IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 84 OF 2011

BETWEEN

REDLAND ROSES LIMITED………………...APPELLANT

AND

HIRIBO MOHAMMED FUKISHA…...……….…............................…RESPONDENT

*(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**J. B. Ojwang'**, **J.**) dated 22nd September, 2006*

in

H.C.C.C. No. 564 of 2000)

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JUDGMENT OF THE COURT

The appellant being aggrieved by the judgment and decree of the High Court, appeals against the award to the respondent of Kshs. 806,280/- being compensation under the Workmen's Compensation Act, Kshs. 5000/- as special damages and costs.

The respondent filed a suit against the appellant claiming special damages, general damages and loss of future earning as a result of serious bodily injuries he sustained due to exposure to hazardous chemicals. He pleaded, *inter alia*, that he was employed as a chemical sprayer in the appellant's rose flower farm at Ruiru in Thika from 16th June 1996; that he was exposed to hazardous chemicals in the process of spraying fields of roses; that he sustained serious bodily injuries – namely, chemical hepatitis due to hydrocarbon; chemical dermatitis and chemical pneumonitis and that the injuries were occasioned to him by reason of the negligence and breach of contract by the appellant. The particulars of negligence pleaded against the appellant included failing to provide him with adequate or suitable goggles, gloves, mouth masks and head gear.

The appellant in its defence denied, amongst other things, that, the respondent sustained the alleged injuries and that the same were caused by the spraying chemicals. The appellant further averred that it provided the respondent with full protective gear and that the respondent had been treated severally by a company doctor and was never diagnosed as having any chemical related illness. The appellant pleaded in the alternative that any disease or damage were wholly caused or contributed to by the negligence of the respondent by, amongst other things, failing to wear rubber gloves or apply barrier cream.

The parties filed eight agreed issues, the directly relevant issue being;

> ***"Did the plaintiff contract any disease while in the employment of the defendant as a result of being exposed to hazardous chemicals by the defendant?"***

The respondent gave evidence and called one witnesses. He also produced medical reports. The appellant called four witnesses and produced medical reports and records relating to the issue of protective clothing and gear to its employees including the respondent during the material period. It is not necessary to reproduce in detail the evidence relating to the working conditions and the safety measures that the appellant had employed, as it is clear from the judgment under appeal that the finding on the liability of the appellant was not based on common law negligence or breach of contract as pleaded, but solely on the provisions of the **Workmen's Compensation Act** – now repealed. It is sufficient to state the primary facts upon which the respondent's case and the appellant's case rested.

The respondent was employed as a chemical sprayer in the appellant's floriculture business at Ruiru. He claimed that he was first employed as a casual labourer from 16th June 1996 to 1st August 1997 when he was formally employed under a contract of employment at a monthly salary of Kshs. 2,230/- plus house and chemical allowances of 800 and 200 respectively (total – Kshs. 3,030/-).

He also claimed that before December 1997 when he was working as a casual labourer he was not provided with protective clothing but admitted that full protective clothing – masks, gloves, overall, goggles, gumboots - a complete spraying suit was provided after he was engaged on contract.

He worked in the spraying department until about January 1998 when he was moved to the irrigation and maintenance department. According to the contract, he was required to work 46 hours spread over six days of the week. He normally worked in two shifts - 6.00 a.m. – 7.00 a.m. and then from 6.00 p.m. to 7.30 p.m.

He fell sick sometime in 1998. He had fatigue, his urine and eyes were yellow, he had difficulties in breathing, headache and itching skin. He was treated by the appellant's resident doctor who later referred him to Nazareth Hospital where he was examined and informed that he had a liver problem (Hepatitis) caused by chemicals.

He resumed work and continued treatment with the appellant's resident doctor. The treatment was not effective. He ultimately attended Kiambu District hospital. Dr. Kamau, a medical officer at Kiambu District hospital, made a report dated 25th February 1999. He reported that the respondent had a case of chemical Hepatitis secondary to hydrocarbon; that his health was poor and rapidly worsening; that he had chemical dermatitis and his respiratory system was compromised due to chemical pneumotitis. He advised that the respondent be retired on medical grounds to facilitate faster recovery. After the report the respondent voluntarily left employment after he was paid salary for February 1999 and instructed a lawyer.

The appellant called evidence to show that the respondent had worked for the appellant for about 1½ years from 1st August 1997 and only for six months in the spray department and that as a sprayer, he had been provided with protective clothes – overall, spray suit, mask, goggles, gloves and gum boots; that some of its employees had worked in the spray department for 6-7 years and none had contracted chemical related diseases; and lastly, that, there was negligible exposure of employees to chemicals due to the stringent company work policy safety guidelines in place, and lastly, that there was no evidence to link the chemicals used to the alleged chemical hepatitis.

The High Court made a finding of fact that the respondent continuously worked in the spray department for a total of 18 months – 13 months as a casual worker and 5 months as a contract worker. There is no cross-appeal against that finding. The High Court made further findings that during at least part of the 18 months that the respondent was working as a sprayer, the appellant had provided the respondent with protective clothing and that the appellant was not liable for negligence based on the common law tort of negligence.

Nevertheless, the High court stated:

> ***"However, the obligation of an employer to make payments to an employee who is injured in***

an accident or mishap involving potentially dangerous substances used in the course of employment, in Kenya is founded upon statute law – the workmen's compensation Act (Cap 236)."

Relying mainly on **S.35** of the Act as read with the Third Schedule thereto, the High Court made a finding that the ailments suffered by the respondent fell squarely within the category of **occupational diseases** and the appellant was therefore liable to compensate the appellant under the Act. The High Court proceeded to compute the compensation under the Act as Kshs.806,280/- in the form of loss of future earnings based on the monthly earnings of Kshs. 3,030/- and 23 years working life (Kshs.3,030 x 12 x 23 = Kshs.806,280).

This appeal is against the finding of liability under the Act and the computation of compensation.

Section 35 is under Part IV of the Act which deals with employer's liability for occupational diseases contracted by an employee in the course of the employment and by the nature of his work. It provides:

"S. 35 (1) Where a medical practitioner grants a certificate –

(a) that a workman is suffering from a scheduled disease causing disablement or that the death of a workman was caused by any scheduled disease; and

(b) that such disease was due to the nature of the work-man's employment and was contracted within the twenty-four months previous to the date of such disablement or death,

The workman or, if he is deceased, his dependants shall be entitled to claim compensation under this Act as if such disablement or death had been caused by an accident, and the provisions of this Act shall, subject to this Part, mutatis mutandis, apply unless at the time of entering into the employment the workman willfully and falsely represented in writing to the employer in reply to a specific question that he had not previously suffered from the disease:

….

(2) If on the hearing of an application for compensation in terms of subsection (1) the court is satisfied on the evidence that the allegations in the certificate are correct, the workman or his dependants, as the case may be, shall be entitled to compensation under this Act as if the contracting of the disease were an injury by accident arising out of and in the course of the workman's employment.

(3) Nothing in this section shall affect the right of a workman to claim compensation under this Act in respect of a disease which he contracts, being a disease other than a scheduled disease and being a disease which is a personal injury by accident arising out of and in the course of his employment, within the meaning of this Act."

Further s. 38 provides:

"If a workman who becomes disabled by or dies or any scheduled disease was within the period of twenty-four months immediately preceding the disablement or death employed in any occupation specified in the Third Schedule opposite such disease, it shall be presumed, unless or until the contrary is proved, that the disease was due to the nature of such employment."

The Third Schedule stipulates and describes 19 occupational diseases to which S. 35 applies, which include:

"Halogen derivatives of hydrocarbons of aliphatic series – the use of handling of, or

exposure to the fumes, or vapour containing, any halogen derivative of any hydrocarbon of aliphatic series.

Organo – phosphorus compounds – the use or handling of, or exposure to the fumes of or vapour containing any of the organo-phosphorus compounds."

Section 5 of the Act is also relevant. It deals with employer's liability for compensation for personal injury or death of the employee by accident arising out of and in the cause of employment.

There are four grounds of appeal relating to liability, namely that, the learned Judge erred in law and fact in failing to determine that the allegations in the doctor's certificate were correct and in failing to consider the appellant's evidence demonstrating that the disease may not have been contracted in the course of employment; that the learned Judge misdirected himself in presuming that the respondent's disease was due to the nature of his employment without considering the appellant's evidence to the contrary and in awarding compensation for incapacity that resulted from a deliberate self-injury. The 5th ground relates to assessment of quantum of compensation which the appellant says was assessed without considering the express provisions of the Act with respect to calculation of compensation.

Mr. Imende, the appellant's counsel, submitted, *inter alia,* that the respondent's claim was based on common law negligence and not on the Act and that liability under the Act was raised for the first time in the respondent's submissions. He contended that the respondent was bound by his pleadings.

Relying on the High Court decision on ***Wilson Nyanya Mosigisi v. Sasini Tea & Coffee Limited** [2006] eKLR,* **Mr. Waweru** for the respondent submitted, amongst other things, that there was no need to prove negligence as an employer's liability under the Act is on "*no fault basis*."

The respondent's claim as pleaded was based on breach of common duty by the employer and negligence under the common law. The appellant by its defence denied that claim. The demand letter dated 1st April 1999, the issues framed; evidence led by both parties and the manner of computation of damages related to that claim. A claim for compensation under the Workmen's Compensation Act which was in force at the material time is distinct. The Workmen's Compensation Act was repealed by Work Injury Benefits Act – Act No. 13 of 2007 (new Act) with effect from 20th December, 2007. However, the new Act still provides for compensation to employees for work related injuries and diseases contracted in the course of employment. It has also updated the law.

As counsel for the respondent correctly submitted, liability for statutory compensation is not based on the breach of duty or negligence of the employer. Rather, liability is based on the altruistic legal policy that the employer should, subject to certain exceptions, compensate the employee for injuries due to accidents and occupational diseases as inherent risks of employment. There are statutory presumptions in favour of the employee and the employee has no burden to prove the causative link between the employer's negligence and his injury or disease. On the contrary, the onus is on the employer to prove that there is no causal link on a balance of probabilities.

However, there are several specified limitations to recovery of compensation under the Act. As **S.35(1)(b)** provides, the provisions of the Act relating to recovery of compensation for incapacity or death resulting from accident *mutatis mutandis* applies to the recovery of compensation resulting from occupational diseases. Indeed, **S.37(2)** specifically provides that section 13 of the Act apply to recovery of compensation for occupational disease. Section 13 provides in part:

"Proceedings for recovery under the Act of compensation for injury shall not be maintainable unless a notice of the accident in the prescribed from has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing injury, or in case of death, within six months from the time of death…"

Further, the jurisdiction to determine claims for compensation under the Act is given to the subordinate court of the first class whatever may be the amount involved [**S.17(2)]** and the maximum amount of compensation which the subordinate court can award in case of permanent partial incapacity, permanent total incapacity as defined in the schedule to the Act and for death are stipulated in the Act. Where death or permanent total incapacity results, the maximum amount recoverable is limited to sixty months earnings (S.6(a) and 7 respectively). For permanent partial incapacity, the compensation payable is a percentage of sixty months earnings (S.8(1)(a)]. An appeal lies to the High Court from the order of the subordinate court (S.22(1).

Lastly, and more importantly by S.25(1) the employee has an option to institute proceedings in a civil court independently of the Act where the injury was caused by the personal negligence or willful act of the employer. By S. 25(2) if in such independent proceedings it is determined that the employer is not liable:

> ***"….the court in which such proceedings are taken or the appellate tribunal may proceed to determine whether compensation under this Act is liable to be paid to the plaintiff and may assess the amount of compensation so payable, but may deduct from such compensation any extra costs which in the opinion of the court or appellate tribunal have been incurred by the employer by reason of the proceedings having been taken independently of this Act."***

Thus, the High Court had jurisdiction after determining that the employer was not liable for negligence to determine whether the employer was liable to pay compensation under the Act.

Turning to the grounds of appeal, it is convenient to deal with all the grounds relating to liability together as they are all related.

It is apparent from the judgment that the learned Judge considered the medical certificate from Nazareth Hospital, the certificate from **Dr. Kamau -** Medical Officer Kiambu District Hospital, the medical report and oral evidence of **Dr. Ngugi** before making a finding that the respondent had contracted chemical hepatitis and chemical dermatitis.

In addition, the medical report of **Dr. Ochieng**' of Canaan Medical Centre certified that the respondent suffered from some form of Hepatitis which had been cured. There was also the medical report of **Dr. Owili** which certified that the respondent had contracted contact dermatitis due to contact with irritant chemicals and that the respondent had suffered permanent disability on his appearance.

The medical report of Dr. Ochieng' and the evidence of **Professor Guantai** reveal that chemicals in use contain organo-phosphate compounds which Dr. Ochieng' says are mixed with Hydrocarbon which act as a propellant.

The evidence of Prof. Guantai, who is not a medical Doctor, that she found no evidence of chemical hepatitis and the report of Dr. Ochieng' that hepatitis is unlikely to be related to any chemical, was not cogent to rebut the presumption that the disease was due to the nature of the respondent's employment. Moreover, the appellant did not produce any concrete evidence to show that any agent other than the chemicals used in spraying could have caused the diseases. The decision of House of Lords in ***Wilsher v Essex Area Health Authority*** ***[1988] 1All ER 871*** relied on by the appellant that;

"where a plaintiff's injury was attributable to a number of possible causes, one of which was defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury", is applicable, as that decision itself shows, to cases where the plaintiff's action is based on negligence and breach of duty and not to cases, like the present one, where there is an express statutory liability on the part of the employer combined with an express presumption of causation in favour of the employee.

Upon the re-appraisal of the evidence before the High Court and consideration of the statutory presumption in favour of the respondent, we are satisfied that the High Court made a correct determination that the respondent suffered an occupational disease due to the nature of his work as a

sprayer. Indeed, the contraction of the diseases and the causal link would have been legitimately inferred from the evidence.

Although the appellant’s counsel did not submit on the ground of appeal relating to alleged erroneous assessment of quantum of compensation, as he did not withdraw it, we are required to consider it. The ground of appeal speaks for itself that the learned Judge did not consider the express provisions of the Act with respect to calculation of compensation for injury.

After rejecting the respondent’s claim based on negligence, the High Court found the appellant liable to pay compensation under the Act. As already stated, the High Court had jurisdiction under S. 25(2) of the Act to do so. Had the High Court found the appellant liable for negligence, damages would have been at large. What is awarded under the Act is strictly not damages but statutory compensation. The compensation under the Act is circumscribed and a court has no power to award more than what is stipulated by law. Again as already stated, the highest compensation for permanent total incapacity stipulated by S.7(1) of the Act is a sum equal to sixty months earnings – that is, earnings for 5 years.

The medical reports do not indicate the degree of incapacity that the respondent suffered except the medical report of Dr. Ochieng who reported that respondent suffered permanent disability on his appearance (dermatitis) and Dr. Owili, which shows that respondent, suffered permanent disability from contact dermatitis. Dr. Ochieng however reported that Hepatitis has been cured and liver function was back to normal. Dr. Ngugi who testified as a witness for the respondent stated that upon examining the respondent he could not see signs of liver damage or pneumonias. He however stated that the respondent had contact dermatitis and had patches and lesions on the skin.

It seems from the medical reports that Hepatitis was a temporary problem which was cured and that the only incapacity that the respondent suffers from is contact dermatitis.

In spite of the inconclusive medical reports, we make a more favourable finding to the respondent that he suffered permanent total incapacity within the meaning of the Act from dermatitis.

The learned Judge erred in principle in the computation of compensation, in that, having found the appellant liable to pay compensation under the Act, he computed compensation independently of the Act in form of general damages for loss of earning. We are entitled to interfere with assessment of compensation. The respondent should have been entitled to compensation computed thus:

- Kshs. 3,030 x 12 x 5 years = Kshs. 181,800/-

Although the appeal has substantially succeeded and although the extra costs incurred by the appellant could be deducted from the compensation by virtue of S.25(2) of the Act, it is just to make no orders as to costs as the compensation has been drastically reduced.

For the foregoing reasons, the appeal is allowed to the extent only that the award of shs.806,280/- as compensation under the Workmen’s Compensation Act is set aside and substituted with as award of compensation of Kshs. 181,800/-.

There shall be no order of costs of the appeal.

For avoidance of doubt, the award of Kshs. 5,000/- as special damages, costs and interest remain intact.

Orders accordingly.

Dated and delivered at Nairobi. this 30th day of JANUARY, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR