



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A.)

CIVIL APPEAL NO. 58 OF 2014

BETWEEN

PURITY WAMBUI MURITHII APPELLANT

AND

HIGHLANDS MINERAL WATER CO. LTD..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Wakiaga, J.) dated 27th June, 2014

in

H.C.C.A No. 122 of 2012)

JUDGMENT OF THE COURT

1. Following an industrial accident which occurred at the respondent's premises on 10th March, 2011, the appellant sued the respondent seeking *inter alia*: - general damages for pain, suffering and loss of earnings and special damages as a result of the injuries she sustained. At all material time, the appellant had been employed by the respondent as a casual labourer working as a packer and cleaner.
2. On the material day at around 4:45 p.m. while the appellant was cleaning the production section she slipped and fell on her back and lost consciousness. She was rushed to Outspan Hospital where she was admitted from 10th March, 2011 to 29th March, 2011. As a result of the accident the appellant sustained injuries to her left elbow, pelvic region, lower back and left knee. According to the appellant, the said accident was as a result of negligence on the part of the respondent for failing to take all reasonable precautions to ensure her safety at work.
3. The respondent filed a statement of Defence denying the allegations by the appellant. The respondent averred that the said accident occurred wholly as a result of the appellant's negligence.
4. In her evidence, the appellant testified that she slipped and fell when she stepped on oil that had spilled

on the floor. The spill was from a particular machine which had been leaking since it was installed eight months prior to the accident. According to the appellant, the respondent was aware of the leakage. She faulted the respondent for not providing her with protective clothing and for not dealing with the oil leakage. PW2, Mr. Zachary Githui Mwaniki, an occupational therapist gave evidence that the appellant had sustained soft tissue injuries on her left elbow, pelvic region, lower back and left knee; on account of the injuries to her back, the appellant could not carry heavy things and she has had to wear a spinal cossette to support her back. He further testified that the appellant was still undergoing physiotherapy.

5. In its defence, the respondent called three of its employees as witnesses. DW1, Mercy Wanjugu (Mercy), who had also been employed as a casual labourer testified that on the material day she was washing the production section with the appellant. While admitting that the said accident occurred Mercy blamed the same on the appellant. According to her, the appellant tried to walk on a slippery portion of the floor where soapy water had been poured while carrying a bucket; the appellant was careless. On cross examination Mercy admitted that there was an oil spill where the appellant fell. She testified that causal labourers were only issued with aprons by the respondent. On the other hand, DW2, Joyce Muthoni Nderitu (Joyce) and DW3, Humphrey Nganga Njenga (Humphrey), testified that there was no oil spill in the production section; the respondent had issued all its employees including the appellant with protective gear namely, apron, gumboots, gloves masks and earplugs. They maintained that the appellant had fallen due to soapy water on the floor.

6. At the conclusion of the trial, the trial court found the respondent 100% liable and entered judgment in favour of the appellant for total sum of Kshs. 705,000/= being Kshs. 700,000/= for general damages and Kshs. 5,000/= for special damages. Aggrieved with that decision the respondent preferred an appeal in the High Court which was allowed vide a judgment dated 27th June, 2014. The High Court set aside the trial court's decision, apportioned liability between the parties at 50%:50% and awarded Kshs. 150,000/= as general damages and Kshs. 5000 as special damages. It is that decision that has provoked this second appeal based on the following grounds:-

- ***The learned Judge erred in law in deciding that liability for the injuries sustained by the appellant herein should be shared on a 50:50 basis between the two parties and in doing so made judgment which was unfair to the appellant.***
- ***The learned Judge erred in law in interfering with the lower court's award on general damages when there was no reason to support the interference.***
- ***The learned Judge erred in law in awarding the appellant general damages amounting to Kshs. 150,000/=. The award in issue was too low considering the circumstances of the matter and resulted in a very unfair judgment to the appellant.***

7. M/s Grace Mukuha, learned counsel for the appellant, submitted that the High Court erred in apportioning liability on a 50:50 basis when there was no evidence supporting such a finding. While relying on this Court's decision in **Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia, (1982-88) I KAR 727** M/s Mukuha argued that it was the employer's duty to ensure the working conditions are safe for its employees hence in this case the respondent was 100% liable for the accident. She also faulted the High Court for interfering with the findings of the trial court on quantum of damages. M/s Mukuha urged us to allow the appeal.

8. Mr. Paul Ngigi, learned counsel for the respondent, submitted that the High Court correctly held that the appellant was 50% liable. According to him, the appellant also owed herself a duty of care since she was aware of the oil spill for a period of three months prior to the accident. Further, the appellant negligently wore rubber shoes while cleaning the floor with soapy water. He submitted that the High Court correctly apportioned liability between the parties. Mr. Ngigi argued that the award of damages given by the High Court was consistent with the soft tissue injuries the appellant had sustained. He urged us to dismiss the appeal.

9. In brief reply, M/s Mukuha submitted that the appellant's work was cleaning the floor so she had to pour soapy water on the floor. Further, that the respondent had not provided the appellant with protective shoes and she had no option but to work in her rubber shoes.

10. We have anxiously considered the record, the grounds in support of the appeal, submissions by counsel and the law. This being a second appeal we caution ourselves that we are restricted to considering only matters of law. In *Kenya Breweries Ltd. –v-s Godfrey Odoyo, - Civil Appeal No. 127 of 2007*, Onyango- Otieno, J.A held:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

We are of the considered view that the following issues arise for determination:-

- ***Did the High Court err in apportioning liability equally between the parties?***
- ***Did the High Court err in interfering with the trial court’s finding on quantum of damages?***

11. It is imperative at this juncture to determine how the accident occurred and who was responsible for the same. It is not in dispute that the appellant fell down and injured herself while cleaning the production section. However, there were two conflicting versions of what caused the fall. On one hand, the appellant maintained that she stepped on an oil spill on the floor and fell. While on the other hand, the respondent denied that there was an oil leakage on the floor and maintained that the appellant fell because she had poured soapy water on the floor. From the record, the trial court believed the appellant’s version more so because firstly, Mercy, the respondent’s witness, who was present at the material time corroborated the fact that there was an oil spill on the floor and that the appellant fell when she stepped on the said spill. Secondly, Joyce and Humphrey were not present when the accident occurred. We see no reason to interfere with this finding by the trial court taking into account this Court’s decision in *Michael Hubert Kloss & Another –vs- David Seroney & 5 Others – Civil Appeal No. 285 of 2005* wherein it was held:

“Where in particular there is a conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court will hardly interfere with the conclusions made by the trial Judge after weighing the credibility of the witnesses.”

12. ***Section 6(1) of the Occupational Safety and Health Act*** provides:-

“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace.”

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer’s failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further ***Section 13(1)(a)*** of the ***Occupational Safety and Health Act*** provides:-

“13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.”

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties.

13. In this case there was an oil spill from a machine in the production section; the machine had been leaking since it was installed eight months prior to the accident. We find that the respondent failed to provide a safe working environment for the appellant by not dealing with the said leakage. From Mercy’s evidence we note that the respondent had not placed a notice to caution its employees of the said oil spill

and only did so after the accident. We also note that Mercy testified that the respondent only gave the appellant an apron. This testimony corroborated the appellant's case that the respondent had not provided her with protective gear to ensure her safety at the work place. To that extent we concur with the High Court that the respondent was liable for the said accident.

14. We also concur with the High Court's finding that the respondent was not entirely to blame for the accident. It was the appellant's uncontroverted evidence that the leakage had been going on for a period of eight months; she had cleaned the production area for a period of three months prior to the accident; she was at all material times aware of the said leakage. Based on the foregoing, we find that the appellant being aware of the oil spill ought to have taken reasonable care to ensure her safety while washing the production area. We find that the appellant was equally to blame for the accident. We are of the considered view that the High Court correctly apportioned the liability at 50%:50%. Lord Reid expressed himself in Stapley –vs- Gypsum Mines Ltd, (2) (1953) A.C. 663 as follows: -

“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.”

15. On a second appeal, this Court cannot interfere with the finding on quantum of damages unless the said finding is perverse. In Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini –vs- A M Lubia & Olive Lubia (Supra), this Court held:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that wither that the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

See also this Court's decision in Arrow Car Ltd. –vs- Bimomo & 2 Others, (2004) KLR 101.

16. Having considered comparable awards for soft tissue injuries as those suffered by the appellant, we find that the High Court was correct in interfering with the award of damages granted by the trial court which were excessive. We see no reason to interfere with the High Court's assessment of quantum of damages payable to the appellant.

17. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 3rd day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR