Githae v Subati Flowers Ltd (Civil Appeal 81 of 2019)
[2024] KECA 60 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 60 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 81 OF 2019

P NYAMWEYA, WK KORIR & FA OCHIENG, JJA

FEBRUARY 2, 2024

BETWEEN

JOHN KARIUKI GITHAE ..... APPELLANT

AND

SUBATI FLOWERS LTD ..... RESPONDENT

(Being an appeal arising from the Judgment of the Employment and Labour Relations Court of Kenya at Nakuru (M. Mbaru, J.) delivered and dated 25th April 2019 in ELRCA No. 31 of 2018)

JUDGMENT

1. This matter is before us on a second appeal having been filed in the first instance before the Chief Magistrate's Court at Nakuru as Civil Suit No. 642 of 2015 and the first appeal determined by the Employment and Labour Relations Court (E&LRC) at Nakuru in Appeal No. 31 of 2018.

2. The background of the suit is that in a plaint dated 12th June 2015, the appellant, John Kariuki Githae, sued the respondent, Subati Flowers Ltd, for negligence causing severe bodily injuries. According to the appellant, he was involved in accident on 2nd July 2012 when he was working for the respondent as a general labourer. His claim was that the respondent had provided him with an unsafe working environment and while he was replacing polythene sheeting on one of the respondent's greenhouses, a metal bar he was stepping on gave way and he fell from a height of 20 feet landing on his back thereby suffering severe injuries as particularized in the plaint. He blamed the respondent for failure to provide him with protective gear, a harness and other equipment required to secure his safety. Further, that the respondent had not provided adequate supervision and enough workers. He also faulted the respondent for providing him with an unsafe system of work and requiring him to work from an unsafe and dangerous place.

3. The respondent through a statement of defence dated 27th July 2015 denied the allegations and asserted that the appellant's injury was caused and/or contributed by his own negligence.

   The respondent asserted that the appellant failed to take reasonable precautions for his own safety, was careless in execution of his duty and disregarded his own safety. After a full hearing, Hon. Gicheha, then a Senior Principal Magistrate, found the respondent 100% liable and awarded the appellant Ksh. 1,000,000 as general damages and Ksh. 4,000 as special damages.

4. The respondent was aggrieved by the decision of the trial court and lodged an appeal before the E&LRC on 8 grounds. In a judgment delivered on 25th April 2019, Mbaru, J. partially allowed the appeal and apportioned liability at 50%:50% but did not interfere with the trial court's finding on quantum. In reaching her decision, the learned Judge held that whereas the respondent was liable for the absence of a supervisor as the appellant undertook risky tasks, the appellant was equally liable for not donning the helmet that had been issued to him.

5. The appellant being dissatisfied with the judgment of the first appellate court has through the Memorandum of Appeal dated 13th September 2019 challenged that decision. We condense the grounds of appeal thus: that the learned Judge erred in law and fact by misapprehending the evidence on record and the applicable principles of law thereby arriving at a wrong conclusion as to the cause of the injury; and, that the learned Judge erred in determining the level of the respondent's breach and consequently reached an erroneous apportionment of liability between the parties.

6. On 18th October 2023 when this appeal came up for hearing, learned counsel Mr. Mbiyu appeared for the appellant while there was no appearance for the respondent. Counsel for the appellant had filed and served submissions dated 2nd June 2023 which he sought to rely on. No submissions had been filed on behalf of the respondent.

7. Mr. Mbiyu set off his submissions by referring to section 72(1) of the *Civil Procedure Act* as well as the cases of *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR and *Stanley N. Muriithi & Another v Bernard Munene Ithiga* [2016] eKLR to highlight the scope of this Court's jurisdiction on second appeals, and to submit that the findings by the learned Judge did not flow from the evidence on record. In pursuit of his assertion that the decision of the learned Judge was contrary to the evidence adduced at the trial, counsel rehashed the evidence on record and argued that the learned judge misapprehended the evidence thereby arriving at an erroneous decision with regard to the apportionment of liability. Counsel also submitted that the finding by the learned Judge that the helmet was necessary in the discharge of the appellant's work was not supported by evidence as none of the witnesses testified to that effect and that in any event, there was no evidence that the failure to use the helmet was the cause of the appellant's injury. Counsel further urged that since the ladder on which the appellant stood gave way, then the helmet would not have been of help hence the chain of events would not have been broken by the donning of the helmet. Counsel also submitted that the question of the necessity of the helmet was not pleaded or raised by the respondent before the trial court. Mr. Mbiyu referred us to the cases of *North Kisii Central Farmers Ltd v Jeremiah Mayaka Ombui & 4 others* [2014] eKLR and *Anthony Francis Wareham t/a Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR to support this contention and to firm the argument that no findings and reliefs can originate from issues not pleaded.

8. On the appellant's assertion that the accident occurred as a result of poor supervision by the respondent, Mr. Mbiyu submitted that the absence of a supervisor from the scene of accident was not the only breach since the respondent also failed to provide a safe system of work by issuing a faulty ladder. According to counsel, the accident was as a result of the faulty ladder. Counsel argued that based on the evidence on record, the accident was wholly caused by the faulty ladder and that the appellant

testified that due to the nature of the work he was undertaking at the material time, the helmet was not necessary. Counsel consequently asserted that liability was 100% attributable to the respondent. He urged us to allow the appeal, apportion liability at 100% against the employer and award the appellant the costs for the appeals, both before this Court and the E&LRC.

9. This is a second appeal and our mandate has been enunciated in a long line of cases decided by this Court. Suffice to cite the cases of *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR and *Pithoni Waweru Maina v Thuka Mugiria* [1983] eKLR, where it was held inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered.

10. We also must bear in mind that the standard of proof in civil cases is different from that in criminal cases. In civil cases, the applicable standard of proof is on a balance of probability as opposed to proof beyond reasonable doubt which applies in criminal cases.

11. Upon considering the record of appeal and the submissions herein, we find that this appeal turns upon the resolution of the question as to the party responsible for the accident leading to the appellant's injuries.

12. The gist of this appeal revolves around the principle of causation and whether the learned Judge of the E&LRC properly applied it to the evidence on record. This therefore raises a question of law. Nyamu, JA in his dissenting judgement in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR cited the House of Lords in *Kay v Ayrshire and Arran Health Board* 987 All ER 417 in which the principle of causation was explained as follows:

> "Where two competing causes of damage existed, such as the overdose of penicillin and the consequences of the meningitis, the law could not presume in favour of the plaintiff that the tortious cause was responsible for the damage if it was not first proved that it was accepted fact that the tortious cause was capable of causing or aggravating such damage. Since, according to the expert evidence, an overdose of penicillin had never caused deafness, the appellant's son's deafness had to be regarded as resulting solely from the meningitis. Thus, appeal would therefore be dismissed."

13. It is therefore important to rehash the evidence on how the accident happened. It is not in dispute that the appellant fell down and injured himself as he was fixing polythene sheets on one of the respondent's greenhouses. A metal bar ladder that he was stepping on snapped and he fell on his back from a height of 20 metres thereby sustaining serious injuries on the lower part of the neck and back. It is also not disputed that there was no supervisor present when the appellant was undertaking his duties yet he ought to have been present to ensure the safety of workers. The respondent on its part contended that the appellant was careless and failed to take adequate precautions for his own safety. The first appellate court agreed with the respondent and found that the appellant, despite being provided with a helmet, decided not to wear it hence he contributed to his own injuries.

14. For starters, Section 6 of the *Occupational Safety and Health Act*, 2007 generally makes the employer liable for any injury or loss that occurs to employees at the workplace as a result of the employer's failure to ensure their safety. Sub-section (1) firmly requires every occupier to ensure the safety, health and welfare at work of all persons working in the employer's workplace.

15. On the other hand, section 13(1)(a) of the same Act requires employees to similarly ensure their own safety and that of other persons who may be affected by their acts or omissions. Therefore, it is not in all circumstances that an employer becomes liable for employee injuries. Liability must therefore be established through evidence in line with the requirements of sections 107 and 108 of the *Evidence*

Act, which require that he who alleges ought to prove. The question of liability in accidents has been discussed by this Court in several decisions including *Purity Wambui Murithii v Highlands Mineral Water Co. Ltd* [2015] eKLR where the Court quoted with approval the holding in *Stapley v Gypsum Mines Ltd*, (2) (1953) A.C. 663 thus:

> "To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident."

16. Going by the above dictum and in view of the evidence on record, we find that there was no connection between the appellant's failure to wear his helmet and the occurrence of the accident. It is also apparent that the nature of the injuries sustained by the appellant were those that the helmet could not prevent. Ordinarily a helmet is meant to protect one from sustaining head injuries in case of an accident. Therefore, despite the appellant's failure to wear the helmet provided by the employer, the injuries would still have been sustained as a result of the accident. It is also important to keep in mind the fact that the accident occurred as a result of a defective ladder whose component gave way leading to the appellant's fall. A supervisor, who was entrusted with ensuring employee safety was not present at the time. We cannot fault the appellant for working without supervision as the duty of ensuring that a supervisor was available and present, belonged to the respondent. We also cannot fault the appellant for attempting to deliver on his assignment during which process the tools provided by the employer broke down. It is the duty of the employer to ensure that the tools provided to the workers are in good condition and safe for the required task. Whereas an employee should report any defect in the equipment assigned to him or her to use, there is no evidence that the appellant had discovered and failed to report the defect in the ladder that he was using. We therefore agree with the appellant that the first appellate court erred in finding him equally responsible for the accident. In the circumstances we set aside this finding and uphold the trial court's decision that the respondent was 100% liable for the accident.

17. As for the quantum of damages, we note that the appellant never challenged the award made by the trial court and affirmed by the first appellate Court. That being the case we have no reason for meddling with quantum. We therefore uphold the finding of the trial court on quantum which finding was affirmed by the High Court.

18. Finally, we have to answer the question as to who bears the costs of the appeal. The appellant argued in favour of being awarded costs for the proceedings before this Court and the E&LRC. Ordinarily, the award of costs is a discretionary matter. In the present matter, the appellant has convinced us that the first appellate court erred in overturning the decision of the trial court. It is therefore just and fair that the appellant is awarded the costs of this appeal and those of the proceedings before the E&LRC.

19. In the end, this appeal succeeds, the judgment of the E&LRC is hereby set aside and the trial court's judgment is reinstated and upheld. The respondent shall bear the costs of this appeal and the appeal before the E&LRC.

20. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar