REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 120 OF 2013

THERESIA MUKHAYI INJI.....APPELLANT

VERSUS

SOLO PLANT (K) LIMITED.....RESPONDENT

(Appeal from the original judgment and decree of Hon. A.W. Mwangi (Ag SRM) in the Senior Principal Magistrate Court at Kikuyu, Civil case No. 305 of 2009, delivered on 1st February, 2013)

JUDGEMENT

1. The Appellant **Theresiah Mukhyai Inji,** sued**, Solo Plant (K) Ltd**, seeking, for workman's compensation following injuries she suffered on 17th July, 2007. The Appellant claimed that when she was undertaking duties assigned to her by her employer, the Respondent, which, included washing of trays for planting flowers and placing them in the trolley, the trays tumbled down striking the plaintiff on the hand. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. She attributed the accident to the negligence of the Respondent. The Respondent denied the Appellant's claim by filing a defence. The dispute was heard by the trial magistrate who dismissed the claim on the basis that the Appellant had not proved negligence on the part of the Respondent.
2. On appeal, the Appellant put forward the following grounds of appeal:

i. ***The learned magistrate erred in fact and in law in finding that the Appellant did not adduce any evidence to prove her case on a balance of probability.***
ii. ***The learned magistrate erred in fact and in law in failing to consider and attach any weight to the Appellant's evidence.***
iii. ***The learned magistrate erred in fact and in law in failing to consider the Appellant's submissions in respect of liability in total disregard to applicable principles of law.***
iv. ***The learned magistrate erred in fact and in law in misapprehending the appellants testimony as regards culpability of the respondent despite the evidence on record.***
v. ***The learned magistrate misapprehended the evidence in material respect and arrived at a finding on quantum of damages if liability was proved that was inordinately low.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424,** it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact,

of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

4. The learned counsels appearing in the matter have filed their respective written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions plus the authorities cited. Though the Appellant put forward a total of five (5) grounds of appeal those grounds may be summarised to two main grounds namely:

   First, that the learned Senior Principal Magistrate erred when she ruled that the Appellant had not proved her case as per the evidence adduced in court.

   Secondly, that the learned Senior Principal Magistrate erred when she found that had the liability been proved then the quantum would have been kshs 70,000/= that is inordinately low.

5. On the first ground as to whether the Appellant adduced evidence to attach liability to the Respondent, it is the submissions of the Appellant that the learned Senior Principal Magistrate erred in holding that the Respondent was not liable for the injuries suffered by the Appellant yet she was injured by a trolley which had trays which trolley was negligently being pushed by other employees who were packing trays. She claims that the Respondent ought to have been held liable for its failure to offer a safe system of work and adequate supervision to permit negligent employees from jeopardising the safety of the Appellant as she conformed with her normal duties of washing the trolleys. She added that the trial court misdirected itself in concluding that she was injured by the trays that she was washing contrary to the evidence adduced in court that she was injured by a trolley being pushed by other employees which trolley contained some trays as such her misfortune was not of her own making. The Appellant further argued that she had not in any way contributed to the negligence since the Respondent was required to secure her place of work as she performed her duties.
6. The Respondent on the other hand submitted that the Appellant did not link the Respondent to any negligence and that she was not clear on how the accident occurred since she painted two scenarios by claiming that she was hit by a trolley which had trays and that as she worked trays in a trolley fell on her causing the alleged injuries. On cross examination, she stated that she was hit by a trolley which had trays. The Respondent also argued that the work undertaken by the Appellant was a manual task which did not require skill and as such she was in total control of the work she was doing, which work she performed poorly. I have carefully considered the material placed before me. I note that the Appellant in her plaint claimed that;

   "...the plaintiff had in the course of her employment with the defendant being assigned the duties of washing trays for planting flowers and placing them in a trolley when they tumbled down striking her the hand..."

7. On examination in chief, the Appellant claimed that trays in a trolley fell on her as she worked. She also stated that she blamed the company for exposing her to danger by employing negligent employees who if they had been careful, they would have prevented the trolley from coming to her. She also categorically stated that she was hurt by the trays. Conversely, in her cross examination she claimed that she was hit by a trolley which had trays which trolley she claimed, was being pushed by those people who were packing the trays. She also claimed that she was hit from behind. The evidence by the Appellant is unclear. It is not in contention that she was injured, however it is unclear how the accident happened for purposes of establishing whether the Respondent should be held liable. The Respondent called DW1, **Stella Munyao** who testified that she was the Appellants supervisor when the accident allegedly occurred. She claimed that the Appellant on the material day was tasked together with other two cleaners to wash the trays and the Appellant was required to only carry and keep trays at their rightful place. She averred that the there was no link between her and packing the trays and that it was the Appellant fault for leaving

her place of work to go where the trays were. On cross examination, she claimed that the trolley was not near them and that there were stairs around hence the trolley could not reach where they were. She further asserted that, trays cannot fall from a trolley because it is flat. She also claimed that the Appellant was not injured and only went to hospital because she claimed she was hurt in the stomach yet she was expectant.

8. In my view, the Appellant did not adduce enough evidence to show that the Respondent was negligent. Her testimony was also contradictory and unclear which evidence was watered down by the Respondent. It is not enough for the Appellant to claim that that the Respondent was negligent, the Appellant ought to show how the Respondent was negligent. Even if I was to consider the evidence adduced by the Appellant, her job was simply to wash the trays and put them away. Her job did not require any specialised training and she was in full control of the cleaning. If indeed there were trolleys being pushed past her to pick up the trays as claimed, it sounds like a routine that was there is in the company and the same was not new to the Appellant neither was the situation unforeseen. The Appellant ought to have been vigilant and careful while undertaking her duties since I don't see what measures the Respondent would have taken to avoid the predicament that the Appellant found herself in. I am persuaded by the case of **Eastern Produce (K) Limited V George Otieno Matara [2012] eKLR, where M.K.Ibrahim J** (as he was then) held that:

"The Plaintiff was injured while pruning tea. He was using a knife provided by the employer. It is my view that pruning is a simple act of cutting and there is no specialized training required. The process involves the physical act and movement of the pruner. He has control of the knife and the work. It is a simple operation which does not require the Appellant supervision. I agree with decision of Justice Waweru in H.C.C.A 58 of 2000 – MUMIAS SUGAR CO. LTD –VS- SAMSON MUYINDA."

9. In the end, I am convinced that the decision by the learned Senior Principal Magistrate cannot be faulted. The trial magistrate therefore arrived at the correct decision.
10. The second ground is whether or not the quantum payable was inordinately low. The Trial Court found that the Respondent was not liable however, the Magistrate intimated that had she found otherwise she would have awarded a sum of kshs 70,000/= general damages and kshs 3,000/= special damages. The Appellant claims that that sum was inordinately low in comparison to the authorities presented to court. I have analysed the submissions of the parties and the decisions availed to the trial court. The Appellant submitted that kshs 150,000/= would have been adequate. He relied **Machakos HCCC no. 42 of 1995 Abednego Kyalo vs Eliud Kioko & Another** where the plaintiff suffered multiple soft tissue injuries, bruises over the head, left shoulder, nose, upper lip, below shin and left knee. General damages for pain and suffering and loss of amenities were assessed at ksh 100,000/=. She also cited the case of **NBI. HCCC No. 4084 of 1983 Daniel Lengete Nkurne vs Constitatino Thomas** and another where the plaintiff who had suffered bruises and cuts over the head, chest and right knee was awarded kshs 100,000/= . The Respondent on the other hand submitted that kshs 40,000/= was adequate. He cited the case of **HCCC no. 18 of 2005 Kisumu, Lilian Achieng vs Nation Media Group** where the plaintiff suffered minor injuries to the chest and was awarded kshs 60,000/=. Taking into consideration the authorities cited and the nature of the injuries allegedly suffered by the Appellant that included Blunt injury to the shoulder and right abdominal wall, I find that the award by trial Magistrate was fair in the circumstances and I would not have disturbed that award.
11. In the end, the appeal is found to be without merit and it is hereby dismissed. The Respondent shall have costs of the appeal and the suit.

Dated, Signed and Delivered in open court this 13th day of May, 2016

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent