REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 148 of 2005

POLLEN LIMITED…….……...…….. APPELLANT

VERSUS

URSULA IKASILON OPUKO…….……..RESPONDENT

J U D G M E N T

By a plaint filed on 17th December, 2003, Ursula Ikasilon Opuko, (hereinafter referred to as the respondent), sought general and special damages from her former employer Pollen Limited, (hereinafter referred to as the appellant). The respondent contended that as a result of toxic chemicals which she was exposed to during the course of her employment with the appellant, she suffered injuries. The respondent maintained that the exposure was due to the negligence of the appellant and or its agents.

The appellant filed a defence in which it admitted having employed the respondent, but denied exposing her to any toxic chemicals. The appellant further denied any negligence or breach of statutory duty on its part or on the part of its servants or agents.

During the hearing of the suit before the resident magistrate Gatundu, the appellant and the respondent each called two witnesses.

The respondent's evidence was that she was employed by the appellant in 1995. She started becoming ill in October, 2000 when she developed chest pain and coughing. She was attended by one Dr. Sharma who diagnosed her to be having bronchitis. In the year 2002 she did not have any problems, but in the year 2003 she started coughing again. Dr. Sharma referred her for X-ray. The X-ray was produced in court as plaintiff Exhibit 7. She was examined again on 24th February, 2004 by Dr. Ikonya whom she called as a witness. Dr. Ikonya testified that on examination the respondent had a clear chest, but Dr. Ikonya formed the opinion that she had suffered a lot of exposure due to chemicals. A medical report prepared by Dr. Ikonya was produced in evidence.

The respondent explained that during the course of her work she used to carry sacks of soil used for planting flowers. She explained that the soil was mixed with chemicals. The respondent further explained that she worked in the green house where there was a lot of dust from the flowers. She claimed she was affected by the weight and the smell of the soil dust which contained chemicals. She blamed the appellant for not giving her gloves, dustcoat and masks for protection.

The appellant called its production manager Daniel Kahu Kisavi and Dr. Wambugu Mwangi, a consultant surgeon. The production manager confirmed that the respondent was employed by the appellant. In the year 1999, she worked as a general worker in the cutting department where she was covering and pruning plants without use of any chemical. In the year 2000, the respondent was assigned to work in the kitchen. It was whilst working in the kitchen that she started complaining about coughing. The witness maintained that it was unnecessary to give the respondent any protective clothing as spraying was done in the evenings. He explained that the soil was packed in bags which were kept in the open. Dr. Wambugu Mwangi testified that he examined the respondent on the 1st of July, 2004. The respondent though normal in the respiratory system, was emaciated and expectant. The doctor was unable to pinpoint whether the respondent had any chemical reaction as she did not have any respiratory problem at the time of the examination.

In his judgment, the trial magistrate concluded that the respondent had proved her case on a balance of probabilities and

therefore entered judgment in her favour awarding her general damages of Kshs.250,000/= and special damages of Kshs.3,800/=. Being aggrieved by that judgment, the appellant has filed a memorandum of appeal raising 8 grounds as follows: -

(1) The learned magistrate erred in law and in fact in finding that the respondent had proved her case against the appellant.

(2) The learned magistrate erred in law and in fact in failing to make any findings as regards the issue of liability.

(3) The learned magistrate erred in law and in fact in failing to state what breach of duty of statute, or duty of care the appellant was guilty of.

(4) The learned magistrate erred in law and in fact in failing to consider that bronchitis, is an airborne disease that can be contracted anywhere and not necessarily at the work place.

(5) The learned magistrate erred in law and in fact in failing to find that the appellant had discharged its duties as an employer.

(6) The learned magistrate erred in law in failing to hold that the actions complained of by the respondent do not constitute a breach of statute or of the common law duty of care.

(7) The learned magistrate erred in law and in fact in entering judgment for the respondent when there was no basis for the said judgment.

(8) The learned magistrate should have found on the evidence:

(a) That the disease complained of did not arise out of any breach of statute or of the common law duty of care by the appellant.

(b) That the respondent has not proved any negligence or breach of duty of care or statute against the appellant.

(c) That the appellant has proved that it was not liable for the disease complained of by the respondent.

(d) The respondent's suit ought to be dismissed.

The respondent was served with the hearing notice for the hearing of the appeal but did not attend court. The hearing of the appeal therefore proceeded *ex parte*. In support of the appeal, counsel for the appellant submitted that the judgment of the trial magistrate did not comply with Order XX Rule 4 of the Civil Procedure Rules as it did not set out the issues for determination or the reasons for the magistrate's judgment nor was the defence evidence considered. It was further submitted that the respondent did not establish the particulars of negligence which she alleged. It was maintained that there was no nexus between the alleged chemicals and the contraction of the respondent's disease.

Relying on the case of ***J.R. Munday Ltd vs London County Council (1916) 2 KB 331***, it was submitted that negligence alone could not give a cause of action nor can damages alone give a cause of action, but that there must be evidence that the two co-existed. The cases of ***Martin vs Shamash Brothers Ltd (1995-1998) 1 EA 179,*** and **Muthuku vs Kenya Cargo Services Ltd (1991) KLR 464,** were cited for the proposition that there was no liability without fault in the Kenyan Legal system. Therefore, it was submitted that a plaintiff basing his or her claim on negligence has to prove on a balance of probability one of the forms of negligence alleged against an employer. The cases of ***Masembe vs Sugar Corporation & Another (2002) 2 EA 434,*** and ***Selle & Another vs Associated Motor Boat Company Ltd & Others (1968) EA 123,*** were relied upon for the submission that an appellate court is not bound to follow the trial judge's finding of fact, if it appeared that, either, the trial judge had clearly failed on some point to take account of particular circumstances, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case. The court was therefore urged to allow the appeal.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I note that in his judgment the trial magistrate merely concluded that the respondent had proved her case on a balance of probability without analyzing the evidence or making any findings. Moreover, the trial magistrate did not give any reasons for her judgment. To that extent I concur with the counsel for the appellant that the judgment of the trial magistrate did not contain the points of determination the decision thereon and the reasons for such decision as required under Order XX Rule 4 of the Civil Procedure Rules.

In her plaint, the respondent alleged particulars of negligence as follows: -

- Failing to provide protective apparel to the plaintiff.

- Failing to provide a safe place of work.

- Assigning duties to the plaintiff without any due care and attention.

- In so far as is possible the plaintiff will rely on the doctrine of *Res Ipsa Loquitor*.

- Failing to fully instruct the plaintiff as to the dangers involved in the said work and precautions to be observed.

- Failing to provide any protective devices in time or at all.

In her evidence, the respondent contended that she contracted her chest problems because of the chemicals which were in use in the appellant's premises. However, the evidence of the two doctors who testified failed to support the respondent's contention. Dr. Ikonya who examined the respondent on 24th February, 2004, testified that on examination he found that the respondent had a clear chest. Nevertheless he formed the opinion that she suffered a lot of exposure from chemicals. The basis of this opinion appears to have been what he was informed by the respondent as his own examination did not reveal anything. Dr. Wambugu Mwangi who examined the respondent on 1st July, 2004, also testified that at the time he examined the respondent she was pale, emaciated, and expectant but was normal in the respiratory system as there was no evidence of bronchitis. Again this doctor could only guess the condition that the respondent may have suffered in the year 2001 and 2003 when she was diagnosed to be having bronchitis. It is clear that both doctors referred to records and exhibits which were done in the year 2002-2003. There was however, no evidence called from the specific doctor who examined the respondent. There was therefore no co-relation between the respondent's illness and her employment. The respondent's evidence was therefore insufficient to prove her claims of negligence. Moreover, the doctor who was treating the respondent was not called to testify, so that his opinion expressed in the treatment notes remained no more than hearsay. I find that the respondent did not prove her case and the trial magistrate's judgment cannot be supported. For these reasons, I allow this appeal, set aside the judgment and order of the trial magistrate and substitute it thereof with an order of dismissing the respondent's suit.

Those shall be the orders of this court.

Dated and delivered this 7th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Lubano for the appellant

No appearance for the respondent