REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 89 OF 2013

ROSE WAMUYU MBUTHIA……..……..APPELLANT

VERSUS

AAA GROWERS LTD……..RESPONDENT

(Being an appeal against judgment and decree in the Nyeri Chief Magistrates' Court Civil Case No. 416 of 2012 (Hon. Mrs Wilbroda A. Juma) delivered on 4th November, 2013)

JUDGMENT

The appellant's suit against the respondent in the magistrates' court was dismissed with costs; in that suit, she had sued for both special and general damages in compensation for injuries she is alleged to have sustained while in the course of her employment with the respondent.

According to the plaint dated 12th September, 2012 and filed in court on 13th September, 2012, the plaintiff was employed by the respondent as a grader in its Turi farm. On the 19th December, 2011, she was leaving the pack house where she was apparently working when she slipped on a pod and lost balance as a result of which she hit her right elbow on the wall. Consequently, she sustained an injury to the right elbow and subsequently a swelling on the right forearm, so she pleaded.

As at the time of filing suit, the appellant claimed that she had lost use of her right hand and thus lost the means through which she could earn her livelihood. She claimed damages for loss of earning capacity at the rate of Kshs 6,000.00 per month.

In her suit she attributed the accident to the respondent's negligence for failure to provide her with a safe working environment.

The respondent contested the appellant's claim and even denied that the appellant was its employee; in the alternative, the respondent contended that even if the appellant was its employee and that an accident did occur, it was either caused by the appellant or that she substantially contributed to it. It asked the court to dismiss the suit with costs.

The lower court was not satisfied that the appellant had proved its case on a balance of probabilities and as noted it dismissed it with costs. Being dissatisfied with that decision, the appellant appealed to this Court on the following grounds:-

1. The learned trial magistrate erred in law and in fact in failing to appreciate that the defendant had admitted that the plaintiff had sustained injuries at the respondent's premises;

2. The learned trial magistrate erred in law and in fact in failing to consider the totality of the appellant's evidence as well as the respondent's;

3. The learned trial magistrate failed to appreciate that the appellant had proved her case to the required standard;

4. The learned magistrate took into account irrelevant factor and failed to take into account relevant factors in this case and thereby arrived at a wrong conclusion; and,

5. The learned trial magistrate erred in failing to make an assessment of damages.

The respondent opposed the appeal and both parties agreed that the appeal should be disposed of by way of written submissions. In her submissions the appellant maintained that it had been established as a fact at the trial that she was the respondent's employee and that she had sustained injuries at the time material to the suit in the lower court.

Once it was established that she was injured at her place of work, it was immaterial, so the appellant argued, whether she was an hygiene assistant or a grader and the learned magistrate fell into error when she overlooked the fact of the appellant's injury and based her decision on the perceived uncertainty of the capacity in which the appellant was engaged. It is for this reason that the appellant argued that the trial court based its decision on an irrelevant factor and failed to consider the relevant factor.

According to the appellant, the court ought to have asked itself whether the respondent owed the appellant a duty of care and provided her with a safe working environment and that once it was established that the appellant had been injured at her work place then the only issue was whether the respondent had breached this duty of care.

Counsel for the appellant also argued that according to **section 10** of the "Work Benefits Injury Act, 2007," the respondent was under strict liability to compensate the appellant where damages under the common law were not available.

Counsel also faulted the learned trial court for not quantifying the damages payable to the appellant had her suit succeeded; according to counsel the trial court abdicated its responsibility and omitted to do what it ought to have done.

The respondent, on the other hand, submitted that the appellant did not prove her case on a balance of probability; in particular, the learned counsel for the appellant contended that there were inconsistencies in the evidence relating to the circumstances under which the appellant was injured, her treatment records and her age. According to counsel, these inconsistencies not only impacted negatively on the appellant's credibility as a witness but it also demonstrated that the appellant's evidence fell short of the required standard. Counsel relied on the decision in **Associated Electrical Industries Ltd versus William Otieno (2004) eKLR** where an appeal was allowed because it was established that the pleadings were at variance with the evidence adduced. He also cited **Phipson on Evidence 13th Edition, at page 40** where it is acknowledged that parties are bound by the particulars of their pleadings.

On the question of burden of proof, counsel relied on the decision in **Wareham t/a A.F. Wareham & 2 others versus Kenya Post Office Savings Bank (2004) 2KLR** in which it was reiterated that the burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. The court also held that the only evidence to be adduced is the evidence of the existence or non-existence of the facts in issue or facts relevant to the issue and therefore only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party that bears the burden of proof ought to fail.

In order to understand how far from or how close to the question in issue the learned counsel's arguments are, it necessary that I look at the evidence adduced at the trial; the fresh reconsideration of the evidence is not only necessary for purposes of assessing the weight to be attached to the competing submissions, but it is also a mandatory obligation on the part of this Court, being the first appellate court to evaluate

this evidence and come to its own conclusions not forgetting, of course, that the lower court had the advantage of seeing and hearing the witnesses. See the decision in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court of Appeal for East Africa (per Sir Clement Lestang, V.P) said:-

> ***"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 a 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 (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

The appellant testified that on 19th December, 2011, she was on duty at the respondent's company premises where she had been engaged in the department of hygiene. She slipped when she stepped on a pea and in the process hit her right elbow on the wall. Because of the injury she sustained, she went to Nanyuki District Hospital for treatment the morning following the accident. It was her evidence that she was admitted for nine days before she was discharged. Upon cross-examination, the appellant testified that she was going out when she slipped; that according to her medical records she was first treated on 1st December, 2012 yet the accident occurred on 19th December, 2011. She said that she was admitted from the 2nd till 9th of a month that she could not recollect. She said that all she was supplied with as a safety equipment as a dustcoat which, obviously, could not have protected her from the accidental slip.

Dr Mutahi Mbugua (PW2) testified for the appellant and said that he examined the appellant on 13th July, 2012. He stated that the appellant had injured her elbow but the entire fore limb was swollen as a result. Due to persistent swelling even after the plaster was applied, the appellant is said to have been admitted on two different occasions. When he examined her, the arm was still in plaster and tender to touch; according to him the arm was still swollen at the time of the examination which was seven months after the accident.

The doctor testified that in making his report he relied on the outpatient card and the discharge summary from Nanyuki district hospital; he also relied on the x-rays on the appellant's right hand. He got the date of the accident from the appellant who also told him that she was born in 1959 although the age indicated on the treatment notes was 30 years. The doctor admitted that he could not determine the authenticity of the medical records he relied on to make his report.

The respondent's representative, **Douglas Mwirigi (DW1)** testified that he was employed with the respondent and that he was engaged as a supervisor at the material time. He knew the appellant who worked also with the respondent company in the cleaning or hygiene department. According to his testimony, on the 19th December, 2011, the appellant was drawing water from a tap; she then slipped and hit her right hand on the wall.

The witness denied that the appellant was a grader as she had alleged in her statement. He also denied that the appellant slipped on a bean pod. To counter the appellant's allegations that she was not given safety equipment, he produced a contract of employment between the appellant and the respondent showing that the former had been supplied with the necessary equipment.

The entirety of the appellant's and the respondent's representative's evidence show that the appellant was at all times material to her suit an employee of the respondent; **Douglas Mwirigi (DW1)** who testified on the respondent's behalf admitted that the appellant was such an employee except that she was engaged in the hygiene department and was not a grader as she had alleged in her witness statement filed in court on

13th September, 2012. Apart from this admission, there was the contract of employment itself and a letter authored by the respondent, dated 23rd March, 2012 confirming that indeed the appellant was the respondent's employee from November, 2011 to the date of that letter; with all this uncontroverted evidence coupled with the respondent's representative's admission, the fact of the appellant's employment with the respondent need not have been an issue.

The appellant's evidence and that of **Douglas Mwirigi (DW1)** also showed that in all probability, the appellant was involved in some sort of accident in the course of her employment with the respondent on 19th December, 2011; it is the circumstances under which this accident happened that appears to have been in issue. While Mr Mwirigi testified that the appellant slipped and hit her right hand on the wall while drawing water, the appellant herself said she actually hit the wall when she slipped on a pea. Although it is not clear from the appellant's evidence whether she slipped while drawing water as suggested by Mr Mwirigi, I gather from their testimony that they were in agreement that at the very least, the appellant slipped as a result of which she hit her right hand on the wall. That settles the issue whether there was any accident involving the appellant at the respondent's premises.

The learned magistrate established as a fact that the appellant was injured as a result of the accident; however she took issue with the appellant's evidence on whether she was employed as a grader or was a cleaner, and therefore whether the accident occurred when she was at her right place of work. In her evidence, the appellant testified that she was engaged to provide cleaning services even though she had indicated in her statement that that she was a grader; this apparent inconsistency appears to have led the learned magistrate to conclude as she did in her judgment that the appellant was neither a truthful nor credible witness and that she could probably have been injured at a place she was not supposed to be.

My own assessment of the evidence on record would not lead me to put much weight on the capacity in which the appellant was employed by the respondent unless it could be demonstrated clearly that the tasks in which she was engaged at the material time had nothing to do with what she was employed to do, or has been said elsewhere, she was on frolics of her own. But even if one was to consider the appellant's duties, she was not cross examined on her tasks and in particular the variation between her statement and her evidence in this regard; in my humble view, if the respondent's case was that the variation between how the appellant described herself in the statement and the evidence she gave in court was so crucial that the accident could have been avoided altogether if the appellant was at a certain place rather than the other the cross examination of the appellant on this issue, and in particular, cross examination on her statement, was necessary. The point is, it was not demonstrated that the accident occurred because the appellant had described herself as a grader rather than a cleaner; neither was it demonstrated that the accident occurred when the appellant was undertaking 'grading' duties (for which she had not been employed to do grade) and not her rightful cleaning duties. Mr Mwirigi never suggested in his evidence that this could probably have been the case; according to him the appellant slipped when she had gone to fetch water which, unless there was any evidence to the contrary, was probably meant for cleaning.

I have also noted from the appellant's letter of appointment that apart from her job title being described as "hygiene" there is a rider that her "*duties may be changed from time to time due to operational requirements*". I understand this to mean that as long as the letter of appointment did not expressly restrict her to a particular task and thus not excluded from doing any other tasks, it could not be ruled out that she could perform those tasks or duties ordinarily performed by graders whenever the occasion so demanded, if the terms of her employment were anything to go by.

If my assessment of the evidence is correct, I would conclude that the description of the appellant as a grader rather than a cleaner should not have been a reason enough for the learned magistrate to doubt the appellant's credibility and thus her evidence and to the extent that she did so, she misdirected herself on the evidence. I humbly think that once the learned magistrate established that the appellant was the respondent's employee and that there was an accident out of which she was injured in the course of her employment it was immaterial whether the appellant was injured as a grader or as a cleaner. The next question which ought to have concerned the court and to which I will now turn, was whether the accident was attributable to the negligence of the respondent.

As noted earlier, both the appellant and the respondent were agreed that the appellant slipped and hit her right hand on the wall. According to the appellant's version of events, she stepped on a pea and slipped; the respondent's witness on the other hand denied that the appellant slid on a pea but the slip was as a result of an accident for which the company was not responsible.

If the respondent admitted that the appellant slipped and hit her hand on the wall yet it could not explain the cause of the appellant's slip, then there was no reason to doubt the appellant's evidence that she slipped on a pea because her evidence in this respect was not controverted. The appellant could not have just slipped without; there must have been a cause and once the appellant explained this cause, the burden of disproving that evidence fell on the respondent. It is worth noting that much as the respondent's witness said that the appellant's slip was merely as a result of an accident, he admitted that it was the company's responsibility to ensure that the appellant's working environment was safe and free from injurious accidents.

In what I suppose was the respondent's attempt to attribute the accident to the appellant, Mr Mwirigi testified and infact produced the appellant's appointment letter according to which, in his opinion, the appellant was supplied with safety equipment the use of which was meant to protect the appellant from the sort of accident that she was involved in. According to the witness, if any one slipped with the safety gear on, they could not be hurt. His case was that the appellant may not have been wearing the safety gear and that is why she was injured when she slipped.

The appellant testified that the only equipment or gear she was supplied with was a dust coat and she was not given other items like shoes. Here again it was up to the respondent to demonstrate and prove that contrary to the appellant's allegations that she was not provided with the appropriate safety equipment, including shoes, she was provided with such facilities. The contract or the letter of appointment that the respondent relied upon to disprove the appellant's contentions was not satisfactory in my view that the appellant had been properly equipped. The pertinent part of the contract which the respondent must have relied upon is clause 7 thereof which provided as follows:-

> *"7. Protective clothing*
>
> *White rubber shoes are recommended for the pack house; the company shall provide you with white gumboots for use in the high care. Dust coats will be provided at the point of entry. Dustcoats, aprons and head covering must be worn at all times in the pack house. All outdoor clothing must either be removed before entering the pack house or be adequately covered. Protective clothing meant for the pack house shall not be worn outside the facility. "*

The letter was signed on 28th November, 2011 when the appellant was apparently effectively employed. My reading of this clause is that white rubber shoes was recommended for those working in pack house; there is nothing in this clause to suggest that beyond this recommendation the company provided the footwear. The only equipment that the respondent undertook to provide was the white gumboots and dustcoats. Now, undertaking or a promise to provide the equipment in future was one thing but the actual provision of that equipment was another thing all together. While the company promised the appellant that she would be provided with safety boots, there was no evidence at all to show that it ever fulfilled this promise. There is no doubt that when the company thought of providing its employee with gumboots it must have foreseen such dangers associated with the nature of its business as accidental slips; with such boots on, accidental slips could easily have been avoided and I suppose this is what the respondent's witness meant when he testified that if the appellant was at all wearing the protective gear, she could not have slipped. In the absence of any evidence that the appellant was provided with such a gear, I hold that the company ought to have been held solely responsible for the appellant's accident.

Was the appellant injured and if so to what extent? This is the next question that I have to consider and in seeking for the appropriate answer, I have to relook at evidence of the appellant together with that of her doctor.

The appellant testified that she injured her right elbow and sustained a fracture; she went to hospital for

treatment on 19th December, 2011 and she was admitted for nine days from the 2nd to 9th of a month that she could not clearly recall. The appellant produced a bundle of treatment cards to prove the fact of her injury and treatment.

Dr Mutahi (PW2) examined the appellant seven months after the accident; apart from what the appellant told him, the doctor relied entirely on the treatment notes from Nanyuki district hospital where she is alleged to have been treated to prepare his medical report which was admitted as evidence in court.

According to the doctor's report, the appellant was injured on 19th December, 2011 at 12.30 am; she proceeded to Nanyuki district hospital for treatment on the same day. Because of the persistence in the swelling of the alleged injured hand, the appellant is said to have been admitted in the same hospital between the 2nd January and 9th January, 2012. The report stated further that the appellant was re-admitted in the hospital again on 1st March, 2012 and discharged on 3rd March, 2012. His findings were that the alleged injured arm was still swollen and that there was no fracture of any sort.

Although both the doctor and the appellant testified that the latter was in hospital on 19th December, 2011, none of the medical records admitted in evidence showed that the appellant was in hospital on this date. Among the treatment records that the appellant relied on was a document described as "General Outpatient Record" which shows that the very first time the appellant visited the hospital was on 9th January, 2012. According to that record, the appellant was registered as patient number 10/12. As the name of the record would suggest, the appellant was treated as an outpatient and there is nowhere in it showing that the appellant was admitted in the hospital at any time in the course of her treatment. If the doctor relied on the treatment notes from Nanyuki hospital to make his report it is curious that he did not notice from the appellant's General Outpatient Record that the appellant was not admitted on any of the dates he gave in his medical report.

In any event, the appellant herself only claimed that she was admitted in hospital between the 2nd and 9th of a month she could not recall; she did not say, as the doctor claimed that she was admitted in hospital on two different occasions.

All I gather from the appellant's and the doctor's testimony is that the appellant did not go to hospital and thus was never treated on the 19th December, 2011 as alleged. It is also apparent from the material presented at the trial court that appellant was not admitted either as alleged or at all. If the appellant's injury was so serious that she had to be admitted, she would have been admitted on 19th December, 2011; as a matter of fact, that is what she said in her evidence in chief, that she was admitted for nine days; however, it has already been noted that there was no proof that she was even attended to, let alone admitted, on that particular day and that it was not until the 9th January, 2012 when she was first treated as an outpatient.

I also doubt the appellant's testimony that she could not recall the month when she was admitted for nine days yet she could remember the specific dates. She testified a little over a year after the accident and I am not convinced that she could possibly have forgotten the month which she was admitted but remember vividly the particular dates.

There were of course two discharge vouchers purporting to show that the appellant was admitted twice, first on 2nd February, 2012 and discharged on 9th February, 2012 and second on 1st March, 2012 1and discharged on 3rd March 2012. This evidence is doubtful for a number of reasons the first of which is that the appellant herself never said that she was admitted on two different occasions. Secondly, even on that occasion when she alleged that she was admitted, she could not recall which month it was that she was admitted; thirdly when she is alleged to have been admitted, her General Outpatient Record shows that she was being attended to as an outpatient and not as an inpatient. Finally, there are corresponding invoices for expenses that the appellant is said to have incurred as a result of admission but there is no evidence that any payments were ever made for those admissions.

My conclusion on this issue is that the lack of proof that the appellant ever went to hospital on 19th December, 2011 contrary to her allegations that she did, and that she only visited hospital, if she ever did, on 9th January, 2012 three weeks after the accident; the contradiction between her evidence and that of her doctor are some of the inconsistencies that are all too striking to go unnoticed. Although I would not go as far as concluding, as the learned magistrate did, that the documents submitted in support of the fact of the appellant's injury were doctored, I would, for reasons I have stated, hold that they fell short of the threshold of proving the appellant's claim on a balance of probability. I would also not agree with the learned magistrate that the alleged injury was proved, when she herself doubted the authenticity or credibility of the evidence intended to establish this very fact of injury.

In any claim for damages in negligence the burden of proof rests primarily on the claimant; he has to demonstrate that he was *injured* by a negligent act or omission for which the defendant is in law responsible. While the appellant was able to demonstrate that by virtue of her employment to the respondent, the latter owed her some duty of care and that there was breach of that duty, she did not demonstrate to the satisfaction of the trial court she sustained an injury or there was a causal connection between the accident which occurred on 19th December, 2011 and the injury she is purported to have been treated for on 9th January, 2012 the very first time she went to hospital.

It is not enough for the claimant to prove breach of duty without injury; injury must be proved except in those cases where the tort is actionable per se. The tort against the appellant did not fall into this category of cases and thus it had to be proved. In **Pickford v Imperial Chemical Industries plc [1998] 3 All ER 462, [1998] 1 WLR 1189, HL** a claim failed because it was not proved that a health condition the claimant had contracted resulted from the nature of the claimant's work. Similarly, in **Société Anonyme de Remorquage à Hélice v Bennetts [1911] 1 KB 243**, it was also held that for a claimant to sustain a claim as a result of breach of duty, the injury must be proved as much as the breach itself.

Again the need to prove damage or injury in actions for damages in negligence was reiterated in B**onham-Carter versus Hyde Park Hotel, Limited 64 TLR** at page 78 and cited with approval in **Narain Singh versus Ismail Suleiman Kumbhar 1948 EACA Vol. XV at page** 21 where it was stated:-

> ***"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the Court saying: 'this is what I have lost; I ask you to give me these damages'. They have to prove it…"***

Counsel for the appellant urged that even if the learned magistrate found that appellant was not entitled to damages under the common law, she could still be compensated under **section 10** of the "Work Benefits Injury Act, 2007"; counsel must have meant the **Work Injury Benefits Act**. It is not clear which of the six subsections under section 10 that the learned counsel must have been making reference to but the subsection closest to what I think the learned counsel meant is subsection (2) thereof which states as follows:-

> ***10. Right to compensation***
>
> ***(1)…***
>
> ***(2) An employer is liable to pay compensation in accordance with the provisions of this Act to an employee injured while at work***.

Without proof of injury, I doubt that the appellant could have sustained an action under this provision; it is clear that one is entitled compensation only if an employee has been injured in the course of employment.

In any event, where one seeks compensation under **sub-section (2**), such compensation can only be made in accordance with the provisions of that Act. **Section 26** is even clearer of how and when such a claim

for compensation could be made; under **subsection (1)** the law is specific that the claim must be made in the prescribed manner within twelve months after the accident. And to show that these procedural requirements are not only necessary but are also mandatory, **subsection (2)** is clear that if a claim for compensation is not lodged in accordance with **sub-section (1)** that claim may not be considered under the Act except where the accident was reported in accordance with **section 21**.

Looking at the appellant's pleadings and her submissions in the lower court, there is nowhere she ever pleaded to be seeking compensation under the Work Injury Benefits Act in the alternative to damages under the common law; further still, it was not demonstrated that she ever complied with the procedural requirements of seeking compensation under that Act. With these express provisions on how and when one can apply for compensation under the Act, it was not open to the learned magistrate to fall on that Act and make an award in compensation of the appellant simply because damages could not be proved under the common law.

I must also say that considering that this point was neither pleaded nor argued in the lower court, it is a bit too late in the day to spring it up at this stage and fault the learned magistrate for it when she was not given the opportunity to consider it in the first place.

I have said what, in my humble opinion, is enough to disallow this appeal. But in the event I am wrong in my decision and the appellant may want to escalate the dispute to a higher court, I direct the lower court to assess damages payable to the appellant if her claim had succeeded; I note the learned magistrate omitted this vital and mandatory exercise; she was under legal obligation to assess the damages payable to the appellant had her suit succeeded. If any authority is required for this, I found the Court of Appeal decisions in **Owayo versus Aduda (2007) 2KLR 140** and **Civil Appeal No. 124 of 1993, Mordekai Mwangi Nandwa versus M/s Bhogal's Garage Ltd** useful guides in this respect**.** Save for the order remitting the file to the lower court for assessment of damages, the appeal is dimissed with costs to the respondent**.**

Signed, dated and delivered in open court this 22nd July, 2016

Ngaah Jairus

JUDGE