



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 58 OF 2017

BIGOT FLOWERS LIMITED..... APPELLANT

-VS-

GLADYS NYABOKE.....RESPONDENT

(Being an appeal from the Judgment of the Hon. E. Kimilu (PM) delivered on the 21st November 2017 in Naivasha CMCC No. 631 of 2015)

JUDGMENT

1. The plaintiff in the lower court filed suit as an employee of the defendant for injuries sustained whilst at her place of work harvesting flowers in a green house. She said she slid on the slippery floor on 24th September, 2012. Her leg then entered into a hole and she fell down sustaining injuries. She blames the accident on the negligence of the plaintiff, particulars of which negligence she specified in the plaint.

2. The injuries for which she claimed and for which the lower court made an award were: Fracture of the right wrist joint and severe soft tissue injuries on right wrist. Liability was apportioned by the court at 80%:20% in favour of the plaintiff and the trial court awarded damages as follows:

General damages 250,000

Special damages 5,000

255,000

Less 20% 51,000

Total 204,000

3. The appellant challenges liability and the award of damages. It asserts that the plaintiff was not injured whilst at work and the issues it has raised are:

a) Whether the Respondent was injured whilst on duty in her employment (liability)

b) Whether the damages awarded are manifestly high.

Whether the Plaintiff was injured whilst at work

4. The appellant argues that the plaintiff was not at work on the material day; that the Muster Roll shows she was not present; that she was issued with some protective gear; that the appellants Accident Register did not indicate that she had reported any accident between 4th July to 27th September, 2012; and that there was no information with the company to the effect that the Respondent was injured while on duty.

5. It is not in dispute the plaintiff was an employee of the defendant. What is disputed is whether she got injured whilst on duty. It is also not disputed that the plaintiff has been issued with protective clothing and equipment namely dust coat and long hand gloves but not a good pair of gumboots.

6. According to the Muster Roll produced, she was off duty on 23rd and 24th September- the material day - and on sick off on 25th to 30th September, 2012. Despite the record in the Muster Roll, PW2 Suleman Rotich, the Clinical Officer at Karagita Health Centre testified that she attended her at their facility on 24th September, 2012 and referred her for x-ray at Naivasha District Hospital. She reported that she had fallen at work.

7. In her own testimony, the plaintiff (PW1) said that after she fell, her supervisor took her to the Defendant company's clinic for first aid and she was bandaged on her right wrist. The Defendant's Clinic Card shows that she was treated for on Saturday 22nd September, 2012 a painful arm, and that crepe bandage was applied. A clinic entry dated 20th September, 2012 shows that defendant had:

"Pain Right Hand wrist joint" and was required to apply gel.

An entry on 21st September, 2012 indicates:

"Right wrist join (sic) painful."

In other words the plaintiff had problems with her right wrist prior to the date of her alleged fall.

8. With regard to the accuracy of the defendant's Muster Roll, its Human Resource Officer (DW1) testified that she was employed in February, 2015. She produced the company's Clinic treatment cards. In cross-examination she admitted that the Muster Roll had cancellation with wit out, that she was not its maker, but was its custodian. She explained the cancellations as follows:

"It comes [about] probably when employees is absent but when he/she comes back he gives explanation which can lead from absent to sick off or leave."

This amounted to a clear admission that the Muster Roll is obviously not free of errors, and I so find.

9. It was also noted by the trial court, that the defendant did not avail the plaintiff's supervisor to testify to the absence of the plaintiff at work on the material day.

10. Taking all the evidence together, I am persuaded that the plaintiff was at work on the material day. Further the Plaintiff's absence due to "Sick Off" from 24th to 30th September, 2012 is consistent with an injury having been suffered and that the company was aware of it. Otherwise, how would the company have known she was sick off, so as to record the same on the Muster Roll yet they did not call evidence concerning that aspect.

11. In the premises, I am persuaded on balance that the plaintiff was at work on 24th September, 2012, and that she was injured whilst there.

12. Equally, I accept the trial magistrate's finding that the appellant was liable for not availing the plaintiff with proper gumboots, and in addition, that the appellant failed to provide a safe and proper work environment.

Injuries

13. With regard to the injuries, it is necessary to determine what their nature was. The plaintiff said her leg slipped entered into a hole on the floor and she fell into a hole sustaining the said injuries. According to the notes from Karagita Health Centre, she injured her wrist. A subsequent X-ray revealed it was fractured, and that plaster of paris applied. All this is also contained in Dr. Omyoma's medical report.

14. What was not highlighted by the Plaintiff or Dr. Omyoma is that the Plaintiff had for a long period before the accident had nagging challenges with her right hand and wrist. The Bigot clinic cards shows as follows:

- On 24th August 2012 she was treated for "painful right hand".
- On 29th August 2012 she again reported she was treated for "painful right hand numbness."
- On 4th September, 2012 she had a "still painful right hand."
- On 20th September, 2012 she presented with "pain right hand wrist joint."
- On 21st September, 2012 "Right wrist joint painful."
- On 22nd September, 2012 "Still painful arm. Plan: apply crepe bandage."

15. So that by continuing to do the type of work she was doing with the challenge she was facing in her right hand, she knowingly took a risk of further injury. When she eventually fell it is the same hand and wrist that sustained the blunt complained of injuries. Even after she recovered, Dr. Obed Omyoma's report shows that she still complained of pain in the right wrist joint and restricted movement in the same wrist. Pain in the wrist hand, as shown, had been nagging pre-accident complaint.

16. Accordingly, I would increase her liability for the injury, for continuing such work while already injured. The full extent of the prior injury was merely exacerbated by the fall. In the circumstances, I would apportion liability at 70%:30% in favour of the plaintiff.

Quantum

17. The appellant challenged the quantum of general damages of Kshs 250,000/= as being too high. In the lower court the appellant proposed Kshs 150,000/= relying on **Isinya Roses Limited v Zakayo Nyongesa [2016] eKLR**. In that case, the court noted:

“The examination is clear that no fractures were involved except for tenderness of the volar right wrist joint.”

18. In the present case there was a fracture, and this distinction was properly noted by the trial magistrate. The plaintiff’s authority **Akamba Public Roads Services v Margaret Modani Musali [2012] eKLR** was also evaluated, and involved fracture of ulna and radius, degloving injuries. The award was for Kshs 600,000/= but the trial magistrate correctly took into account *“the nature and the extent of the injuries”* and made an award that showed she took a position that *“strikes a cord of fairness would be sufficient.”*

19. As pointed out in **Butler v Butler CA 49 of 1983**:

“An appellate court cannot interfere with an award on damages by a lower court unless it has shown:

(a) That the court acted on wrong principles;

(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters he ought not to have considered or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision.

20. I see nothing suggesting that the trial court award needs remedying for breach of any of the grounds set out in the **Butler** case above.

21. Ultimately, however, I hereby set aside the award on liability for the reasons earlier stated, and substitute it with an award of 70%:30% in favour of the Respondent. The award shall therefore be as follows:

General damages 250,000

Special damages 5,000

255,000

Less 30% 76,600

Total 178,500

22. Interest shall be at court rates. Costs in the lower court shall be for plaintiff. However, each party shall bear their own costs of appeal.

Administrative directions

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 8th Day of December, 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Langat for the Appellant
2. Ms Amboko for the Respondent
3. Court Clerk - Quinter Ogutu