



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.162 OF 2007

HOME GROWN (K) LTD.....APPELLANT

VERSUS

JACKLINE BONABERI OTIENO.....RESPONDENT

JUDGMENT

The Respondent, Jackline Bonaberi Otieno, instituted a suit in the lower court (Naivasha SPMCC NO.488 of 2006) seeking general and special damages for injuries she allegedly suffered during the course of her employment with the appellant.

It was the respondent's case that on 11th November, 2005 while carrying out her assigned duty (removing discards from the parkhouse), she accidentally slid and fell on the door of the parkhouse.

After the accident, she was given first aid by the company nurse and referred to Dr. Munga for further medical attention. Dr. Munga referred her to Naivasha District Hospital for X-ray. Later on, she saw Dr. Omuyoma who examined her and prepared a medical report.

Dr. Omuyoma, who testified as P.W.2, informed the court that he examined the respondent on 12th July, 2006. According to him, the respondent sustained a fracture of distal end of the left radius and soft tissue injuries to the left arm. He produced the Medical Report as PEX 4.

For the services rendered by Dr. Omuyoma the respondent paid Kshs.3000/= and was issued with a receipt (PEX 5).

The respondent contended that the appellant was to blame for the occurrence of the accident as it inter alia failed to provide her with a safe working environment. The respondent, particularly blamed the respondent for failing to provide her with protective clothing, gloves etc.

Concerning the respondent's contention that she was injured while playing football, she admitted that she used to play football after work but denied having been injured while playing football.

In support of her case, the respondent reiterated the contents of the plaint and Dr. Omuyoma (PW2) testified to having examined her and preparing the medical report.

On its part, the appellant admitted that the respondent was its employee at the material time but denied that the accident occurred while the plaintiff was in the normal course of her employment with it.

In its statement of defence and the testimony of its witnesses, the appellant contended that the respondent sustained the injuries complained of when playing football with her colleagues.

To prove its case, the appellant called six witnesses who contrary to the respondent's case, led evidence to the effect that the respondent was injured while playing football. In this regard, D.W.1, Anne Njiine an Administration clerk of the appellant, informed the court that the respondent slid and fell when they were playing football. According to her, the accident occurred at about 5.30 p.m, whereby the respondent slid and fell down and hurt her left hand. After the accident, she was given first aid by their first aider Wellington Kaka. After receiving first aid, the respondent went home. On the following day, she took the respondent to the company clinic for medical attention. She produced the injury form which she filled for the respondent (DEX 1).

The company nurse, Naomi Wanjiru Nyanjeri (DW2), confirmed that the respondent was treated at the appellant's clinic and referred for further treatment to Dr. Munga. She produced the injury register, DEX 2, which was prepared by her assistant, Beatrice Nyakaya, in her presence.

D.W.3, Wellington Kitela, informed the court that he was present when the accident herein occurred. Like D.W.1, his testimony was that the respondent was injured while playing football at Kingfisher field. He gave the respondent first aid and took her to the respondent's clinic. Later on, he prepared the accident injury form (DEX 3) and a witness statement to that effect (DEX 4).

D.W.4, Lucy Mwangi, produced the L.D 104 form that was filled for the purpose of the respondent's compensation (DEX 5) and the claimant's form (DEX 6) which was allegedly prepared by the club secretary, William Ewoi. Like the other defence witnesses, D.W.4 maintained that the respondent sustained the injuries complained of while playing football and not while working at the parkhouse as claimed.

Upon considering the evidence presented before him, the trial magistrate found both parties to have contributed to the accident and apportioned liability at 60:40 in favour of the respondent and against the appellant respectively. He assessed damages payable to the respondent, subject to the decreed contribution, at Kshs.163,000/=, being Kshs.160,000/= (general damages) and Kshs.3000/= (special damages). He also awarded costs of the suit and interest on the decretal sum to the respondent.

Aggrieved by the judgment of the lower court the appellant brought this appeal challenging the decision of the lower court on fourteen (14) grounds which can be summarized as follows:-

- (a) That the respondent's case was not proved to the required standard;**
- (b) That the trial magistrate failed to consider the appellant's defence and/or to give reasons for rejecting the appellant's defence;**
- (c) That the trial magistrate failed to consider its submissions;**
- (d) That the general damages awarded are excessive.**

This being a first appeal it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify. See **Selle & Another vs. Associated Motor Co. Ltd & Others** (1968) E.A. 123.

It is common ground that the respondent was an employee of the appellant when the accident herein occurred. It is also common ground that on the material day the respondent was on duty. It is also not in dispute that the respondent used to play football.

It is also common ground that the respondent was injured. However, the point of departure is where the respondent got injured, whereas the respondent says it was while she was at work, the appellant maintains

that she was playing football. The issues for determination are when was the respondent injured at work or while playing football and if indeed she was playing football, is the appellant liable innigligence?

Concerning this question, counsel for the appellant submitted that while lodging her claim, the respondent neither disclosed what she was doing when the accident occurred nor how the accident occurred. This prompted the appellant to serve the respondent with a request for particulars, which request the respondent did not heed to until the appellant filed an application in the lower court to compel the respondent to provide the requested particulars.

The appellant contends that unlike the respondent who neither called any witness nor produced any documents prepared at the time of the alleged accident to corroborate her allegations, it called several witnesses and produced many documents to prove its case.

The evidence of D.W.1, who was allegedly playing with the respondent is said to have given a clear and consistent account of how the accident occurred. The testimony of D.W.2, who is also said to have been consistent and unshaken on cross-examination. D.W.3, is said to have confirmed the testimony of D.W.1 in that he admitted having given the respondent first aid.

Through D.W.4, Lucy Mwangi, the appellant produced LD 104/1 form and the statement signed by William Ewoi in which the respondent had allegedly stated as follows:-

“I was playing football, then felled (sic) on my left hand.”

Contending that its witnesses corroborated each other and that their testimonies were unshaken during cross-examination, the appellant wonders why the trial magistrate chose to ignore those testimonies and the documentary evidence in support of their testimony.

Terming the respondent's version of events a conjured fabrication, the appellant wonders why the respondent chose to depart from her own statement (DEX 6).

The trial magistrate's observation/finding that the documents that the appellant produced in court were not produced by their makers is faulted on the grounds that he neither indicated the documents which were not produced by their makers nor the contents thereof which were not corroborated.

Contrary to the trial magistrate's finding, the appellant argues that most of the documents were produced by their makers. For example DEX 1 is said to have been produced by its maker, Anne Njiine. DEX 2 is said to have been produced by the person who had the custody of the document, the nurse, DW2.

On his part, the respondent has submitted that there is nothing in DEX 1 capable of proving that the plaintiff was injured when playing football, as alleged; that the testimony of D.W.2 was rightfully rejected as she was not the maker of the document she produced in court, (DEX2). The document (DEX2) Is also said to have had alterations; that D.W.3 was not a credible witness as his testimony had glaring unexplained contradictions; for instance, the witness is said to have been watching the women play football yet he did not witness the respondent get injured;

D.W.4, Lucy Mwangi, who produced the LD 104 form filled for the respondent is said to have admitted that the form is filled for purposes of compensation in work related injuries.

The trial magistrate is said to have been justified in rejecting the defence as it was contradictory, hearsay and tampered with. The appellant is also said to have failed to call material witnesses.

I have read the judgment of the trial court and I do agree with the appellant's contention that the trial court did not fully comply with Section 169 of the Civil Procedure Act in that the trial magistrate did not address all the issues raised and failed to give reasons for his decision. On liability, though he found that the respondent contributed to the accident, he did not state why he arrived at that decision.

After the appellant applied to be supplied with particulars, the appellant filed an amended defence dated 8/6/2006 in response to the particulars supplied. There is no evidence that the respondent ever filed any reply to defence in response to the allegations raised in the said amended defence. Order 2 Rule 11(1) of the Civil Procedure Rules (Order vi Rule 9(1) of old Civil Procedure Rules). the said rule states:-

“11(1) Subject to section (4) any allegations of fact made by a party in his pleading shall be decreed to be admitted by the opposite party unless it is traversed by that party in his pleadings or a joinder of issue under rule 10 operates as a denial of it.”

In the amended defence, the appellant denied all the particulars of negligence leveled against the respondent which are specifically pleaded at paragraph 6A, 6B, 6C and 6D. In the above mentioned paragraphs the appellant denied that the injuries were sustained at the parkhouse as the respondent alleged in her plaint but that the respondent was injured while playing football. Having failed to file a reply to the defence, admitting or denying the said allegations, the respondent is deemed to have admitted the said facts i.e. that she was injured while playing football. The above rule was correctly applied in the case of **Boniface Ngugi Munyu v Nassir Abdullah Khamuci HCC 218/1990**, where J Mwera relied on the decision of **Gideon Idethe v Roseline Osborn**, Civil Application NAI 62/986, where the court said:-

“There was no reply to this defence with the result that the allegations of negligence made against the appellant by the defendant in her defence were deemed to have been admitted under Order 6 Rule 9(1) of the Civil Procedure Rules.”

I do agree with the above finding. This is a case where a reply to the defence was necessary and the respondent having failed to reply, the respondent is deemed to have admitted to having been injured while playing football.

The trial court faulted the defence for reasons that the documents were produced by people other than their makers. I do note that the trial court did not consider each of the documents produced in evidence as required of it and made a blanket finding. First of all, the question of the respondent being an employee of the appellant did not arise. The only question was whether the respondent injured, when at the Parkhouse or when playing football. DW1, Anne Njiine testified that she was the administration clerk. She told the court that she was playing football with the respondent at the time the respondent got injured. She also said that the injury form (DEx.1) the document was prepared at their clinic and she signed it. Having signed the document, she is deemed to be the maker. As respects DEx.2, the accident register, DW2 told the court that she registers any accident that is reported by the workers. Although she did not make the entry in respect of the respondent, she identified it as having been made by the nurse aide and then the document was also in her custody. DW2 also told the court that she is the one who treated the respondent. If she is the one who was in custody of the accident register, then she is qualified to produce it in evidence. DEx.3, the accident injury form was signed by both DW2 and DW3. DW3 also said that the respondent signed the said form. The form was produced by the maker. DEx.4 Witness Supervisor's Statement, was also produced by DW3, who was the maker. DEx.5 is Form LD 104/1 was a document issued by the company under the repealed Workman's Compensation Act and was produced by DW4, the company records keeper and so was DEx.6 the claimant's statement. The people who signed the statement had left the defendant's employment but this being a company, it is not expected that employees will never leave its employment. Employees who take over from those who had been in office will produce such documents because the company is a going concern. Contrary to the trial magistrate's blanket finding that all documents were produced by people who were not their makers, I find that the defence exhibits were properly produced by the makers or those in custody thereof and the trial court erred by dismissing all the documents as hearsay evidence. The trial magistrate should have taken time to consider each of the said documents individually and considered its relevance or irrelevance accordingly.

The particulars of negligence attributed to the appellant are contained at paragraph 5 of the plaint. It is pleaded inter alia:-

“(b) Failing to provide or maintain adequate or suitable appliances and in particular with any gloves and/or protective gears to carry out the said work in safety or to protect the

plaintiff's hands while she was carrying out the said work;

(c) Directing and requiring the plaintiff to carry out the said work without providing her with suitable protective clothing, gloves, and/or otherwise to protect her hands."

It means what the respondent was concerned with was protection of her hand which was injured. However, the respondent sharply contradicted her pleading because she admitted to having been issued with gloves and a dust coat. In her evidence, she then introduced the fact that she was not issued with gum boots which have a good grip. No where in the pleadings did she mention that the appellant failed to issue her with gumboots or that she asked for them and she was told they are out of stock. The plaintiff did not endeavour to prove any of the other particulars of negligence. In my considered view, the particulars of negligence are at variance with the evidence adduced by the plaintiff. The plaintiff is bound by her pleadings and could not purport to depart from them in her evidence.

Having considered all the evidence that was adduced before the trial court, I am persuaded to believe the appellant's witnesses that the respondent may have been injured elsewhere than at her place of work. It is no wonder that even when the respondent filed this suit her pleadings were so vague as to the nature of her injuries sustained and the circumstances of the industrial accident that the respondent was involved in. I am satisfied that the failure to file a reply to the defence, the evidence adduced by the appellant's witnesses which were to show that the respondent could have been injured while playing football and the fact that the plaintiff's evidence was at variance with her pleadings, I find that the respondent did not prove that she was injured during the course of her employment. The appellant's evidence tilts the balance of probability against the respondent's case and the appellant's defence of *volenti non fit injuria* has basis. In **Halsburys Laws of England 3rd Ed Vol 28 pg 85**, such defence is considered in this passage:-

"A person engaged in playing a lawful game takes on himself the risks incidental to being a player and has no remedy by action for injuries received in the cause of the game unless this be due to some unfair act or foul play"

In the case of CA 260/1997, **Kabuswa Tea Estate v Moses Ludenyo Ambwere**, the Court of Appeal held:-

"The learned magistrate failed to consider the fact that the game of football was not being played for the benefit of the appellant. It was a normal Sunday pass time for fun and enjoyment of the players. The appellant could not have had any interest in the result of the game. Even if it had a foul on the part of an opposing player causing injury to its employee, does not saddle the appellant with any liability. Such liability is too far fetched and amounts to stretching too far the doctrine of duty of care."

In this case the respondent has not demonstrated that the football game was for the benefit of the appellant. It was for her own pleasure and the appellant cannot be said to have had duty of care. The respondent took some risk of injury when she engaged in playing football and liability cannot therefore attach as against the appellant.

In the end, I will allow the appeal, set aside the judgment of the said magistrate on both liability and quantum and dismiss the respondent's claim against the appellant.

For purposes of assessing costs, I will go ahead and make an estimate of the costs I would have awarded had I found to the contrary. The plaintiff was found to have sustained a fracture of the distal end of the left radius and soft tissue injuries to the left arm, plaster of paris was applied. The injury was classified as grievous harm as per medical report of Dr. Omuyoma. The respondent's counsel had proposed an award of Kshs.200,000/- in damages and relied on the cases of **Christine Wanguru v Stephen Ngugi HCC 4833/90**, where the plaintiff sustained similar injuries and was awarded Kshs.120,000/- in 1992 and **Peter Ndethi v E.A. Road Services Ltd HCC 963/1986**, where an award of Kshs.100,000/- was made in 1989 for injuries that were slightly more serious.

The appellant on the other had made a proposal of Kshs.80,000/- as general damages and relied on the decision of **Penina Adhiambo Kaperu v Hexron Nyanduzi** NR HCC 1684/1991, where the plaintiff suffered fracture of radius, chest injury and loosing of teeth and was awarded Kshs.60,000/- in 1993. The trial court made an award of Kshs.160,000/- and having considered the case law relied up in comparison to the injuries, I find that the award was not manifestly high nor was it too low, having been made in 2007, over 10 years, since the other awards were made. In the end, the appeal is allowed with costs of the lower court and this appeal to the appellant.

DATED and DELIVERED this 1st day of October, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Mwangi holding brief Mr. Mwangi for the appellant

Mr. Maragia holding brief for Mr. Obae for the respondent

Kennedy – Court Assistant