REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 138 OF 2010

(Being An Appeal From The Judgment And Decree Of The Senior Resident Magistrate, Naivasha (Hon. P. M. Mulwa) In Naivasha Spmcc No. 802 Of 2007, Delivered On The 6th Day Of May, 2010)

LAMORNA LIMITED.....APPELLANT

VERSUS

HANNAH WARUGURU MACHARIA.....RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of Hon. P. M. Mulwa, Senior Resident Magistrate sitting at Naivasha in SPMCC No. 802 of 2007 and delivered on the 6th day of May 2010. The appellant, then an employee of the Respondent sued the respondent for negligence and breach of statutory duty owed to her and sought special and general damages for an alleged injury sustained in the cause of her duties on the 29th June, 2006. After a full hearing the court found the appellant wholly to blame in negligence and awarded her a sum of shs. 120,000/= in general damages for pain and suffering and shs. 2,500/= in special damages. Being dissatisfied with the whole Judgment, the appellant has brought this appeal and seeks that the appeal be allowed and the lower courts suit be dismissed with costs, and in the alternative the award on general damages be substantively reduced.

2. The grounds upon which the appeal is based may be categorised into two – on liability and quantum of damages. A total of 9 grounds have been stated, but I shall reframe them into three as follows:

1. That the learned trial magistrate erred in law and fact in finding that the plaintiff had proved her case on a balance of probability against the weight of evidence tendered *(grounds 1, 2 & 3)*.

2. That learned trial magistrate erred in law and fact by failing to consider the appellant's *(defendant's)* evidence and submissions, and to uphold the doctrine of precedent and stare decisis thus arrived at an erroneous decision *(grounds 4, 5, 6)*.

3. The learned trial magistrate erred in law and fact by failing to consider the medical records tendered thus arrived at an erroneous assessment of general damages that is manifestly excessive *(grounds 7, 8, 9)*.

3. Appellant's case

The appellants case is that the respondent was not injured in her eyes while on duty as alleged. The appellant states that when flowers are sprayed with chemicals, it takes only $2^1/_2$ hours to dry and

during that time no employee is allowed to go into the green houses. The appellant's witness stated that flowers are sprayed only in the morning and afternoon, and not at 1.00 p.m. as alleged. The respondent admitted in her evidence upon cross examination that the flowers had been sprayed at 1.00 p.m. and that she got injured at 4.00 p.m. by chemicals that splashed her face injuring both her eyes. She did not even mention chemical burns on the face. The Appellant produced a clinic attendance register of the appellant's employees. The said register confirmed that the respondent was seen at the clinic on the 30th June 2006 and her complaints were itchy and skin rashes the whole body, that started the previous day – the 29th June, 2006, at 1.00 p.m. No mention of any injury to the eyes. She was then referred to Kingfisher Medical Clinic. Records from the said clinic were not availed to court. No records at all were produced to show any treatment of the alleged eyes injury. In her testimony she admitted having no such records. The Appellant's Dr. P. M. Wambugu in his medical report stated that upon evaluation of the respondent, there were no residual signs of chemical burns or eye injury as alleged, and further that her history and availed hospital records were at variance. She told the doctor that she was injured on the 30th June, 2006 which is in variance with her testimony and pleadings that she was injured on the 29th June, 2006. The appellant faults the trial court in that the magistrate ignored its doctors medical report and did not even mention it in his Judgment which grossly affected the outcome of the case. The appellant further faults the trial court for not considering and giving weight to the appellants submissions and case law submitted on the subject thus arrived at an erroneous finding on liability. On the medical report prepared by Dr. W. Kiamba *(the respondent's doctor)*, it is stated that such report did not identify the specific chemical alleged to have splashed on the respondents face and injured her eyes. The report does not mention injury to the eyes at all.

4. In its submissions the appellant has urged this court to look at the totality of the evidence tendered at the trial court and find that the respondent did not prove the case on a balance of probability and dismiss the same as it was a false claim. The appellant has further stated that in view of the contradictory statements by the respondent and her witnesses, the court ought to find that the respondent was not injured while in the cause of duty, and that the appellant can not be held liable as it provided all necessary work place safety protective gear and systems.

5. <u>It is the respondents case</u> that she proved her case to the required standard, and that the trial court can not be faulted in any way in arriving at the decision it did. It was her evidence that after the accident she was treated at the Naivasha District Hospital and later at the company's clinic. The plaintiffs fact of being on duty of the material day was confirmed by the 2nd defendant's witness but he could not confirm whether or not she was injured as he was not her supervisor.

It is not in dispute that the respondent was an employee of the appellant. The main dispute is whether or not the respondent was injured on her face and eyes while in the cause of her duty on the 29th June, 2006 which facts the appellant has denied. Going by the evidence on record, it is the respondents submission that the case was proved on a balance of probability and the award on quantum of damages was consumerate with the injuries she sustained.

6. <u>Evaluation of Evidence and findings</u>

This court being the first appellate court is called upon to re-evaluate the evidence on record and come up with its own independent findings and conclusions as held in the case **<u>Selle and another</u> -vs- <u>Associated Motor Boat Company Ltd</u> (1968) EA 123.**

The trial court in its judgment found that the respondent was injured in the cause of duty on the 29th June, 2006. The court confirmed that the name of the respondent did not appear in the appellant's accident register for the day but was treated at the company's clinic. The nature of the injury or complaint presented at the company's clinic upon perusal of the said treatment notes, it is clearly indicated that the complaint by the respondent was itchy skin rashes the whole body and no where was it indicated that there were chemical burns, face or eye injury the previous day, nor mention of treatment the previous day at Naivasha District Hospital. The respondent in her evidence in-chief and on cross examination confirmed that she was not treated for the alleged eye injury. The court is therefore left in

doubt as to whether indeed the respondent was injured in the face and eyes and if so the extent of injury that did not require any treatment as evidenced by the treatment notes and her own admission in the trial court.

7. It is instructive to note that in the medical report prepared by Dr. W. Kiamba, *(the respondent's doctor),* no mention of an eye injury was made. The injury indicated was chemical burns on the face, for which injuries it is further indicated were treated at the Naivasha District Hospital and the company's clinic. In her statement of claim dated the 12th September 2007, the particulars of injury shown was chemical burns on the face. In her evidence in chief, she stated that the chemicals splashed across her face injuring both her eyes. From the above it is clear that the injuries she alleges to have sustained is injury to both eyes, yet when she attended the company's clinic, her complaint was different, itchy skin rashes. If indeed she had the alleged eye injury to both her eyes, it would have been captured by the clinician, and the other doctors who examined her later. As no explanation was offered as to the variance of the nature of injury, this court can only conclude that the respondent was not injured in the eyes.

8. The next question that the court will seek to answer is what chemicals caused the alleged facial burns, if any.

The court in the case **Homegrown (K) Ltd -vs- Hannah Wairimu HCCC No. 68 of 1999**, it was held that the specific chemicals that affected the respondent must be identified through expert evidence and a scientific basis for the ailments of the respondent.

In the present case, no expert doctor examined and prepared a report on the specific chemicals that are alleged to have splashed across the respondents face causing her chemical burns.

In the appellant's submissions before the trial court, the issue was adequately addressed but the trial court ignored the whole submissions together with case law provided for guidance, and made a finding without any basis, that the appellant was 100% liable in negligence, and awarded damages for the alleged injuries in the face of contradicting and unsupported evidence. I therefore find that ground No. 1, 2, 3 *(reframed as ground 1)* **merited**.

9. I have considered the trial courts judgment, submissions by both counsel for the appellant and the respondent and the law appertaining to the issues under review. It is evidently clear that the trial magistrate erred in law and fact in failing to consider the appellant's evidence and submissions and to uphold the doctrine of precedent and stare decisis and thus arrived at an erroneous decision. Consequently grounds No. 4, 5 and 6 of the appeal are **merited** *(reframed as ground No. 2).*

10. In its totality and the evidence on record, I come to the conclusion that the respondent failed to discharge the burden of proof that she was injured and the nature of injury while on duty and that the injury was due to the negligence of the appellant. I further find that the trial magistrate failed to evaluate the evidence tendered and thus came to the wrong finding that the appellant was liable in negligence and proceeded to award general damages to the respondent for pain and suffering.

11. On quantum of damages, grounds 7, 8, 9 – *(reframed as ground No. 3).* As stated above, I have analysed the medical evidence tendered, more specifically in the treatment notes at Naivasha District Hospital, the appellants clinic register and the two medical reports by Dr. W. Kiamba and Dr. P. M. Wambugu, and find that all of them differ on the alleged injuries sustained by the respondent. I need not go back to the particulars. This court would be slow to interfere with the trial court's discretion on an award of damages unless it is satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or left out a relevant factor or the amount awarded is so inordinately low or wholly erroneous estimate of the damage. This was held in the case **Kemfro Africa t/a Meru Express Services & another -vs- Lubia & Another (1982-88) KLR 727.** It has also been held in various past cases that where an award differs widely from the awards given in comparable cases, it might be appropriate for an appellate court to interfere and alter it. I am also minded that each case ought to be considered on its peculiar own facts, and this I have done.

12. In his assessment of damages the trial magistrate relied on the medical report dated 25th October 2007 prepared by Dr. W. Kiamba only, and the plaintiffs submissions. There is no indication at all as to whether the other medical records, that is the treatment notes and medical report by Dr. P. M. Wambugu were considered. A sum of shs 120,000/= was awarded in general damages for pain and suffering. No comparable authorities were referred to or shown to have been considered as a guide to the assessment of the damages notwithstanding that both parties had submitted such authorities. This in my view lead to an erroneous estimate of awardable damages in the circumstances.

13. Had I found that the appellant liable in negligence, I would have awarded NIL damages for the alleged injuries in view of my finding that the alleged injuries were not proved.

14. For the above reasons, the appeal succeeds and the trial court's judgment and decree is set aside. Costs for the primary suit shall be borne by the respondent as well as costs for the appeal.

Dated, signed and delivered at Nakuru this 20th day of February, 2015

JANET MULWA

JUDGE

Judgment read in open court in the presence of:

Kinyanjui for appellant

No appearance for respondent

Court clerk – Mwai

Mr. Kinyanjui:

In view of the judgment, I request for release of the Decretal sum of Shs.177,975/= plus accrued interest deposited at CFC Bank, Naivasha be released to the Appellant's Advocates Wangai Nyuthe & Company Advocates.

Court:

The sum of Shs.177,975/= plus accrued interest deposited at CFC Bank, Naivasha Branch Deposit Ref. No. MM130720009 be released to the Appellants Advocates Wangai-Nyuthe & Company Advocates.

JANET MULWA

JUDGE

20.2.2015