



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 60 OF 2010

(Being an appeal from the judgment/decree of Hon. S. SOITA, Principal Magistrate, Molo delivered on 23rd February, 2010 in Molo SRMCC NO.169 OF 2007)

CROWN FOODS LTD.....APPELLANT

VERSUS

EMILY WANGUI.....RESPONDENT

JUDGMENT

The respondent, Emily Wangui filed a suit in the lower court against the appellant, Crown Foods Ltd, claiming general and special damages for injuries which she sustained on 2nd November 2006, during her employment with the appellant. She had been tasked to mop the floor when one of the seats which was coated with iron sheets fell on her left leg and causing soft tissue injuries to the left leg, a cut wound. The plaintiff stated that she was an invitee or visitor on the appellant's premises within the meaning of the **Occupiers Liability Act Cap 34 Laws of Kenya**. She also pleaded that the defendant's premises were a factory under the **Factories Act** and under the **Common Law**, the appellant had a statutory duty of care owed to the employee. It was stated that the appellant had a duty of care imposed by law but that the appellant was in breach of the statutory duty by exposing the respondent to unsafe work conditions, failing to ensure the safety of the plaintiff while in the appellant's premises and failing to provide the respondent with protective clothing while on duty.

In the statement of defence the respondent denied allegations of negligence or breach of statutory duty and in the alternative stated that if the respondent sustained any injuries, it was due to the respondent's negligence by failing to work with due care, failing to adhere to proper work procedures and failing to have due regard to her own safety. The particulars of the respondent's alleged negligence was set out in the defence.

In her testimony, the respondent (PW1) stated that while mopping the floor, chairs which had been heaped in a corner fell on her leg. She reported to Mr. Nyandusi and was later taken to Molo District Hospital where she was issued with a treatment card.. She was examined by Dr. Omuyoma who prepared a report. She denied having been issued with gum boots, dust coat and gloves. It is her view that gum boots would have protected her for the said injury.

PW2, John Kinuthia Ng'anga, a Records Officer at Molo Hospital where the respondent claimed to have been treated produced the treatment card as PEX1, though he was not the one who issued it because he

was not working at the hospital then. Dr. Omuyoma testified as PW3. He produced the medical report he prepared after examining the plaintiff. He relied on the treatment card and the history given by the respondent to prepare the report.

The appellant called one witness, Richard Wambua Muthini, a Supervisor at the Company. He claimed to have been supervising the respondent. He explained the procedure where an accident occurs – a report is made to him, he organizes for first aid and if injuries are serious, he takes the victim to hospital and he records the accident in the Accident Register. He denied that the respondent's name was in the register and he denied that any chairs were ever kept in the store. In cross examination, he admitted that he had not come with any of the attendance registers and there was nothing to show that he recorded in the accident book. He recalled that George was a manager and was required to sign for any entry in the accident register.

After the hearing was determined, Mr. Soita, Principal Magistrate rendered his judgment on 23/2/2011. He apportioned liability at 90% to 10% as against the appellant and assessed damages at Kshs.100,000/- which came to Kshs.90,000/- after apportionment. Being aggrieved by the said judgment, the appellant lodged this appeal raising the following grounds:-

- i) **whether the trial court's judgment complied with Order 20 Rule 4 of the Civil Procedure Rules (old Rules).**
- ii) **whether the trial court critically analysed the evidence before it.**
- iii) **Whether the respondent established a nexus between the appellants negligence and her injuries.**
- iv) **Whether the court's award on damages was excessive.**

This being a first appeal, this court is required to evaluate all the evidence on record and come up with its own independent findings. This court, however, bears in mind that it did not have the benefit of seeing and hearing the witnesses testify. **Order XX Rule 4** of the **Civil Procedure Rules** (old Rules) requires that in a defended suit, a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision should be clearly stated. In the instant case, after the magistrate summed up both the evidence of the respondent and appellant, he found that the defendant's witness did not demonstrate that he was at work and found the defendant to be liable. I do agree with the appellant's submission that the trial magistrate did not comply with **Order XX Rule 4** of the **Civil Procedure Rules** by failing to state the reasons why he arrived at the decision he made. The trial court never bothered to consider the case law that was cited by both parties. In **AFRO SPIN LTD V FEDELIS GORI HCA 61/05**, J. Musinga found that the learned magistrate had failed to comply with **Order 20 Rule 4** of the **Civil Procedure Rules** and that failure to comply with the above provision renders the judgment vulnerable to be interfered with on appeal. I do agree with that finding.

According to the appellant, the trial court failed to analyse the evidence adduced before it because it had glaring discrepancies which if considered, it would have arrived at a different decision. One such discrepancy was that the respondent alleged that a heap of chairs fell on her as a result of which she was injured, but that evidence is at variance with the pleadings which are that one chair fell on her. At paragraph 8 of the plaint, the respondent pleaded that **"one of the seats coated with iron sheets fell on the plaintiff"**, thus injuring her. In cross examination, the respondent stated that many chairs fell but only one injured here. In that regard, I find that there was no variance in the pleadings and evidence of the respondent. The other discrepancy that was pointed out by the appellant was in respect of the nature of treatment administered to the plaintiff. The respondent denied that she was ever stitched nor was she given any drugs save for an injection. To the contrary Dr. Omuyoma who examined the respondent a year after the incident, stated in his report that the respondent was given oral analgesic, tetanus toxoid injection, stitching of the wound under local, anesthesia and oral antibiotics. The evidence of the respondent and PW2 who produced the treatment card was consistent. It is not clear where PW3 got the

issue of stitching. The fact that the respondent was not stitched just goes to show that the injury sustained was less serious than PW3 would have the court to believe.

The appellant also contended that the respondent's claim is falsified because her name did not appear in the accident register of the appellant which means that no such accident occurred. DW1 said that he is the one who records the accident book but there was nothing to show that he recorded thereon. He also said that the injured did not sign anywhere. The said accident book is kept in the appellant's custody and is under its control. The respondent had no control over the accident book or the entries therein. The injured were not allowed to sign the book and there is no way that the respondent could have confirmed that accident report was recorded. The fact that the respondent's name does not appear in the accident book is not evidence that the accident did not occur.

In the plaint, the respondent alleged that the appellant breached his duty of care under the **Occupiers Liability Act**. Under **Section 3** of the said **Act**, the occupier of a premises has the duty to ensure that a visitor or invitee is safe while on the premises for the purposes for which he went there. There is no doubt that the respondent was on duty at the said premises on the said day and was cleaning the floor when chairs which were heaped in a corner of the room fell on her. DW3 never specifically denied that fact or that the premises were safe for the use of the respondent. The respondent was not performing duties that involved special risks.

The respondent also alleged that the appellant owns Crown Foods Ltd which manufactures distilled water and other products and therefore is a factory within the **Factories Act**. That fact is not denied by the appellant. Under **Section 34** of the **Act**, the owner of a factory has a duty to provide a safe working environment. The respondent averred that the room she was cleaning was stacked with seats in a corner which fell and one injured her. That allegation was not rebutted by the appellant. The liability under the **Act** is strict and it was upon the appellant to demonstrate that they fulfilled their statutory obligation.

Lastly, the respondent also based her claim on common law negligence, that the employer owes its employees a duty of care to ensure that the working environment is free from any foreseeable danger. The respondent was not assigned the duty to arrange chairs but clean the floor. It was the duty of the appellant to ensure that the chairs that were kept in the room which the respondent was assigned to clean were properly arranged so as not to pose any danger. The appellant did nothing to avoid any harm being occasioned to the respondent. The appellant also failed to controvert the respondent's contention that she was not provided with gum boots. Had she been provided with them, her leg may not have been injured. After considering the question of liability under the three heads pleaded by the respondent, I do find that the appellant failed to discharge its duty of care that was owed to the respondent.

The trial court apportioned liability at 90% as against the appellant but did not give reasons for the finding. Even as the respondent mopped the room, she had the duty of care owed to herself too, to ensure that the chairs stacked in the room did not fall on her. I doubt that the chairs just fell from where they were stacked. It is likely that the respondent came in contact with them which caused them to fall on her. For that reason I am in agreement with the trial magistrate on the apportionment of liability and will therefore not interfere with the trial court's finding.

Was the award excessive? The respondent's evidence was supported by the treatment card produced by PW2. She sustained a wound on the leg which was cleaned and dressed and she was injected. By the time she was examined by Dr. Omuyoma a year later, she was fully healed. Since the respondent denied having been stitched, it means that her injuries were less serious. In the trial court, an award of Kshs.150,000/- was proposed and reliance was made on the decisions in **LAWRENCE AMURARU V KPLC HCC 975 OF 1998** and **LUCY WAIRIMU WAITHAKA V SOKORO PLYWOOD LTD CA 55/2001**. In the last authority, the respondent sustained a burn on the leg which left a scar. An award of Kshs.64,000/- was made on appeal in 2004. In the first case, the injuries suffered by the respondent were not disclosed. On the other hand the appellant suggested an award of Kshs.30,000/- as general damages and relied on the following authorities:-

1. **GRACE NDUTA V SOKORO LTD HCCA NO. 99/2003**, plaintiff suffered soft tissue injuries of

the right hip joint and back and an award of Kshs.30,000/- was made in 2006.

2. **AFRCAN HIGHLANDS PRODUCE B.D. V FRANCIS MOSOSI, KERICHO HCA NO. 22/03**, where an award of Kshs.100,000/- was substituted with Kshs.40,000/- on appeal for soft tissue injuries.
3. **SCOFINAF LTD V JOSHUA NGUGI MWAURA, NARIOBI HCCA NO. 742 OF 2005** was reduced to Kshs.20,000/-

It is trite law that the appellate court will not interfere with an award of damages by the trial court unless it is demonstrated that the damages are inordinately high or low that it amounts to an erroneous estimate of the damages or that the court applied the wrong principles in awarding the damages. The court also takes into account the fact that an award of damages must be reasonable and be assessed in moderation as an award is not meant to punish the defendant but should be a reasonable compensation for the loss suffered. This court is guided by the decisions in **WEST (H) SON LTD V SHEPHERD (1964) AC 326** and **LIM POH CHOO CAMDEN & ISLINGTON AREA HEALTH AUTHORITY (1979)1 ALL ER 332**.

In the instant case the respondent only sustained a cut wound on the left leg. The authorities referred to by the respondent did not compare well with the respondent's injuries. I am in agreement with the appellant that the injury was very minor and an award of Kshs.100,000/- was excessive in the circumstances and therefore an erroneous estimate of what the respondent was entitled to. In my judgment, I find that an award of Kshs.40,000/- is reasonable compensation in the circumstances. The trial magistrate's award of Kshs.100,000/- is consequently set aside and substituted by a award of this court for Kshs.40,000/-. The respondent proved special damages of Kshs.2,500/-. The respondent will therefore have judgment as follows:-

General damages.....	Kshs.40,000.00
Special damages.....	<u>Kshs. 2,500.00</u>
Total.....	Kshs.42,500.00
Less contribution 10%.....	<u>Kshs. 4,250.00</u>
TOTAL=	<u>Kshs.38,250.00</u>

Since the appellant is partially successful in this appeal, I shall award it half the costs of this appeal. The respondent will, however, have the costs in the trial court. Interest on the damages awarded shall be applied from the date of the initial award by the trial magistrate. It is so ordered.

DATED and DELIVERED this 23rd day of September, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Mbatia for the appellant.
Mr. Githui for the respondent.
Kennedy - Court Clerk.