REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 665 OF 2006

SOCFINAF COMPANY LIMITED.....APPELLANT

VERSUS

PAULINE NYAMBURA MATU.....RESPONDENT

(Being an appeal from the judgment of Honourable A. Lorot (Mr.) (Resident Magistrate) delivered on 12th September, 2006 in CMCC NO.386 OF 2004)

J U D G E M E N T

1. The respondent who was the plaintiff in Gatundu CMCC NO. 386 OF 2004 instituted a suit against the appellant by way of a plaint dated 31st January, 2004 seeking general and special damages in addition to costs and interest on the suit.

2. In her plaint, the respondent pleaded that she was at all material times under the employment of the appellant and that sometime on or about the 10th of June, 2003 while pruning coffee bushes in the ordinary course of her employment, she accidentally stepped into a hidden pit/hole, thereby sustaining grave injuries. The respondent blames the appellant for her injuries on the basis of a breach of its statutory duty of care owed to her.

3. Upon entering appearance, the appellant through its firm of advocates on record put in a statement of defence dated 1st July, 2004 fundamentally denying its employment relationship with the respondent as well as the particulars of negligence asserted in the plaint. To add on, the appellant pleaded that if at all the accident occurred as claimed, then the same was wholly or substantially the result of the respondent's negligence. In her rejoinder, the respondent put in a reply to defence.

4. At the trial of the suit, the respondent gave evidence and further called the doctor who had examined her to produce the medical report in support of the plaintiff's case. Two (2) witnesses equally testified for the defendant's case.

5. At the close thereof, parties filed written submissions on liability and quantum, following which the trial court rendered its decision in favour of the respondent as hereunder:

a) Liability-100%

b) Quantum:

(i) General damages Kshs.80,000/=

(ii) Special damages Kshs.7,000/=

Total Kshs.87,000/=

6. Being dissatisfied with the abovementioned decision, the appellant has now moved this court by way of an appeal. Its memorandum of appeal dated 4th October, 2006 stands on the 9 grounds set out hereinbelow:

(i) THAT the learned magistrate misdirected himself and erred in law and in fact by writing and delivering a judgment against the weight of evidence.

(ii) THAT the learned magistrate misdirected himself and erred in law and in fact by disregarding the truthful, cogent and reliable testimony of the appellant's witnesses and instead relied on the untruthful, contradictory testimony of the respondent's witnesses.

(iii) THAT the learned magistrate misdirected himself and erred in law and in fact by finding that the respondent was involved in an accident and was injured in the appellant's premises, therefore holding the appellant 100% liable in the face of credible and convincing evidence by the appellant's witnesses to the contrary.

(iv) THAT the learned magistrate misdirected himself and erred in law and in fact by failing to consider the appellant's submissions on record.

(v) THAT the learned magistrate erred in law and fact, misdirected himself or disregarded the ratio decidendi in HCCA NO. 152 OF 2003 (Statpack Industries v James Mbithi Munyao)-unreported; and HCCA NO. 15 OF 2003 (Wilson Nyanyu Musigisi v Sasini Tea & Coffee Limited)-unreported.

(vi) THAT the learned magistrate misdirected himself and erred in law and in fact by assessing and awarding unreasonable, excessive general damages at Kshs.80,000/= against the weight of evidence while there was no evidence or basis to support such an award.

(vii) THAT the learned magistrate erred in law and in fact by delivering a judgment wholly unsupported by evidence on record.

(viii) THAT the learned magistrate erred in law and in fact and misdirected himself on the ratio decidendi, or disregarded the trend in awarding damages as portrayed in HCCC NO. 4150 OF 1991 (Loise Nyambeki Oyugi v Omar Haji Hassan)-unreported and HCCC NO. 778 OF 1991 (Evanson Babu Njuru v Paul Nyamotenyi)-unreported.

(ix) The judgment by the trial court cannot be supported in law or fact.

7. As per the directions of this court, the appeal was to be canvassed through the filing of written submissions. I only have with me the appellant's submissions. Going by the record, it would appear the respondent did not participate in the proceedings. I do recall that when the appeal came up in court on various occasions previously, the appellant was ordered to ensure service upon such respondent. The appellant has since filed an affidavit of service indicating that service had been effected and I am satisfied that the service was proper.

8. In the premises, I have considered the appellant's submissions on record. I have also taken time to re-evaluate the evidence adduced before the trial court and study the impugned judgment.

9. I will address grounds (i) to (iv) of appeal together. The appellant submitted that the respondent was not injured at work on the material day, neither is there documentary evidence to prove that a report of the purported injuries was made. The appellant further submitted that whereas the respondent claimed to have been given 3-days' sick off, the evidence of DW1 confirms that she was at work during the time she claims to have been off duty, adding that the respondent was at all material times working in the suckers section and not pruning coffee as alleged.

10. It is also argued in the appellant's submissions that the company nurse, DW2, referred to her medical report construing that when the respondent visited her, she indicated that her injuries had been sustained while walking and that someone else later doctored the report to read that the injuries were sustained while the respondent was on duty along the coffee lines. Ultimately, the appellant contended that the learned trial magistrate had no basis for finding it 100% liable.

11. In her oral evidence at trial, the respondent who was PW2 testified that she had been assigned pruning duties at the appellant's Githumbuini Estate on the material day and it was while performing such duties that she accidentally fell into an unmarked hole, sustaining injuries to her right leg. The respondent stated that subsequently, she was sent to hospital by her supervisor (Leonard Kitheka) at which point she visited the appellant's dispensary where she received treatment and was discharged on 3-days' sick off. During cross examination, the respondent clarified that she was accompanied to the dispensary by a colleague named Cecilia Mwihaki, who was later sacked.

12. Douglas Mburu Ndirangu, being DW1, gave evidence that he was at all material times a field conductor at the appellant company, in charge of overseeing operations around the estate. It was the said witness' testimony that while the respondent was indeed on duty on the material day, records showed that she was similarly on duty in the days she claims to have been on sick off, though he confirmed during cross examination that he was not the maker of the records ascertaining the above fact and that none of the workers appended their signature against their names appearing on the said records. This witness went ahead to state that when an employee is injured, he or she is required to report to his or her immediate supervisor, who then refers the person to the dispensary.

13. The appellant also relied on the testimony of DW2, Nancy Gloria Ndole, who was at all material times a nurse at the appellant company. This particular witness acknowledged knowing the respondent and confirmed having treated her on the material day. The witness stated that the respondent came to the dispensary with a sprained right knee, which injury she claimed had occurred while walking. DW2 admitted to having prepared the medical report save to add that some additions were made therein by somebody else whose identity she was not aware.

14. Turning to the judgment, the learned trial magistrate noted that the respondent's supervisor was never called to rebut her testimony that she was injured on duty and that the testimony of the respective witnesses confirmed the respondent's employment with the appellant, while the evidence of DW2 confirmed the injuries sustained by the said respondent were as pleaded. In the end, the said magistrate found that the respondent had proved her case on a balance of probabilities.

15. For starters, I have studied the aforesaid judgment and found nothing to indicate that the appellant's evidence or submissions were in any way disregarded.

16. Further to the foregoing, it is uncontroverted that the respondent was truly the appellant's employee at all material times and that she

sustained the injuries pleaded. The issue has to do with whether or not the respondent proved that her injuries were sustained in the course of employment and as a result of breach on the part of the appellant, and consequently, whether the learned trial magistrate's finding on liability was reasonable.

17. DW1 testified that as per the records, the respondent was on duty on the material day. Later on, DW2 confirmed that she had treated the respondent for injury to her knee. To my mind, all evidence points to the possibility that the respondent was indeed injured in the course of her employment and which evidence was not sufficiently disproved by the appellant. In her evidence, the respondent further blamed the appellant for her injury, stating that no warning sign was placed to mark the hole and that employees should have been provided with gumboots to minimize the chances of slipping; this was equally not rebutted by either of the appellant's witnesses at trial by way of evidence to show that the necessary precautions were taken to ensure a safe work environment for employees with the aim of preventing or reducing accidents as much as possible.

18. In my reasoned view, the appellant's argument that the respondent worked at the suckers section and not the pruning section is not the issue here; the appellant brought forth no evidence to refute liability for the injury suffered by the respondent. In any event and as the learned trial magistrate correctly put it, the respondent's supervisor was never called by the appellant to controvert her evidence, thereby leading to the fair conclusion that the respondent had proved liability on a balance of probabilities.

19. I also noted the respondent's argument that she was given 3 days off duty following her injury. On the one hand, the record indicates that no evidence was tendered to support the claim of sick off. On the other hand, DW1 while producing work records indicating that the respondent was on duty at all material times, acknowledged that not only did the employees not sign against their names, but he was not the maker of the said records. In that case, there was no possible way of ascertaining whether the respondent was off duty or not.

20. That notwithstanding, I am persuaded the learned trial magistrate properly applied the evidence placed before him thus arriving at a reasonable finding on liability. The above grounds cannot stand.

21. I am now left to address the remaining grounds (v) to (ix) on quantum. To begin with, the appellant argued that given the nature of injuries sustained by the respondent in this instance, the award of Kshs.80,000/= was both unreasonable and excessive, urging this court to instead award the sum of Kshs.20,000/=.

22. Turning to the evidence adduced before the trial court, Dr. George Kungu Mwaura while confirming the nature of injuries as explained by DW2 stated in his evidence as PW1 that upon examining the respondent on 18th January, 2004 he noted her nature of injuries as a swollen, tender and painful right knee and categorized the same as soft tissue in nature with no permanent incapacity anticipated. A medical report was produced to that effect.

23. The respondent urged the trial court to award the sum of Kshs.150,000/= as general damages, citing *Douglas Totia v Kariuki Mbugua & Another (HCCC NO. 730 OF 1988) unreported* where Kshs.60,000/= was awarded to a plaintiff who had sustained a sprained right knee and abrasions on the right forearm, and *Auma Adhiambo v Kenya Cargo Handling Services Ltd (HCCC NO. 515 OF 1986) unreported* wherein the court awarded Kshs.50,000/= as general damages for a twisted right knee joint injury.

24. On its part, the appellant proposed an award of Kshs.20,000/=, relying on *Loise Nyambeki Oyugi v Omar Haji Hassan (HCCC NO. 4150 OF 1991) unreported* and *Evanson Babu Njuru v Paul Nyamotenyi (HCCC NO. 778 OF 1991) unreported* where similar awards were made for multiple soft tissue injuries.

25. In the end, the trial court proceeded to award the sum of Kshs.80,000/= as appropriate general damages.

26. From the foregoing, it is clear the injuries suffered by the respondent were fairly minor in nature. I have re-considered the authorities cited by the respective parties and find relevance in those relied upon by the appellant albeit the same were decided years ago. I have equally drawn reference from ***Socfinaf Company Limited v Samuel Kariuki Kihiu [2015] eKLR*** where the court upheld an award of Kshs.55,000/= for comparable injuries.

27. In the premises, I am of the reasoned view that the award of Kshs.80,000/= was on the higher side and I am therefore bound to interfere with the same. To my mind, an award of Kshs.50,000/= would suffice.

28. The upshot is that the appeal succeeds on quantum. Consequently, the award of Kshs.80,000/= is hereby set aside and substituted with an award of Kshs.50,000/=. Each party shall bear its own costs.

Dated, signed and delivered at **NAIROBI** this **11TH** day of **JULY**, **2019**.

……..

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent