



AGNES KAMENE MULYAI..... APPELLANT

VERSUS

HARVEST LIMITED..... RESPONDENT

(Being an appeal from the decision of the Hon. H.A. Omondi (Mrs) given on 17th June, 2004 in the Chief Magistrate's Court, Civil Case No. 1937 of 2003)

J U D G M E N T

1. The genesis of this appeal was a suit which was filed in the Chief Magistrate's Court at Nairobi, by Agnes Kamene Mulyai, hereinafter referred to as the appellant. She had sued her former employer, Harvest Limited, hereinafter referred to as the respondent. The appellant claimed general and special damages for personal injuries suffered by her, during the course of her employment as a result of the respondent's breach of contract, statutory duty and/or common law duty of care.
2. The respondent filed a defence in which it denied that the appellant was its employee, as alleged. In the alternative, the respondent maintained that there was no contract of employment, and denied having breached any such contract, or having exposed the appellant to any risk or having failed to provide a safe and proper system of work. Further the respondent denied being negligent and contended that any injury suffered by the appellant was wholly caused or substantially contributed to, by appellant's own negligence. The respondent further contended that the appellant with full knowledge and understanding of the danger arising from her nature of work, voluntarily accepted the risk of injury, while engaged in carrying out her work.
3. In proof of her case, the appellant testified and also called Dr. Wambugu Mwangi. In her evidence, the appellant stated that she was employed by the respondent in the year 2001. On 17th March, 2002, she was on duty at the Green House. Her work involved cutting flowers and placing them in water. She had to cut the flowers in rows and immediately after cutting one row, place the flowers in water mixed with chemicals so that they did not wither.
4. It was while the appellant was in the process of drawing water from a drum with a pail, intending to place the cut flowers which she was cradling with her left arm, that she slipped and fell down on her right hand. The appellant explained that the area around the drum where she was to draw the water from was wet and muddy. The wood around the drum which she had to step on in order to draw the water broke because it was old and wet, causing the appellant to slip and fall. The appellant blamed the respondent for failing to have the floor washed daily, causing it to remain muddy and wet. The appellant also claimed that she was using old gumboots which she claimed is what was issued to her.
5. The appellant was injured on her right arm. She was taken to Athi River Medical Centre where she was x-rayed. Later she underwent surgery and had a metal plate inserted. She was later examined by Dr.

Wambugu Mwangi who prepared a medical report. Dr. Wambugu confirmed that the appellant sustained a fracture of the right radius bone and the right ulna bone, for which she had to undergo surgery and a metal fixed in order to help the fracture unite.

6. The respondent testified through Christine Mumbua Gatino (Christine) who was at the material time, working for the respondent as a supervisor. She explained that the appellant who was also at the material time an employee of the respondent was going to collect water with a pail, when she slipped and fell. Christine accepted that the floor was wet and muddy, but contended that the mud was brought in by the appellant who was coming from the Green House. She explained that the workers were cautioned to walk slowly because of the wet surface. Christine testified that the floor was washed daily in the evenings. She further contended that the appellant was provided with new gumboots which were issued every month. She produced a document showing that the appellant had been issued with a new pair of gumboots on 10th January, 2002. She blamed the appellant for the accident maintaining that the appellant was the one who walked carelessly as she was working in a rush so as to go home.

7. Written submissions were filed on behalf of each party, each urging the Court to find in favour of his client. In her judgment, the trial Magistrate found that by nature of the environment and the work carried out, the floor of the Green House had to be wet. The appellant having been provided with gumboots, protective measures were taken. The trial Magistrate, however blamed the respondent for failing to ensure that there were cleaners draining the floor frequently. She found that the appellant was also to blame in failing to take care whilst walking on the wet surface. The trial Magistrate therefore apportioned liability at 50:50% in favour of the appellant as against the respondent. She awarded general damages of Kshs.150,000/= subject to contribution and Kshs.20,000/= for future medical care. She also awarded costs of the suit to the appellant.

8. Being aggrieved by that judgment the appellant has lodged this appeal citing 4 grounds as follows:

- (a) The learned Chief Magistrate erred in her finding that the appellant had contributed to the accident at all or to the extent of 50%.
- (b) The learned Magistrate erred in failing to find that the respondent was wholly liable or largely to blame for the accident.
- (c) The learned Magistrate failed to take into account relevant facts and or took into account irrelevant facts.
- (d) The learned Magistrate erred in her assessment of damages by making an award which –
 - (i) Was too low as to be a wholly erroneous estimate of the loss and damage suffered.
 - (ii) Did not take into account relevant facts.

(iii) Did not take into account precedent and the medical evidence adduced.

9. The respondent who was also dissatisfied with the entire judgment on liability and quantum, cross appealed on the following grounds:

(a) That the learned Magistrate erred in law and in fact in failing to appreciate the totality of the evidence adduced before her.

(b) That the learned Magistrate erred in law and in fact in failing to appreciate the issues of liability given the plaintiff's own admission of fault and apportioning the same equally without any evidence in support of such a finding.

(c) That the learned Magistrate made a finding on future medical expenses at Kshs.20,000/= which claim was not proved nor in line with the pleadings before the Court.

(d) That the learned trial Magistrate failed to consider the totality of the evidence placed before her by the plaintiff, which did not support her claim as pleaded.

(e) That the learned trial Magistrate made a finding on liability apportioning the same equally between the plaintiff and defendant when the evidence of the plaintiff did not establish any or any reasonable claim against the defendant.

(f) That the learned trial Magistrate erred in apportioning liability equally when the plaintiff's evidence did not establish any claim against the defendant and ought in the circumstances to have been dismissed for lack of proof.

10. Following the parties agreement that the appeal and cross appeal be disposed of by way of written submissions, each party has filed written submissions. For the appellant it was submitted that the trial Magistrate apportionment of 50:50% was erroneous because the primary cause of the appellant's fall and injury was the respondent's breach of statutory duty, in failing to keep the work place clean from mud and wetness; and therefore the respondent should have been held fully to blame. It was submitted that the fact that the wooden platform broke and the appellant's hand got trapped therein, was further evidence of breach of statute. In support of that submission, the case of ***African Highlands and Produce vs. Colins Musweti Ontweka, HCCA No. 38 of 2002 (Kericho)***, was relied upon. The Court was urged to find that if the appellant was contributorily negligent, it could only be to the extent of 10:20%.

11. With regard to damages, it was submitted that the trial Magistrate was wrong in relying on the case of ***David Kamande Mbui***, as it did not involve comparable injury. It was maintained that ***Civil Appeal No. 177 of 1999*** ought to have been followed. The Court was urged to set aside the award as being too low, and to enhance the award to a sum of Kshs.300,000/=.

12. For the respondent, the following cases were cited on the principles regarding the circumstances in which an appellate Court can interfere with findings of facts or quantum by a trial Court.

- ***Makubi vs. Nyamuro [1983] KLR 403***
- ***Selle & Another vs. Associated Motors Bolt Company & Another [1968] E.A.123***
- ***Butler vs. Butler [1984] KLR 225***
- ***Butt vs. Khan [1982– 88] KLR 1.***

13. It was submitted that the appellant having been provided with gumboots, which were to protect her feet and also ensure that she did not slip, the respondent had taken the necessary precaution. Thus, the trial Court should not have found the respondent negligent at all. It was argued that the appellant fell because she was working in a rush, and therefore overlooked the safety precautions. It was submitted that the issue of the wooden platform that collapsed was never pleaded, and was only raised by the appellant during the hearing. That allegation was denied by the respondent's witness and was in any case not the cause of the accident.

14. Further, it was submitted that the appellant was undertaking manual work, which did not require any specialized training. She was therefore under a duty to take reasonable care for her own safety. In this regard the following cases were cited.

- ***Kericho HCCA No.15 of 2003, Wilson Nyanyu Musigisi vs. Sasini Tea and Coffee Limited***
- ***Nairobi HCCA No. 152 of 2003, Statpack Industries vs. James Ngiri Munyao***

The Court was urged to find that the appellant failed to prove any of the particulars of negligence contained in the plaint. It was maintained that the accident was wholly caused by the appellant.

15. On the issue of quantum, it was submitted that according to the medical report produced by the appellant, the appellant sustained a fracture of distal right radius bone, and fracture styloid of right ulna bone. The degree of partial permanent disability was assessed at 5%. It was submitted that the award made by the trial Magistrate was proper and in accordance with the comparable cases cited to her. It was maintained that the award was reasonable. It was further submitted that the special damages which were the cost of future medical treatment, though pleaded were never strictly proved. It was thus maintained that no sum should have been awarded.

16. I have carefully reconsidered and evaluated the evidence which was adduced in the lower Court as I am expected to do in this first appeal. I have also considered the grounds set out in the memorandum of appeal and cross appeal, as well as the submissions made by both parties. It was not disputed that the appellant was injured during the course of her employment. It was also not disputed that the appellant slipped and fell as she was trying to draw water from a drum. Further, it was common ground that the floor was wet and muddy. The main issue was whether the respondent was negligent or in breach of its statutory duty of care; or whether the accident was caused by the negligence of the appellant.

17. In her plaint, the appellant alleged particulars of negligence on the part of the respondent, its employees, servants or agents as follows:

- (a) Subjected the plaintiff to a risk of bodily injuries they knew or ought to have known.
- (b) Failed to provide a safe place of work and or safe means of work.
- (c) Failed to clean the platform or to ensure no mud or water or slippery substances collected or remained at the place of work.
- (d) Failed to cement the place or to ensure proper grip and or drainage.
- (e) Failed to provide hand gloves or gumboots with good tread or at all.

18. During the hearing, the appellant conceded under cross-examination that she was in fact issued with a new pair of gumboots which she signed for. The allegation that she was not given protective clothing was therefore, effectively rebutted. The appellant also explained that she had to cut the flowers, and quickly proceed to the drum where she was to draw water mixed with chemicals and put the flowers inside. It is clear that the mud was from the Green house while the water was from the drum as the appellant put the flowers in the water. The manner in which the work was carried out by the appellant, made the presence of water and mud on the floor inevitable. Although it was necessary to put the plants in the water mixed with chemicals, the respondent could have provided a better system which would not have resulted in the floor surface being wet and muddy. For instance, if the water was filled in the sink instead of being drawn with the pail, the surface of the floor would not have been wet.

19. It was argued that the appellant did not plead the issue of the wooden platform however, paragraph 6 of the plaint clearly explains that the drum was placed on top of the wooden platform and that the appellant slipped and fell due to mud, water and chemicals which was thereon. It is apparent that by allowing the presence of water and mud on the wooden platform and the floor area, the respondent did not provide a safe working environment. The possibility of the appellant (or any other employee) falling down due to the wet and muddy surface was not unforeseen. The respondent therefore, failed in its duty of care to its employees including the appellant.

20. Nevertheless, the fact that there was mud and water on the floor was a fact which was within the appellant's knowledge. The appellant had a responsibility to take special care whilst working. Under cross-examination, the appellant conceded that she was working at a fast speed, in a hurry so as to finish her work before closing time. It is apparent that due to her hurry the appellant failed to exercise due care whilst walking on the wet and muddy area and this resulted in her slipping and falling. Thus the appellant was also contributorily negligent.

21. In her judgment the trial Magistrate apportioned liability at 50:50%. This finding is however not consistent with the evidence. It is clear that employer had a higher responsibility to provide a safe working system. The apportionment of liability at 50:50 was therefore improper. I would accordingly, set aside that apportionment and substitute thereof an apportionment of 70:30 in favour of the appellant.

22. With regard to quantum of damages, the appellant suffered fracture of distal right radius bone

and the fracture of styloid of right ulna bone. In awarding general damages of Kshs.150,000/= the trial Magistrate was guided by *HCCC 281 of 1997, David Kamande Mbui vs. Kenya Bus Services Ltd*, in which a sum of Kshs.100,000/= was awarded by Angawa, J. on 7th June, 2001 for injuries which included a compound fracture of proximal and right ulna ulecranon with displacement of the radial head. I find that the trial Magistrate did not act on wrong principles nor was her award so excessive or so little as to justify the intervention of this Court.

23. Finally the appellant claims Kshs.35,000/= in her plaint for future medical costs. Dr. Wambugu Mwangi who testified stated that the appellant who had metal implants would need to have the implants removed at a cost of Kshs.35,000/= in a private hospital or Kshs.20,000/= at Kenyatta National Hospital. The trial Magistrate allowed the future medical expenses at the rate of Kshs.20,000/=. I have no reason to fault her in this regard. Future medical costs are anticipated costs. At best evidence can only be adduced regarding the estimated costs.

24. The upshot of the above is that the appellant's appeal succeeds only in regard to the issue of liability. The judgment of the trial Magistrate is set aside to the extent of apportioning liability at 70:30 in favour of the appellant. I award costs of the appeal to the appellant. To this extent only, does the appeal succeed. I dismiss the cross appeal with no order as to costs. Those shall be the orders of this Court.

Dated and delivered this 27th day of October, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Wambua for the respondent

Advocate for the appellant served with notice, absent

Eric, court clerk