



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 141 OF 2010

THE BOARD OF GOVERNORS

ACACIA CREST ACADEMY APPELLANT

VERSUS

KNIGHT KHASIRO MUKITI RESPONDENT

*(Being an appeal from the Judgment and order of the Principal Magistrate Hon Sd. D.M. Itaya (R.M)
in Kajiado Principal Magistrate Civil Case No. 22 of 2007)*

(Before B. Thurairajasingham J)

J U D G M E N T

The Respondent, **Knight Khasiro Mukiti** as the Plaintiff filed suit on 1/2/2007 against the Defendant, the **Board of Governors Acacia Crest Academy** claiming damages suffered as a result of an accident which occurred on 18/10/2006 when the Respondent fell down while she was working for the Appellant. The Respondent blamed the accident on the Appellant stating that the Appellant was negligent.

The Appellant denied the claim through a statement of defence. The Respondent in the alternative claimed that the Respondent was the one who was negligent. The Respondent filed a reply to the defence denying any negligence.

After hearing the case, the trial magistrate entered judgment in favour of the Respondent for Kshs.100,000/= general damages, Kshs.2,000/=special damages plus costs.

The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:-

1. **THAT the Learned Trial Magistrate erred in law and fact in awarding damages that were excessive and incommensurate with the injuries suffered.**
2. **THAT the Learned Trial Magistrate erred in law and fact in not taking into account the defendant's submissions as to the issue of liability.**
3. **THAT the Learned Trial Magistrate erred in finding the defendant liable despite the overwhelming weight of evidence against the finding.**

The appeal was canvassed by way of written submissions which I have duly considered.

This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.

The brief facts of the case are that the Respondent was employed at the Applicant school as a cleaner. On the 18th day of October 2006, the Respondent was cleaning the ceiling of the bathroom when the chair she was standing on fell down. The Respondent fell down and sustained soft injuries to her back. The Respondent was given first aid at the school and subsequently treated at **Athi River Medical Services** and at **Kajiado District Hospital**. A medical report by **Dr. Moses Kinuthia** reflected that the Respondent had sustained a blunt trauma to the back. The doctor charged Kshs.2,000/= for making the medical report.

From the Appellant's side, it was not disputed that the Respondent worked there as a cleaner but it was contended that her services were terminated due to the desertion of duty. DW1 **Stephen Maina** the director of the school however admitted having been informed by the school nurse about the Respondent's injuries. DW2 **Mutua Mwangangi** a fellow employee who was carrying cleaning duties together with the Respondent testified that the Respondent informed her of the injury, a report was made to the school and the Respondent was taken to hospital.

Although DW1 and DW2 did not witness the actual accident, it is clear that they were aware of the accident and that the Respondent was taken to hospital. The medical report produced by the Respondent was not rebutted by any other evidence.

The Respondent in her evidence established the occurrence of the accident and the injury sustained. The next issue to grapple with is who is liable for the accident and in what extent?

The Respondent blamed the Appellant for lack of safety at the place of work. The Respondent in his evidence stated that she was not issued with safety apparels to wit gumboots and gloves. She further stated that there was no ladder. Although the Appellant's witnesses testified that the Respondent was supplied with gumboots and a uniform, the same could not have stopped the Respondent from falling. The main issue was the lack of a ladder. It seems there was no ladder for standing on to reach the high surfaces.

DW2 mentioned no ladder while DW1's evidence was that the ceiling did not need cleaning and that the walls to the bathroom are tiled up to 4½ feet only. Assuming the evidence of DW1 is nothing but the truth, the issue of training comes in. It seems the Respondent had no instructions on how to go about her duties. The Respondent's supervisor did not testify.

The Respondent had three years experience on the job. There is no evidence that she requested for a ladder to be supplied to aid in cleaning high surfaces. However, **“just because an employee adapts to do a job which happens to be inherently dangerous is in my judgment no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure existence of minimum reasonable measures of protection.....”**

In my view the Appellant was negligent in that he failed to provide a ladder and proper work instructions to the Respondent. On the other hand, the Respondent did not show what steps she took to ensure her own safety. I would apportion liability at 70% against the Appellant and the Respondent 30%.

The Kshs.100,000/= award of general damage is in my view reasonable and is in line with awards made in similar cases.

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of **Eastern Africa** to be that it must be satisfied that either the judge, in assessing damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. (See **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A.M. Lubia and Olive Lubia (1982-88) L KAR 727** at

page 730).

I therefore interfere with the judgment of the lower court only the extent of apportioning liability at 70% against the Appellant and 30% against the Respondent. Costs of the appeal apportioned at the same ratio.

.....

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **11th** day of **July** 2013.

.....

B. THURANIRA JADEN

JUDGE