REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 573 OF 2012

AAA GROWERS LIMITED.....APPELLANT

VERSUS

DAVID MWIHIA NG'ANG'A.....RESPONDENT

(Appeal from the original judgment and decree of Hon. Cecilia Githinji (MS)

delivered on 10th October, 2012 in Kandara CMCC No. 40 of 2010)

JUDGEMENT

1 The Appellant, AAA Growers Limited, was sued by the Respondent David Mwihia Ng'ang'a on account of injuries that the Respondent claimed to have sustained while in the employment of the Appellant. According to the plaint filed by the Respondent which is dated 24th February, 2010, he pleaded that while he was on duty at his place of work on 1st March, 2008 he got injured by a sliding door and sustained serious injuries. The Respondent blamed the Appellant for the said accident because, according to him, the Appellant had failed to provide him with a safe working environment, provision of poor working tools and failure to warn him of the dangers in time among other particulars of negligence stated in the Plaint. As a result, the Respondent averred that he suffered an injury to his right middle finger. The Respondent prayed for general damages for the injuries that he sustained and special damages of Kshs. 3,000.

2 The Appellant filed a defence dated 27th January, 2012. In the said defence, it denied the claim in totality and the particulars of negligence. In the alternative, it averred that such occurrence was caused solely by the negligence of the Respondent, the particulars whereof includes failure to use protective apparel provided by the Defendant and ignoring the Defendant's rules and regulations at work.

3. After hearing the case, the trial court found the Appellant 100% liable for the said accident and awarded the Respondent Kshs. 80,000 in general damages and Kshs. 3,000 in special damages.

4. The Appellant being aggrieved by the said decision filed an appeal to this court on the grounds that;

(a) The Learned Magistrate erred in fact and in law, and misdirected herself in holding that the Plaintiff had proved his case against the Defendant on a balance of probability.

(b) The Learned Magistrate erred in law and in fact and misdirected herself in holding that the Defendant was liable to the extent of 100% without any evidence.

(c) The Learned Magistrate erred in law and in fact in not considering the evidence tendered on behalf of the defendant

(d) The Learned Magistrate erred in law and in fact in finding that the Plaintiff was injured at work despite there being evidence from the Defendant that the Plaintiff was not at work on the date of the alleged incident.

(e) The learned magistrate erred in law and in fact in making a decision based on the wrong principles of law.

(f) The Learned Magistrate erred in law and in fact in awarding excessive damages; and

(g) The Learned Magistrate erred in law and in fact in failing to consider and address the entire issues raised in the defendant's defence and submissions.

5. During the hearing of the case before the trial magistrate, only the Respondent testified in support of his case. The Respondent testified as **PW1** and told the Court that on 29th February, 2008 he reported for a night shift at 8.00 pm. That on that night he had been assigned cleaning work. He testified that on the morning of 1st March, 2008 at 6 am, while scrubbing the floor, someone pushed the door to the cold room which was a sliding door and he fell down as the door slid. He tried to protect himself from being hit on the head but his fingers were pressed on the door. He stated that he reported the accident to one Mr. Jite who was a supervisor and he took him to see the nurse but unfortunately the nurse had not arrived. He went to the security desk but he could not get assistance. It is at that point, according to his testimony, that he called his mother and by the time she arrived, he had bled profusely to the point of being unconscious. He was taken to Thika medical hospital where he was treated. He produced a medical report by Dr. Karanja dated 22nd February, 2012 which shows that he sustained a cut wound on the right middle finger. He also produced a letter from the Appellant confirming that he was injured by a door at the work place which letter he testified, was signed by one Mr. Jite, a supervisor, whose employment number was 270.

6. The Appellant called two witnesses. The Appellant's payroll master **METHANITE NOTI MNYIKE** testified as **DWI**. He stated that he kept records for the Appellant and that the Plaintiff was an employee of the Appellant for the period from 18th February, 2008 to 29th February, 2008. He told the court that the Respondent was not at work on 1st March, 2008 and produced copy of master roll and that according to the payroll, the Respondent's payroll no. was 756. He further testified that the letter confirming the Respondent's injuries did not originate from the Appellant and from his payroll experience, the said Mr. Jite did not work with them. On cross-examination he acknowledged that the letterhead and the stamp are theirs but stated that the signature is not their specimen.

7. The second witness was **STEPHEN CHEGE NDERU** (**DW2**) the farm manager at Hippo farm-AAA Growers where the Respondent used to work. He testified that he is not personally known to him but according to records, he was not injured at work and that the said Mr. Jite did not work with them. On cross examination, he testified that he started working with Hippo farm in October 2008 and that on 1st March, 2008 he was not working with the farm. He confirmed that the Respondent was at work on 29th February, 2008 having reported to work that night at 8.00 pm. Though he stated that he had not heard of Mr. Jite, on being referred to D exhibit 2 at page 6, he confirmed that there was a person by that name whom, he testified, was an employee of AAA Growers.

8. This is a first appeal. As was stated by S**ir Clement Lestang V.P. in Selle –vs- Associated Motor Boat Co. Ltd [1968] E.A. 123** at page 126 para G

> "*An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demenour of a witness is inconsistent with the evidence in the case generally."*

9. In the instant appeal, the evidence adduced before the trial magistrate by the Respondent was that he reported to work on 29th February, 2008 at 8 pm for a night shift and was injured while working on the morning of 1st March, 2008 at 6 am. The examination card dated 1st March 2008 from Thika District Hospital confirms that the Respondent was treated on that day which treatment included stitching and dressing. There is on record a medical report by Dr. Karanja confirming the injuries. The Respondent also produced before the lower court a letter from the Appellant on its letterhead stating that he was injured by the door of pack House on the right hand middle finger when he was working. The letter is stamped with the official stamp of the Appellant and it is signed.

10. It was the Appellant's case that the Respondent did not suffer the injuries whilst at work and that he did not work with the company on 1st March 2008 since he did not sign on the master roll for that day. The Appellant also denied that Mr. Jite worked with them. They also denied the letter confirming the injuries even though DW2 confirmed that the letter head was theirs as well as the stamp.

11. In this Appeal, the Appellant filed and served the respondent with its submissions but the respondent did not file any.

12. I have re-evaluated the evidence on record. The two main issues for determination are whether the Respondent established his case on a balance of probability. The other issue is whether the trial magistrate had applied the correct principles in awarding general damages to the Respondent. A number of issues have been disputed by the Appellant. To start with, it was alleged that the Respondent was not at work on 1st March, 2008. I have examined the attendance sheet marked as D Exhibit 1 which shows that the Respondent reported on duty on 29th February, 2008 at 8.00 pm for the night shift. My finding on this is that if the Respondent reported for a night shift, then it goes without saying that he was on duty for the night running from 8 pm on 29th February, 2008 to the morning of 1st March, 2008. The accident occurred at 6 am on 1st day of March, 2008. He testified that he did not sign the master roll on 1st March 2008 when he left work. It is my finding that the Respondent worked on 1st March, 2008 when the alleged accident occurred.

13. The Appellant has also disputed that the said accident occurred at their premises but as the court has observed hereinabove, on 1st March, 2008 the Respondent was at work, the examination card from Thika District Hospital is evident that the Respondent was injured 1st March, 2008. It therefore follows that since the Respondent was on duty on 1st March, 2008 and that it is evident from the medical examination card that he was treated on the same day, he was injured at his work place. There is also the letter dated 1st March, 2008 from the Appellant confirming that the Respondent was injured by a door while at work. The Appellant's DW2 admitted that the letterhead and the official stamp are theirs but disputed the signature. He testified that the said Mr. Jite was not their employee but later on when referred to D exhibit 2, the payroll, he admitted that the name was there and therefore he was an employee of the Appellant. To that extent, the contention by the Respondent that the said letter emanated from Mr. Jite then holds water. Mr. jite did not testify in court to deny having signed the letter. Being the alleged maker of the letter, then it would have been prudent for the appellant to call him as a witness to deny that allegation. The fact that he was not called to testify led to the inference that his evidence would have been adverse to the Appellant's case.

14. The other issue which the court has to consider is whether the Respondent succeeded in proving negligence against Appellant. I have looked at the particulars of negligence set out in paragraph 6 of the plaint and I have considered the same together with the evidence adduced by the Respondent. I am alive to the fact that the standard of proof in Civil Cases is on a balance of probability. In his evidence, he testified that he was on the night shift while cleaning and as he finished, the door to the cold room was pushed and as he tried to protect himself from being hit on the head, his fingers were pressed on the door. He stated that he blamed the company because they did not give him first aid and that there was no warning that the door was being pushed. He admitted that he had been provided with protective gear but it was worn out. It is, however, not clear from the evidence on record, the protective gear that he had been provided with and whether the state it was in, could have contributed to the accident. In my considered view, the fact that there was no warning before the door was pushed in itself could not amount to negligence on the part of the Appellant. The Respondent ought to have foreseen that another employee could open the door anytime and hence take precaution while he was engaged in his work. It is a foreseeable consequence that when a door is not locked, there is a possibility that anyone can open it without any warning and especially in a work place. My view finds support in the case of **Mwanyule Vs said t/a Jomvu Total Service Station (2004) 1 eKLR 47** where the Court of Appeal stated; ***"The employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against the risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution."***

15. The other particulars of negligence though pleaded were not proven. For the above reasons, I find that the Respondent did not proof negligence against the Appellant and in entering judgment on liability at 100% against the Appellant, the Learned Magistrate made on error.

16. On quantum of damages, it is trite law that this court can only interfere with the assessment of damages by the trial court if the assessment was either excessively high or excessively low putting into consideration the injuries sustained by the Respondent. The Respondent suffered a cut wound on his right middle finger, the x ray done revealed no fracture and he was put on medication and healed after two weeks. The trial court awarded Kshs. 80,000 in general damages which award, I find, was not excessive in the circumstances. In the case of **Kennedy Mutinda Nzoka v Basco Product (Kenya) Limited [2013] eKLR** where the Claimant sustained serious injuries to his index finger, the court awarded Kshs. 210,000/= in general damages. In **Oluoch Eric Gogo v Universal Corporation Limited [2015] eKLR** the plaintiff sustained a crushed injury to the left thumb with fracture of mid phalanx and was awarded Kshs. 200,000 in general damages. Comparatively, the injuries in these case were more severe than the ones in this appeal I find that the learned magistrate award of Ksh.80,000/= was reasonable. The special damages of Kshs. 3,000/= were pleaded and proven. Had the court dismissed the Appeal, I would have confirmed the award on both special and general damages.

17. In the end, I find the Appeal has merits and I allow the same with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 10th Day of May, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*