REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 185 OF 2010

LOICE IMINZA ……..…… APELLANT

VERSUS

NYAYO TEA ZONES DEVELOPMENT CORPORATION …..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Resident Magistrate Honourable G. MUTISO (RM), in KAPSABET PMCC No. 340 of 2005 dated 7. 7.10.2010)

JUDGMENT

1. By her plaint dated 7th September, 2005, the appellant *Loice Iminza* then the plaintiff sued the respondent Nyayo Tea Zone Development Corporation then the defendant in Kapsabet PMCC No. 340 of 2005 seeking general and special damages for injuries allegedly sustained in the course of her employment with the respondent. She also prayed for costs of the suit and interest.

2. In her plaint, the appellant pleaded that on or about 7th April, 2004, while lawfully working for the respondent, she was injured owing to the respondent's negligence as a result of which she suffered loss and damage. She set out the particulars of negligence attributed to the respondent and or its servants.

3. Through its statement of defence filed on 2nd October, 2005, the respondent denied having employed the appellant as alleged and denied the particulars of negligence attributed to it and knowledge of the injuries allegedly sustained by the appellant. The respondent in the alternative pleaded contributory negligence against the appellant and set out particulars thereof. In essence, the respondent denied the appellant's claim *in toto* and put her to strict proof thereof.

4. After hearing both parties, the learned trial magistrate *Hon. G. Mutiso* (RM) in a judgment delivered on 7th October, 2010 dismissed the appellant's case with costs on grounds that she had failed to prove her case on a balance of probabilities.

5. Aggrieved by the trial court's decision, the appellant proffered an appeal to this court relying on the following grounds;

> ***(i) That the learned trial magistrate erred in law and in fact in finding that the plaintiff had not proved her case on a balance of probability whereas there was overwhelming evidence to the contrary.***
>
> ***(ii) That the learned trial magistrate erred in law and in fact in failing to consider the submissions of the plaintiff while arriving at his decision.***

(iii) That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced in support of the plaintiff's case while arriving at his decision.

(iv) That the learned trial magistrate erred in law and in fact in failing to find that the plaintiff had proved negligence against the defendant and ought to have been compensated for the serious/grievous injuries suffered.

(v) That the learned trail magistrate erred in law and in fact in failing to find that the defence case did not offer any and/or any satisfactory answers to the plaintiff's case.

(vi) That the learned trial magistrate erred in law and fact in failing to take into consideration matters that he ought to have considered in arriving at his decision and taking into consideration matters he ought not to have considered in arriving at his decision.

6. From the above grounds, it is evident that the appellant's main grievance was that the learned trial magistrate erred in finding that she had not proved her case to the standard required by the law which finding was in her view, against the weight of the evidence adduced during the trial.

7. By consent of the parties, the appeal was prosecuted by way of written submissions which were highlighted before me on 13th July, 2016. At the hearing, learned counsel *Mr. Kagunza* represented the appellant while learned counsel *Mr. Odhiambo* appeared for the respondent.

8. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am aware of the duty of the first appellate court which is to revisit and reconsider the evidence presented before the trial court in order to arrive at my own independent conclusions regarding the validity or otherwise of the trial court's decision having in mind that I did not hear or see the witnesses testify and give due allowance for that disadvantage. See: ***Williamson Diamond Ltd V Brown (2007) 2 KLR 1.***

9. I have carefully considered the evidence on record, the submissions made by both parties and the persuasive authorities they cited. I find that the main issue that arises for my determination is whether the trial magistrate erred in dismissing the appellant's suit with costs on grounds that she failed to prove her case on a balance of probabilities.

10. I wish to start by stating that it is now settled law that although an appellate court has jurisdiction to interfere or reverse the findings of fact made by a trial court, this is a jurisdiction that must be exercised with caution because as *Sir Kenneth O'Connor* stated in ***Peters V Sunday Post Limited (1958) EA 424 at page 429***; ***" It is a strong thing 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 ..."***

11. The Court of Appeal in discussing the scope of an appellate's court mandate said the following in ***Makube V Nyamoro (1983) KLR 403*** ;

"….. A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong legal principles in reaching the findings he did ….".

12. From the above, it is clear that the mandate of an appellate court is limited. It can only interfere with findings or decision of a lower court if it is satisfied that it was based on no evidence or on a misrepresentation of the evidence or if it was satisfied that in arriving at its decision, the trial court considered irrelevant matters or applied the wrong legal principles.

13. Guided by the above principle, I will now embark on the task of establishing whether, on the evidence on record, the appellant proved her case to the required legal standard which is, on a balance of probabilities. In order to accomplish that task, it is necessary to revisit the evidence that was presented to the trial court.

14. The appellant testified as PW2. She stated that she was employed by the respondent as a tea plucker. She had worked in the same capacity for 15 years. On 7th April, 2009, she was taking tea for weighing when she fell into a ditch or hole as a result of which she sustained a dislocation of one of her ankles. She had not seen the hole as it was covered by grass. She sought treatment at Asai Medical clinic. She blamed the respondent for the accident because of digging holes and failing to warn its employees about their existence.

15. In support of her case, she called *Dr. Samuel Aluda* (PW1) and PW3 *Mr. Wiliam Mchanjo* , the clinical officer who treated her at Asai Medical clinic on 7th April, 2004. PW3 recalled that he treated the appellant for a bruised hand and a dislocation of the right ankle joint. He produced his treatment notes as PExhibit 3 which PW1 said he relied on to prepare a medical report on the appellant's injuries about an year after they were sustained. He produced the report as Pexhibit 1.

16. The respondent called one witness *Mr. John Hamisi* who was one of its supervisors. In his evidence, DW1 admitted that the appellant was one of the respondent's employees but relying on the master roll for April 2004 (Dexhibit 1) and payment sheet (Dexhibt 2), he denied that the appellant was on duty on 7th April, 2004. The two documents did not bear the appellant's name as one of the employees who were on duty on that day. He therefore supported the respondent's case that the appellant was not injured in the course of its employment as alleged.

17. In his judgment, the learned trial magistrate dismissed the appellant's suit with costs on grounds that there was a major contradiction between her evidence and the evidence of PW3 regarding the injuries she allegedly suffered in the accident in question. He found that while as *Dr. Aluda* and the appellant claimed in their evidence that the appellant had sustained a dislocation on her right ankle, PW3 who treated her when the injuries were fresh testified that he had treated her for a dislocation on her shoulder. This in my view was a misdirection on the part of the learned trial magistrate because it is very clear from the record that PW3 testified that on examining the appellant, he noted that she had a bruised hand and a dislocation of her right ankle. I therefore disagree with the trial court's finding that there was a contradiction regarding the injuries sustained by the appellant. I find that on the evidence on record, the respondent sustained injuries on her hand and right ankle on the material date.

18. Having made that finding, the only other issue left for my consideration is whether the appellant proved on a balance of probabilities that she sustained those injuries in the course of her employment and that the said injuries were occasioned by the respondent's negligence. I say so because it is trite law that he who alleges the existence of certain facts has the burden of proving that those facts exist- See *Section 107* and *108 of the Evidence Act*. And in order for the appellant to succeed in her claim, she needed to prove a causal link between her injuries and the respondent's negligence.

19. I agree with the holding in ***Statpack Industrides Limited V James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003*** where the court held that;

> ***"It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable".***

20. On my own evaluation of the evidence, I am not satisfied that in this case the appellant proved the particulars of negligence attributed to the respondent on a balance of probabilities. The appellant in her evidence blamed the respondent for his misfortune claiming that it had dug holes and failed to warn its employees about their existence. But she only testified about one hole that was covered by grass meaning that it was not visible. The appellant did not claim that there were a set of holes from which it could reasonably be inferred that they were manmade holes which the respondent knew or ought to have known about their existence and ought to have taken reasonable precautions to avoid the risk of its employees falling into them and sustaining injuries by either informing them about their existence or taking any other measures. There is evidence that the appellant had worked in that plantation for fifteen years yet he

was not aware of that particular hole's existence and he had not seen it since it was covered by grass. Considering that this was a hole in an estate which no doubt covered a vast area, it was incumbent upon the appellant to prove that the respondent was actually aware of the said hole and that it failed to take reasonable precautions to warn its employees about its existence.

21. The law of negligence is based on the concept of foreseeability. An employer can only be held liable for damage which was foreseeable and which he failed to avoid by taking reasonable precautions. I agree entirely with the sentiments expressed by *Sitati J* in ***James Finlays (K) Ltd V Evans Nyati Kisii Civil Appeal No. 223 of 2006*** where in an appeal which was on all fours with the instant one, she held as follows;

> ***"It is now trite law that where work is being undertaken in the field especially in a tea plantation if an injury occurs from events whose occurrence is too remote an employer should not be held liable. In this instant case the hole which the Respondent allegedly fell into is not a manmade hole, it is a hole whose existence was too remote for the Appellant to have knowledge about. It is therefore against this background that even assuming that indeed there was duty of care owed to the Respondent, the claim by the Respondent would not fall as part of those the Appellant would be held liable for breach of duty of care cause existence and possibility of causing injury was too remote".***

22. In the absence of proof that the respondent was aware of the existence of the said hole and that it failed to exercise its duty of care to the appellant and the other employees by warning them about its existence or taking other safety measures, am persuaded to find that the appellant failed to establish a causal link between his injuries and the respondent's negligence. In the circumstances, I have come to the same conclusion as the learned trial magistrate, albeit for different reasons, that the appellant in this case failed to prove her claim against the respondent on a balance of probabilities. In the circumstances, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with costs.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 6th day of October 2016

In the presence of:

Mr. Songok holding brief for Mr. Odhiambo for the respondent.

No appearance for the Appellant

Ms. Naomi Chonde Court Clerk.