

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Appeal 219 of 2004

KIJABE LIMITED.....APPELLANT

VERSUS

DORRIS ONYANGO ODERO.....RESPONDENT

JUDGMENT

The respondent, Doris Onyango Odero, filed suit in the magistrate's court at Naivasha against the appellant seeking to be paid damages on account of injuries that she alleged to have sustained while in the employment of the appellant. The respondent pleaded that the appellant was negligent and breached the conditions of the contract of employment by failing to provide her with the proper tools of employment and further by failing to provide her with a safe working environment. The respondent attributed the injury that she sustained while in the employment of the appellant to the negligence of the appellant. The appellant filed a defence. It denied the allegation by the respondent that she was injured while at her place of work at the appellant's premises. It further averred that if the respondent was injured then it was due to her own negligence by failing to adhere to the safety regulations put in place by the appellant. The appellant pleaded that if the respondent was ever injured then it was a case of volenti non fit injuria. The suit was heard by the resident magistrate, who after hearing the plaintiff and a witness availed by the appellant found the appellant to be solely liable for the accident that caused the injuries to the respondent. She assessed the general damages payable to the respondent to be Kshs 40,000/=. She further awarded the sum of Kshs 2,000/= as special damages. Being aggrieved by the said decision, the appellant filed an appeal to this court.

In its petition of appeal, the appellant raised several grounds faulting the decision of the trial magistrate in finding in favour of the respondent. The appellant was aggrieved that the trial magistrate had arrived at the decision whereas the respondent had not proved her case on a balance of probabilities. The appellant was aggrieved that the trial magistrate had found that the respondent had been injured in the appellant's premises. The appellant was further aggrieved that the trial magistrate had found the appellant liable for the said accident without putting into consideration the evidence that was adduced by the appellant to the effect that the respondent had been injured earlier than the date stated on the plaint. The appellant was aggrieved that the trial magistrate had not considered the totality of the evidence adduced before arriving at the said decision in favour of the respondent. The appellant therefore urged the court to allow the appeal and set aside the judgment of the trial magistrate and substitute it with the judgment of this court dismissing the respondent's suit.

At the hearing of the appeal, this court heard the submissions made on behalf of the appellant by Mr Wachira and the response thereto made by Mr Gekongá, Learned Counsel for the respondent. Before considering the issues raised in the said submissions, it is imperative that the facts of this be set out albeit briefly. The respondent testified that she was employed as a casual labourer by the appellant at its farm at Naivasha. The duties of the respondent at the material time involved watering the flowers using a hose pipe. She testified that on the 16th of November 2002 while she was on duty she slipped and fell down injuring her knee. She attributed her fall to the fact that she had not been issued with gumboots by the appellant to enable her have a better grip when walking on the wet surface. She testified that after she had fallen down and injured her knee, she was attended to by a nurse employed by the appellant. When her situation worsened, she was referred to the Naivasha District Hospital, where her left knee was x-rayed. The x-ray however did not reveal any fracture. The respondent further blamed her injury on the fact she was given the task to haul a heavy hose pipe which she could not carry alone in view of her age. When she was cross-examined by the appellant she denied that she had been injured elsewhere other than at the

premises of the appellant while she was on duty. The medical report prepared by Dr Omuyoma indicating the injuries that the respondent had sustained was produced in evidence by the respondent. Similarly, the treatment charts issued to the respondent by the Naivasha District Hospital when she sought treatment was produced in evidence. According to the medical report of Dr Omuyoma the respondent sustained severe soft tissue injuries to the left knee joint. At the time of examination, the respondent was still feeling pain on her left knee joint.

The appellant called one witness who testified on its behalf. The said witness, Jacob Lenjo testified that he was a record keeper at the Human Resources Office of the appellant company. He testified that he was not at the scene when the injury that the respondent complained of took place. He however produced medical records which showed that the respondent had been injured five days before the day she alleges to have slipped and fallen down while at her place of employment. According to the appellant, the respondent was attended to by a nurse employed by the appellant after she claimed that she had been injured when she fell on a trench while walking at night when she had arrived from Kisumu. The appellant's witness testified that although the records indicate that the respondent was at her place of work on the 16th of November 2002, the medical records reveal that she had been attended to severally by the nurse employed by the appellant as a follow-up to the injury that she had sustained when she fell into a trench while walking at night outside the appellant's premises. The appellant's witness denied that the respondent was injured while at work at the appellant's premises. The appellant did not however call the respondent's supervisor who was present when the incident took place. The appellant did not also call the nurse who could have clarified under what circumstances she treated the respondent. After the close of the respondent's and the appellant's case, both the appellant and the respondent filed written submissions in support of their respective cases.

This being a first appeal, this court is mandated to re-evaluate and reconsider the evidence adduced before the trial magistrate and reach its own independent determination whether or not to uphold the decision of the trial magistrate. In reaching its determination, this court has to put in mind the fact that it neither saw nor heard the witnesses as they testified. (See *Selle –vs- Associated Motor Boat Co Ltd & Anor* [1968]E.A. 123 at page 126 para H. In the instant appeal, the appellant has challenged both the finding of the trial magistrate on liability and on quantum. The issue for determination by the court is whether the respondent established that the appellant was liable to her in tort as a result of the injuries that she sustained (which she claimed occurred while she was in the employment of the appellants), to the required standard of proof. If the answer to the above legal question will be determined in favour of the respondent, the other issue for determination is whether this court can interfere with the assessment of general damages arrived at by the trial magistrate.

Having considered the submissions made before me and re-evaluated the evidence adduced by the parties to this appeal before the trial magistrate, there is no dispute that the respondent was injured on her left knee that she required hospitalization. She was treated both by a nurse employed by the appellant and by the medical officers at the Naivasha District Hospital. Whereas the respondent claims that she was injured while at her place of work, the appellant alleges that the respondent was injured while walking at night when she fell into a trench outside the premises of the appellant. The respondent testified that she was injured on the 16th of November 2002 while she was at her place of work at the appellant's premises. She fell down when she slipped on a slippery surface as she was watering flowers. She blames the appellant for the accident on two accounts: firstly for not issuing her with gumboots which would have enabled her to have a better grip while walking on the wet surface and secondly for being given a task to haul a heavy hose pipe which was beyond her physical capacity. The respondent testified that when she fell down, she injured her right knee joint that she had to require medical attention. The evidence of the respondent was not controverted by the appellant. No eye-witness account was adduced by the appellant. The appellant's witness indeed confirmed that the respondent was on duty on the material day. Although the respondent testified that she informed the supervisor of her injury, the appellant did not deem it appropriate to call the supervisor to controvert the evidence of the respondent.

In the absence of any evidence adduced to the contrary, this court finds that the respondent proved her case on a balance of probabilities that while at work at the appellant's premises, she fell down and injured her left knee when she slipped on a wet and slippery surface. The appellant failed in its duty of care to the

respondent when it failed to provide her with gumboots which could have enabled her to have a better grip of the wet and slippery surface. In this respect the appellant failed to provide the respondent with a safe working environment by providing her with equipment which would enable her to work safely in the circumstances. I do therefore find that the respondent established on a balance of probabilities that the appellant owed her a duty of care. The appellant was therefore solely liable for the injuries that the respondent sustained while at her place of work. The allegation by the appellant that the respondent fell into a trench while walking at night five days before the 16th of November 2002 was not proved. The appellant did not call the nurse who is alleged to have attended the respondent on the day in question to shed light on the allegation that she had been told by the respondent that she had injured her knee in the circumstances claimed.

The only evidence that the appellant put before the court is the hearsay evidence of its witness who testified before court. In my considered view, the trial magistrate, (and also this court) rightly rejected the evidence of the appellant. In the circumstances therefore, having re-evaluated the evidence adduced, I do find that the respondent established her case as against the appellant on liability on a balance of probabilities. I do hold that the appellant was solely liable for the injuries sustained by the respondent. On quantum, as was held in Tunoi J.A. in Johnson Evan Gicheru –vs- Andrew Morton & Anor C.A. No. 314 of 2000 (unreported) at page 7 of his judgment; “It is trite law that this court will be disinclined to disturb the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it would generally be necessary that this court should be convinced that either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.

This is the principle enunciated in Rook –vs- Rairrie [1941]1 All ER 297. It was echoed with approval by this court in Butt –vs- Khan [1981]K.L.R. 349 when it held as per Law, J. A. that:- “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.”

In the present case the medical report prepared by Dr Omuyoma indicated that the respondent had suffered severe soft tissue on her left knee joint during the accident. At the time of examination, the respondent was still feeling pain on her left knee joint. Although the issue of the age of the respondent may be a factor in the fact that the pain has persisted, this evidence was not controverted by the appellant. The trial magistrate awarded the respondent Kshs 40,000/= general damages. In my view this award was neither too high nor too low as to constitute an entirely erroneous estimate of the damages to be awarded in view of the injuries sustained by the appellant. I do not see any breach of any principle of law when the trial magistrate assessed the said damages to be paid. The special damages of Kshs 2,000/= awarded was proved. This was the amount which was paid to Dr Omuyoma to prepare the medical report which was produced in evidence in court. I will not therefore interfere with the award by the trial magistrate.

In the circumstances therefore, the appeal filed herein lacks merit. It is dismissed. The respondent shall have the costs of this appeal.

DATED at NAKURU this 11th day of November 2005.

L. KIMARU

JUDGE