REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 134 OF 2017

CHEBUT TEA FACTORY LIMITED.....APPELLANT

VERSUS

FLOMENA JEMUTAI.....RESPONDENT

(An appeal against the Judgment and decree delivered by D.A Alego vide Kapsabet CMCC NO. 2 OF 2015 on 2.10.2017)

JUDGMENT

1. The appellant **(CHEBUT TEA FACTORY LIMITED)** contests the decision which essentially stems from an alleged work injury claim **in KAPSABET PMCC NO. 2 OF 2015**, where the Respondent **(FLOMENA JEMUTAI)** claimed that on 20th July, 2011, she was engaged upon her lawfully assigned duties when due to the negligence of the appellant or its agents/servants, a conveyor frame fell on her while she was trying to move it and as a result she sustained injuries. The Appellant denied liability. Upon hearing the matter, the trial court entered judgment in favour of the respondent against the appellant on liability at 90% against the appellant, and 10% against the respondent

2. Whether the Respondent was on duty on 20.07.2011 when the accident occurred? It was the Respondent's testimony that on 20th July, 2011, she was working at Chebut Tea Factory grinding tea leaves, the roller supporting the conveyor fell and hit her right leg. That the conveyor hit her right knee and scratched her right ankle. She blamed the appellant for failing to provide her with gum boots. Upon completion of the day's work, she went to Kapsabet District hospital although her recorded statement read Nandi Hills hospital. She produced a medical report prepared by Dr ALUDA which bore the name FLORENCE, but explained that there was an error in the spelling of her name, as the hospital had even issued her with a card bearing the name FLOMENA JEMUTAI.

3. On cross-examination, she confirmed that she did not report the incident to her supervisor on that night, saying the supervisor was not on duty and no one else witnessed the incident. She also told the court that she was 50 years old in 2015 although the report prepared by Dr Aluda indicated that she was 28 years old in 2014. She also clarified that the appellant had provided her with gumboots which workers were not allowed to wear at night on pretext that they would steal tea and hide them inside the boots

4. DANSON GICHANGI (DW2) who worked at Kapsabet County Referral hospital told the trial court that the respondent (whose age was recorded as 28 years) presented to the facility with a deep cut wound on the right leg middle third tibia, associated with right knee joint dislocation. The injury was classified as soft tissue injury. He told the trial court that he confirmed her age from her national identity card

5. The appellant's witness Caroline Chepkemboi Maritim (DW1), she informed the trial that she kept records of the company's employees and confirmed that the respondent was an employee of the company working as a casual labourer. She explained that the respondent worked in the fermentation area, where they used mobile metal trollies which were operated manually. DW1 confirmed that the respondent was on duty on the night in question, but that no accident was reported on that date, and the respondent's name did not appear in the accident register.

6. DW1 explained that when a person gets injured at the work place, First Aid is administered initially before the victim is taken to hospital. The injured worker then makes a report to the supervisor, who relays the same to DW1, but this did not happen, and infact the respondent was on duty the next day, and she worked the entire month

7. BETTY MATELONG (DW2), a health records officer at the Kapsabet County Referral Hospital (who keeps all patients records at the facility) told the trial court that the respondent's name did not appear in their records, and pointed out that whenever a patient visits the facility for treatment, an outpatient number is recorded, yet the outpatient treatment notes which the respondent sought to rely on did not bear an out-patient number. That even if the patient had been 'a walk-in individual', the name would still appear in the treatment records

8. The trial court found that the appellant did not deny that its supervisor was not on duty on the night that the respondent got injured, and the respondent would not be expected to wait for an administrative procedure before seeking treatment. The court held that the respondent was

on duty on the date in question, got injured and went to hospital for treatment as she was attended to by PW2.

9. The trial court stated thus:

> **'…in light of the conflicting evidence bought by the Appellant and the Respondent on this issue, this court is of the view that the evidence by PW1 and PW2 appears to be credible…DW1 and DW2 were on the other hand neither at the scene of the accident, nor did they receive any report as regards the same to be able to conclusively state that the Respondent was not involved in the same. For these reasons, it is the finding of this court that the trial magistrate did not err in relying on the evidence of PW1 and PW2 in finding that the Respondent did prove on a balance of probabilities that he was involved in the said accident…'**

> **…other than disputing that the Respondent was not involved in the accident, the Appellant did not call any other evidence to show that these injuries were not suffered by the Respondent. In addition, the evidence of DW1 and DW2 cannot be relied upon on this fact as they never examined the Respondent'**

10. The respondent's counsel submits that the evidence presented proved that the respondent was on duty at the appellant's premises.

11. The evidence by DW2 that all patient's records were digitized at the hospital, and that the respondent's name did not appear, was dismissed on grounds that DW2 did not work at the hospital when the respondent went to seek treatment. The court held that the respondent had proved her case on a balance of probabilities but apportioned liability at 90% against the appellant, and 10% against the respondent, who was thus awarded general damages in the sum of Kshs. 180,000 and special damages of Kshs 1,500/-

12. Whether the Respondent was injured during the course of duty?

13. The respondent's counsel maintains that the Respondent's claim that she got injured while on duty remained unchallenged by the Appellant. That in support of her case, the Appellant produced treatment chits issued by the then Kapsabet District Hospital (now Kapsabet Referral Hospital).

14. That it is not contested that PW2 is an employee of Kapsabet District Hospital. That DW1 was categorical of the duties assigned to the Respondent. She stated that:

> **'…she was working at the fermentation area where the green leave is being fermented. They were using trolleys which is metal made. They are movable. They are manually moved...'**

15. That the Respondent on her part reiterated that she got injured when 'the roller that was supporting the conveyor that was conveying tea leaves fell and hit my right leg..'

16. That in fact, the testimony of the Appellant and that of the Respondent perfectly corroborate each other.

> **GROUNDS OF APPEAL**
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> **a. Whether the Learned Trial Magistrate erred and misdirected herself in facts and evidence on record with respect to the circumstances surrounding the alleged accident involving the respondent and thus erred in law on liability.**

17. This court's jurisdiction to review the evidence should be exercised with caution, is well stated in the locus classicus case of **Selle vs Associated Motor Boat Company Limited**, which was reiterated by Justice Kamau in ***Jacob Momanyi Orioki v Kevian Kenya Ltd [2018] eKLR***, that: -

> **"This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.**
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> **13. This was aptly stated in the cases of Selle vs Associated Motor Boat Company Ltd [1968] EA 123 and Peters vs Sunday Post Limited [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-**
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> > **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

18. The respondent's counsel submits that she had proved her case on a balance of probability, Section 107 of the Evidence Act stipulates: -

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."**

19. It is pointed out that the Appellant indeed issued the respondent with gumboots however she was prevented from wearing them at night

because the company was alleging people will steal tea leaves and hide in the gumboots. That the found that DW1 confirmed knowing the Plaintiff and that on 20th July, 2011, the Respondent worked from midnight to 10 a.m. and as such this answers the question that she was at work on the fateful time pleaded. Further, she stated in the judgement that, **"somebody injured will not wait for "administrative procedure" as deemed by the defence herein. One would move to the next available health facility for treatment and seemingly this is what the Plaintiff did**".

20. The appellant counters that it is indispensable to note that the issue of causation is critical in determining if but for an action by the appellant herein, the Respondent would not have sustained the injuries she alleges to have suffered. Without proof of causation through the initial treatment note, then the trial magistrate erred in law and in fact in holding that the appellant was 100% liable for the alleged industrial injury. In addressing a similar issue in **Statpack Industries v James Mbithi Munyao [2005] eKLR** Justice Visram held inter alia: -

> **Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.**

21. The appellants contend that the court did not make any finding whether indeed there was proof of negligence on the part of the appellant. That although the respondent had pleaded the particulars of negligence she led no evidence to prove the same, and infact confirmed that she had been provided with the safety gear in the form of gumboots, and the trial court did not make a finding on the issue of negligence. It is submitted that it is totally incomprehensible where the trial court fetched the figure of 90% against the appellant and 10% against the respondent.

22. The appellants argue that the respondent did not tender any evidence in Court to prove that indeed she did report the alleged accident to the supervisor. That the Respondent was cognizant to the procedures followed when one in injured at a work place, and for the Appellant to be found negligent, there MUST be a causal link. The Respondent was given protective gear and she willingly chose not to put them on. That the Respondent's allegations that the Appellant indeed issued her with gumboots however she was prevented from wearing them at night because the company was alleging people will steal tea leaves and hide in the gumboots is neither here nor there. No evidence was tendered in court to prove such allegations. The law is very clear that he who alleges must prove and as such, it is clear that there is no causal link to the Appellant's negligence leading to the injuries.

23. In support of these arguments, the appellant cites the case of **Twin River 1 Estate v Teresia Mutheu Nzui [2018] eKLR (supra);** where the Court was faced with a similar scenario held as follows:

> **The Incident Book could have contained the respondent's name if at all she had been injured. No benefit of the appellant was shown in failure to record the respondent's alleged incident despite irregular recording of events, (not according to chronological order), the Incident Book report shows recording of many accidents and incidents happening to their staff ranging from "cut by panga left arm near the thumb when sharpening a file" on 2/6/2006; "attack by thugs while guarding Thika Pump" on 19/8/09; "Pinched by nail in factory" on 11/4/2010; and "foreign body in eye while picking cherry" on 1/05/2010. Why would the incident of 27/3/2007 involving the respondent be omitted? The respondent, whose duty it is to prove the claim in negligence, did not provide any answers apart from the bare assertion by the respondent's counsel that the name could have intentionally been omitted by the appellant in order to show that the respondent was not at work and thus was not injured.**

24. Indeed, **Twin River 1 Estate v Teresia Mutheu Nzui [2018] eKLR (supra);** it was stated as regards **The Burden of Proof**

> **In Halsbury's, Laws of England, 4th Edition paragraph 662 (page 476) it is observed as follows:**
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> > **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."**

Alongside this is the standard of proof in civil cases which is on a balance of probabilities. As pointed out by the appellant, he standard has been explained by Lord Nicholls in **Re H (minors) (1996) A.C. 563 as follows:**

> **"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."**

25. In the present situation, the trial court failed to take into account relevant evidence which placed the burden of proof on the respondent, and rendered the standard of proof completely wobbly. 1. The respondent's testimony was fraught with information which raised a lot of questions as to her credibility, and gave the impression of a patched up clam. testified that she went to Kapsabet District Hospital (though she had indicated in her statement that she was treated at Nandi Hills District Hospital) when she was done working and was issued with an outpatient treatment card dated 20th July, 2014 (which did not bear the hospital's outpatient number). So even if her name did not appear in the outpatient's register, and the trial magistrate found that DW2 lacked the finesse required in relation to digitization, then surely at least there would be one redeeming record of appearance at the hospital.

26. During cross examination it was the Respondent's testimony that she did not know the exact time she got injured and she did not inform her supervisor. As the appellant points out, surprisingly, the respondent stated that she worked the entire duration of her shift and went to hospital thereafter and opted not to inform the supervisor or report to anyone. Even if the supervisor was not present that night, but what about the next day? She could not plead ignorance as the trial court was informed that the respondent had worked for the appellant for a period of 9 years.

27. Then there is the issue regarding the name stated in the medical report is Florence Jemutai aged 28years and her ID Number is not stated in the medical report. The respondent confirmed that she was 50 years old and thus the treatment note produced for Florence Jemutai could not be hers by dint of the age captured therein. In-fact her own witness (PW2) confirmed to the trial court that he checked FLORENCE's national identity card which showed she was 28 years… so did the respondent really go to hospital or was it a different person all together who was attended to at the Kapsabet facility?

28. Whereas it is true that PW2, a clinical officer at Kapsabet County Referral Hospital testified that the Respondent herein was treated at Kapsabet County Referral Hospital on 20th July, 2011, even on re-examination the witness insisted that he confirmed from the respondent's Identity Card that she was 28 years. It is however clear that the respondent in her testimony denied that she was aged 28 years at the time of treatment and even availed her Identity Card which demonstrated that she was over 45 years old at the time she allegedly attended the facility.

29. It does not help the respondent's case that no accident was reported on that specific day and her name was not encapsulated in the accident register book. She seemed to use different names with different identification records, her claim just seemed to wrap itself into many untidy knots, and what is termed as corroboration by Dr Aluda only goes to confirm that the person who was attended to was on all probabilities not the 45-year-old **FLOMENA JEMUTAI**, but a 28-year-old **FLORENCE JEMUTAI**. It is apparent that the respondent dug a hole in her own case, and created loopholes which the trial court ought not to have ignored.

Consequently, I find that the trial court erred in its findings, failed to make a pronouncement as to how the appellant was negligent and ignored a myriad of questionable and rather doubtful information presented by the respondent. The appeal is merited, and the judgement entered by the trial court, be and is hereby set aside in its entirety. The respondent shall bear the costs of this appeal.

E-Delivered and dated this 3rd day of June 2020 at Eldoret

H.A. OMONDI

JUDGE