Homegrown (K) Limited v Karuga (Civil Appeal 9 of 2020)
[2023] KEHC 17841 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17841 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 9 OF 2020

FROO OLEL, J

MAY 16, 2023

(FORMERLY NAKURU CIVIL APPEAL NO. 228 OF 2009)

BETWEEN

HOMEGROWN (K) LIMITED ..... APPELLANT

AND

GRACE NGINA KARUGA ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon Njuki (S.R.M.) delivered on 3rd July 2009 in Naivasha SRMCC no 895 of 2003)

JUDGMENT

1. The Appellant was the Defendant in the primary suit, where they were sued as the employer of the Plaintiff who was working at the Marula Pivot farm. On 17.05.1999 while the plaintiff was lawfully on duty, some chemical solutions spilled on her face and she sustained serious injuries which she contends were due to the negligence of the Defendant who breached the terms of employment by failing to put in place precautionary measures and a proper system of work. She sought general damages, special damages and costs.

2. The Defendant, the Appellant herein filed a defence on 30.10.2003 essentially denying the contents of the Plaint and opined that if the accident occurred then it was caused by the negligence of the Plaintiff. The Defendant asked that the suit be dismissed.

3. After the hearing, the learned magistrate in his judgment delivered on 3rd July 2009 and made a finding that the appellant did not call any witness to defend this claim. The Appellant was found to be 100% liable and awarded the Respondent general damages at Kshs. 250,000/=, special damages at Kshs 7,000/= plus costs.

4. The Appellant being dissatisfied by the said judgment filed their memorandum of Appeal on 5th November, 2009 and raised the grounds of appeal namely: -

    a. That the Learned Trial Magistrate erred both in law and in fact in making a finding that the Respondent had proved her case against the Appellant on a balance of probability when inter alia no evidence establishing negligence on the part of the Appellant was adduced.

    b. That the Learned Trial Magistrate erred both in law and in fact in making a finding that the Respondent suffered from a chemical related injury when the named of the chemical was not stated by any of the witnesses who testified before the trial court

    c. That the Learned Trial Magistrate erred both in law and misdirected himself by awarding Kshs 250,000 as general damages for soft tissue injuries which award was excessive and not proportional to the injuries purported suffered.

    d. That the Learned Trial Magistrate erred both in law and in fact in failing to appropriately address the question of contributory negligence and accordingly apportion the same.

    e. That the Learned Trial Magistrate erred both in law and in fact in failing to evaluate and analyze the evidence in support of the appellant's case to include the Appellant's submissions on record when judgment was delivered.

5. The Appellant sought to have the judgment of the trial court set aside and the suit against the Appellant in the Lower Court dismissed with costs. He also prayed for costs in the trial court and in the Appeal.

Facts of the Case

6. The Plaintiff called two witnesses in support of her case.PW1 was the respondent herein. She testified that she used to work at the appellants company as a general manager. She stated that on 17.5.2009 she was on duty harvesting summer beans and thereafter while taking the beans back to the factory, she was hit on the face by insecticides being sprayed in another block. It immediately affected her sight and could not see. She was taken to the clinic, and was treated for about 2 years. She produced hospital attendance chit. Later she saw Dr. Omuyoma who made a report and she paid Ksh.2,000. She blamed the company because they ought to have given her protective clothing if they knew there was spray while work was taking place.

7. Upon cross examination, she stated that she was employed in 1995 and had not known or seen the sprayer before she was hit. John Kamau was the one who was using the spraying machine, when the insecticide being sprayed hit her. The chemical affected her face and eyes. She was examined by company doctor who said she had an allergy. In re-examination she testified that she did not know the meaning of allergy .The spraying was not on the portion they were harvesting, the insecticide was on a tractor but the sprayers were using a hose pipe.

8. PW2, Dr. Obed Omuyoma stated that on 6.7.2003 he examined the plaintiff who had been injured on 17.05.1999 at her place of work. She sustained chemical burns on the face and eyes and had been treated at her employer's clinic and Naivasha District Hospital. She developed allergic reaction to the face and he classified degree of injury as harm. He produced the medical report and a receipt for Kshs 2000 that he charges and another receipt for Kshs 5,000 being court attendance fee.

9. Upon cross examination, he said he examined the respondent about 4 years after the incident and the treatment notes from the employer were not availed to him. He was shown the treatment card from Naivasha District hospital which he relied on as well as history. The treatment notes showed she was treated for pimples on the face and not facial burns. She had an allergic reaction. He said chemical

burns can provoke allergic reactions, even pollen. He did note establish which chemical it was. He said he had seen Dr. Otaras medical report but could not vouch for it. In reexamination, he said Dr. Otara made his own opinion. He said the history he was given was consistent with the injuries, pimples are part of allergic reaction and the treatment notes are consistent with chemical burn injuries.

10. The Defendant did not call any witness.

Appeal Submissions

11. The Appellant filed submissions on 19.01.2023. On liability, while relying on the case of Nairobi Civil Appeal No 192 of 92 Coast Bus Service Limited vs Sisco E. Murunga Ndanyi & 2 others and that of Joyce Mukulu Kilonzo vs Purity Kanyaa Mwangangi, Machakos HCCA 202 of 2011, it was submitted that he who alleges must prove and where the evidence does not support the pleadings, then the claim fails. That the Respondent never mentioned that she sought treatment at Naivasha District Hospital and did not render treatment notes from the said hospital yet PW2's evidence is based on a medical card allegedly from the said hospital. Exhibit 1 dated 17.5.99 bears the same date as that of the alleged accident, the recommendation reads 'work' and there is no mention of burns on either the face or eyes of the Respondent.

12. The Appellant submits that burn injuries are serious and one cannot sustain burns on the face and eyes and the medical personnel recommends that she continues working. That the same pimples the Respondent had on the date of the accident are the ones that PW2 saw four (4) years later when he examined her. It was submitted that the Respondent's evidence was contradictory and unsupported by documentary evidence. Further that the doctor's evidence should support the Respondent's case and not the other way around. Also, the name of the alleged chemical was never disclosed.

13. On quantum, it was submitted that the award of Kshs 250,000 was excessive in comparison to the injuries. There was no evidence that the Respondent was given off-duty or hospitalized and the injuries sustained were simple soft tissue injuries in the form of pimples arising from allergy. The Appellant proposed the quantum awarded be reduced to Kshs 40,000 as adequate compensation.

14. The Respondent filed submissions dated 19.01.2023 and stated that its evidence on liability was uncontroverted and therefore unchallenged. That its case was proven on a balance of probability. Reliance was placed on the case of Trust Bank Limited vs Paramount Universal Bank Limited & 2 otherS , Nairobi Milimani HCCS No. 1243 of 2001, D.T Dobie & Company (K) Limited vsWanyonyi Wafula Chebukati [2014] Eklr and James Gikonyo Mwangi vs D.M (Minor suing through his mother and next friend,IMO) (2016) Eklr.

15. It was submitted that it was not contested that the Respondent was employed by the Appellant and sustained injuries while under the employ of the Appellant. The Appellant did not adduce evidence to negate that they did not deal with chemicals in their premises and the Respondent had no special knowledge about chemicals that were being utilized by the Appellant and as such it would be unfair for her to be compelled to give the specific brand which is immaterial. Reliance was placed on the case of Samson Emuru vs Ol Suswa Farm Limited [2006] e KLR , Primarosa Flower Limited vs Diana Mwende Kimani [2019]e KLR.

16. The Respondent submitted that the award of General damages was not inordinately high in the circumstances and further her evidence remained uncontroverted. Reliance was placed on the case of Ngala Shedi vs Jackson Naybu whose citation was incomplete and Patrick Kinoti vs Peter Mburunga G Muthamia [2014] e KLR.

17. As regards lack of consideration of their submissions by the Trial Court, it was submitted that the Appellant failed to attend the mention to confirm filing of submissions and to file its submissions late. The allegations by the Appellant were therefore misleading.

Analysis and Determination

18. I have considered the lower court record, the memorandum of Appeal and the submissions of parties and find that there are two issues for determination revolve around issues of burden of proof, liability and quantum.

19. This court has a duty that is enumerated under Section 78 of the *Civil Procedure Act* which espouses that the role of a first appellate court which is to:

> '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'

20. This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

21. The first issue which this court would wish to address is the submissions by the appellant that the trial court failed to consider their submissions filed in lower court. The proceedings indicate that this matter came for mention on18.06.2009, by then only the Plaintiff's submissions were on record and judgement was reserved for 3.7.2009. From a perusal of the court file the Appellants submissions are on record but they were filed on 3.7.2009. The same was not placed before the court and the Trial court cannot be faulted for that.

22. It is not in dispute that the Respondent was an employee of the Appellant and sustained chemical burns on the face and on the eyes. The evidence of PW1 is corroborated by PW2, a doctor who examined the Respondent. The Appellant did not call any witness nor did they provide any evidence to contradict the evidence of the Respondent. As it stands, the evidence of the Respondent remains uncontroverted.

23. This has stated in the case of Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

24. However, the court has a duty to interrogate the Respondent's case to establish if she was able to on a balance of probability, to prove her case. This was emphasized in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

> "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

25. The Respondent proved that she sustained the injuries while at work and was taken to the clinic, which evidence she supported with a treatment chit. The issue of whether she was given time off work is a non-issue in this instance. She also stated that she was not given protective clothing while at work and thus was exposed danger within the work environment. There was also no evidence tendered by the Appellant that they warned their workers of the impending danger and trained them on work place safety regarding how their workers would work in the field, while insecticide spraying was being carried out.

26. In Common Law, an employer owes a duty of care to his employee. Halsbury's Laws of England, 4th Edition, Volume 15 at paragraph 560:-

> "At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk."

27. The *Occupational Safety and Health Act* (Chapter 514 of the Laws of Kenya), under section 3 states as follows:

> "(1) This Act shall apply to all workplaces where any person is at work, whether temporarily or permanently.
>
> (2) The purpose of this Act is to—
>
> (a) Secure the safety, health and welfare of persons at work; and
>
> (b) Protect persons other than persons at work against risks to safety and health arising out of, or in connection with, the activities of persons at work."

28. Section 6 (1) and (2) of the *Occupational Safety and Health Act* provides that an employer's duty of providing a safe working environment is not restricted only to it areas of control. The said provisions are as follows:

> "(1) every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace.
>
> (2) Without prejudice to the generality of an occupier's duty under subsection (1), the duty of the occupier includes—
>
> (a) The provision and maintenance of plant and systems and procedures of work that are safe and without risks to health;

(b) Arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;

(c) The provision of such information, instruction, training and supervision as is necessary to ensure the safety and health at work of every person employed;

(d) The maintenance of any workplace under the occupier's control, in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks to health;

(e) the provision and maintenance of a working environment for every person employed that is, safe, without risks to health, and adequate as regards facilities and arrangements for the employees welfare at work;

(f) Informing all persons employed of—

(i) Any risks from new technologies; and

(ii) Imminent danger; and

(g) Ensuring that every person employed participates in the application and review of safety and health measures.

29. This duty was also stated in the case of Mwanyule vs Said T/A Jomvu Total Service Station [2004] 1 KLR 47, where the court affirmed that

> " The employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution"

30. It was submitted that the pimples that the Respondent had on the day of the accident are the same ones Dr. Omuyoma saw 4 years later when he examined the patient. The evidence of Dr. Omuyoma could only be contradicted by that of another doctor/Medical expert. It is not for the Appellant to interrogate the type and nature of injuries sustained in submissions. The Appellant also cross examined the said doctor who clearly stated that he relied on the history given, the treatment notes from the company clinic and Naivasha District Hospital. The nature of pimples caused by a chemical burn may or may not have been seen, but the uncontroverted evidence is that she and other company employees were assigned to work within the farm and insecticide chemicals were accidentally sprayed on the respondents face. It affected her face and eye to the extent that she had to seek treatment.

31. On the contents of the chemical, that could only be explained by the Appellant who failed to do so. After the accident, the priority of the Respondent was to get treatment first before anything else. The court in the case Homegrown (K) Ltd -vs- Hannah Wairimu HCCC No. 68 of 1999, held that the specific chemicals that affected the respondent must be identified through expert evidence. The evidential burden to prove that what was sprayed was or was not a chemical was on the appellant but no such expert was called in this case. In the absence of any other evidence, I find no reason to disturb the finding of the Trial court on liability and the same is upheld.

32. On the issue of quantum, the Appellant contends that the award of Kshs 250,000 was manifestly excessive and urged the court to give an award of Kshs 40,000 as there was no evidence that the Respondent was given any off duty or hospitalized. Further, that the Respondent had pleaded "allergy". I have looked at the Plaint and the injuries sustained has been listed as "chemical burns on the face on the face and eyes". PW2 stated that the degree was harm. The report by Dr. Otara was not produced in evidence and thus cannot be relied upon.

33. An appellate court can interfere with a trial court's assessment of general damages, the principles for interfering with the trial court's award are well established in Salim Zein And Another vs Rose Mulee Mutua Civil Appeal No. 147 of 1994 where the court stated that;

> " The appeal court must be satisfied either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage."

34. Similarly, in the case of Telkom Orange Kenya Limited vs I S O minor suing through his next friend and mother J N [2018] eKLR it was held that;

> " General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR that: 'Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.'"

35. Having considered the injuries sustained and that the Respondent is in generally good condition as well as the time of the accident. Considering similar awards for similar injuries, I find that the award was excessive and reduce it to Kshs 120,000.

Disposition

36. This appeal is partially successful. I do set aside the award of Ksh 250,000/= delivered by Hon N. Njuki {SRM} In Naivasha Senior principal magistrate civil case Number 895 of 2003 dated 3rd July 2009 and revise the same downwards to Ksh120,000/=. Special damages remain as awarded Ksh 7,000/=plus costs and interest of the suit.

37. Since the Appeal has partly succeeded, each party shall bear its own costs for the Appeal.

38. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 16th day of May, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant