



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 151 OF 2008

KREATIVE ROSES LIMITED.....APPELLANT

VERSUS

OLPHER KERUBO OSUMO.....RESPONDENT

JUDGMENT

1. The Respondent, Olpher Kerubo Osumo, instituted a suit in the lower court seeking general and special damages for injuries she allegedly suffered in the course of her employment with the appellant, Kreative Roses Limited.
2. The trial magistrate upon considering the evidence presented before her entered judgment in favour of the respondent and awarded her Kshs.50,000/= in general damages and 10,000/= in special damages.
3. It was the respondent's evidence that on 11th May, 2006 while carrying out the duty assigned by her employer (the appellant) namely, collecting and taking cockpit (some kind of manure) to the greenhouse she was tripped by polythene papers used and left on the shamba. As a result, she fell on a piece of timber with nails and sustained soft tissue injuries, and a cut to the right leg. Her supervisor, Sarah Mutua, took her to the Company clinic for first aid whereat she was attended by Lilian (the nurse). Later on she resumed her duties and completed the day's work.
4. On the following day, she reported at her duty station and continued working but at about 1.00 p.m she left her duty station and went to seek medication at the Naivasha District Hospital as her injuries had become worse. She blamed the appellant for failing to provide her with protective clothing and to provide her with a safe work environment.
5. Later on the respondent was examined by Doctor Omyuoma who from the history, the treatment card from Naivasha District Hospital and his own physical examination compiled a medical report for her (PEX 4). The doctor noted that the respondent was injured while on duty at the Appellant's premises and sustained a cut wound on the right leg and soft tissue injuries on the right leg. He also noted a permanent scar on the right leg. He assessed the degree of injury to be harm.
6. As the Appellant objected to the production of the treatment card from Naivasha District Hospital, the respondent called Joseph Nakuro, a Clinical Officer from the Hospital who gave testimony to the effect that the respondent was treated by a student at the Hospital working under his supervision. Although he could not remember the name of the student, this witness confirmed that the respondent was indeed treated at the facility on the day in question.

7. The Appellant, on its part, called Robert Osoro (D.W.2) who conceded that the respondent was an employee of the defendant at the material time. He denied the allegation that the respondent was injured on the material day. It was his case that whenever an employee got injured in the course of employment, he or she would be sent to Longonot Hospital for treatment since this was not the case then it meant that, the respondent was not injured at the appellant's premises. He also stated that all injuries sustained in the course of employment were registered in the accident book.

8. Relying on the accident record book (DEX 2), he maintained that the respondent was not injured at work as the accident record book did not attest to that. He further stated that the muster roll showed the plaintiff having worked for a full day on the day she allegedly got injured and on the day she allegedly went to Naivasha District Hospital. He produced the Muster Roll as DEX 3.

9. He further led evidence to the effect that the company issues protective clothing like dirt coats, boots, overalls and gloves to its employees. As regards the respondent, he maintained that she had been issued with protective clothing. To prove this fact, he produced the respondent's clearance form which confirmed that she returned the said protective clothing when leaving the appellant's employment.

10. On cross-examination he conceded that he was neither the immediate supervisor of the respondent nor the maker of the documents he produced in court. He also conceded that the occurrence form he produced in court was not signed by the respondent.

11. It is also noteworthy that he did not comment on the safety or otherwise of the Appellant's work environment.

The appellant's witness, Benson Karera Wahome, a Health Records officer at Naivasha District Hospital testified that the treatment card produced by the respondent was not authentic as the name and number indicated thereon did not tally with the records they had.

12. Upon considering the foregoing evidence the trial magistrate came to the conclusion that the respondent was indeed injured as claimed and that the appellant was to blame for failing to provide her with a safe working environment.

13. Being dissatisfied with the entire decision of the lower court, the appellant filed this appeal challenging it on eight (8) grounds which can be summarised as follows:-

1. That the respondent did not prove her case to the required standard;
2. That the learned trial magistrate erred in law by shifting the burden of proof to the appellant;
3. That the learned trial magistrate did not consider and/or give appropriate weight to the evidence and submissions by the appellant;
4. That the learned trial magistrate misapprehended the doctrine of negligence applicable to a contract of employment and as a consequence imposed on the appellant incongruous liability; and
5. that the general damages awarded to the respondent are inordinately high.

14. This being a first appeal this court must consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses.

15. It is common ground that the respondent was an employee of the appellant and that she was on duty on the material day. The only question that fell for consideration before the trial court, and which is also the crux of this appeal is whether she was injured at her place of work as alleged.

16. It was the respondent's testimony that on 11th May, 2006 while collecting and taking cockpit to the

appellant's greenhouse she was tripped by polythene papers used and left on the shamba. She fell on a piece of timber with nails and sustained the injuries.

17. She blamed the appellant for failing to provide her with protective clothing and failing to provide her with a safe work environment.

18. The medical report by Dr. Omuyoma, showed that she had sustained a cut wound on the right leg and soft tissue injuries on the right leg. It also indicated that the injuries had healed leaving a permanent scar on the right leg.

19. Joseph Nakuro, a Clinical Officer from Naivasha District Hospital confirmed that the respondent was indeed treated at the Hospital.

20. Although DW 1 led evidence to the effect that the treatment card produced by the respondent was not genuine, the trial magistrate found his evidence to be unreliable as it related to in patient records while the respondent was never admitted. This is what the trial magistrate observed regarding DW1's evidence:-

“What surprisingly escaped the notice of both counsels was the fact that whilst the card produced was clearly an out patient (OP) card, the records produced are clearly for in patient department.....This witness evidence did not add any value to the defendant's case. It was a simple wastage of time.”

21. As regards the evidence led by DW2, the trial magistrate noted, and rightly so, that the witness was not the plaintiff's supervisor on the material date. The witness was neither the maker of the records he produced in court nor the custodian of the records. I have duly considered the written submissions by both counsel.

22. Like the trial court, upon taking into account the evidence adduced by the respondent, I am persuaded that the respondent proved, on a balance of probabilities, that she was injured while on duty and that the appellant was negligent in leaving the polythene papers that tripped her on her work environment. I also find presence of the timber with nails in her work environment to be a foreseeable risk for which the appellant should be held liable.

23. The court of Appeal quoting Halbury's Laws of England in the case of Mwanyale V. Said t/a Jomvu Total Service Station stated as follows:

“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employees' safety; the exercise of due care and skill suffices.”

24. Did the appellant exercise due care? The respondent blamed the appellant for failing to provide her with safe working environment and in particular failing to provide her with protective gear. Although the appellant led evidence to the effect that at the respondent was issued with protective gear, that evidence does not controvert the respondent's testimony to the effect that the protective gear was issued after occurrence of the accident. It is noteworthy that the evidence led by the appellant's witnesses did not address the safety of the appellant's work environment. The respondent's evidence to the effect that she fell on a piece of timber with nails was, therefore, not controverted. Presence of timber with nails, in my view, was a foreseeable risk.

25. Having already found that the respondent was injured while in the course of her employment, without any proof to the contrary, I find that the appellant was in breach of its duty to provide the respondent

with a safe system of work and/or a safe working environment. The appellant ought to have provided the respondent with gum boots and kept the work environment free of health hazards like the timber with nails.

26. As the duty to provide a safe working environment solely lay with the appellant, the appellant was wholly and solely to blame for the injuries and damage that the respondent sustained.

27. As regards damages, an appellate court would not interfere with damages awarded by a trial court unless it is satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or short of this, the amount was so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages. See **Kemfro Africa Limited t/a "Meru Express services" V. Lubia & Another** (No.2) (1987) KLR 30.

28. In deciding damages to award a court must ensure that the award is within limits set out by decided cases and within limits the Kenyan economy can afford. The award must also be based on comparable injuries. See the Court of Appeal decision in **Kigaragari V. Aya** (1982-1988) 1 KAR 768. In the instant case the respondent had submitted for Kshs.140,000/= whereas the appellant had submitted for 30,000/=. The trial court awarded Kshs. 50,000/= which amount was neither so high nor so low to warrant the interference of this court. However, as regards the special damages I note that the trial magistrate awarded Kshs. 10,000/= when the amount pleaded was Kshs. 3,000/=. This, in my view, was a misdirection on the part of the trial magistrate. The Kshs. 7000/= awarded on account of proved witnesses expenses does not meet the rule for award of special damages as special damages have to be pleaded and specifically proved. The special damages pleaded and proved are Kshs.3,000/= (three thousand only). I set aside the sum of Kshs.10,000/= awarded and substitute it with Kshs.3,000/=.

29. It is only to the extent of special damages that the appeal succeeds. The rest of the appeal has no merit and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 28th day of February, 2014.

H.A OMONDI

JUDGE