chest pains and congestion were as a result of the lasting effects of chronic obstructive airway disease, directly attributed to the prolonged exposure to toxic fumes.

69. The said doctor, being qualified and having examined numerous other cases of similar nature, confirmed that the best diagnosis in the Appellant's case was through clinical deductions, history and the environment to which the Appellant had been exposed to.

70. He ascertained that although everyone is genetically exposed to the disease (Chronic Obstructive Airway Disease), the bad working environment allowed by the Respondent was the trigger to the Appellant's condition.

71. He further testified that his findings were corroborated by the treatment notes from Mbagathi and Shalom Hospital that were produced by the Appellant as plaintiff Exhibit 3 (a) (b) and (c). The said treatment notes guided him on making a conclusive report.

72. While giving her testimony, the Human Resource Assistant of the Respondent testified that the Respondent is subject to NEMA audits under the Occupational Safety and Health Act (No. 15 of 2007 Laws of Kenya) to ascertain plant conditions are compliant with the regulatory provisions.

73. In the statement produced by the Respondent's Human Resource Assistant, she avers that KEMRI and Dr. Ravi of Directorate of Safety and Health (DOSH) carried out periodic medical examinations to ascertain and ensure individual employee health status.

ISSUES, ANALYSIS AND DETERMINATION

74. After going through pleadings, evidence on record and the submissions, I find the issues are;

1) Whether the trial court erred in arriving at a decision it made?

2) If the answer in an affirmative, what is the appropriate award to be made?

3) What is the order as to costs?

75. The Appellant during her testimony averred that she did not have the disease prior to working for the Respondent. She also testified that before developing the decease, she was able to use a jiko well and carry out domestic work such as sweeping the floor.

76. It was the Appellant's testimony that she blamed the Respondent's for the disease for the reason that she had no gas mask.

77. As an employer, the Respondent had a duty of care to its employee and it did not bring any evidence that the Appellant was offered a safe working environment.

78. In **Winfield and Jolowicz on Tort, Seventeenth Edition**, the nature of an employer's duty in summary is the duty to take reasonable care so as to carry on operations as not to subject persons employed to unnecessary risk, and this includes the duty to provide competent staff, adequate plant and equipment, a safe place of work and a safe system of working.

79. See **Section 3 of the Occupational Safety and Health Act (Chapter 514 of the Laws of Kenya)** states as follows:-

2) The purpose of this Act is to:-

a) Secure the safety, health and welfare of persons at work; and

b) Protect persons other then persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work.

80. It was held in **Purity Wambui Muriithi –Vs- Highlands Mineral Water Co. Ltd (2015) eKLR** 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 the workplace."

81. It is 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.

82. The aspect of a safe working environment was explained in the case of **Sokoro Saw Mills Limited –Vs- Bernard Muthimbi Njenga Nakuru High Court Civil Appeal No. 38 of 1995** where the court stated that the duty of the employer to provide a safe place of work to the employee, comprises,

"not merely to warn the employee against unusual dangers known to them….but also make the place of employment as safe as the exercise of reasonable skill and care would permit."

83. In the present matter, the Respondent did not adduce evidence demonstrating the Appellant had been issued proper protective gear suitable to her role. It was not sufficient to offer the Appellant ear muffs. The measures adopted by the Respondent did not match the common law duty to take all reasonable steps to ensure the employee's safety.

84. In **Wislon & Clyde Coal Co. –Vs- English (1938) AC 579** it was held that employers are under a duty to provide adequate material and a safe system of work. The Learned Magistrate failed to adequately analyze the scope of the Employer's liability, for the acts of an employee carried out within the scope of employment.

85. The Respondent as an employer did not demonstrate to have availed to the Appellant a safe system of work. Thus the court finds respondent 100% liable.

86. On quantum, the Appellant relied on authority of **Hibiro Mohammed Fukisha –Vs- Redland Roses Limited (2006)** where the Plaintiff had been employed by the Defendant, a floriculture company, as a sprayer and he remained in service in that capacity from 16th June, 1996 to February 1999 a period about 2½ years. He pleaded that he was retired on medical grounds.

87. Judgment in favour of the Plaintiff was awarded as follows:-

1) Special damages: Kshs. 5,000/=.

2) Compensation by virtue of the Workmen's Compensation Act (Cap. 236): Kshs. 3,030 x 12 x 23=Kshs. 806,280/=.

88. Also the Appellant cited **Sylvester Oduor Othwila –Vs- Phoenix Aviation Limited (2014)** where the claimant, worked for the Respondent, Phoenix Aviation Limited, for close to four years.

89. The work mostly consisted of spraying aircrafts in a closed hangar in order to guard against polluting the environment as a result of which the Plaintiff developed chest problems which led to termination of his employment.

90. He was awarded Kshs. 225,000/= plus costs and interest at court rates from the date of the award until payment in full.

91. Doing the best I could in the circumstances, I make the following orders namely;

i. Judgement is entered in favour of Appellant against Respondent on liability at a rate of 100%.

ii. The Appellant is awarded Kshs. 300,000/=.

iii. Interests awarded from dates of the lower court judgement.

iv. Plus costs.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

HON. KARIUKI

JUDGE