



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL APPEAL NUMBER 118 OF 2010

BIGOT FLOWERS (K) LIMITED.....APPELLANT

VERSUS

DAVID NYONGESA OKIYA.....RESPONDENT

*(Being an Appeal from the Judgment/Decree of Hon.N. Njagi, Senior Principal Magistrate,
Naivasha delivered on 22nd April, 2010 in Naivasha PMCC No. 404 of 2007)*

JUDGMENT

1. The appeal before me is against both liability and *quantum* of damages as determined by the trial court on the 22nd April 2010. The court found the appellant 85% liable in negligence and awarded Kshs.120,000/= to the respondent for injuries he sustained in the industrial accident.

2. It is the appellants grounds of appeal that the trial court's judgment was based on insufficient evidence, and that the respondent failed to prove his case on the required standards and shifted the burden of proof on the appellant contrary to the law.

It is his further statement that failure by the respondent to produce the initial treatment notes was fatal to his claim and therefore the trial court erred finding the appellant liable in damages. It is sought that the trial court's judgment be set aside.

3. This is the first appellate court. It is by law mandated to re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions. It is however not bound to agree with the trial court's findings on fact. It is to interrogate the evidence and find out whether the conclusions reached by the trial court are based on the evidence adduced and if such conclusion is based on no evidence adduced or the trial court took into account an irrelevant factor or omitted a relevant one, then, the court will make its own independent findings and conclusions. See **Selle -vs- Associated Motor Boat Co Ltd (1968)EA 123**.

4. The Respondent's evidence before the trial court was brief. He testified that on the 2nd February 2006 he was spraying flowers at the appellants farm when he slipped and fell because the surface was wet and his gumboots were worn out, and upon falling on the spray the pesticide sprayed onto his eyes. He was given first aid and sent to Dr. Odhiambo, the company doctor, and thereafter recorded a statement on the incident. He further testified that after eight hours his eyes started itching and he went to the Naivasha District hospital for treatment. The treatment card was produced as Exhibit by the clinical officer of the Naivasha District Hospital, but it did not have an out patient number.

5. Dr. Kiamba prepared a medical report with reference to the treatment card on his injury as well as Dr. Malik. It was his testimony that the appellant company was to blame as the face shield had no string to tie under the chin hence it came off when he fell and that the gumboots provided were old and worn. In cross examination, he stated that he had requested for fresh stock but was not given. He further stated that his name did not appear in the accident register and that he was not the one who was to record the incident in the register, but by the personnel office.

6. The Appellant's case was put forth by DW1, George Otieno the Human Resource Manager. He confirmed that the respondent was its employee but no injury was recorded on the material day the 2nd April 2006, that as no record of injury was recorded, the respondent was not injured. The accident register was produced as Exhibit. He termed the claim as false.

On cross examination, he stated that he was not in the employment of the appellant at date of injury and had no records from the company Doctor Odhiambo on the injury.

7. A health records officer from Naivasha District Hospital, one Benson Karera testified as DW2. He told the court that as the person incharge of registration of in-patient and court that and the person in charge of registration of in-patients and out-patients at the hospital, he had no records for the 7th October 2006 for the respondent and therefore concluded that he was not treated at the facility. Shown the treatment card, he stated as it had no outpatient number, that meant the Respondent was not treated at the hospital. He however confirmed that the treatment card was issued from the hospital, and even agreed that he had seen cards without out-patient numbers. He agreed that the respondent was seen in the hospital and that the entries in the card were correct and accurate.

8. I have considered the Judgment of the trial court as well as the parties written submissions before the trial court. There is no doubt that the trial court analysed the evidence as tendered as well as the submissions and made findings that the respondent was injured, that the treatment card was issued form the Naivasha District hospital and in his discretion apportioned liability at 85% against the appellant and awarded Kshs.120,000/= damages for pain and suffering to the Respondent being guided by authorities tendered by both parties.

9. The issues that arise from the above, and as stated by the appellant are three fold.

(1) *Whether the trial court erred in finding that the respondent had proved his case on a balance of probability.*

(2) *Whether the Respondent proved negligence on the appellant.*

(3) *whether the trial Magistrate erred in his assessment of damages awardable to the Respondent.*

10. From the evidence on record, this court is satisfied that the respondent upon being injured reported the incident to the company first aider who administered first aid to him. It was not his duty to enter the injury in the accidents register. The appellants Human Resource Manager was not in the employment of the appellant when the accident occurred. His evidence that no injury occurred on the material date cannot be taken seriously. Other than a general comment that since the injury register did not have the respondent's name, he did not offer any challenge to the respondent's evidence at all. To that extent it is uncontroverted. The makers of the appellant's document were not called to produce the said documents. See **Sokoro Saw Mills Ltd -vs- Grace Nduta Ndung'u HCA 99 of 2003 – Nakuru** where the Judge held that evidence of a master roll or register of an accident book and documents prepared by the appellant without the respondent's input cannot be considered to represent factual evidence in the face of evidence adduced by the respondent.

11. Evidence adduced by the appellant's DW2 – the health records officer of Naivasha District

Hospital buttressed the respondent's case that he was treated at the Naivasha District Hospital and was issued with the treatment card. He told the court that the treatment card was correct and accurate. The court finds that the treatment card through without an outpatient number was indeed genuine. It was not the duty of the respondent while seeking treatment to order the hospital officials to give the card a number. Failure by the hospital staff to give the card an outpatient number cannot be visited upon the respondent.

12. It is trite that the respondent had a duty to prove his allegations as contained in his statement of claim to the required standard, upon a balance of probability. See **Mutuku -vs- Kenya Cargo Handling Services Ltd (1991) e KLR**.

The Respondent had the requisite protective apparel – old and worn out gumboots and a face shield that was not proper. This piece of evidence was not controverted at all.

In the case **Otieno Nalwoyo -vs Mumias Sugar Company Limited (2014) e KLR**, it was held:

“the duty of an employer to provide the servants with a safe place of work is not merely to warn against unusual dangers known to them--- the master is under a duty to make his servants to take reasonable care to avoid harm---.”

Section 74 of the Employment Act too places such duty on an employer.

See also **Port Services Limited -vs- Benson Nyaga Njue (2014) e KLR**.

13. I am in agreement with the holding of the Honourable Justice **Kimaru in Timsales Ltd -vs- Willy Nganga Wanjohi, Nakuru HCCA No. 230 of 2004** that:

---when a party pleads negligence he has to prove the causal link between the injury and the duty of care placed upon the employer in negligence where an employee is undertaking manual work as is the case hereof, he is to take reasonable care of his own safety as the employer is not expected to babysit or supervise such manual tasks that need no supervision.”

14. The respondent in this present case needed no supervision. He knew the surface of the farm was wet. He knew that the gumboots he was wearing were worn out and therefore ought to have exercised more care when walking on the wet farm. He also knew that the face shield could not be properly tied to the chin. There is no indication on record that the appellant failed to replace those old items.

15. For those reasons, it is my finding that the Respondent's share of blame and liability ought to be more than the 15% found by the trial magistrate.

I will set aside the apportionment of liability by the trial court and substitute it with a finding that the appellant is 50% to blame for negligence by not providing adequate protective gear to the respondent and 50% on the respondent for not taking sufficient care for his own safety.

16. On the third issue on the *quantum* of damages. The court having found that the respondent was injured, and the treatment card and notes issued from the Naivasha District Hospital were correct and accurate as stated by the health records officer of the hospital, then, that ground of appeal fails.

Dr. Kiamba prepared a medical report on the respondents injuries.

17. The injuries as stated were injuries to the eyes due to chemical spray. No mention was made of burns on the face. The appellant submits that a sum of Kshs.40,000/= was more appropriate and

relied on several authorities, not on injury to the eyes but on soft tissue injuries generally.

18. In the case **Kemfro Africa Ltd t/a Meru Express & Another -vs- A.M. Lubia & Another (1982-88) KAR**, it was held that the courts will be very slow to interfere with a trial court's discretion in the assessment of damages unless it is evident that the said damages are either too low or too high as to represent a wholly erroneous estimate of the damages. I have considered authorities tendered before this court and the trial court. It is evident that the respondent's injuries were minor, of soft tissue nature, but to the eyes without any burns to the face.

19. An award of damages ought to be with a measure of uniformity to precedents. The trial court's award was given on the 22nd April 2010. It is now six years since. Inflation has taken a toll on the Kenyan economy too has to be considered. Taking all circumstances into consideration, I find the award of Kshs.120,000/= by the trial court as being on the higher side. I shall reduce the said award to a reasonable sum of Kshs.70,000/= that will be subjected to a 50% reduction.

In reaching the above decision, I have had regard to the cases **African Highlands Produce Co. Ltd -vs- Francis Mososi HCCC No. 22 of 2003** where the court on appeal substituted an award of Kshs.100,000/= with Kshs.40,000/=. In **Sokoro Saw Mills Ltd -vs- Grace Nduta Ndungu NKU Hccc No 99 of 2003**, the court awarded Kshs.30,000/= for soft tissue injuries.

20. The upshot is that the appeal succeeds. The trial court judgment is set aside and substituted with liability being shared equally between the appellant and the Respondent. The award of damages of Kshs.120,000/= is substituted with an award of Kshs.70,000/= subject to 50% reduction, thus Kshs.35,000/=.

Each party shall bear its costs of the appeal.

Dated, signed and delivered in open court this 12th day of May 2016

JANET MULWA

JUDGE