REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 78 OF 2013

[FORMERLY NYERI HCCA NO. 90 OF 2012]

SOCFINAF COMPANY LTD (RUERA ESTATE).....APPELLANT

VERSUS

MARY NJERI KIBE.....RESPONDENT

[An appeal from the judgment of T. Gesora, Principal Magistrate, in Kandara PMCC No. 133 of 2010 delivered on 4th July 2012]

JUDGMENT

1. The appellant contests the findings of the lower court on *liability* for negligence for injuries allegedly sustained by the respondent while on duty at Ruera Estate. The appellant contends that the respondent's claim was bogus.

2. 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.

3. 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.

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

5. In paragraph 5 of the plaint dated 7th May 2010, the respondent (who was the plaintiff) pleaded that that on 4th May 2010 (which date was later amended by consent to read 3rd May 2010) she was *"spreading fertilizer on Block E5 Ruera Estate [when] she slipped due to wet ground and fell down"* and suffered some injuries.

6. As I will discuss later, the respondent departed from her pleadings and told the trial court that she fell into an unmarked hole dug by the appellant which was concealed by overgrown grass.

7. 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.

8. By a statement of defence dated 15th October 2010, the appellant denied that that the respondent was its servant or was injured while on duty. It also denied that it failed to provide a safe system of work. In the alternative, and without prejudice, it blamed the respondent for contributory negligence.

9. The learned trial magistrate found that the appellant was 85% liable while the respondent contributed to the negligence by 15%. He assessed general damages at Kshs 150,000; and, special damages at Kshs 3,000. The respondent was also granted costs.

10. The memorandum of appeal was lodged on 11th July 2012. There are four grounds: Firstly, that there was no evidence that the respondent was injured at the estate on the material date; secondly, that the visit by the respondent to a clinic the following day was not proof of the accident; thirdly, that the doctrine of *res ipsa loquitor* was not pleaded and was inapplicable; and; lastly, that the trial court erred by applying the *no fault principle*.

11. In the written submissions at the High Court, learned counsel argued that evidence of the appellant's three witnesses rebutted the fictitious claim by the respondent. In a nut shell, she submitted that the respondent failed to discharge both the legal and evidential burden of

proof.

12. The respondent's counsel countered that the trial court did not rely on the *no fault principle* and that there was cogent evidence demonstrating that the respondent was injured while on duty at the estate.

13. 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.

14. From the evidence, I readily find that the respondent was employed by the appellant as employee number 314. She had worked for the company as a general worker for about 10 years. Paragraph 4 of the defence denying that the respondent was its employee was clearly a red herring.

15. The core of the appeal is whether respondent was injured *at* work; and, whether the appellant was *negligent*.

16. Like I stated earlier, the respondent's pleading in the plaint was that *"she slipped due to wet ground and fell down"*. But in her testimony she told the trial court that she fell into an unmarked hole dug up by the appellant and which was concealed by overgrown grass. She blamed the company for negligence. In cross examination, she said:

> *It had rained the whole night. I can't blame the company for the rain. I blame the company because there were holes in the shamba. I could not see the hole because it has [sic] overgrown with grass. Coffee is seasonal, it was dry so we were dressing with fertilizer* [underlining added]

17. From the record, the plaint was not amended to change the circumstances that led to the fall. The only minor and oral amendment clarified that the accident happened on 3rd May 2010. The particulars of negligence were never amended. I find that the trial court erred by admitting evidence that was *inconsistent* with the respondent's pleadings.

18. I will now turn to the evidence surrounding the accident. I find that there was a dearth of evidence to support the respondent's allegations. On the one hand she claimed that it had rained the whole night. On the other hand, she said that it was a dry season and that is why top-dressing was being carried out.

19. Secondly, the accident is alleged to have occurred at 11:00 a.m. The respondent claimed that when she fell, she *"saw a lady pass and I called her. I reported to Mr. Njuguna the supervisor. I went to the clinic; the nurse was not there. I went to Gatundu Hospital the next day"*. The name of the lady was not given and she never testified.

20. The appellant's supervisor, Njuguna (DW3), did not receive the alleged complaint of injury from the respondent. The field clerk (DW1) saw the respondent at work but also received no such report. The company nurse, DW2, said she was on duty and attended to 11 patients. The respondent was not among them. To be fair to the respondent, she claimed that she did not find the company nurse; and, that she took a ride home on a motorbike.

21. Thirdly, the respondent did not go to Gatundu Hospital until the following day as per the outpatient card (plaintiff's exhibit 1). It thus remains *doubtful* what time and at which place she sustained the soft tissue injuries.

22. Fourthly, the respondent had worked at the farm for about 10 years. She thus assumed some risks *incidental* to her contract of employment. It remained her *primary duty* to keep a safe look out. Even assuming that she slid and fell in the farm as originally pleaded, it would be unreasonable in the circumstances to blame her employer.

23. 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 absurd 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.

24. 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**. From my re-appraisal of the evidence and the reasons I have outlined above, I find that the respondent suffered injuries but she was unable to prove a *balance of probabilities* that they were sustained on 3rd May 2010 at the appellant's Ruera Estate.

25. With tremendous respect to the learned trial magistrate, his finding that the respondent's evidence was uncontroverted; or, that the appellant was to blame at 85% or at all for the alleged accident is not supported by the record. In the end, I am *not* satisfied that the appellant was negligent or failed to provide a safe working system.

26. I will now turn to quantum of damages. An appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. ***Butt v Khan*** [1982-88] KAR 1.

27. From the two medical reports by Dr. Ikonya and Dr. Madhiwala (Plaintiffs exhibits 2 (a) and 3) the respondent suffered *soft tissue injuries* on the right shoulder, chest and back which had healed. The treatment given comprised of analgesics. I thus find, with respect, that the general damages awarded by the lower court of Kshs 150,000 were too high as to disclose an error of principle.

28. In ***Peter Kahugu & another v Ongaro***, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, Kshs 80,000 was awarded for

multiple soft tissue injuries. In ***Timsales Ltd v Penina Omondi***, High Court, Nakuru, Civil Appeal 192 of 2008 [2011] eKLR, the respondent suffered a deep cut wound on the left index finger and severe soft tissue injuries. The High Court reduced the general damages to Kshs 60,000.

29. Granted the injuries in this case an award of Kshs 50,000 would have been sufficient. The special damages of Kshs 3,000 were specifically pleaded and strictly proved by the respondent.

30. But that is now water under the bridge: The respondent having failed to establish liability, this appeal must succeed. I hereby *set aside* the judgment and decree of the lower court dated 4th July 2010. I substitute it with an order *dismissing* the respondent's case in the lower court.

31. Costs follow the event and are at the discretion of the court. I will grant the appellant costs in the lower court; and, also 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.