

After considering the evidence in its totality, the learned trial magistrate rendered a decision favouring the respondent and awarded her damages in the sum of Ksh. 300,000/=.

Being dissatisfied with the decision and the award, the appellant filed this appeal on the basis of the grounds contained in the memorandum of appeal dated 17th September, 2008.

At the hearing of the appeal, Learned Counsel **Mr. Lagat**, appeared for the appellant while Learned Counsel, **Mr. Mokuu**, appeared for the respondent.

Both counsels agreed to have the appeal argued by way of written submissions and in that regard, the appellant filed its submissions on 16th June, 2014, while the respondent did likewise on 8th June, 2014.

Having considered the rival submissions it fell upon this court to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, the evidence by the witness has been given careful consideration by this court which therefore finds that the occurrence of the accident and the respondent's employment with the appellant were factors which were not at all or substantially in dispute.

The basic issue that fell for determination was whether the accident was caused by the appellant's negligence and/or breach of contractual duty and if so, whether the respondent was entitled to any damages and to what extent.

The evidence by the respondent indicated that she was harvesting flowers which had been sprayed with pesticide (medicine), when the chemical spread into her right eye thereby causing eye-ache. She was thereafter taken to a clinic before being referred to Kitale District Hospital where she was treated. She implied that she ought not have been asked to harvest flowers before the chemical dried up and without having been provided with protective gear such as goggles which she had previously requested for from her superior one Salim Wanjala.

The appellant's Human Resource Manager (DW1) implied that the respondent could not have been injured in the course of her employment or that she did not follow the safety precautions given to employees. However, he (DW1) was not aware or made aware of the material accident and could not therefore have known how it happened or whether or not the respondent had been provided with protective gear. He had no record to show that the respondent was issued with any protective gear while in the course of her employment.

The defendant's supervisor (DW3) confirmed that the respondent was employed by the appellant company but contended that she was not on duty on the material date of the accident. The documents he relied on to establish the fact appeared to have been produced as an afterthought and were not reliable for lack of necessary date and signature of the author. He was not certain whether or not the respondent was on duty on the material date of the accident.

There was sufficient evidence from the respondent showing that she was injured while in the course of her employment. However, she did not clearly state how the accident occurred. She merely talked of medicine (pesticide) dropping into her right eye but did not state how this occurred. Her statement of claim (plaint) indicated that a chemical pesticide splashed in both of her eyes but the evidence did not show how this happened. Most likely than not she must have contributed to the accident by failing to observe safety precautions and thereby disregard her own safety.

This court would thus find the respondent to have been contributarily negligent to a degree of 30% with the appellant taking the remaining 70%.

The finding of this court on liability would be 70% against the appellant and 30% against the respondent.

With regard to quantum of damages, the respondent, prayed for special damages in the sum of Ksh. 2,000/= for the medical report. This was established by production of the medical report and the accompanying receipt (P. Exh. 3 a-b). the respondent was therefore entitled to the special damages as claimed. She was also entitled to general damages for pain, suffering and loss of amenities.

The medical report by Dr. Aluda, dated 27th October, 2005, indicated that the respondent suffered severe chemical trauma to both eyes leading to tenderness, tearing and redness as well as pain during and after the injury. The injuries healed but with occasion pains expected to subside with time.

A further prognosis was recommended but appears not to have been done. It was therefore apparent that the respondent healed from her injuries without any permanent residual effect.

The learned trial magistrate awarded general damages in the sum of Ksh. 300,000/=. the opinion of this court is that the amount was on a higher side regard being given to the injuries suffered by the respondent which healed without any permanent disability. A sum of Ksh. 100,000/= would have sufficed as being reasonable and adequate. This court settles for that amount. In the end result, the appeal is allowed to the extent that the appellant is herein found liable for the accident at 70% and that the respondent would be entitled to general damages in the sum of Ksh. 100,000/= less 30% contributory negligence.

The judgment of the trial court is thus set aside and substituted for a judgment in favour of the respondent for the sum of Ksh. 102,000/= less 30% contributory negligence i.e. Ksh. 71,400/= together with costs of the suit.

The appellant would be entitled to the costs of the appeal.

[Delivered and signed this 2nd day of July, 2014.]

J.R. KARANJA.

JUDGE.