REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 63 OF 2009

OL-NJOROWA LIMITED……..APPELLANT

VERSUS

DORCAS NDUMI MUTISYA……..RESPONDENT

[Appeal arising from the judgment of the Hon. N. N. Njagi Principal Magistrate dated 24th day of March, 2009 in Naivasha SPMCC No.804 of 2007]

JUDGMENT

The Respondent herein brought a suit against the Appellant due to injuries she sustained while under its employ and at the workplace.

The Honourable trial magistrate found that the Respondent had proved her case and awarded her damages totaling to kshs.130,000/= plus costs and interest. Liability was apportioned at 80:20 in favour of the Respondent.

The Appellant being dissatisfied with the trial magistrate's decision brought this appeal and listed seven (7) Grounds of Appeal in its Memorandum of Appeal filed on the 21st April, 2009.

The Grounds of the Appeal are *inter alia;*

1. **THAT the Learned Principal Magistrate erred in fact and in law by failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for his judgment pronounced on 24th March, 2009.**
2. **THAT the Learned Principal Magistrate erred in law and in fact in disregarding that the burden of proof lay on the Plaintiff to prove injuries to herself and to prove negligence and breach of contract and particulars of negligence as well as particulars of breach of contract pleaded which she failed to do.**
3. **THAT the Learned Principal Magistrate erred in law and in fact in ignoring that the Plaintiff had failed to prove injuries to herself and in particular failed to prove medical treatment received by her and failed to produce as an exhibit the medical treatment card which was the primary evidence and which had been marked for identification as MFI 3.**
4. **THAT the Learned Principal Magistrate erred in law and in fact in disregarding the defence evidence in its entirety and in particular that the Plaintiff was not injured at her place of work.**
5. **THAT the Learned Principal Magistrate erred in law and in fact in holding that Defendant's**

"ACCIDENT/INJURY NOTIFICATION FORM" adduced in evidence was a notification to the Insurance Company and erred in holding that the notification was proof that the Plaintiff was injured at the work place.

6. **THAT the Learned Principal Magistrate failed to appreciate the totality of the evidence before him and erred in not considering the submission on behalf of the Defendant.**
7. **THAT the damages awarded by the Learned Principal Magistrate are excessive and unrealistic.**

ISSUES FOR DETERMINATION

Both Counsel elected to make oral submissions in disposal of the Appeal herein. Upon hearing their respective submissions, I have framed the main issues in contention are as follows:-

1. **Whether the Respondent was injured at work or at home? If at work, who is to blame for the accident?**
2. **By failing to file a Reply to Defence, did the Respondent admit the particulars of negligence attributed against her by the Appellant?**
3. **Were the damages excessive?**

ANALYSIS

This being the first appellate court it behoves this court to reconsider the evidence on record, re-evaluate it and to arrive at its own independent findings and conclusions always bearing in mind that this court neither saw nor heard the witnesses. Refer to the case of **Selle and Anor** V. **Associated Motor Boat Company Ltd and Others**, (1968) EA 123.

The first issue relates to; ***Whether the Respondent was injured at work or at home? If at work, who is to blame for the accident?***

The Appellant claims that the Respondent was injured at her home whilst carrying water to the bathroom.

In support of its contention, the Appellant produced an Injury Notification Form dated 26th October, 2005. The Form indicates that the Respondent was injured at her home and not at work. The Form was produced by Fred Masengeli **(DW2)**, who testified that he had filled out the said Form. It was his evidence that as long as a person is an employee of the Appellant they were entitled to treatment at the company clinic regardless of where they had gotten injured.

The Appellant also called the nurse **DW4** who had initially treated the Respondent for her injuries on the fateful day –**.** The said nurse produced Defence Exhibit **"DExb.5"** being the hospital records. From the records it is not disputed that the Respondent was injured on 25th October 2005. Under **'Place of Injury'** it is indicated as – **'away from work'**. It should be noted that **DExb.5** which is an extract of the company's medical records confirms and corroborates **DW2** and **DW4's** evidence that the company does indeed treat its employees regardless of where they were injured. The column titled **'Place of Injury'** indicates that the company can treat employees injured both at work at away from work.

The trial Court held that the Respondent was injured at work because the Appellant had filled in a Notification of Injury Form for its employee. I respectfully disagree with the learned trial magistrate's finding.

The Respondent testified that she had gotten injured at work. She testified under cross-examination that she signed the Injury Notification Form under duress. She however did not give evidence as to why she was allegedly forced to sign the same, in that, what would have been the consequences of her not signing the said Form. She could have refused to execute the same and this would not have barred her or precluded her from bringing the suit claiming for damages.

It is also imperative to note that the court record shows that the Respondent never called any of her co-

workers who might have witnessed the incident, to corroborate the fact that she was indeed injured at work.

As indicated earlier, the said records show that the company treats employees who were injured both at work and away from work. There being no record to support the injury having occurring at the work place and in the absence of testamentary evidence to corroborate the Respondent's evidence I am satisfied that the Respondent did not prove negligence and breach of contract as against the Appellant to the desired threshold.

This ground of appeal is found to be meritorious and is hereby allowed.

The next issue for determination relates to; ***By failing to file a Reply to Defence, did the Respondent admit the particulars of negligence attributed against her by the appellant?***

> **Order 2 Rule 12** of the **Civil Procedure Rules, 2010** sets out the ramifications of failing to file a Reply to Defence. The Rules provide that:-
>
> **"12 (1) If there is no reply to a defence, there is a joinder of issue on that defence.**
>
> **(2) Subject to sub-rule (3)—**
>
> **(a) there is at the close of pleadings a joinder of issue on the pleading last filed; and**
>
> **(b) a party may in his pleading expressly join issue on the immediately preceding pleading.**
>
> **(3) There can be no joinder of issue on a plaint or counterclaim.**
>
> **(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation."**

The upshot is when the Respondent failed to file a Reply to Defence, then there was a joinder of issue to the said Defence *to wit* the Respondent is deemed to have admitted the facts and particulars of negligence alleged in the defence.

The last issue for determination is; ***Were the damages excessive?***

At this juncture, the direction the appeal is headed is apparent but this notwithstanding it behoves me and indeed this court is expected to render an assessment and a finding on this ground of appeal; whether the quantum of damages awarded by the trial Court was excessive; Refer to the case of **Selle** supra.

The Respondent pleaded that she suffered soft tissue injuries to her left leg and hip and a blunt injury to her anterior chest wall.

These injuries were confirmed by the Medical Reports of Dr. Omuyoma and Dr. K.P. Mahida and the Reports were produced by consent as Plaintiff's exhibits **"PExb.**5" and **6** respectively.

According to the said Medical Reports, the injuries suffered by the Respondent did not leave her with any permanent incapacity. At the time of examination by both doctors, she had fully healed.

The said injuries are classified as soft tissue in nature.

The trial Court awarded the Respondent Kshs.130,000/= as general damages for pain and suffering.

For this court to interfere with quantum of damages awarded by the trial magistrate's court, it has to observe the well settled principles set out in the case of **Butt** V. **Khan,** (1977) 1KAR where Law JA stated that;

> **"An appellate court will not disturb an award for damages unless it is 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 arrived at a figure which was either inordinately high or low."**

Bearing the above principles in mind, I have considered the comparable authorities that were considered by the trial court. In view of the injuries suffered by the Respondent I find that the award of the trial Court was inordinately high and that it represents an erroneous estimate. Reliance is placed on the case of **Timsales Limited** V. **Penina Achieng Omondi,** [2011] eKLR wherein the Respondent suffered soft tissue injuries after an accident. The Court awarded Kshs.60,000/= in the year 2011.

I have noted the fact Appellant's counsel did not make any submission on what award should have been given by the trial Court as it had prayed for the suit to be dismissed.

I have taken inflationary trends into consideration and an award in the sum of Kshs.90,000/- would have been appropriate and I would have interfered with the award and substituted it with this figure.

FINDINGS

In the light of the above, having reconsidered and re-evaluated the evidence on record these are my findings:

I find that by virtue of DExb.5, the Appellant/company demonstrated that the accident happened away from work.

I find that the Respondent having failed to file a Reply to the Defence is deemed to have admitted the facts and particulars of negligence alleged therein.

I find that the award of the trial Court was inordinately high but there is no need for interference.

DETERMINATION

In conclusion, this appeal is found to be meritorious and is hereby allowed.

The judgment of the trial Court in SPMCC No.804 of 2007 is hereby set aside.

Each party shall bear her/its own costs in the lower court and on appeal.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 19th day of June, 2015.

A. MSHILA

JUDGE