REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.112'A' OF 2006

BILASHAKA FLOWERS.....APPELLANT

VERSUS

NAISULAENE NAIRUKO.....RESPONDENT

JUDGMENT

1. The Respondent, Naisulaene Nairuko, instituted a suit in the lower court (Naivasha SRMCC NO.1228 of 2004) seeking general and special damages for injuries she allegedly suffered during the course of her employment with the appellant.

2. It was the respondent's case that on 28th June, 2008 while carrying her assigned duty (cutting flowers using scissors), she accidentally cut herself on the left hand. It was her testimony that she reported the accident to her supervisor one, Sammy Liambo who gave her a note to take to Rocco Dispensary (PEX 1) for treatment. Later on, she saw Dr. Omuyoma Obed who examined her and prepared a medical report for her (PEX 3) at a fee of Kshs. 2000/= and was issued with a receipt (PEX 4).

3. In addition to the documents mentioned above the plaintiff also produced a copy of L.D 104/1 which was allegedly filled and given to her by the appellant (PEX 2).

4. Absolving herself from blame for causing the injury, the respondent stated that she was careful in her work and blamed the appellant for failing to give her protective gear.

5. Reacting to the appellant's contention that she was no longer in its employment when the accident allegedly occurred, the respondent maintained that she was an employee of the appellant at the material time and that she was injured in her course of employment with the appellant. She conceded that she had instituted another case over the same cause of action namely, Naivasha PMCCC NO.1101 of 2005.

6. The appellant, through its personnel officer, Erick W. Njenga, sought to prove to the trial magistrate that the respondent had left its employment at the time the accident allegedly occurred. He produced two letters allegedly issued to the respondent terminating her services, both dated May 26, 2004 (DEX 1 and 2 respectively); the company's muster roll showing 27th May, 2004 as the respondent's last day at work (DEX 3) and the plaint filed in Naivasha PMCC NO.1101 of 2005 (PEX 4).

7. Upon considering the evidence presented before him the trial magistrate found the appellant to have been 100% liable for causing the accident complained of and the resultant injuries. Consequently, he ordered the appellant to pay the respondent general damages amounting to Kshs. 80,000/= and special damages of Kshs. 3000/=. He also awarded costs of the suit to the respondent.

8. Aggrieved by the judgment of the lower court the appellant brought this appeal challenging the decision of the lower court on four (4) grounds which can be summarized as follows:-

a. That the evidence adduced was insufficient to prove the respondent's case against the appellant.
b. That the trial magistrate failed to consider the appellant's defence; and
c. That the general damages awarded were excessive.

9. 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.

10. It is common ground that the respondent was an employee of the appellant a month before the accident complained about occurred. The only question that fell for consideration before the court below and which is also the crux of this appeal is whether the respondent was an employee of the appellant when the accident complained about occurred and if so whether the appellant was to blame for occurrence of the accident.

11. As pointed out above, it was the respondent's testimony that while doing the work assigned to her by her employer (cutting flowers) she cut herself on her left hand by the scissors which she was using. Claiming that she was careful. Respondent blamed her employer for failing to, *inter alia*, provide her with protective gear like boots or gloves. She reported the accident to her supervisor who referred her to a local dispensary where she was treated.

12. As pointed out in paragraph 6, the appellant led evidence calculated at proving that the respondent was not its employee at the material time. In this regard the appellant explained that it had run short of jobs and had declared the plaintiff and other workers redundant; that when the respondent was served with one month notice of termination of her services, she refused to work and asked to be paid her terminal dues forthwith. On the same day her terminal dues were processed and paid. The appellant maintained that the respondent signed for her dues and left the company. To prove that fact the appellant produced its muster roll (DEX 3) which indicated that as at 28th May, 2004 the respondent had left its employment. The appellant also complained that the respondent had sued it in a subsequent suit over the same injuries.

13. The appellant witness (DW1) maintained that the respondent was not injured as claimed because the accident register (DEX 5) did not bear out that fact. He also sought to impugne the exhibits produced by the respondent claiming that PEX 2 (L.D 104/1 form) does not show wages that the respondent was earning and that there is nothing in it to show that the doctor filled it to show the degree of injury. He further claimed that the form lacked the company's rubber stamp. However, he admitted he was not the respondent's supervisor.

14. Disbelieving the evidence of the appellant the trial court observed:-

> **"There are doubts that the defence has raised that the plaintiff was not working at the time; and that she was paid her dues but there are doubts in my mind if this is so. I say so because according to her she is illiterate and does not know how to write; if this is so then how was she able to sign for her dues. It is the contention of the defence DEX 3 that the plaintiff had left, but the documents; exhibit 3 has not assisted the court in any way. It is a document that is not certified by the defendants, and one cannot even know its source. The document has no legends and the court cannot know what the markings on it are all about. There is even nothing in DEX 3 to show it is an authentic document from the defendant. Even the defence by the defence witnesses who appeared before me did not convince this court that they were truthful in the allegation that the defendant was not at the place of work on the date of injury. If another suit against the defendant has been filed by the plaintiff, and this was confirmed through the plaint filed by Kamau Mwaura advocate, the court has seen the plaint in civil case No. 11/05, the defence cannot seek the dismissal of this suit at this stage ..."**

15. As regards the first ground of appeal, the foregoing evidence millitates against the appellants' contention that the trial magistrate did not consider its defence.

16. Having re-evaluated the evidence led in the lower court, I agree with the trial magistrate that the evidence led by the appellant was incapable of controverting the respondent's evidence to the effect that she was still an employee of the appellant when the accident complained of occurred. I say this, because, some of the documents produced in evidence like PEX 1 and PEX 2 were allegedly issued by the appellant. Although the appellant's witness cast aspersions on the authenticity of the documents, upon evaluation of the documents I find them to be *prima facie* authentic. The LD 104/1 form, for instance, bore the appellant's rubber stamp. Secondly, the appellant's only witness (DW1) admitted that he was not the respondent's supervisor but one, Sammy Kiambo. That being the case, he had no reason or any basis for casting aspersions on PEX 1 which was allegedly issued by the said Sammy Kiambo. Further, as pointed out by the trial magistrate, the exhibits the appellant sought to rely on are unable to support its case. For instance, there is nothing in the letters allegedly issued to terminate the respondent's services capable to prove that the notices were received by the respondent either as alleged or at all. As regards the muster roll (DEX 3) like the trial court I find it to be incredible-nothing in it is capable of proving that the respondent was no longer working for the appellant. Whereas DW1 claimed that the appellant had laid off some of its staff, the Muster Roll did not bear that out. The only employee indicated as having left the appellant's employment is the respondent.

17. In view of the foregoing, and bearing in mind that the trial magistrate had the opportunity to consider the demeanor of the witnesses, I find no reason for deviating from the trial magistrate's finding that the respondent was still an employee of the respondent when the accident complained of occurred.

18. Was the appellant to blame for the accident hereto and if so to what extent was he liable?

19.Upon review of the evidence adduced before him the trial magistrate found the appellant to have been in breach of its contractual duty of providing the respondent with protective gear like gloves or gumboots to prevent and protect her from any harm or injury.

20. Before I give my view on the trial court's holding it is important to put in perspective the duty of an employer to an employee which, the court of Appeal while quoting Halbury's Laws of England in the case of **Mwanyale** V. **Said t/a Jomvu Total Service Station** held to be 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."**

21. 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. That evidence was not controverted in any way by the appellant as its defence was limited to proving that the respondent was not its employee at the material time.

22. Like the trial court, I find the appellant to have been in breach of its contractual duty to the respondent. Did breach of that duty occasion the injury hereto. My answer is in the negative. I say this because the respondent was in full control of the circumstances that led to the occurrence of the accident. Although the respondent has claimed that she was careful, given that she was in full control of the scissors which cut her and there being no evidence to prove that there is nothing she could do to prevent the occurrence of the accident I find her to have equally contributed to the occurrence of the accident.

23.For the foregoing reasons I find and hold that even if the respondent had been supplied with the protective gear, without due care on her part, the accident would still have happened but the resultant injuries might have been less serious. Consequently, I set aside the trial magistrate's finding on liability and substitute it with 50% liability against the appellant.

24. 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.

25. 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.150,000/= whereas the appellant had submitted for 40,000/=. The trial court awarded Kshs. 80,000/= which amount was rather high in relation to the injuries and warrants the interference of this court. As regards the special damages I note that the trial magistrate awarded Kshs. 3,000/= when the amount proved is Kshs. 2,000/=. This, in my view, was a misdirection on the part of the trial magistrate. Consequently, I set aside the award of Kshs. 80,000 general damages and substitute it with Kshs.50,000/= (Fifty thousand only) set aside the award of Kshs. 3000/= awarded on account of proved special damages and substitute it with Kshs. 2000/= which was strictly proved, as required at law.

26. The upshot of the foregoing is that the appeal has partially succeeded in his appeal and is entitled to half the costs of the Appeal.

Dated, Signed and Delivered at Nakuru this 14th day of February, 2014.

H.A OMONDI

JUDGE