REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 2 OF 2012

AFRICA APPAREL EPZ LTD .....APPELLANT

-V E R S U S –

RHODA NYAMBURA WERU .....RESPONDENT

(Being an appeal from the judgment and decree on liability of the Hon. P. Nditika SRM at Nairobi CMCC No. 8311 of 2009 delivered on 23rd November, 2011)

JUDGEMENT

1) The respondent herein instituted a suit by way of plaint in the Chief Magistrate's Court at Nairobi, Milimani Commercial Court, Civil Suit no. 8311 of 2009. The respondent was an employee of the appellant when on or about the 2nd June 2009, while in the course of her employment, a rivette machine pressed her right index finger severely injuring her. The respondent suffered loss and damages. The respondent was examined by a medical doctor, PW1, who issued her with a medical report. She was also x-rayed.

2) DW1 stated that the respondent had been trained and provided with protective garments and blamed the respondent for the injuries she sustained. The appellant did not deny the occurrence of the accident. The appellant proposed that an award of ksh.50,000/= as adequate compensation and general damages whereas the respondent proposed ksh.250,000/=.

3) Learned Principal Magistrate (Mr) P. Nditika in his judgment on 23/11/2011 held the appellant herein 100% liable. He further awarded the respondent ksh.220,000/= as general damages, ksh.8,000/= as special damages which was in line with the nature of injuries, decided cases as well as the rate of inflation. Costs of the suit were also awarded. The appellant being aggrieved preferred this appeal.

4) On appeal, the appellant put forward the following grounds in its memorandum;

> ***1.The learned magistrate erred in law and fact in finding that the plaintiff/respondent was contributory negligent.***
>
> ***2. The learned magistrate erred in law and fact in finding the defendant/appellant 100% to blame when the plaintiff/respondent had not demonstrated (as by law required) mechanisms which the defendant ought to have put in place to avert the occurrence of the purported accident.***
>
> ***3. The learned magistrate erred in law and fact in awarding the plaintiff/respondent kshs.220,000/= plus interest and costs which is excessive for the minor injuries allegedly sustained by the plaintiff/respondent.***

4. The learned magistrate erred in law and fact by not finding the plaintiff/respondent was to blame for the accident as she admitted the machine was not mechanically unfit.

5. The learned magistrate erred in law and fact in finding that the defence witness was not present during the time of the accident yet it is not necessary that a witness must be present at the time of the occurrence of any accident. The learned magistrate failed to appreciate the fact that employees move in and out of institutions all the time and therefore the reason for institutions to depend on records.

6. The learned magistrate erred in law and fact in finding that the machine was faulty when actually it was not.

7. The learned magistrate erred in law and fact in finding the defendant/appellant 100% negligent yet the appellant had trained the plaintiff on how to operate the machine and had equipped her sufficiently to be in full control and in charge of riveting machine.

8. The learned magistrate erred in law and fact by disregarding the fact that the plaintiff/respondent could only be injured because of her inattentiveness and/or negligence as she was in full control of the machine which was not automatically operated.

9. The learned magistrate erred in law and fact by disregarding the effect of the notices provided by the defendant/appellant that were pinned all over the work place.

10. The learned magistrate erred in law and fact by not holding that the defendant/appellant had taken all reasonable steps in law to ensure employees safety.

11. The learned magistrate erred in law and fact in holding the appellant/defendant liable in negligence against the weight of the evidence.

5) Though the appellant put forward 11 grounds of appeal, I am satisfied that those grounds can be summarised to two grounds namely;

i. *Whether the learned magistrate erred in law and fact in holding the appellant 100% liable.*

ii. *Whether the learned magistrate erred in law and fact in awarding quantum of ksh.220,000/=.*

6) On the first ground as to whether or not the learned trial magistrate erred in law and in fact in holding the appellant 100% liable. The appellant is of the view that the respondent ought to have been held wholly to blame by the trial court for injuries she sustained. This is premised on the following reasons:

The respondent was in full control of the machine and she had the duty to observe reasonable care in order to prevent the occurrence of the accident. More to this is that she had adequate know how to operate the said machine per the evidence adduced before the trial court. The respondent further admitted that, the machine did not have any mechanical problem and was in good condition at the time she was operating the same. It is the appellant's humble submission that the respondent having been conversant with the machine needed no constant supervision. The appellant relied on the case of **Wood vs Durable Suites Limited (1953)2 ALL ER 391** where it was held that "***an employer's duty at common law is to put in place all reasonable steps to ensure employee safety but he cannot 'baby-sit' an employee as he is not expected to watch the employees constantly."*** The appellant argues that it is trite law that the burden of proof of any act of allegation is on the respondent, in this case she did not at any point adduce evidence of the employer's negligence on a balance of probability; a connection between the two, an injury per-se is not sufficient to hold someone liable for the same. The appellant continues to say that the principle that the plaintiff should lead evidence to connect his injuries or an accident to an act or omission on the part of the employer applies. The appellant to reinforce this position relied on the case of **Muthuku vs Kenya Cargo Services (1991) KLE 468** where it was held that:

> **"It is for the appellant to prove upon a balance of probability, one of the forms of negligence as was alleged in the plaint, our law has not reached the stage of liability without fault."**

7) It's for these reasons that, the appellant is fully convinced that the respondent had the onus to establish causation as well as to establish elements of negligence against the appellant. The fact that the appellant took all the reasonable steps to instruct its employees on safety issues at work, then it cannot be apportioned 100% liability and the court should vacate the trial court judgment on liability and replace it with a dismissal as the respondent failed to prove this claim on a balance of probabilities.

8) The respondent on the other hand concerning the issue of liability, submitted that it is not in dispute that she was involved in an accident at the appellant's premises, while engaged in duties that she was assigned in her course of work.

9) The witness admitted that the respondent was an employee with the company and that she was indeed injured. The witness was not present at the time the respondent was injured, and as such could not give an account of the event of that day. The witness also produced the safety instructions but failed to establish any casual link on how the respondent failed to follow the alleged instructions. There was no negligence proved on the part of the respondent and as such, the issue of contributory negligence could not arise. The respondent relied on the case of **Timsales Ltd –vs- Willy Ng'ang'a Wanjohi Nakuru HCCA no. 230 of 2004** where it was held that;

> **"..... when a party pleads negligence he has to prove the casual link between the injury and the duty of care placed upon the employer in negligence. where an employee is undertaking manual work as is the case hereof, he is to take reasonable care of his own safety as the employer is not expected to babysit or supervise such manual tasks that need no supervision."**

10) It was DW1's testimony that there were no protective clothingissued to the respondent when operating the machine.

11) The duty of an employer is not merely to warn against dangers, but must also take steps to ensure that the employees follow the safety measures put in place for their own safety. This was held in the case of **BIGOT Flowers (K) Ltd vs David Nyongesa Okiya (2016) eKLR**

12) It is the respondent's submission that the appellant herein failed to demonstrate any measures if at all taken to ensure that the alleged safety instructions were followed or that the respondent was trained on the same. The respondent relied on the case of **Kenya Power and Lighting Co. Ltd vs Matheru Kabeye Wanyiri (2010) eKLR** where Justice John Mativo in dismissing the appellants appeal cited the case of **Stat Pack Industries –vs- James Mbithi Munayo,** where it was held that;

> **"An employer's duty at common law is to take all reasonable steps to ensure the employees safety but he cannot baby sit an employee. He is not expected to watch over the employee constantly."**

13) The appellant did not demonstrate any reasonable steps taken to ensure the respondent's safety at work. It is for these reasons that the respondent prays that this honourable court is persuaded by the above authorities and find no fault in the magistrate's judgement on liability.

14) On the second ground as to whether the learned magistrate erred in law and fact in awarding quantum of kshs.220,000/= the appellant is of the view that the award was excessive in view of the minor injuries that were sustained by the respondent. The trial court relied on the case of **HCC No. 520 of 1987 Nairobi, Samuel Kariuki Kinyua –vs- Machezio & Another**, in which the plaintiff had a fracture of the right index finger and deep abrasions on his right arm. The injuries herein were more serious that that suffered by the respondent herein. By relying on this authority the appellant believes that the trial court acted on wrong the principles in determining the award for general damages. That the trial court should have awarded the respondent ksh.50,000/= for the said injuries which were minor in nature.

15) In arriving at the above conclusion on quantum the appellant relied on the case of **Igamba Shadrack –vs- Bhangra Saw Mill Ltd Nairobi HCCC No. 3178 of 1987** where the court awarded ksh.25,000/- for near similar injuries. The award is old and taking into account the passage of time and the inflationary trends, the appellant was of the opinion that a figure of ksh.50,000/= would have been adequate compensation to the respondent at the time of delivering the trial courts judgement.

16) The respondent on the other hand, on the issue of quantum is of the view that the award of damages is an exercise of discretion and the appellate court would normally not interfere with such an award unless the court is satisfied that the trial magistrate acted on wrong principles of law or the award was so high or so low as to make it an entirely erroneous estimate of damages.

17) As to the award of 220,000/= the respondent relied on the case of **Oluoch Erick Gugo –vs- Universal Corporation Limited (2015) eKLR**, where the High Court made an award of ksh.200,000/= where the appellant sustained injuries involving crushed injury to the left thumb with a fracture of middle, phalanx. The respondent herein sustained a crush injury to the distal phalanx of the right index finger with a fracture of the left of the distal phalanx. The respondent is of the view that the award herein was consistent with the injuries sustained and in line with the trial court award. Having considered the rival submissions and proposals, I am persuaded that the trial magistrate considered relevant principles in assessing both liability and quantum.

18) In the end, the appeal is dismissed and the judgement of the trial court upheld. Cost of the appeal with costs to the Respondent.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent