



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 686 of 2005
SOCFINAF COMPANY LIMITED.....APPELLANT
VERSUS
MARGARET WAITHERA MBUGUA.....RESPONDENT

(Being an appeal from the judgment of Mr. S. Mukua, Senior Resident Magistrate dated the 9th day of August, 2005 in the Chief Magistrate's Civil Case No.231 of 2005 at Thika)

J U D G M E N T

1. Socfinac Company Limited (hereinafter referred to as the appellant) was the defendant in the lower court. Margaret Waithera Mbugua (hereinafter referred to as the respondent) had sued the appellant seeking general and special damages. The respondent, who claimed to have been an employee of the appellant, alleged that she was injured during the course of her employment as a result of the appellant's breach of statutory duty and or negligence or breach of contract.

2. The appellant filed a defence in which it denied that the respondent was its employee or that an accident occurred at its premises on 1st August, 2003, or that the appellant was in breach of statutory duty/contract or negligent. In the alternative the appellant maintained that if there was an accident, then the same was caused solely or substantially by the negligence of the respondent.

3. During the trial in the lower court, the respondent produced an employment card showing that she was employed by the appellant. She explained that her work was to carry coffee. On the material day as she was carrying coffee when her leg got caught up in a hole and was fractured. She reported the matter to her supervisor. She was then taken to the appellant's clinic where she was given first aid. She went home but was unable to come back to work the next day. She was given 3 days off duty. She was later examined by Dr. Wanyiri Maina who prepared a medical report. The report was produced by the respondent. The respondent stated that she was not provided with any gloves or gumboots.

4. The appellant called 2 witnesses in support of its defence. These were Evalyn Kadia Adala who was employed by the appellant as a field clerk in October 2004. She produced the field book for August 2003 according to which the respondent was not on duty on the date she alleged she was injured. The witness conceded that she was not in the employment of the appellant at the material time nor was she the one who entered the details in the field book.

5. Teresa Wanjiru Nderitu who was employed by the appellant as a nurse also testified. She produced a register where all injured employees treated at the clinic were recorded. She maintained that her record did not include the respondent as having been injured or treated at the clinic. She denied having referred the respondent to another clinic or hospital.

6. Each party's counsel filed written submissions urging the court to find in favour of his client. Counsel for the respondent urged the trial court to award her general damages of Kshs.180,000/=, whilst counsel

for the appellant urged the trial court to find the respondent's case not proved. On damages counsel for the appellant urged the court that an award of Kshs.20,000/= would be adequate compensation.

7. In his judgment, the trial magistrate found that the respondent was injured whilst on duty. He noted that the respondent was partly to blame for the accident as she failed to keep a proper lookout. He therefore apportioned liability at 90:10% in favour of the respondent. The trial magistrate assessed general damages at Kshs.130,000/= and gave judgment in favour of the respondent subject to 10% contribution.

8. Being aggrieved by that judgment, the appellant has lodged this appeal raising 9 grounds as follows:

- (i) The learned magistrate erred in failing to dismiss the respondent's claim.
- (ii) The learned magistrate erred in law by failing to take into account the appellant's evidence adduced during the trial.
- (iii) The learned magistrate erred in law by failing to dismiss the respondent's claim in the face of un-controverted evidence that the respondent was not at work at the time of the alleged injury.
- (iv) The learned magistrate erred in law in contravening the object and provisions of the Workmen's Compensation Act.
- (v) The learned magistrate erred in fact by finding that the respondent was injured in the appellant's premises and in the course of her duties.
- (vi) the learned magistrate erred in law by shifting the burden of proof to the appellant.
- (vii) The learned magistrate erred in fact and in law in disregarding the defendant's witnesses' testimonies and assuming that the same had been rebutted in the absence of such clear evidence or testimony of rebuttal.
- (viii) The learned magistrate erred in making the appellant's liability absolute irrespective of the circumstances and the venue of the alleged accident.
- (ix) The learned magistrate's decision offends the provisions of the Evidence Act and the principle of burden of proof in civil cases.

9. Following a consent recorded by the parties, written submissions were duly exchanged and filed and this court is invited to determine the appeal based on these submissions. For the appellant, it was submitted that the evidence tendered in the court showed that the respondent did not report on duty on 1st August, 2003 and 2nd August, 2003 and was only indicated as sick from 4th to 9th August, 2003. The court was referred to the record produced by the appellant's witness. It was further maintained that the alleged accident was neither reported nor was the respondent treated at the appellant's clinic. It was submitted that the trial magistrate misdirected himself on the burden of proof by shifting the burden of proof from the respondent to the appellant. It was further submitted that the oral testimony of the respondent could not be relied upon to controvert the documentary evidence produced by the appellant's witness, showing that the respondent was on duty on the material day. The court was urged to find that the respondent failed to prove liability. It was further submitted that no evidence was adduced to show how the appellant was responsible for the respondent's injury.

10. On the issue of quantum, it was noted that the report of Dr. J. Maina showed that the respondent suffered a sprained ankle joint which had healed with no residual effect, and therefore the amount of Kshs.130,000/= awarded as general damages was manifestly excessive as to justify interference. Counsel for the appellant argued that a sum of kshs.20,000/= would have been more than adequate for the injuries suffered.

11. For the respondent it was submitted that the respondent's evidence was that she was injured while in the course of her duties, and that she was thereafter given sick off. It was submitted that the record produced by the appellant were under the appellant's custody and could therefore be subjected to manipulation. It was maintained that the

respondent was first attended at the appellant's clinic before she proceeded to Ngenda Health Centre.

12. The court was urged to uphold the judgment of the trial magistrate as it was the responsibility of the appellant to take reasonable care for the safety of its employees. Counsel for the respondent relied on:

- (i) ***HCA 32 of 1989 Gatundu Coffee Growers Co-operative Society vs Njoki Njoroge.***
- (ii) ***Nakuru Civil Appeal No.99 of 2003 Sokoro Saw Mills Ltd vs Grace Nduta Ndungu.***

13. On quantum the court was urged to find that the award was not so inordinately high as to justify interference. In that regard ***Nairobi HCCC No.4956 of 1991 John Chiriba Mutendo vs Naftali Ogumbo Ogira*** was relied upon. The court was therefore urged to dismiss the appeal.

14. I have carefully reconsidered and evaluated all the evidence which was adduced before the lower court. On the issue of liability, the respondent had the responsibility to establish the following:

- (i) That she was an employee of the appellant.
- (ii) That the appellant was in breach of its statutory duty and or was negligent or in breach of contract.
- (iii) That the respondent suffered injury as a result of that breach and or negligence.

15. The respondent produced an employment card which showed that she was employed by the appellant. This document was not challenged by the appellant. Therefore the employee/employer relationship was established. The question is what duty if any did the appellant as employer owe the respondent, and was the appellant in breach of such duty?

16. In answering this question I find guidance in the case of ***Mwanyule vs Said t/a Jomvu Total Service Station*** where the extent of the employer's duty to an employee in Kenya was held to be same as that stated in ***Halsbury's Laws of England*** as follows:

"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 the 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."

17. Thus the appellant in this case did not owe the respondent an absolute duty but only owed the respondent duty of taking reasonable care against risk of injury caused by events reasonably foreseeable or which could be prevented by taking reasonable precaution.

18. In her plaint, the respondent pleaded the particulars of breach of statutory duty and negligence against the appellant as follows:

Breach of statutory duty:

- (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 her of the dangers likely to arise in connection with her work, or without providing her 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 equipments.

Negligence and/or breach of contract:

- (a) Failing to make any or adequate precautions for safety of the plaintiff while she was engaged upon the said work.
- (b) Failing to provide or maintain adequate or suitable appliances and in particular with any gumboots and/or protective gears to carry out the said work in safety or to protect the plaintiff's legs while she was carrying out the said work.
- (c) Directing and requiring the plaintiff to carry out the said work without providing her with suitable protective gumboots and/or otherwise to protect her legs.
- (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 unsafe place.

19. The respondent had therefore to prove one or more of the above particulars. In her evidence the respondent's evidence was simply that she was carrying coffee when her leg got into a hole and got fractured. The respondent explained further that she was removing coffee from the factory and taking it to the bed where it was to be dried. The respondent did not however explain where exactly the hole was, how big it was and why she failed to see it. Of greater concern is that the respondent did not explain in what way the appellant failed to provide a safe working system, or failed to provide the respondent sufficient training. Indeed, one wonders what kind of training the respondent required in order to carry coffee from the factory to the bed.

20. It is common sense that one should look where one is going and stepping into a hole unless accompanied by other factors could only be a result of the respondent's own negligence. The respondent further maintained that the appellant failed to maintain adequate or suitable appliances or provide protective gear to protect the respondent whilst she was carrying out her work. In her evidence the respondent stated that she was neither supplied with hand gloves nor gumboots. Nonetheless, there was no evidence as to how the hand gloves and gumboots would have protected the respondent against the risk of falling into a hole, particularly where there was no evidence as to the exact location or size of the hole. In the circumstances, the respondent failed to prove that the hand gloves and gumboots were a necessary protection in the performance of her work. Thus, the respondent failed to establish that her working environment was unsafe or that the respondent failed to take reasonable care against foreseeable danger.

21. The respondent apparently relied on the fact that she was injured at her place of work, as evidence of the appellant's liability. However, that was not enough, the respondent had to establish that her injury resulted from the appellant's breach of duty and this, the respondent failed to do. I find that the trial magistrate failed to properly address the issue of liability and did not therefore critically analyze the evidence in that regard. Her finding on liability cannot therefore be supported.

22. With regard to quantum, although the respondent claimed that her leg was fractured, the medical report by Dr. Maina showed that she suffered a dislocation of the right ankle joint and that X-ray revealed a sprained ankle joint. The authorities which were produced by the respondent's counsel all related to fractures and were therefore not appropriate for purposes of comparison. On the other hand the authorities cited by the appellant's counsel related to mainly soft tissue injuries and were therefore not useful. In the circumstances, the award of Kshs.130,000/= made by the trial magistrate was not based on appropriate comparables. I would have set aside the award and substituted thereof a sum of Kshs.80,000/=. Nevertheless, the respondent having failed to establish liability against the appellant her suit ought to have failed.

23. Accordingly, I set aside the judgment of the lower court and substitute thereof an order dismissing the respondent's suit with costs. I award the appellant costs of this appeal. Orders accordingly.

Dated and delivered this 16th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Bosire for the respondent

Eric - Court clerk