



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL 724 OF 2002

CELINICO FLOWERS LIMITED.....APPELLANT

VERSUS

JANE WANGARE MAGE.....RESPONDENT

JUDGMENT

By a Plaintiff dated 12th July, 2002, the Respondent (Plaintiff in the lower court) claimed damages from the Appellant, her employer, for personal injuries sustained in the course of her employment. Paragraph 5 of her Plaintiff states as follows:

“On or about the 5th day of February, 2002 while the plaintiff was in the course of her employment at the defendant’s company spraying insecticides she was infected by the chemicals of the insecticide and she sustained serious injuries. This incident was wholly caused by negligence and/or breach of employment and terms thereof on the part of the Defendant; it’s servant and/or agents.”

The particulars of negligence outlined in the Plaintiff are as follows:

- Failing to provide a safe place and/or system of work at the premises/site.
- Failing to take adequate precautions towards the plaintiff’s safety while he (sic) was engaged in their employment.
- Exposing the plaintiff to a risk of injury, which they knew or ought to have known.
- Causing the plaintiff to work on a place, which was not safely secured.
- Failing to provide the plaintiff with any protective wear.

In a brief, and rather scanty two-page Judgment, the lower court agreed with the Respondent, and delivered itself, in part, as follows:

**“I have duly considered the evidence on record and my findings are as follows:-
Evidence shows that the plaintiff was an employee of the defendant working in the green house and doing gardening. I am satisfied with the evidence of the plaintiff that though she was not employed as sprayer, they were provided with small bottles with which they would spray on mites, amphid and other insects. The plaintiff was taken ill on 5th February, 2002 and she further emphasized, that it was a Monday though Monday was 4th. I do not find that mistake of the date of any notable significance.**

Dr Okare who examined the plaintiff testified that the plaintiff was exposed to organic phosphorus chemicals without protective clothing, gloves, boots, masks and that the symptoms are suggestive of an organic phosphorous poisoning. The evidence was challenged by the report of Dr Patel of Limuru Nursing Home. Dr Patel states that the illness of the Plaintiff was not due to chemical reaction, but that she was diagnosed for acute laryngitis of viral origin. Of interest is that this report of Dr Patel is dated 23/8/2002 when this case was already in court. I am of the view that the report of Dr Patel was meant to favour the defendant. It is noteworthy that the report of Dr Wambugu which was obtained through efforts of the defendant was conveniently not produced, the same could have assisted the court, but it must have been a report not in favour of the defendant.

I would find that the defendant is liable to the plaintiff to the extent of 100%.”

It is against that Judgment that this appeal has been preferred. There are nine needlessly long grounds of appeal, which I do not feel necessary to repeat here, as these have been incorporated in the submissions of Counsel summarized below. Suffice it to say that both liability and quantum are in issue. In his submissions before this Court, Mr Njengo, Counsel for the Appellants, argued that the Respondent's alleged claim that she was employed to work in green houses, where chemicals were sprayed on flowers, was controverted by two defence witnesses who said that the Appellant was a general worker who did cleaning, weeding and harvesting – not spraying; that women were never given spraying duties, that her claim that she used small spray cans had not been pleaded; that evidence showed that she was taken to hospital for treatment on 4th February, 2002 and not on 5th February, 2002 as pleaded; that according to defence evidence work environment was completely safe with employees given protective clothes where appropriate; that her injuries did not arise from any kind of chemical poisoning; and finally that the quantum of damages awarded was manifestly excessive.

Mr Orege, Counsel for the Respondent, submitted that the Respondent's case had been proved on a balance of probability in that the Defence had admitted that chemicals were indeed used at the Appellant's premises, and that on 5th February, 2002 organic phosphorous (the cause of the Respondent's injuries) had indeed been applied to plants; that the Respondent had been exposed to chemical poisoning; that Dr Patel who was the Appellant's consultant could not have been relied upon to provide a credible report; and that the quantum of the award was fair given the injuries suffered. As this is a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him and that he has not acted on wrong principles in reaching his conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

The Respondent presented two witnesses – her doctor and herself. Nowhere in her testimony, during the examination in chief, did she mention that her job was to spray chemicals, or that the area in which she worked was exposed to chemicals which are injurious to human health. She simply said that her job was “to pick flowers and work inside the green house”. However, it was only during her cross examination that she claimed that she used to spray spider mite, aphid etc, but that on the 5th February, 2002, which is the material day, she was not spraying, although she was in the green house. Yet, in her Complaint she attributes her injuries to an event that happened on 5th February, 2005. The Complaint is very specific in the nature of her claim: “On or about the 5th February, 2002 while the Plaintiff was ... spraying insecticides she was infected by the chemicals of the insecticide and she sustained serious injuries.” She does not say that she was affected by the chemicals or poisoned over a period of time. She was specific that it happened on 5th February, 2005. Despite this specific claim, of an incident on a specific date, she did not lead any such evidence in the lower court. By her own admission, she was not spraying on 5th February, 2005.

Doctor Okoth Okare, her Doctor, the second Plaintiff witness, concluded that the Respondent was exposed to “organic phosphorous poisoning”. He admitted, however, that he saw her on 8th July, 2005, five months after the alleged injury, and that his report was based entirely on physical examination and

the history given to him by the Respondent. He did not carry out any blood tests, or undertake any scientific analyses to reach his conclusion. As against this evidence, the Defence presented three witnesses – a Doctor who examined the Respondent on the same day the alleged injuries took place, the Managing Director of the Appellant Company, and its Pest Control Supervisor. Dr Ramesh Patel, who examined the Respondent on 4th February, 2005 at the Limuru Nursing Home where the Respondent was hospitalized for five days, concluded that the Respondent suffered from acute laryngitis of a viral origin. He was specific in his report (D. Exhibit 1) that her problem could not be attributed to chemical reaction. His opinion was based on physical examination and blood, stool and urine tests.

The Appellant's second witness, Mr Christopher Shaw, the Company's Managing Director, testified that the Respondent was a "general" worker, not a sprayer, and that his Company did not allow women to spray. Spraying was a function reserved only for men. This evidence was corroborated by the Appellant's third witness, Mr John Kasinga, the Pest Control Supervisor, who was emphatic that the Respondent was not a sprayer. He had documentary records to show who did the spraying, and when. Based on the evidence before the lower court, it is very difficult to understand why and how the learned magistrate came to the conclusion that the Respondent was a sprayer, and that she was exposed to the chemicals that caused her injuries. The evidence, as I see it, is exactly the opposite. The Respondent herself admitted that she did not do any spraying on the material day. I take the material day to be either the 4th or 5th of February, 2002. The Counsel for the Appellant made a strong submission that the inconsistency in dates meant that the Respondent had not proved her case as pleaded. I disagree with that proposition. That is an attempt to split hair. The Plaintiff's obligation is to prove her case on a balance of probability – that on or about the 5th February, 2002 she sustained injuries etc.

Now, this could have happened on 4th or 5th, as long as there was sufficient evidence to connect her injury to the chemical exposure at her place of work. But, I am afraid, there was none. Not only is there an admission by the Respondent that she did not do any spraying on the material day, but the two witnesses for the Respondent, in unchallenged testimony, stated that no women, the Respondent included, were allowed to spray. Then, finally, there is the medical evidence. The lower court seemed to have preferred the evidence of the Respondent's Doctor, Dr Okere, as opposed to Dr Patel's on the ground that Dr Patel's report having been dated 23rd August, 2002 when this case was already in Court, "was meant to favour the defendant". That is a very absurd conclusion that defeats all logic, and is impossible to understand. As evidence showed, Dr Patel had practiced as a medical doctor in Limuru for 28 years. He was the first to see and examine the Respondent. He treated her for five days.

He carried out blood, stool and urine tests, and reached conclusions based on his examination and scientific/medical analyses. On the other hand, Dr Okere, who was specifically retained by the Respondent, saw her five months later, did no tests, and simply concluded that the Respondent had been exposed to organic phosphorous poisoning based on what his patient told him. It is clear to me that the lower court erred hugely in preferring his testimony to Dr Patel's.

Accordingly, and for reasons outlined, I am satisfied that the Respondent, Plaintiff in the lower court, did not prove her case as pleaded on the balance of probability, and that the learned magistrate's conclusion in her favour is not based on the evidence before the court, nor on correct principles. This is, therefore, a proper case where the appellate court must interfere with the decision of the lower court on its findings of facts. Based on this decision, the issue of quantum does not arise, but I must say, for what its worth, that the award of damages amounting to Kshs.100,000/= for minor soft tissue injuries here is grossly and manifestly excessive. I will simply leave it at that.

This appeal is, therefore, allowed and the Judgment and decree of the lower court is set aside. The Appellant shall have the costs, both of appeal, and in the lower court.

Dated and delivered at Nairobi this 13th day of June, 2005.

ALNASHIR VISRAM

JUDGE