REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
CIVIL APPEAL NO. 55 OF 2001

LUCY WAIRIMU WATHAKA……APPELLANT

VERSUS

SOKORO PLYWOOD LIMITED……..RESPONDENT

JUDGMENT

The appellant was the Plaintiff in C.M.C.C. No. 1560 of 2000. She filed a suit against the respondent as a result of an industrial accident which occurred in the respondent's premises on the night of 5th and 6th February, 1998. The appellant testified that on the material date, while she was engaged in the respondent's place of work, lights went off and as she was going out from the factory she stumbled on a hot steam pipe which burned her left leg. The trial magistrate established that the accident occurred and that the appellant was injured as a result thereof. He apportioned liability at 60% against the appellant and 40% against the respondent and assessed general damages at 20,000/- on 100% basis thereby awarding the appellant a sum of Kshs.8,000/- for general damages plus Kshs.2000/- as specials, making a total of Kshs.10,000/- plus costs of the suit.

She appealed against the learned magistrate's finding on the issue of liability as well as the assessment of damages. The respondent did not cross appeal. Mr. Ndeke Gatumu, the appellant's learned counsel argued ground one and two of the appeal together as they related to the issue of liability. He submitted that the learned trial magistrate's finding that the appellant contributed 60% to the occurrence of the accident was erroneous and contrary to the evidence that was adduced in court. He submitted that the trial court should have found the respondent 100% liable.

The trial magistrate's finding on the issue of liability was due to the fact that the appellant had worked for the respondent since 1991, a period of six years before the date when the accident occurred and during that period she knew that the steam pipe was in that place.

From the appellant's evidence, it was not unusual for power to go off at times and when it went off, the workers usually went out. It could therefore be concluded that she was familiar with the geography of her work place. The appellant told the court that if the respondent had provided a stand by generator or any other alternative lighting when electric power went off, she would not have been stumbled by the said pipe. She said that when it was done it was not possible to know where the pipe was.

All the above facts regarding the occurrence of the accident were not controvert by the respondent and that being so, there was no proper basis of holding that the appellant was more to blame than the respondent. However, on the part of the appellant, she should have proceeded cautiously since she knew

there was a steam pipe somewhere along her path. There was no emergency like a fire out break which would have caused her to dash out of the premises as soon as possible. But all the same, the respondent had a responsibility of providing alternative source of light when electric power was off so as to ensure that its workers were safe while engaged in their work. The respondent could also have insulated the hot steam pipe.

I am of the view that from what I have stated hereinabove, the appropriate apportionment of liability should have been 20% against the appellant and 80% against the respondent and I proceed to vary the learned trial magistrate's finding on liability as such.

Regarding general damages for pain suffering and loss of amenities, the learned trial magistrate does not seem to have been guided by any authority in arriving at the figure of Kshs.20,000/-. He appears to have followed the footsteps of the respondent's counsel who had submitted that an award of Kshs.20,000/- was reasonable without supporting the proposal with any authority whatsoever.

The appellant, on the other hand, had urged the court to award a sum of Kshs.120,000/-.

He had cited the case of ***SIMON AZEZE MUHANDIA VS THE HON. ATTORNEY GENERAL & ANOTHER HCCC NO. 3041 OF 1987*** where the Plaintiff suffered burns on his right leg and recovered from the injury except for loss of skin. I have perused the above authority and the injuries which the Plaintiff therein suffered are much more serious than the ones which the appellant suffered.

In the case of ***BUTLER VS BUTLER [1984] K.L.R. 225*** the Court of Appeal stated that assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial court's assessment unless the court acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or where the court had taken into consideration matters that it ought not to have considered or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.

In the matter under consideration, although the learned trial magistrate stated that he was guided by the medical report by Dr. Kiamba and noted that the appellant had suffered a burn on the leg which left a scar, he failed to take into account relevant authorities relating to award of general damages for similar injuries as those sustained by the appellant. This had the result of awarding damages which were considerably lower than would have been appropriate. Relating the appellant's case to the authority which was cited by the appellant during the trial, I believe that an award of Kshs.80,000/- on full liability would have been appropriate. I will vary the amount of general damages awarded to the appellant from 8,000/- to Kshs.64,000/- which is 80% of Kshs.80,000/-.

The special damages will remain to be Kshs.2000/- The end result is that this appeal is allowed with costs to the appellant.

DATED, SIGNED & DELIVERED at Nakuru this 23rd day of March, 2004. DANIEL K. MUSINGA

AG. JUDGE

23/3/2004