REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 77 OF 2013

[FORMERLY NYERI HCCA NO. 91 OF 2012]

SOCFINAF COMPANY LIMITED.....APPELLANT

VERSUS

VERONICA WANJIRU KIMUNYU.....RESPONDENT

[An appeal from the judgment of T. Gesora, Principal Magistrate, in Kandara PMCC No. 125 of 2010 delivered on 4th July 2012]

JUDGMENT

1. This appeal challenges *liability* for negligence for injuries allegedly sustained by the respondent while on duty at the appellant's farm.

2. The memorandum of appeal and the written submissions are completely silent on the quantum of damages. There is no cross-appeal by the respondent.

3. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic;* and, pursuant to the *Practice Directions* published in the *Kenya Gazette* of 17th April 2020 as Gazette Notice No. 3137 of 2020, this appeal was heard electronically on 22nd June 2020.

4. The Court had earlier granted directions on 26th March 2019 that the appeal be canvassed through written submissions. The parties filed a consent dated 5th June 2020 agreeing that the appeal be heard remotely; and, that the judgment be transmitted electronically.

5. The appellant filed submissions on 6th June 2019 while those by the respondents were lodged on 31st July 2019.

6. In the plaint dated 28th May 2010, the respondent (who was the plaintiff) pleaded that that on 29th April 2010 she was *"spreading fertilizers [when] she stepped on a concealed hole dug by the defendant for trapping soil and she suffered injuries"*. She blamed the appellant for failing to provide a safe system of work; failing to issue protective gear; and, exposing her to danger. She thus sought special and general damages.

7. By a statement of defence dated 15th October 2010, the appellant denied the claim *in toto*. In particular, it denied that the respondent was its servant or injured while on duty on the material day. It also denied that it failed to provide a safe system of work. In the alternative, it blamed the respondent for contributory negligence.

8. The learned trial Magistrate found that the appellant was 90% liable while the respondent contributed to the negligence at 10%. He assessed general damages at Kshs 100,000; and, special damages at Kshs 3,000. The respondent was also granted interest and costs.

9. The appellant lodged an appeal on 21st May 2012. There are *six* grounds of appeal. They all revolve around *one* key issue: that the trial court erred by holding that the appellant was liable for the accident. In the written submissions at the High Court, learned counsel underlined that the respondent was not on duty on the date of the accident; and, that she failed to discharge both the legal and evidential burden of proof.

10. The respondent's counsel retorted that the respondent's version of events was corroborated by PW2; and, that the documents produced by the appellant's witnesses to show she was absent were unreliable. She emphasized that the respondent fell into an unmarked hole which was concealed by weeds.

11. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.

12. It is common ground that the respondent (PW1) was employed by the appellant. She produced her pay slip (exhibit 1). Paragraph 4 of the defence denied that the respondent was employed by the appellant. In the absence of evidence in rebuttal; or, any meaningful cross-examination on that aspect, I find that the respondent was an *employee* of the appellant.

13. The respondent was a general worker on the appellant's coffee farm. The crux of the appeal is whether respondent was injured *at* work; and, whether the appellant was *negligent*. A related issue is whether the respondent was guilty of contributory negligence. In her testimony, she said:

> *There was a hole in the ground dug by the company. It was covered with [sic] weeds, my leg got caught up in the hole and I fell with the fertilizer. I got injured in the ankle. it was not fractured but the leg got swollen*

14. Under cross examination, she conceded that the holes were always there but the company did not *"clear the weeds so that we see them openly; many people have fallen into the hole"*.

15. Her sole witness PW2 confirmed that the claimant was injured. She helped her to get out of the hole. She said they reported the matter to the supervisor (DW2) who advised them to go to the company dispensary. She said that she and the respondent had worked for the appellant for 9 years. PW2 also conceded in cross examination that *"the hole was always there even now they [sic] are there"*.

16. Like I stated, the appellant's case is that the respondent's case is phantom. The field clerk (DW1) produced a field book showing that the respondent (employee No. 720) was absent from work on the material day. The supervisor (DW2) denied receiving a report of the injury. Teresa Nderitu, DW3, was the company nurse. She produced an outpatient register for the period 2008 to 2010 which had no entry showing that the respondent attended the clinic on 29th April 2010. The respondent on the other hand claimed she was attended to by DW3 who "put some medicine" on her leg and asked her to return the next day.

17. I have concluded that one of the parties was *not* telling the *truth*. I did not have the benefit of seeing their demeanour. Since the respondent did not suffer serious injuries she may have just had the leg sprayed with "deep heat". The nurse herself testified that *"when one gets an injury to the leg without a fracture, I apply the deep heat spray"*

18. There is one other piece of evidence in favour of the respondent. Two of the appellant's witnesses, DW1 and DW2, confirmed in cross examination that *PW2* was at work on the material day. PW2 in turn testified that she was in the company of *PW1* and that she assisted her when she got injured.

19. I thus find on a *balance of probabilities* that the respondent fell into the hole. Her injuries were minor and she may not have taken them seriously until she noticed the swelling on her leg the next morning. The two medical reports produced were made months after the incident and throw little light on liability.

20. The next key question is whether the employer was *liable* for the injuries; or, for not marking the ditch. Paraphrased, was the appellant *negligent* or in breach of statutory duty or common law duties of care? For starters, the legal burden of proving *negligence*; or, *breach* of any statutory duty of care fell squarely on the respondent's shoulders. See section 107 of the **Evidence Act**.

21. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See ***Halsbury's Laws of England*** 4th edition volume 16 paragraph 562, ***Mwanyule v Said*** [2004] KLR 1**, *Arkay Industries Ltd v Amani*** [1990] KLR 309.

22. In this case, the respondent had worked in the coffee farm for 9 years. She confirmed she was aware of the holes. True, the hole was concealed by weeds. But she knew about the risk. I am alive that there was an implied term of the contract that the respondent took the risks *incidental* to her contract of employment. It was the respondent's *primary duty* to keep a safe look out. I thus find that the respondent *contributed* to the accident. Granted those circumstances, I find that both parties should share *equal liability* for the accident.

23. I stated at the beginning that neither the appellant nor the respondent has challenged the quantum of damages. Furthermore, an appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. See ***Butt v Khan*** [1982-88] KAR 1.

24. From the two medical reports, the respondent suffered minor soft tissue injuries. The damages awarded in the present case *may* seem a little high. But I cannot say the award is *exorbitant*. I thus decline to disturb it. The special damages were also specifically pleaded and proved.

25. In the result, the appeal succeeds in part. The judgment of the lower court dated 4th July 2012 is hereby *set aside*. Judgment is now entered in favour of the respondent against the appellant as follows:

a) Liability is apportioned *equally* between the appellant and respondent.

b) General and special damages are assessed at Kshs 103,000 *less 50% contributory negligence* which is to say *Kshs 51,500.*

c) Each party shall bear its own costs in the lower court and in this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANG'A** this 9th day of July 2020.

KANYI KIMONDO

JUDGE

ORDER

Notice of delivery of this judgment was transmitted to the parties' email addresses. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the Practice Directions issued by his Lordship, the Chief Justice dated 17th March 2020 and published in the *Kenya Gazette* of 17th April 2020 as Gazette Notice No. 3137, this judgment has been delivered to the parties by electronic mail. The parties filed a consent dated 5th June 2020 waiving compliance with Order 21 Rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of:

Ms. Dorcas Waichuhi, Court Assistant.