



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NUMBER 218 OF 2011

ABDUL VIRJI.....APPELLANT

VERSUS

MWANAHARUSI M. RONGOLA.....RESPONDENT

J U D G E M E N T

This is an appeal against the judgment of the Hon Adika, Resident Magistrate, Mombasa, in RMCC 3397 OF 2005.

The Appellant a businessman, had his home in Kizingo, Mombasa. The Respondent was his househelp, and also worked at his office, from around May to September, 2005. Her case was that she was at work at the Appellant's home, on 10th July, 2005, a Sunday. Soon the Appellant requested her to climb up a water tank to check on a problem with the water. Whilst she was up the tank, she slipped and fell, injuring her right foot.

She was seen by Doctor Rasik Patel, who gave evidence that her foot had been fractured. It was plastered, and eventually healed so that she fully recovered with no disability. By a Plaint dated 7th October 2005, she sued her employer, the Appellant, in RMCC 3397 of 2005, demanding general and special damages and costs of the suit plus interest.

Her Plaint alleged: that it was a material term of her contract of employment that the Appellant was obliged to ensure her safety whilst engaged in her work; the duty included that she be not exposed to risk of damage or injury; and that the Appellant should have provided a safe and proper system of working.

She outlined the particulars of negligence along the above stated lines, and cited the particulars of injuries, namely: fracture of right foot calcareous bone. She also set out the particulars of special damages.

The Appellant's case was essentially a denial of the claim; that if there was any contract, which was denied, it was for the Respondent to take reasonable precautions for her own safety not to expose herself to risk of injury and, to obey all lawful instructions. Further, that an accident did not occur on the date or at the place stated, that there was no negligence on Defendant's part, or as particularized in the Plaint; and that any negligence if at all, was attributable to the plaintiff. There was also a general denial of any loss or damage occasioned to her.

At the hearing in the lower court, the Respondent's case was supported by two witnesses: The Respondent herself (DW2) and Doctor Patel who examined her (PW1). The Defendants case was pegged on the evidence of three witnesses; Adam Muselem Ali (DW1) an employee of Scania Auto Spares owned by the Appellant; Mgandi Ngahita Ngwaya (DW2) who was at the material time the Appellant's househelp, and the Appellant himself DW3.

The parties also filed written closing submission; the Defendant's are dated 8th August, 2007, and the Plaintiffs' are dated 14th August, 2007.

In his judgment, the learned Magistrate found that the Defendant's/Respondent's witnesses had given contradictory evidence, and that the plaintiff had proved her case on a balance of probability. On that basis, he found the Appellant 100% liable and awarded the plaintiff an amount of Kshs.80,000.00 in compensation, and Kshs.4,500.00 as special damages plus costs and interest.

The Appellant's appeal, herein, challenges the learned Magistrate's findings of law and fact on eight grounds as follows:

- 1. THAT the learned Resident Magistrate erred in law and in fact by finding that the Appellant was 100% liable in negligence.**
- 2. THAT the learned Resident Magistrate erred in law and in fact by failing to find that the plaintiff caused or substantially contributed to the accident.**
- 3. THAT the learned Resident Magistrate erred in law and in fact by awarding Ksh.85,000/= which was excessive and unreasonable considering the injuries.**
- 4. THAT the learned Resident Magistrate erred in law and in fact by failing to consider or consider fully the circumstances leading to the injury.**
- 5. THAT the learned Resident Magistrate erred in law and in fact by failing to consider that the injury was self inflicted and that nothing the Appellant could have done within reason to avoid the injury.**
- 6. THAT the learned Magistrate erred in law and in fact by finding that the Respondent fell from a water tank.**
- 7. THAT the Learned Magistrate erred in law and in fact by failing to find and hold that the respondent fell from a mango tree.**
- 8. THAT Learned Resident Magistrate erred in law and in fact by failing to hold that the Respondent did not sustain the injuries during the scope or in the course of her employment.**

The appeal was heard before me on 1st November, 2011. Ms. Muyaa of Karigithu Kinyua and Company Advocates appeared for the Appellant, and Mr. Nyongesa of O.A. Sherman & Company Advocates, appeared for the Respondent.

The Appellant argued the grounds of appeal in three clusters which I will adopt for ease.

On grounds 1, 2, and 5 Ms. Muyaa for Appellant, argued that the learned Magistrate did not properly apply the facts and law on the issues and arrived at an improper finding on negligence. He was wrong in finding the Appellant 100% liable, finding no contributory negligence on the part of the Appellant, and that there was nothing the Appellant could have reasonably done to avoid the Respondent's injury. Ms. Muyaa dissected many aspects of the evidence at pages 6-13 of the record of proceedings, some of which I will refer to.

On Grounds number 4, 6, 7, 8 and also 5, the Appellant argued that even if the Respondent was

injured whilst going up the tank, the Appellant's duty of care was limited and in fact discharged. All that was required was thirty seconds to tap something, that she had and used a ladder and "it was not spoilt." She went up the tank in the presence of others that there was no hurry, and she had in fact not been instructed to go up.

The Appellant pointed out that the lower court was factually wrong in finding that the Respondent fell from the water tank rather than from the mango tree.

On ground 3, the Appellant argued that the Respondent was the sole author of her injury, thus there was no reason to make an award in her favour, and certainly not for the quantum awarded.

In reply Mr. Nyongesa for the Respondent, referring to ground 3 highlighted the Appellant's final written submission at page 26 where the Appellant proposed an award of Ksh.80,000/- subject to apportionment of liability. That amount was what the lower court adopted, and the Appellant should now not be heard to decry it.

On liability, the Respondent's Counsel clustered grounds 1, 2, 3, 4, 5, 6, and 7 of the Memorandum of Appeal. Respondent submitted that its evidence at trial was consistent with the averments in the Plaint, and that it was the Appellant's witnesses' oral evidence at the hearing which was inconsistent with their statement of defence. Nowhere in the defence, for example, does the issue of the Respondent being on a frolic of her own, and climbing a mango tree, feature. Counsel submitted that this was a fabrication of the Appellant's raised only at the hearing, and made up as an afterthought given the fact that the Respondent was not even cross-examined as to whether or not she climbed the mango tree.

With regard to the contradiction in evidence, Mr. Nyongesa argued that the trial Magistrate rightly found that at the trial that the defence testimonies were contradictory. On this, he highlighted, for example, the fact that the day, being a Sunday, the Appellant said he did not go to work whilst his driver, DW1, said he took the children to school and then took the appellant to work.

On negligence, the Respondent submitted that it was immaterial whether the instructions to climb the tank came from the Appellant or his wife or one of their servants. The Appellant did not deny that there was need for someone to go up the tank. As such, it was for the employer to ensure that the place was safe to work at and the work was safely carried out.

I have carefully considered the submissions of counsel for the parties, the documents availed and in the record of appeal, and the authorities submitted.

In an appeal such as this one, it is the duty of the court under Sections 65(1) (b) and 78(2) of Civil Procedure Act to review both the evidence adduced and the applicable law.

My understanding of the evidence, taken as a whole from the record of testimonies of the parties, is as follows. The Respondent went to work at the home of Appellant on the morning of 10th July, 2005. DW1 and DW2 saw her at about 7.00 a.m. It was soon discovered that there was a problem with the water, and someone needed to climb up the tank to check. This is not in dispute.

The timing of the climb is neither asserted nor disputed by the evidence of DW2, but it is clear that according to DW2, the climb was before Abdul, the Appellant, left. And according to the Appellant, DW3, he confirmed he left at 10.30 a.m. with his family. Thus the evidence shows that the climb most likely occurred before 10.30 a.m.

At any rate, the material events of that day as narrated by the witnesses do not extend beyond 2.30 p.m. as estimated by DW3 in relation to the time he returned home after being first driven out.

Sunday's Activities

In reviewing the record, I found the evidence of DW1 Adam, the appellant's driver rather

strange. He says:

“I took the children to school then came back to wait for the boss to take him to his office.”

I note that all this was on 10th July, 2005, a Sunday, and an unusual and unlikely day to take children to school. He says he then drove the Appellant to the office leaving “with Abdul and his wife.” On his part, the Appellant’s evidence in cross examination is as follows:

“ Adam (the driver) works on one Sunday.....

I did not go to work on that day. I went for a drive with the family. We came back at about 1.00 – 1.30p.m.. We were with him all the time with my wife and children....’

I find these aspects of the testimonies of DW1 and DW3 are in outright contradiction. The evidence of each appears not to relate to the same day.

It is further not clear whether, when DW2 said that after having tea:

“ Abdul left and I was with the driver and the wife...”

he meant that Abdul left the compound, or just the spot where they had been standing. At any rate, DW2 the eyewitness, alleged that Abdul’s wife was present when the Respondent went up the ladder and came down.

On the basis of this evidence, I agree with the Learned Magistrate in his finding that the defendant’s witnesses’ testimonies were contradictory. As such greater weight was, on balance, correctly attached to the Respondent/Plaintiff’s evidence.

Evidence Concerning Happenings around the Gate

All evidence concerning events at the gate was given by the defence witnesses.

DW1, the driver, said that after he drove the Defendant to his office, they went back to the house at lunch hour. At the gate he hooted once, and a second time, and that it was not until he pressed the horn for a third and long time, that it was opened. It was as they entered the house after parking that they saw the Respondent seated next to a mango tree. He stated that:

“She was seated under a mango tree. We wondered what happened to her. I took her to hospital.”

DW1 did not indicate how he found out that the Respondent was injured or needed medical attention in hospital, although in cross examination he stated that when the Respondent got injured, he was not there.

DW2, the Appellant’s worker, stated that whilst ironing clothes at midday, he saw the respondent go up the mango tree and pluck two mangoes. While she was still up in the tree the driver came and hooted. DW2 walked slowly to open the gate hoping, he said, to allow the Respondent time to get down from the tree. After the driver hooted again, there was some urgency and he ran to open the gate. In his own words he said:

“ The driver hooted and I had to run. I opened the gate and the lady fell down. She was injured and I was given liniment to apply later we took him (sic) to hospital.”

On his part DW3, the Appellant testified that when he got back to the house at 1.00 or 2.30 p.m. with his wife and the driver:

“We saw her (Respondent) screaming in pain next to the mango tree..... the ground around the mango tree is surrounded by a cement floor.”

The evidence of those witnesses, taken together, appears to me inconsistent. If the Respondent had just fallen down onto the ground from the high branches of a mango tree as the gate was opened, as testified by eye witness DW2, and was screaming in pain, as testified by DW3, who was the with DW1, how is it that DW1 the driver, merely indicates the respondent's apparently nonchalant state when he drove into the compound, in the bland language he used:

“ She was seated under a mango tree we wondered what happened to her, I took her to hospital.”

And did DW1 hear no screaming? Did he not see that the Respondent appeared injured? Did he not see liniment being given to DW2 and being applied on the Respondent? Did no one run to the screaming woman who was probably writhing? His evidence appears to me more typecast than in tandem with the natural course of events where a person, an elderly woman, has just painfully fallen from high branches onto the ground and sustained fracture. Like the Hon. learned Magistrate in the lower court, I find the defence evidence less than credible and contradictory, more consistent with a rehearsed story than with real, live, painful and tragic events that had just occurred.

The Climb and the Instructions

The Respondent's testimony as to who told her to climb was as follows:

“ On 10th July, 2005, I went to work at Abdul Virji's house. He (meaning Abdul) told me to go up a ladder to the tank and see if there was water. I used a ladder of metal I slipped as it had rained. I was already up the tank. I then fell down. I had slippers on...”

In cross examination, she confirmed that she fell after she got to the tank, that she had never gone up a ladder before and that this happened in the morning.

DW2, however, said that:

“ Virji's wife asked me to go up and I refused...Mwanaharusi was there. She said she can go up the tank....She went up the tank, touched the ball and water came out. She did not fall and went down properly. We even had tea. Abdul left and I was with the driver and the wife.”

In cross examination, DW2 said that the Appellant's wife was present when the Respondent went up the tank and came down.

The Appellant's evidence on this point was that in the morning his wife wanted someone to check on the tanks. That the respondent:

“ ...volunteered to go up the tank.... At 10.30a.m. I was leaving the house with my family. The Plaintiff was up the tank seated up there...”

In cross-examination he said:

“ I went for a drive with the family. We were with him (the driver) all the time with my wife and children... My wife did not give instructions to the Plaintiff. She told the male worker. I do not know where my wife was when she gave instructions....I saw the plaintiff up the water tank and I did not see her fall.”

In re-examination he said:

“ I heard clearly my wife gave instructions to the male worker.”

What is common in the evidence of those three witnesses is that the Respondent went up the tank either on instructions of the Appellant or his wife. What is contradictory is the evidence of the defence witnesses. If Abdul had left and DW2, his worker, was with the driver and wife; how is it that the Appellant had simultaneously left with his wife and children? If, as testified by DW2, the wife and driver were with him, and Abdul had left when he saw the Respondent climb up and down the tank, where was the Appellant, who himself said the Respondent was up the tank, seated there as he left the house at 10.30a.m. With his family? The evidence is incoherent at this point.

With regard to issuance of the instructions to climb, I find it strange that DW2's evidence is that he had been asked to climb the tank but declined and that the Respondent, an elderly lady who had never before been up a ladder, volunteered to do so. Stranger still is the evidence of the Appellant who says the Respondent volunteered to go up the tank, upon his wife's open request; but in cross-examination said he did not know where his own wife was when she gave instructions. And on re-examination, he convoluted the facts further by saying he clearly heard his wife gave instructions to the male worker. Given the foregoing, I concur with the learned Trial Magistrate's finding that the defence witnesses gave contradictory evidence.

I now move to the grounds relating to negligence.

Although the Appellant's Counsel pointed out that there was no corroborating evidence for the Respondent/Plaintiff, and that three defence witnesses testified in unison against her, it must be remembered that evidential value is not predicated upon the preponderance of numbers but on its quality. Due to the contradictions pointed out in the testimonies of the defence witnesses, their credibility was that much reduced. The trial would have, indeed, benefitted from the evidence of the Appellant's wife who was also apparently an eyewitness.

Liability

I now move to the grounds of appeal relating to liability, negligence and contribution.

The Appellant argued that there is no recorded instance in which the Respondent touched on liability and that the Defendant merely narrated her injuries. As such, argued the Appellant, there was no basis for a finding of liability in negligence, since it is clear that the Respondent, by climbing a mango tree, was on a frolic of her own. Indeed, that there was nothing the Appellant could have done to avoid the injury.

Appellant's Counsel referred to **Kiema Muthuku and Kenya Cargo Handling Services Limited – Civil Appeal Number 94 of 1990.** In that case, the Appellant sustained a fracture of in his right small finger whilst unloading heavy duty nuts from a motor vessel. The Court of Appeal found in that case, that there was no evidence that the performance of the work involved risks similar to those for which special precautions would be required. The Court of Appeal therefore dismissed the appeal, holding that it was for the Appellant to prove, on a balance of probability, one of the forms of negligence as alleged in the Plaintiff. The Court also stated that:

“ Our law has not reached the stage of liability without fault.”

The Respondent's counsel in response pointed out that the authority was distinguishable since in the **Kiema** case the employee had long been handling nuts which were not weighty and could not cause injury. In the present case, the Respondent was asked to climb a ladder, something that was not usual or in the line of her duty, and it was her first time to do so. I, too, agree with the distinction drawn on the facts and the resulting principle of law.

What was the evidence given on liability?

The Respondent stated:

“I am a househelp... He(referring to the Respondent as employer) told me to go up a ladder to the tank and see if there was water..... I had slippers on....He sent me up a ladder when it was wet.”

And in cross examination she said:

“This was my first time to go up the ladder. I have never gone up a ladder in my life.”

And further on in cross examination:

“The tank is up on a pavilion. It is the height of the court ceiling.”

In my opinion, a househelp or house-worker who has come to work at the employer’s residence in the morning, and climbs up a high tank on a wet day, in slippers, to check on the water pursuant to a request made by one, or both, of the employers in the household, and whilst her employer or employers are both actively engaged and watching as testified by the Appellant in his evidence, and stated in cross examination by DW2, is entitled in these circumstances, to be considered to be working on their instructions or tacit, if not express, approval. It does not require a substantial contractual agreement of detailed, carefully phrased clauses, to get a househelp to perform a particular task in an employer’s compound. Nor is liability in this case contested on that basis, for that would be both laughable and incongruous with the normal course of events.

Here, both the Appellant and his wife did not dissuade the Respondent; she was their househelp not a trespasser or a stranger; they watched her go up their wet ladder, to their high tank, on a pavilion, in their compound. She was going to do or perform a job up there which they required done. She had come, as usual, to do work assigned. In those circumstances, I have no doubt that her safety should have been assured by them; and that they knew, or ought to, or would have known, that in doing that work she would be exposed to risk or danger of injury and loss if she had fallen. I therefore agree with the learned Magistrate in finding the Appellant liable.

In her Complaint, at Paragraph 5 she alleged, and at the hearing she testified, that she fell down, from the tank. The Appellant in his statement of defence at paragraph 4 denied that the accident occurred, but did not deny the instructions to climb, although he denied the date and place of the occurrence of the accident. None of the testimonies of the defendant’s witnesses disclosed any other date. Indeed, they all confirmed the date of the accident wholly in contradiction to the statement of defence, but were contradictory as to the place in relation only as to whether the fall was from the tank or the mango tree. For her consistency, the Trial Magistrate preferred her evidence on balance of probability. He rejected the defence testimony as less credible on balance. He was entitled to, given the analysis I have already done.

The next question concerns the extent of the Appellant’s liability, and whether there was contribution by the Respondent. Based on my earlier discussion, it is clear that there was no system in place for ensuring the safety of the Respondent whilst she worked at the tank. Indeed, there is no evidence at all that it was a job she was employed to do although as a househelp she could do day work assigned at the house. The facts that it was not a job she had done before or regularly did; that she did it using a wet ladder; that she was in slippers and had no prior experience of using a ladder; all these are indictments on the Appellant’s unpreparedness for the performance of the one-off specific job the Respondent undertook. Yet, it was the job requested by the Appellant and or his wife with each other’s approval. I do not see how, given the aforesaid facts, the Appellant can avoid full responsibility, and I so find.

I finally, turn to the question of quantum. The learned Trial Magistrate awarded general damages of Ksh.80,000/=. This was the amount proposed, subject to apportionment of liability, by the Appellant on the last page of his written final submissions. The Respondent had sought Ksh.200,000/-, inclusive of interest citing a 1994 authority for fracture of a heel bone where the award was Ksh.100,000/- for special damages. The trial Magistrate made an award based on receipts and the Appellant’s proposals in his submissions. As I have found full responsibility lay on the Appellant, I see no reason for upsetting the award on quantum.

Given all the foregoing, I hereby dismiss the appeal, with costs to the Respondent, and confirm the learned Trial Magistrate’s decision.

Dated and Delivered this25th.Day of November, 2011

R. M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....