REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 361 OF 2012

SOCFINAF COMPANY LIMITED

T/A TATU ESTATE.....APPELLANT

VERSUS

JOSEPH IRUNGU KARIUKI.....RESPONDENT

[An Appeal from the Judgment of the Hon. Senior Principal Magistrates (Hon. C. Obulutsa) delivered on 3rd July, 2012 Milimani CMCC 9765 of 2006]

J U D G M E N T

The appeal herein arises from the judgment of Hon. Obulusta delivered on the 3rd day of July, 2012 in CMCC number 9765/2006. In the said case, the respondent herein who was the plaintiff, filed the plaint dated the 18th day of August, 2006, against the appellant, who was the defendant, in which, he claimed general damages, special damages in the sum of Kshs. 7,000/- plus costs of the suit.

In the plaint, the respondent avers that he was employed by the appellant, under a contract of employment when, on or about 27th November, 2000 while in the course of his employment with the appellant, he was carrying a sack of coffee when he stepped on a log and slipped and fell as a consequence of which he sustained serious injuries.

He contended that the said accident was occasioned by negligence on the part of the appellant. He has set out the particulars of such negligence in paragraph 6 of the plaint while the particulars of injuries and those of special damages are set out in paragraph 7 of the plaint. The respondent also relied on the doctrines of vicarious liability and that of res Ipsa Loquitur. He prayed for judgment against the appellant.

The appellant denied the claim by way of defence dated 9th October, 2006. It averred that it had at all material times provided the necessary and mandatory safety standards to all its employees including the respondent who was under a legal obligation to perform tasks assigned to him with acceptable standard of skill and attention to detail commensurate with the appellant's company standard working practice as envisaged by the law governing its core business.

The appellant denied the occurrence of the accident but averred that any injury, loss or damage allegedly sustained by the respondent was occasioned by his own negligence and that he was the author of his own misfortune. The particulars of negligence of the respondent are set out in paragraph 3 of the defence. It denied the particulars of negligence attributed to it. It also averred that the respondent's claim is unsustainable in law as the same is time barred and therefore incompetent.

The matter proceeded before the trial court and in its judgment delivered on 3rd July, 2012 the learned magistrate found the appellant liable for the accident and awarded a sum of Kshs. 700,000/= as general damages and special damages of Kshs. 1,500 plus costs of the suit and interest.

Following the said judgment, the defendant filed the appeal herein, on the 17th, July, 2012 in which, it has set out nine grounds of appeal which can be condensed into two grounds.

1. *Liability*

2. *Quantum of damages*.

The appeal was disposed off by way of written submissions.

The court has considered the said submissions, the evidence adduced before the trial court, the authorities cited and the pleadings.

From the pleadings and the evidence on record, it is not disputed that the respondent was an employee of the appellant and that he was injured. What this court has to determine is whether the appellant was negligent and in doing so, the court will consider whether it owed the respondent a duty of care, whether the duty was breached and whether he suffered damage as a result. On the other hand, the appellant has blamed the respondent for the accident and this court will have to determine whether he was also to blame and if so, to what extent.

As submitted by the appellant, four elements are required to establish a prima facie case of negligence which are;

1. Existence of a legal duty that the defendant owed the plaintiff.

2. Defendants breach of that duty

3. Injury to the plaintiff

4. Proximate cause (proof that the defendants breach, caused the injury.)

In his evidence, the respondent testified that, on the 27th November, 2000, he was working at the Tatu Estate and was assigned to carry a 50kg bag of coffee from the farm to the road. The sack was on his shoulder and he was bare feet, when he stepped on a log, slipped and fell backwards injuring his left hip. He shouted for help and the watchman by name Simon went to his help. He called other workers who took him to Thika District Hospital using the staff vehicle where he was admitted for 1½ months then transferred to Kenyatta National Hospital for one month. He was later taken to AIC Kijabe Hospital but he could not be treated as he had no money.

It was his further evidence that the appellant had sprayed water which made the path muddy. He blamed the company for not providing him with gumboots.

In cross examination, he stated that he was not on leave as alleged by the appellant. It was his further evidence that he made a report of the injuries which report was received at the office and that after the injury, he continued residing within the camp. He was even getting his medication from the clinic.

On its part, the appellant through DW1 testified that the respondent was on leave from 27th November, 2000 to 23rd December, 2000. He produced the wages sheet as an exhibit to show that the respondent was on leave at the material time and that he was paid while on leave. He stated that he was aware the respondent reported having been injured while on duty but further in his evidence, he testified that after Christmas when the respondent returned back to work he noticed he was limping and on asking him he said he had fallen at home and was injured.

The appellant's other witness was DW2, Catherine Wanjiku, who is a nurse working with the appellant but at the material time of the accident, she had not joined the appellant. She stated that her duty was to treat minor injuries but could refer the serious ones to Thika District Hospital. It was her evidence that a staff living within the premises could be treated in the staff clinic even when on leave if there was an emergency. She referred to the record of 27th November, 2000 to proof that the respondent was not treated in the clinic as his name does not appear in it as having been treated there on that day. She stated that she was not aware if the respondent was admitted for an injury in any hospital.

The appellant contended that the respondent recanted his evidence on what caused the accident referring to paragraph 5 of the plaint wherein he has pleaded that he stepped on a log, slipped and fell and his evidence in chief where he stated that the appellant had sprayed water which made the path muddy.

The appellant in its defence also contended that the respondent was on leave at the material time when the accident is said to have occurred. A wage sheet was produced as an exhibit.

This court has considered the above issues vis-à-vis the evidence on record and the submissions by both parties. In his plaint paragraph 5, the respondent has stated that he stepped on a log, slipped and fell thus sustaining injuries. Nowhere in his plaint has he pleaded that the path was muddy as a result of water that was sprayed by the appellant. Infact, this piece of evidence was given at the tail end of his testimony and just in passing without much emphasis. Looking at his evidence in chief, the respondent pegs his case on the fact that he was bare feet and that he stepped on a log, slipped and fell backwards injuring his left leg.

It is trite law that a party is bound by its pleadings.

Having so stated, Section 6(1) and 2 (d) of Occupational Safety and Health Act No. 15 of 2007 imposes a duty on an employer in the following terms;

6(1) every occupier shall ensure the safety, health and welfare at work of all persons working in his work place"

(2) Without prejudice to the generality of an occupier duty under subsection (1), the duty of the occupier includes;

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

On the other hand, Section 13(1)

> *(a) Of the Occupational Safety and Health Act No. 15 of 2007 imposes a duty on the employee to ensure his own safety. It reads;*

1. Every employee shall, while at the workplace;-

> *a) Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.*

Section 14, further provides;

> *"every employee shall report to the immediate supervisor any situation which the employee has reasonable grounds to believe presents an imminent or serious danger to the safety or health of that employee or of other employees in the same premises, and until the occupier has taken remedial action, if necessary, the occupier shall not require the employee to return to a work place where there is continuing imminent or serious danger to safety or health."*

There is no evidence of how long the respondent had worked with the appellant and in that capacity. The court is not able to ascertain whether he was conversant with the path that he was using, the size of the log, for how long the alleged log was on that path and if he was guilty of failing to report to his immediate supervisor of the presence of the log on the said path. All these are very pertinent issues which the parties left unclear to the court.

Be that as it may, the law under Section 6(1) (2) and 13(1) of the Occupational Safety and Health Act No. 15 of 2007 imposes a legal duty on both the employer and the employee as stated herein above. The appellant did not deny the existence of the log on the aforesaid path. On the other hand, the accident occurred during the day and the respondent could see the road ahead and had he been careful, he could have avoided the log. However, considering that he was carrying a heavy load on his shoulders, it was possible that he could not see a long stretch of the path and only saw the log at a short distance. In view of this observation, I find that both parties were to blame for the accident and do apportion liability at 70%:30% in favour of the respondent.

On the issue of whether the respondent had been provided with the gumboots or not, as rightly submitted by the appellant, even if the respondent had gumboots, they could not have protected him from stepping on the log.

In their defence, and in DW2's evidence, it was alleged that the respondent was on leave at the material time when the accident occurred. The court has perused the wage sheet that was produced as an exhibit and the same does not shed much light on that issue and it cannot help the court to make a conclusive finding in that regard. As rightly submitted by the respondent, the assertion that the respondent was on leave was not pleaded in the defence. In paragraph 3 of its defence, the appellant blames the respondent for the accident and attributes negligence on him. If indeed it's true that the respondent was on leave, the same would have been pleaded. As stated earlier on, a party is bound by its pleadings and this legal principle applies to the appellant as well.

As to the allegation that the respondent was injured elsewhere, the court has considered the evidence and has seen the outpatient register which was produced as exhibit 2. It was the evidence of DW2 that the staff clinic deals with minor injuries. The evidence of PW2 was that when he shouted for help, the watchman namely Simon in company of other people took him to Thika District Hospital in the staff vehicle. This therefore means that he was not treated at the staff clinic on the 27th day of November, 2000 and one would not expect his name to be on the list of those who were treated in the said clinic.

On quantum of damages, the court has been asked to interfere with the trial court's award for being excessive. Various authorities were relied on by the parties. The general principle is that the assessment of damages is within the discretion of the trial court and the appellate court will only interfere where the trial court in assessing damages, either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Limited T/A Meru Express & Another vs. A. M. Lubia & Another (1982 – 88) IKAR 727***.

Further, in the case of ***Sino Hydro Corporation Limited vs. Daniela Atela Kimida (2016) eKLR***, the court in considering whether or not to interfere with an award of damages, set out the following principles;

> *a) Damages should not be inordinately high or too low.*
>
> *b) They are meant to compensate a party for the loss suffered but not to enrich a party and as such they should be commensurate to the injuries suffered.*
>
> *c) Where past decisions are taken into consideration, they should be taken as mere guides and each depends on it's own facts.*
>
> *d) Where past awards are taken into consideration as guides, an element of inflation should be taken into account as well as the purchasing power of the Kenyan shilling at the time of the judgment.*

Taking into account all the decisions cited by the parties and the injuries sustained by the respondent as set out in the medical report dated the 5th day of August, 2011 by Dr. Cyprianus Okoth Okere, I find the sum of Kshs. 700,000/= awarded by the Learned Magistrate an appropriate award.

From the foregoing, the appeal partly succeeds on the issue of liability as shown above. The quantum of damages as awarded by the trial court remains at Kshs. 700,000/= subject to contribution of 30% making it Kshs. 490,000/=. There was no challenge on special damages.

General damages as awarded in this appeal to earn interest from the date of judgment of the trial court and special damages from the date of filing of the plaint. The respondent is hereby awarded half of the costs of the appeal and that of the trial court.

Dated, Signed and Delivered at NAIROBI this 6th Day of FEBRUARY, 2020.

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L. NJUGUNA

JUDGE

In the Presence of

……. For the Applicant

……. For the Respondent