REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 99 of 2003

SOKORO SAW MILLS LIMITED…….....……APPELLANT

VERSUS

GRACE NDUTA NDUNGU…….....……RESPONDENT

JUDGMENT

The respondent, Grace Nduta Ndungu filed suit against the appellant, Sokoro Sawmills Limited seeking to be paid damages on account of the injuries that she alleged to have suffered on the 25th of August 1999 while working for the appellant at the appellant's sawmill at Elburgon. The respondent averred that she was injured when she slipped on an oily surface when she was attempting to escape injury by a machine which had malfunctioned. She attributes her injury to the negligence of the appellant whom she claimed had failed to provide her with a safe working environment and further had exposed her to risk of damage and injury by failing to maintain the machines at her place of work.

The appellant filed a defence denying that it was liable to the respondent for the injuries that she sustained. The appellant denied that the respondent was at her place of work on the day she alleged that she was injured. The appellant further pleaded that if the respondent sustained the said injuries, then it was caused by the negligence of the respondent. After hearing the case, the trial magistrate found the appellant to have been 100% liable for the injuries that the respondent sustained. She awarded the appellant Kshs 80,000/= general damages, special damages of Kshs 2,000/= and costs of the suit. The appellant was aggrieved by this decision of the trial magistrate and has appealed to this court.

In its memorandum of appeal the appellant has raised six grounds of appeal challenging the decision of the trial magistrate. The said grounds of appeal may be summarized as follows:- The appellant was aggrieved that the trial magistrate had found it liable for the said injuries sustained by the respondent whereas no evidence was adduced to support the respondent's claim that she was injured while she was in the employment of the appellant. The appellant faulted the trial magistrate for considering irrelevant matters in arriving at the said decision in favour of the respondent and as against the appellant. The appellant was aggrieved that the trial magistrate had awarded the respondent damages that were inordinately high considering the injuries that the respondent had sustained.

At the hearing of the appeal, I heard the submissions made by Mr. Yego on behalf of the appellant and Mr. Gatumu on behalf of the respondent. Before addressing the issues raised in this appeal, I will briefly set out the facts of this case. The respondent testified that at the material time she was an employee of the appellant. On 29th of August 1999, she reported on duty as usual and was instructed by PW2 Sammy Kiriungi Mwangi, her supervisor (*who corroborated her evidence)*, to hold a tin and collect oil which was leaking from a saw machine. She testified that as she was holding the tin, the saw machine malfunctioned and as she was trying to escape from the machine to avoid injury, she slipped on the oil which had spilled on the floor and was as a result injured on her back and on her leg.

Immediately after she had sustained the injury, she was taken to hospital and was treated and discharged. The treatment papers were produced as *plaintiff's exhibit No. 1*. She later saw Dr. Kiamba who prepared a medical report enumerating the injuries that she had sustained. The medical report was produced in evidence by PW3 Dr. Wellington Kiamba when he was called to testify in court. The medical report was marked as *plaintiff's exhibit No. 2.* The receipt for the sum of Kshs 2,000/= which was paid to Dr. Kiamba to prepare the said medical report was produced as plaintiff's exhibit No. 3. The respondent blamed the appellant for the said injuries that she had sustained. She testified that she had been given a dangerous task to undertake near a machine that was defective. She denied the suggestion that she was not at work on the material day when she was injured.

The appellant called one witness Samuel Kiambuthi who testified that the respondent was not on duty on the 25th of August 1999 when she claimed that she was injured. He produced the master roll and the accident book as *defendant's exhibit No. 1 and 2* respectively in support of the appellant's contention that the respondent was not at her place of work when she claimed that she was injured.

This being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced by the witnesses before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the decision of the trial magistrate. In **Jabane –vs- Olenja [1986] KLR 661** at page 664, Hancox JA stated as follows:

"***I accept this proposition, so far as it goes, and this court does have the power to examine and re-evaluate the evidence and the findings of facts of the trial court in order to determine whether the conclusion reached on the evidence should stand –*** *see Peters –vs- Sunday Post [1958] EA 424****. More recently, this court has held that it will not likely differ from the findings of facts of a trial judge who had the benefits of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did –*** *see* ***in particular*** *Ephantus Mwangi –vs- Duncan Mwangi Wambugu (1982-88) 1KAR 278 and Mwana Sokoni –vs- Kenya Bus Service (1982-88) 1KAR 870."*

In this appeal, the issue for determination by this court is whether the respondent proved her case that she was injured due to the negligence of the appellant. The other issue for determination by this court (*if the first issue is ruled in favour of the respondent*) is what damages should be quantified as payable to the respondent for the injuries that she claimed to have sustained.

On the first issue, the appellant has complained that the trial magistrate found in favour of the respondent yet the respondent had not pleaded statutory negligence. The appellant argued that the evidence adduced by the respondent clearly established that the respondent injured herself when she slipped from the oil which she herself had spilt on the floor. Learned counsel for the appellant argued that the appellant could not have been found negligent in the circumstances of this case. Furthermore, he submitted that the appellant had established that the respondent was not at her place of work when she was injured on the material day. The respondent countered this argument by submitting that the respondent had proved that she had been injured while working at the appellant's sawmill.

Having re-evaluated the evidence adduced, I have no doubt that the respondent proved that she was injured while working at the premises of the appellant. Her evidence was corroborated by the evidence of PW2 who was at the material time her supervisor. The respondent was instructed to collect oil from a machine which was leaking from a machine which was also in motion. The respondent established that she slipped and fell to the ground thus injuring herself when she stepped on oil which had spilled on the floor as she was escaping being injured by a part of the machine which had malfunctioned. Evidence was adduced by the respondent which proved that the said machine was defective and its defect was known by the appellant. The appellant chose not to repair the said defect but instead assigned the respondent the dangerous work of working close to the defective machine of collecting oil which was leaking from the said machine. The respondent proved that the appellant had exposed her to a dangerous working environment and the subsequent injury that she sustained made the appellant strictly liable for the said injury.

The argument by the appellant that the respondent had not pleaded statutory negligence in my view is a case of splitting hairs. The respondent proved that she was injured due to the negligence of the appellant. This court cannot ignore evidence which clearly established that the appellant was in breach of its statutory duty when it failed to maintain the machines in the factory where the respondent worked. I find no merit in the appellant's contention that the respondent had not proved her case on a balance of probabilities. Furthermore, I find no merit in the submission made by the appellant that the respondent was not at her place of work at the appellant's premises on the material day. The evidence of the master roll and the accident book which were produced as exhibits by the appellant were documents which were prepared by the appellant itself with no input by the respondent. The evidence of the said records therefore cannot be considered to be the factual in the face of the evidence which was adduced by the respondent and her witness. I therefore dismiss the appellant's appeal on liability.

On quantum, the principles governing this court in deciding whether or not to interfere with the award made by the trial magistrate was set out in the case of **Kemfro Africa Limited & Anor –vs- Lubia & Anor (No. 2) [1987] KLR 30** where it was held that an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high, that it must be a wholly erroneous estimate of damages.

In this appeal, the respondent sustained soft tissue injuries to the right hip joint and the back. When she was examined by Dr. Kiamba he formed the opinion that the respondent had suffered soft tissue injuries which had caused her a partial temporary disability of two weeks. It is evident that the respondent had completely healed from the soft tissue injuries that she had sustained. On re-evaluation of the evidence, it is my opinion that the award of Kshs 80,000/= as general damages for the injuries that the respondent sustained was inordinately high in the circumstances. This court will interfere with the said award.

I agree with the appellant that the trial magistrate ought to have been guided by the case of **Nyambegi Oyugi –vs- Haji Hassan Nrb HCCC No. 4150 of 1991** *(unreported)* which was delivered in 2001 where the plaintiff in that case was awarded Kshs 20,000/= for the soft tissue injuries that he had sustained and which were similar to the injuries sustained by the respondent in this case. I have put into consideration the incidence of inflation. I will therefore set aside the said award of Kshs 80,000/= general damages and substitute it with an award of this court of Kshs 30,000/=.

In the premises therefore, the appeal filed by the appellant is allowed as hereunder;

(i) Appeal on liability is dismissed.

(ii) Appeal on quantum is allowed to the extent that the award of Kshs 80,000/= general damages by the trial magistrate is reduced to Kshs 30,000/=. The special damages of Kshs 2,000/= which was proved shall be paid to the respondent.

(iii) Since the appellant was partially successful on this appeal, it is awarded half of the costs on appeal.

(iv) The respondent shall however have the costs of the suit in the lower court.

(v) Interest on the said general damages shall be paid from the date of the judgment of the trial magistrate.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE