REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 190 OF 2008

BIGOT FLOWERS (K) LIMITED..APPELLANT

VERSUS

DAVID WERE ....RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. D. Njagi, Principal Magistrate, Naivasha delivered on 4th December 2008 in Naivasha PMCC No . 713 of 2007)

JUDGMENT

1. **David Were,** the Respondent filed a suit against the appellant in the trial court seeking general and special damages for injuries following an accident at his employers premises whilst in the cause of his duties as assigned for the day, the 24th December, 2006. The appellant denied that the respondent was its employee, occurrence of the accident and in the alternative pleaded contributory negligence upon the Respondent.

2. After a full trial, the trial court found in favour of the respondent and apportioned liability in the ration 20:80. For injuries sustained, being of soft tissue nature, the court awarded a sum of Kshs.100,000/= in general damages for pain and suffering and Kshs.3,000/= in special damages.

3. The appeal is premised upon two grounds: on liability and quantum of damages.

The appellant framed two issues which in my view summaries his seven grounds.

> *1. Whether the trial magistrate erred in law and fact in holding the appellant liable despite evidence to the contrary.*
>
> *2. Whether the trial magistrate erred in his assessment of damages awardable to the Respondent vis-a-viz injuries sustained.*

4. As a first appellate court, I shall re-evaluate the evidence adduced before the trial court and come up with my own findings. I am not bound to follow the trial courts' findings, but would not also depart from the findings of fact as I neither saw nor heard the witnesses testify, unless the said findings are based on no sound evidence or it is demonstrated that the said findings are based on wrong principles of law as stated in the case **Kemfro Africa t/a Meru Express Services & Another -vs- Lubia & Another (1982-88) KAR 727**.

5. **The Respondent's case before the trial court** was brief and straightforward. That he was an employee of the appellant and on the material date, 24th December 2006, was sorting flowers in the grading hall and transporting them from the cold store to the grading hall using a trolley. That while transporting the flowers, he slipped after the trolley landed into a trench, after it lost control and was injured, that he informed his supervisor, was given first aid and later went for treatment at the Naivasha District Hospital in place of the company hospital which was more expensive (his salary would be deducted) where he was given a treatment card serial No. OP 66295, which Dr. Okere referred to in preparation of the medical report dated 6th August 2007 that the said doctor produced in court on the 15th October 2008.

For the injury the respondent placed blame on the appellant for not placing a warning sign at the trench where a metal rod had been removed that morning.

On cross examination, he stated that the metal rod had been removed that morning and had no warning of the removal. He admitted he had full control of the trolley and having been given all protective gear. He testified that at the Naivasha Hospital, he was given the treatment card with a serial number and his name was entered in the register. He testified that he sustained injuries to the right shoulder joint and wounds on the right leg. He produced the treatment card that was marked for identification (MFI 2).

6. **The Appellant case before the trial court** by its supervisor Mary Nabalya DW2 acknowledged that the respondent was its employee but denied that he was on duty on the 24th December 2006 and therefore not injured while on duty. A muster roll was produced that indicated that the respondent was absent. It was her testimony that no injury was reported as none was recorded in the accident register, and concluded that the claim was not genuine.

7. After analysis of the evidence tendered and submissions by counsel, the trial court in its judgment made the following findings that; that the respondent was injured while in the course of duty with the appellant, that the said manual work in nature needed no training, and that the respondent did not exercise due care and attention and thus caused the accident. The court also made findings that the appellant on the other hand had a duty of care to the respondent to provide protective gear, that she observed there was no evidence of such having been provided.

For the above, the trial court apportioned liability at 20:80 ratio against the appellant.

8. On the issue of injuries, the trial court found that the respondent sustained soft tissue injuries as reported in Dr. Okero's medical report and the treatment card from Naivasha District Hospital and proceeded to assess damages as stated above.

9. **The Appellants submissions are that the trial court** erred by holding the appellant 80% liable yet no liability could be placed on it based on the evidence adduced, that the respondent was not at work on the 24th December 2006, and therefore no injury could have possibly occurred at its premises. He doubted the genuineness of the treatment card, as in his own testimony PW2, James Mwangi who confirmed treatment of the plaintiff at the hospital stated:

> ***"I do not know the writing on the card. I do not know whose signature it is. It has no rubber stamp. OP No 66295 is the number on the card. --- the number exists on the register. --- if the numbers on the card do not tally with the register, then the number was not given."***

10. The appellant doubted whether the said treatment card was even produced as exhibit and therefore concluded that the card did not form part of the court record, and therefore no injuries were sustained by the respondent, that in view of the above, no accident occurred on the 24th December 2006 at the appellants premises as he was not on duty.

11. On the second issue, the appellant submitted that the trial court awarded inordinately high damages of Kshs.100,000/= for minor soft injuries and proposed a sum of Kshs.20,000/= and relied on several

authorities to buttress its proposition.

12. The Respondent in his submissions was categorical that the trial court arrived at the right decision based on the evidence adduced before it. It was submitted that it was incumbent upon the appellant to place a warning on the trench where a metal rod had been removed that morning and failure to do so caused the respondent's trolley to loose control causing the accident and the injuries complained of, and for that the appellant did not provide a safe working environment and relied on case **Otieno Nalwoyo -vs- Mumias Sugar Co. Ltd (2014) e KLR.**

It was his submission that evidence adduced by the Respondent and his witnesses was sufficient to prove that he was at work on the material day and that he was treated and issued with a a treatment card at the Naivasha District Hospital and denied that the said card was a forgery as stated by the Records Officer of the hospital. On that, it was submitted that he was neither the maker of the card nor the keeper of records at he hospital and had no business checking whether the card given to him was genuine or not as he had no way of making such findings. The court was urged to ignore the evidence adduced in respect of the said treatment card, and hold that it was genuine. Replying on the **Case Otieno Nalwoyo(Supra**), the respondent submitted that the trial court exercised its discretion in the award of damages that for the injuries sustained, were adequate.

13. The court has considered the evidence tendered by all the parties before the trial court and the documents produced as exhibits and submissions by both counsel. There is no dispute that the respondent was an employee of the appellant at the material time. What is in dispute is whether he was on duty on the said date, and if so, whether an accident did occur from which he was injured. In dispute too is whether the respondent was treated at the Naivasha District Hospital and therefore, whether the appellant could be held culpable in negligence for the injuries and consequently compensation in damages.

14. The evidence on record points to the fact that the respondent was, in all probabilities on duty on the 24th February 2006. He was not the one who was responsible for filling the accident and attendance registers that were produced in court. I find the respondent a truthful person. He admitted that the work he was doing needed no supervision, only that, that morning a metal rod was removed from the trench and no warning sign was placed there to show the workers that there was danger. For that omission, the appellant must bear some degree of blame, for not providing a safe environment for its workers, and in particular the respondent.

In the case **Otieno Nalwoyo**(**Supra**), the court held:

> ***"that the duty of an employer to provide the servants with a safe place of work is not merely to warn against unusual dangers known to them--- the master is under a duty to make his servants to take reasonable care to avoid harm.---"***
>
> **Section 74 of the Employment Act** too places such duty on an employer. **See also Port Services -vs- Benson Nyaga Njue (2014) KLR,** where such duty of care was placed upon the employer.

15. It is trite that he who alleges must prove. In a civil case, such proof must be on a balance of probability which according to Justice Dulu in the case above **Otieno Nalwoyo** is merely providing evidence which is more believable than the other, with regard to prove of an incident. The court upon re-evaluating the evidence before the trial court has reached an independent finding that it is more probable than not, that while performing his duties at the appellants premises, the respondent was indeed injured and thus has proved his case on negligence to the required standards. That answers the first issue.

16. Having found no error in fact or law by the trial Magistrate the next issue for determination concerns the genuineness or otherwise of the treatment card produce by the respondent as PExh2. It is submitted that the appellant, even after submitting on the same document at length, and its witnesses having testified on the same doubted whether it was produced as exhibit or not. I have perused the proceedings. The said treatment card was produced and marked for identification as MFI 2. The court is satisfied that the Respondent attended and was treated at the Naivasha District Hospital and a card with **Serial No.**

OP52921 issued to him. DW1 acknowledged that the card originated from the said hospital, but stated that it was not assigned to anyone. PW2, a worker at the hospital testified that the Respondent was treated at the hospital by a trainee who was working under him and that he endorsed the treatment. He confirmed that the out patient number existed in the register. From the above testimonies, it is evident that the treatment card was issued to the respondent at or after treatment.

It is not practical for a patient when seeking treatment to question the treatment card or notes he is given from the institution or even to inquire as to the names and qualifications of the treating officer. The hospital has a duty to make sure that documents given to patients who attend their institutions for treatment are genuine and the necessary entries in their registers are properly filled. That can never be a duty of a patient. It is not clear why the treatment card was marked for identification by the trial court. It has been held and confirmed in numerous decision that a treatment card or notes is the property of the patient, and as such, he is the right person to produce it as exhibit in court.

It would be a denial of justice to a party to be asked to go and bring the maker of a treatment card from a medical institution when such party may not even know who in particular treated him. Many a times a records officer from the hospital or clinic would deny existence of such card or records, yet admitting that such card was from the said institution. In **Timsales Ltd -vs- Harun Thuo Ndungu C.A No 102 of 2005 (Nakuru),** the court held that treatment notes and card belong to the plaintiff, not the hospital, and therefore it is the plaintiff who ought to produce it as an exhibit, and not the hospital representatives.

17. The injuries sustained by the Respondent as appears in the treatment card and from which Dr. Okere prepared the medical report are not in dispute. These are:

- Blunt injury to the right shoulder
- Lacerations on the left leg.

The particulars of injuries as stated in the plaint are similar, soft tissues injuries by nature which may be categorised as minor soft tissue injuries. They are not severe or serious. The award of Kshs.100,000/=in 2008 for such injuries in my view was slightly on the higher side. In awarding damages, the court ought to consider awards made in comparable decisions during same period.

I have considered the authorities relied upon by both counsel.

18. An appellate court will be slow to interfere with the trial courts discretion on the award of damages unless it is satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or the amount awarded is so inordinately high or low as to represent an erroneous estimate of the damages -see **Kemfro Africa t/a Meru Express Services** (**Supra**).

I shall reduce the trial courts award in general damages to Kshs.75,000/= as fair and reasonable compensation for the injuries sustained by the respondent. In coming to this decision, I have considered comparable decisions in **Eldoret Steel Mills Ltd -vs- Charles Owino (2012) e KLR.** The High Court confirmed an award of Kshs.80,000/= for soft tissue injuries that healed without deformities in July 2012.

19. In conclusion, the appeal fails on the issue of negligence and culpability. The trial court's judgment is upheld that the appellant shall shoulder 80% contributory negligence. On the matter of quantum of damages, the appeal succeeds to the extent that the award of general damages is reduced to Kshs.75,000/=. The said award is subject to contributory negligence of 20% by the respondent. Interest on the said sum shall accrue from the date of the trial court's judgment at court rates.

20. Each party shall bear its own costs of this appeal.

Dated, signed and delivered in open court this 24th day of March 2016.

JANET MULWA

JUDGE