IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 175 OF 2008

(Appeal from the judgment of N. N. NJAGI, Principal Magistrate, dated 22nd October, 2008 in Naivasha Chief Magistrate's Court,

Civil Case No.185 of 2007)

SHALIMAR FLOWERS LTD.....APPELLANT

VERSUS

NOAH MUNIANGO MATIANYI.....RESPONDENT

JUDGMENT

This is an appeal from the judgment of N. N. Njagi, Principal Magistrate in CMCC No. 185/07 (Naivasha) delivered 22/10/08. The appeal is against both liability and the assessment of damages. The grounds of appeal as contained in the memorandum of appeal dated 7/11/08 are as hereunder:-

1. The learned magistrate erred in law and fact by failing to give concise statement of the case, a concise statement of evidence adduced by the plaintiff, the points of determination, the decision thereon and reasons of his judgment pronounced on 22nd October, 2008;

2. The learned magistrate erred in law and in fact in disregarding that the burden of proof lay on the plaintiff to prove negligence, breach of statutory duty and breach of contract as well as particulars of breach of statutory duty, negligence and breach of contract pleaded in the plaint which the plaintiff failed to do.

3. The learned magistrate erred in law and in fact in ignoring that the plaintiff had failed to prove that he was injured on 29th of September, 2006 as pleaded in the plaint and that the plaintiff had adduced contradicting evidence on the date of injury.

4. The learned magistrate erred in law and in fact in disregarding and dismissing the defence submissions and in particular submissions on the date of injury.

5. The learned magistrate failed to appreciate the totality of the evidence before him.

6. The learned magistrate erred in ignoring that the plaintiff was entirely to be blamed for the injuries to himself and the contributory negligence awarded is too little.

7. The damages awarded by the learned magistrate are excessive and unrealistic.

Noah Muniango Matianyi, the (plaintiff/respondent) was an employee of the defendant. On 29/9/06 while performing his duties at the appellant's premises, he was involved in an industrial accident as a result of which he sustained injuries. He testified as PW1 and recalled that on 29/9/06 while on patrol duty, at about 4.30 p.m. he was tripped by a wire that was in the grass. His left leg was trapped and he fell down and was injured on the chest, cut on the left wrist, and the back. He made a report to the supervisor, Kioko, was referred to the Company Clinic and given first aid by Esther Ruto. He was given a day's off but did not get well. He was further treated in hospital. He was later examined by Dr. Omuyoma who prepared a report and was also seen by the appellant's doctor. He blamed the appellant for having been negligent by failing to cut grass. Dr. Omuyoma who examined the respondent on 2/3/07 testified as PW2. He found that the respondent had sustained a deep cut wound on the left writ joint, and a blunt injury to the anterior chest wall. He classified the injury as harm and James Mwangi (PW3) a clinical officer at Naivasha District Hospital testified that the plaintiff attended the hospital on 3/10/06 had an abscess on the left wrist joint, an impression of a cut wound on the left wrist joint. He produced the card issued by the hospital as an exhibit 4.

In the plaint it had been pleaded that the appellant breached a statutory duty by:-

a) Failing to make or keep safe the plaintiff's place of work;

b) Failing to provide or maintain safe means of access at the defendant's place of work;

c) Employing the plaintiff without instructing him of the dangers likely to arise in connection with his work, or without providing him with sufficient training in work or without providing any and/or adequate supervision;

d) In the premises, failing to provide a safe system of work and/or suitable working equipment.

In respect of negligence and breach of contract it was alleged:-

(a) Failing to make any or adequate precautions for the safety of the plaintiff while he was engaged upon the said work;

(b) Failing to provide or maintain adequate or suitable appliances and in particular with any protective clothings such as gloves, gumboots and/or protective gears to carry out the said work in safety or to protect the plaintiff's legs, hands and chest while he was carrying out the said work;

(c) Directing and requiring the plaintiff to carry out the said work without providing him with suitable protective clothings such as gloves, gumboots and or protective gear and/or otherwise to protect his legs, hands and chest;

(d) Employing untrained staff or employees.

(e) Exposing the plaintiff to danger, which the defendant knew and/or ought to have known;

(f) Assigning the plaintiff duties in an unsafe place.

The appellant filed a defence in which he did admit that the respondent was its employee but denied any allegation of breach of contract or negligence and put the respondent to strict proof. It was also denied that the respondent was ever injured in the cause of his employment as alleged and all allegations of breach of contract, particulars of negligence or statutory duty and without prejudice to the allegations of negligence, the defendant pleaded that the respondent contributed to the negligence by exceeding the terms of his employment, failed to take any reasonable precautions for his own safety, was careless in execution of his duty. It denied ever receiving a demand. The defendant did not call any evidence in support of the defence.

This being the first appellate court, this court has a duty to evaluate and analyse the evidence afresh and come up with its own decision both on liability and damages.

Mr. Mahida submitted that the magistrate did not give a concise statement of the case and reasons for the judgment. Mr. Ombati for the respondent submitted that the lower court said that all the evidence, submissions of both parties had been considered. **Order 20 Rule 4** of the **Civil Procedure Rules** requires that judgments in defended suits do contain a concise statement of the case, the points for determination, the decision thereto and the reasons for such decision. I find that the magistrate failed to summarise the case for both the plaintiff and defendant did not analyse the evidence before making his determination and the reasoning thereof and make judgment.

It is the appellant's contention that the respondent failed to prove that he was injured on 29/9/06. Initially PW1 testified that he was injured on 29/6/06. Pressed in cross examination, he denied knowing when he was injured. Later in re-examination, he stated that he was injured on 29/9/07. It was pleaded at paragraph 5 of the plaint that the respondent was injured on 29/9/06. At first the respondent told the court that he went to hospital at Naivasha on 3/10/06 but later changed in cross examination and said it was on 3/10/07. PW2, Dr. Omuyoma who examined the respondent said that from the history he was given, the injuries took place on 29/9/06 he went to hospital on 3/10/06 which was consistent with the plaintiff's first testimony that the incident occurred on 29/9/06. That also tallies with the date in the plaint, that the injury occurred on 29/9/06 and the hospital card issued on 3/10/06. It was indeed observed by the trial court during the cross examination that the plaintiff was confused and I do attribute that to the varying dates he gave in his testimony. This case was filed on 8/3/07. The injury cannot have been sustained on 29/9/07 after the case was filed. I find that the industrial accident did occur on 29/9/06 and that tallies with the plaint, the card from hospital issued on 2/10/06 and the doctor's evidence. The date of 29/9/07 was a slip.

The respondent alleged that there was long grass in the compound and he was tripped by a wire as he patrolled the compound. The employer had a statutory duty to ensure that he provided a safe working environment for the employee. If the grass had not been cut and the respondent was required to patrol anyway, a wire hidden in the long grass paused a danger because anything could have been hidden in the grass including a snake, a sharp object. I do find as the trial court did, that failure to cut grass as a result of which a wire hidden under tripped the respondent, was a result of the unsafe working environment. It was also negligent of the applicant to leave such long grass which was likely to habour dangerous objects that were a danger to the employees. The respondent proved some of the particulars of negligence alleged in the plaint.

The lower court apportioned liability for reasons that the respondent should have known that it was risky walking in the long grass and the respondent exposed himself to danger. The trial court attributed to the respondent 20% contribution. I am in agreement with the magistrate's finding that the respondent owed himself a duty of care and should have been more careful and therefore contributed to the injury to himself. I do uphold that finding.

The appellant has challenged the award of Kshs.120,000/- as general damages for being excessive. Doctor Omuyoma found that the plaintiff suffered a deep cut on the left wrist joint which healed leaving a scar, soft tissue to the same joint and blunt injury to the anterior chest wall. He assessed the degree of injury as harm. Doctor Maida also examined the respondent about a year later, found that there were no scars, noted that the plantiff was in fair condition and only suffered a partial incapacity of a temporal nature. 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 various decisions i.e. **ZIPPORAH WAMBUI WAMBAIRA V GACHURU KIOGORA, DAVID MWANIKI KURIA V KIONGORA SAW MILLS (2004) KLR** and **CA 32/1989 GATUNDU COFEE GROWERS CO-OPERATIVE LTD V NJOKI NJOROGE. J.** Makhandia considered the said principle in **JOSEPHINE ANGWENYI V SAMUEL OCHILLO CA 125/08** which states:-

"…an appellate court in deciding whether it is justified in disturbing the quantum awarded by the trial court, it must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor, or left out of account a relevant factor 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 …."

Bearing the above principles in mind, I have considered the comparable authorities that were considered by the trial court. The appellant's counsel did not make any submission on what the award should have been. The respondent's counsel submitted an award of Kshs.160,000/- general damages and relied on the case of **PETER GICHANGO V NRB CITY COUNCIL HCC NO. 4093/1991.** In the above case, the plaintiff sustained multiple soft tissue injuries involving deep scalp lacerations to the left side, contusion to the chest wall, mild soft tissue lower left elbow, extensive degloging injury to both gluteal regions. The wounds became septic. He was operated upon for skin grafting and wounds took too long to heal and got infected. He later developed contracture of the scar on the left groin with deformity and pain on standing up straight. The court awarded Kshs.120,000/- as general damages in 1997. I find that the above case is not comparable with the instant case because the respondent herein suffered much less serious injuries than in the above cited case. The court had also been invited to consider the decision in **BEATRICE NALIAKA V MICHAEL KINUTHIA KARIUKI HCC NO. 1251/1992** in which the plaintiff suffered deep cuts on the left index finger, 3rd finger and blunt injury to the chest, was left with scars on chest, nail fingers, left forearm and legs. She healed leaving multiple scaring scars. An award of Kshs.80,000/- was made in 1994. Again, I find that the injuries suffered in the above cited cases were more serious than the instant case. I do take into account the fact that the above cited decisions were made about 10 years ago. I agree that the award made by the trial court was inordinately high for the injuries that were suffered by the plaintiff.

In the case of **JOSEPHINE ANGWENYI** (supra) in which the appellant alleged that an award of Kshs.30,000/- was too low where the plaintiff had sustained the following injuries:-

- Deep cut wound on the back;
- Bruises to both legs;
- Chest contusion;
- Bruises to both hands;
- Celebral concussion and
- Pain to the back

The court made an award of Kshs.70,000/- and quashed the award of Kshs.30,000/- in September 2010. In my view, the above injuries were even more serious than what the respondent sustained. I find that the trial court's award was inordinately high. Taking into account all the comparable decisions and incidence of inflation I would make an of Kshs.50,000/- as general damages. The respondent proved Kshs.3,000/- as special damages.

In the result, I disallow the appeal on liability but do allow the appeal on the quantum, set aside the award of Kshs.120,000/- general damages, made by the trial court and substitute it with an award of Kshs.50,000/- general damages, Kshs.3,000/- special damages, less contribution of 20%. The total award is **Kshs.42,400/-.** The appellant will also have costs of this appeal.

DATED and DELIVERED this 25th day of March 2011.

R.P.V. WENDOH

JUDGE

PRESENT:
Mr. Rodi holding brief for Mr. Nyambane for the appellant.

Mr. Ombati holding brief for Mr. Obae for the respondent.

Kennedy – Court Clerk.