REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 59 OF 2010

BUDS AND BLOOM LTD.....APPELLANT

VERSUS

LAWRENCE EMUSUGUT OBWA.....RESPONDENT

(Being Appeal from the Judgment/decree of Hon. W. Kagendo, Senior Resident Magistrate

Nakuru, delivered on 5th March 2010 in Nakuru CMCC No.59'A' of 2006)

JUDGMENT

1. The appeal before me is against both liability and *quantum* as determined by the trial court in its judgment delivered on the the 5th March 2010.

The appellant in his Memorandum of Appeal states that the trial magistrate misdirected himself and failed to analyse the evidence on record to find the appellant 70% liable. It further faults the trial court in its assessment of damages when the Respondent failed to produce treatment notes and proceeded to award damages that is excessive in the circumstances.

It is urged that this court do set aside the said judgment and order the case to start a fresh to allow parties to ventilate their respective cases without hindrance and or restriction.

2. The Respondent's case before the trial court was that he was an employee of the appellant from1995 and was dismissed in June 2003. That on the 10th February 2003 he was working as a security supervisor and that in the evening while handing over and showing the incoming security officer what had gone on in the green house and using a torch, and while in the company of his colleagues, William and Wanjala and another officer was pricked by a nail on his foot that was left unattended in the green house and could not be seen using the torch light.

It was his testimony that he had not been provided with protective gum boots. He went to St.Peter's Clinic, Nakuru where he was treated on the same day and Wanjala with whom he was and witnessed the accident said he would report and book in the accidents register.

He produced the treatment card that was marked for identification. He Also Produced His Appointment Letter Dated 1st November 2005 and Letter of Employment dated dated 6th June 2003 as exhibits.

Being shown a letter dated 26th November 2001 and marked DMFI, a letter of termination, he admitted

that he was given the letter but clarified that it was a termination letter but he was to be reinstated if he improved in his work, which he did and was reinstated to work. He blamed the appellant for exposing him to an unsafe working environment and sought compensation for the injuries. Dr. Omuyoma produced a medical report on the respondents injuries. He stated that he relied on the treatment card from St. Peters Clinic two years before.

3. The appellant's case was urged by one Joseph Omari Apondi, the transport and security officer. He confirmed that the Respondent was one of the security guards and that his employment was terminated in 2001. He referred to Letters of Appointment, in 1995, confirmation letter dated 7th August 2006 and termination letter dated 26th November 2006. He told the court that the letter referred to verbal warnings to improve work, and another termination notice that he says could be withdrawn if he improves, but further states that the respondent did not improve so he was terminated on the 24th December, 2001. All were produced as DMF 1, 2, 3 and 4. On plaintiff Exh6 – Certificate of Employment, he stated that it was not signed by the Defendant and he reported to the police that it was a forgery. He further stated that no accident was reported to him as he had the injury and accidents register. He did not produce the payroll but stated that did not have the respondent's name.

On cross examination, this witness said the letter of termination was both a termination and notice and that no other letter was written. He said the letter was forged. He did not produce the payroll for 2003, the termination letter and labour letters that he had.

4. Upon analysis of the evidence tendered before him and submissions by both counsel, the trial court made a finding that the respondent was an employee of the appellant at the date of the accident and that he was injured and upon considering the circumstances, apportioned liability at 70% against the appellant with contributory negligence of 30% by the Respondent.

5. On the matter of treatment notes, the trial court made a finding that the respondent had been treated at the St. Peters Clinic which treatment card Dr. Omuyoma referred to in preparation of the medical report that he produced to court as an exhibit.

Referring to two cases **Nakuru HCCA No. 208 of 2004 and HCCC No. 148 of 2008,** Justice D.K . Maraga, J (as he then was) stated that as the Doctor had referred to treatment notes produced in court, then the injury was satisfactorily proved. He awarded general damages in the sum of Kshs.70,000/= for pain and suffering for soft tissue injury.

6. This court shall re-evaluate the evidence tendered before the trial court and come up with its own findings and conclusions as mandated.

See **Selle -vs- Associated Motor Boat Co. (1968) E.A 123.**

The court will however not re-examine findings of fact in order to determine whether the conclusion reached on the evidence should stand, taking into account that the trial court had the benefit of hearing and seeing the witnesses testify, unless such findings are based on no evidence or it is shown that the court acted on wrong principles in reaching the findings.

See See **Mwanasokoni -vs- KBS(1982) 1 KAR 278 and also Empantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88)1 KAR 278.**

The issues that arise from the evidence above are:

1. ***Whether the Respondent proved his case against the appellant to the required standards, on a balance of probability.***

2. ***Whether the trial court erred in the assessment of damages awardable to the respondent.***

7. The appellant in its written submissions reiterates that the respondent was not on employment of the

appellant on the 10th February 2003 the date of the accident, as he had been dismissed on the 26th November 2001.

I have looked at the letter dated 26th November 2001, its defence witness Joseph Omari referred to the same. He told the court that it talked of verbal warnings to the respondent to improve his work and according to him, the termination notice was on 24th December 2001.

He further clarified that the letter could be withdraw if the respondent improved. He even confirmed that the respondent asked to be reinstated. It is upon the above that the Respondent testified that he was reinstated and was working on the date of injury. The appellants witness failed to produce the injury book and accident register. The pay roll was also not produced. The appellant faults the trial on court this omission. The proceedings are clear as to why the trial court objected to the production of the said documents. They had not been shown to the Respondent earlier, and their production could have been an ambush.

In any event, the information contained in the accident Register is unilaterally filled. The respondent had no input in it. It cannot be relied upon by a court to come to an informed decision on whether or not the respondent had been injured. It was the respondents testimony that he was with one other supervisor, a Mr. Wanjala who undertook to report and book the accident in the register.

In **NKU HCCA No. 16 of 2005 - Flamingo Bottlers Ltd -vs- Tobias Wanga Yenga where** J. Kimaru held the same opinion that an accident register, a document filled by an appellant without the Respondent's input cannot be relied upon.

The court has also noted that the appellants exhibits produced in the trial court, and in particular DExh I – the letter of termination dated 26th November 2001 is not placed in the Record of Appeal and others save for DExh No. 6. The court has perused the proceedings. There is no indication that such letter was ever produced as an exhibit. It is not in the proceedings.

8. The trial court in coming to the conclusion that the respondent was an employee at the date of the injury considered the pleadings that bind a party. The appellant had denied that the respondent was its employee yet its witness confirmed that indeed he was. It also considered that the appellant failed to produce to the respondent relevant documents before the hearing and concluded that the appellants evidence was untruthful and not credible. My analysis of the said evidence brings me to the same conclusion. The Respondent was indeed an employee of the applicant at the date of the injury, and that he was injured while in the course of his duties at the appellants farm.

9. In the case **Amalgamated Saw Mills Ltd -vs- Stephen Murutinguri HCCC No. 75 of 2005,** the following observations were made:

"Revising the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a casual link between someone's negligence and the injury. The plaintiff must adduce evidence from which, on a balance of probability a connection between the two may be drawn----"

The respondent testified that he blamed the appellant for not providing him with gum boots, and that the light of the torch he was using was not enough for him to see the plank with the offensive nail that pricked his foot.

Thus, the environment was not safe, and exposed the respondent to harm.

In **Otieno Nalwoyo -vs- Mumias Sugar Co. Ltd (2014) e KLR** it was held that:

> ***"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 Ltd -vs- Benson Nyaga Njue (2014) e KLR** where such duty of care was placed upon the employer.

10. The respondent's evidence on the causation of the injury was not challenged. The appellant had not provided any protective gum boots to the respondent who was expected to walk at night in the farm green house in deem torch light. That environment cannot, by any standards, be termed to be a safe environment at the place of work. Proper light and gumboots would no doubt shield the respondent from the injury as he would have been able to see the path he was walking on, and avoid stepping on the nails and if he did, gumboots would have minimised the injury.

11. This court finds that the appellant was negligent and exposed the respondent to an unsafe environment. The nexus between the injury and the appellants negligence were proved on a balance of probability.

I fully agree with the appellants submission that it was upon the respondent to prove one of the forms of negligence against the employer – See **Kiema Mutuku -vs- Kenya Cargo Hauliers Services Ltd (1991) e KLR.** The circumstances of the present appeal are distinguishable from these obtaining in the case of **Wilson Nyanju Musigisi -VS- Sasini Tea & Coffee Ltd. HCCA No. 15 of 2003** where the Judge dismissed the suit as the appellant was undertaking manual work, which required no supervision.

That issue of liability having been settled in favour of the respondent, I now proceed to address the issue of the treatment notes.

12. The respondent testified that as it was in the evening when he was injured he sought treatment at St Peter's Clinic at Free Area, Nakuru. The treatment Card was produced, but marked for identification. The court had the advantage of looking at it. Indeed Dr. Omuyoma in the preparation of the medical report referred to the said card abeit two years after the accident. It was not clear why the respondent could not produce the treatment card as exhibit as it was his property, not for the clinic. There was no basis upon which it was marked for identification. I hold the view that the respondent was the right person to produce the treatment card. Many decisions differ on this aspect.

> In **Timsales Ltd- vs- Moss Muru NKU HCCA No. 208 of 2004 and HCCA No. 148 of 2005 - Timsales Ltd -vs- Stanley Njihia Macharia,** in both cased J. Maraga, (as he then was) observed:
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> ***"failure to produce a treatment card however does not always lead to the dismissal of the injury claims where a doctor who examines him several days or months later makes reference to the treatment card, unless otherwise proved, that should suffice and the non production of the card is not fatal."***

Unlike in cases where no treatment notes are produced, the respondent did produce the treatment card though marked for identification. Both the appellant and the court had the advantage of looking at it. This court is satisfied that the respondent was injured, and the treatment card represented the nature of injuries sustained and which were reproduced in Dr. Omuyoma's report.

13. The injuries sustained were of soft tissue nature. A deep cut wound on the left leg, and soft tissue injuries on the leg. The injury had healed at the date of examinations on the 17th July 2005 save occasioned pain on the leg. This court finds the trial court of Kshs. 70,000/= inordinately high. Relying on several authorities, the appellants suggested a sum of Kshs.30,000/=. The respondent proposed Kshs.150,000/= relying on the case **Manji -vs- Gatheche HCCC No. 457 of 1991** where the plaintiff had sustained uncomplicated fracture.

In **African Highlands Produce Co. Ltd -vs- Francis Mososi and HCCA No. 22 of 2003**, the court substituted an award of Kshs. 100,000/= with Kshs.40,000/= on an appeal for soft tissue injuries in 2005.

Likewise, in **Sokoro Saw Mills -vs- Grace Nduta Ndung'u NKR HCCC No. 99 of 2003**, the court awarded Kshs.30,000/= for close to injures sustained by the respondent herein.

As stated above, the amount of Kshs.70,000/= awarded by the trial court was based on no comparable decisions. Although assessment of damages is at the discretion of the court, that discretion must be exercised cautiously.

This court will therefore set aside the said award of general damages and substitute it with an award of Kshs.50,000/= as more reasonable award. The said sum shall be subjected to the 10% contributory negligence as found by the trial court, and which the court has upheld.

Consequently, the appeal succeeds partially as follows:

1. The trial court's finding on liability at 90% against the appellant and 10% against the Respondent is upheld.

2. The award of generals damages of Kshs.70,000/= is set aside and is substituted with Kshs.50,000/=, less 10% thus Kshs.45,000/=.

3. Each party shall bear its own costs of the appeal.

Dated, signed and delivered in open court this 5th day of May 2016

JANET MULWA

JUDGE