IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.191 OF 2003

BIGOT FLOWERS (K) LIMITED……APPELLANT

VERSUS

MARY WANJIKU WAMAITHA…….…….…….RESPONDENT

[An appeal from the Judgment/Decree in Naivasha P.M.C.C.NO.837 of 2007 by Hon. N. Njagi, Principal Magistrate, dated 4th December, 2008]

JUDGMENT

The respondent brought an action against the appellant claiming compensation for injuries allegedly sustained when she worked for the latter. She blamed the appellant for being negligent and for violating its statutory duty.

The appellant denied liability arguing that the respondent was not its employee during the period when the accident is alleged to have occurred. The appellant also denied that it was negligent or that it was in breach of the contract of employment. Instead it blamed the respondent for the injuries, if any.

The appellant called Leah Wanjiru the supervisor. According to the respondent, the accident occurred while she was harvesting flowers. She fell and injured her right hand and her head. James Mwangi is said to have attended to the respondent at the Naivasha District Hospital a day after the alleged accident. Upon examining the respondent, Mwangi noted a cut wound on the left knee joint and swollen groin.

Dr. Omuyoma examined the respondent two months after the alleged incident and observed a lacerated scar on the left lower leg and pain on that leg.

For the appellant, Leah Wanjiru Njoroge confirmed that the respondent was an employee of the appellant but denied that the respondent was injured on 28th July, 2007. She asserted that according to the Muster Roll, the respondent was on duty throughout the day and even worked extra two (2) hours overtime. She further confirmed that the respondent was provided with protective gear.

The learned magistrate considered the foregoing evidence, submissions by counsel for both parties on liability and quantum and delivered herself thus:

“This court will therefore wish to point out although the evidence by the plaintiff has contradictions here and there, these contradictions are not at all fatal to the plaintiff’s case. It is equally important to point out that the plaintiff had a duty not to fall carelessly as happened here. The defendant was not expected to baby-sit the plaintiff at all”

With that, the learned magistrate apportioned to the respondent 20% liability and 80% to the appellant.

On quantum, after observing that the respondent suffered deep cut wound on the left leg and blunt head injury, the learned magistrate relying on authorities cited before him awarded Kshs.100,000/= subject to 20% liability.

The finding on liability and quantum aggrieved the appellant who has brought this appeal on the grounds that:

i) the finding on liability was against the weight of evidence;
ii) the trial court failed to evaluate the evidence presented;
iii) the trial court disregarded the defence;
iv) the damages awarded were excessive.

It is settled that the onus in a civil case is upon the plaintiff to prove his/ her case on a balance of probability. It is also trite learning that in order to hold an employer liable in negligence acts or omission constituting negligence must be proved and when the employer is to be held liable for breach of contract of employment, it must be shown that the employer failed to take reasonable care.

It was held in **Statpack Industries Ltd.** V. **James Mbithi Munyao**, Nbi. HCCA No 152 of 2003 that:

"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury *per se* is not sufficient to hold someone liable"

Halsbury's Laws of England states the law on breach of statutory duty thus:

"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 their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage 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 employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends only to his person"

It is clear that liability does not arise merely because an injury has occurred. The injury must be linked to an act or omission of the employer. The respondent explained how the accident occurred as follows:

"I was harvesting flowers. I fell down. I was injured on the right hand. I was also injured on the head. …… ……...

I am blaming the defendant because they dug trenches on the drip. I had been provided with mud boots. I was wearing the gumboots on the day of the accident."

In cross-examination, she confirmed that apart from the gumboots, she had been provided with feeders, gloves and scatter; that she had worked in the farm for 2½ years and that she knew about the trenches even before she fell.

How then can the appellant be blamed after providing protective gear? No act of negligence was attributed to the appellant. No evidence of breach of statutory duty was presented.

The respondent was not herself on the proper look-out as she knew of the existence of the trenches. That failure or omission cannot be attributed to the appellant.

There were inconsistencies with regard to the date of the accident. The plaint was to the effect that it was on 28th July 2007. The clearance form gives 4th October 2006 as the date. Secondly, it is not clear which part of the respondent's body was injured. Was the injury to the left leg as pleaded or to the right hand according to the evidence? Contrary to the finding of the learned magistrate, these were critical discrepancies, particularly in view of the defence that the respondent was not on duty on the date of the alleged accident.

For the reasons stated, the learned magistrate erred in finding that the appellant was 80% liable. The appeal is allowed and the award of Kshs.100,000/= subject to contributory negligence is set aside.

Costs of the trial and this appeal are awarded to the appellant.

Dated, Signed and Delivered at Nakuru this 6th day of March, 2012.

W. OUKO
JUDGE