



**PJ Dave Flowers v Muhangani (Appeal 40 of 2018)
[2024] KEELRC 1151 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 40 OF 2018
SC RUTTO, J
APRIL 19, 2024**

BETWEEN

PJ DAVE FLOWERS APPELLANT

AND

CHRISTINE NAMUKWI MUHANGANI RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon.
Principal Magistrate M. Kasera delivered on 11th October 2016)*

JUDGMENT

1. Through a Plaintiff dated 24th July 2015, the Respondent instituted a suit at the Principal Magistrate's Court at Kajjado being Civil Suit No. 355 of 2015, in which she averred that she was employed by the Appellant as a grader. The Respondent averred that it was an express and/or implied term of the employment that it was the duty of the Appellant to take all reasonable precautions for her safety while she was engaged in the discharge of her work, not to expose her to risks of damages or injury which the Appellant knew or ought to have known, to provide adequate, safe and suitable working environment to enable her carry out her work in safety.
2. It was the Respondent's case that on or about February 2013, during the course of her employment, she was ordinarily grading flowers in the cold room for export. That she started experiencing chest pains that gradually led to difficulty in breathing and ultimately led to her developing bronchitis, generalized body aches and headaches leading to excruciating great pain and suffering. According to the Respondent, she sustained severe injuries and suffered great loss and damage.
3. Against this background, the Respondent sought special damages and general damages for pain and suffering as well as costs of the suit.
4. The Appellant challenged the suit through a Statement of Defence dated 24th August 2015 in which it denied that the Respondent was its employee. Putting the Respondent to strict proof, the Appellant



averred that it did not owe her any duty of safety. The Appellant further denied the sequence of events and occurrence of the accident as narrated by the Respondent in her Plea.

5. The Appellant further contended without prejudice that if any accident did occur, the same was wholly and/or substantially contributed to by the carelessness and negligence of the Respondent. Consequently, the Appellant asked the Court to dismiss the Respondent's suit with costs.
6. During the trial, both parties called oral evidence and after close of the hearing, written submissions were filed. Subsequently, the trial Court evaluated and analyzed the evidence on record, and found the Appellant liable. In its judgment, the trial Court reckoned that the Appellant ought to have ensured that the Respondent dresses appropriately. Accordingly, the trial Court awarded the Respondent general damages in the sum of Kshs 180,000/= and apportioned liability at 80%:20% hence the total award was Kshs 144,000/=. The Respondent was further awarded special damages in the sum of Kshs 3,000/= as well as costs of the suit plus interest at court rates.

The Appeal

7. The Appellant was aggrieved by the decision of the trial Court hence the instant Appeal. In the Memorandum of Appeal dated 9th November 2016, the Appellant raises the following three grounds: -
 1. That the Learned Trial Magistrate erred in law and in fact in awarding general damages at Ksh180,000/- that were manifestly excessive and incommensurate with the injuries as (sic) suffered.
 2. That the Learned Trial magistrate erred in law and fact in holding the Defendant 80% percent liable despite overwhelming evidence to the contrary.
 3. That the Learned Trial Magistrate erred in law and fact in completely overlooking the defendant's submissions.
8. The Appellant therefore sought an award of the following orders:
 - a. The judgment be set aside and or substituted with an appropriate judgment on liability and general damages.
 - b. The Appellant be awarded costs in both the high and subordinate court.

The Submissions

9. The Appeal was canvassed by way of written submissions. The Appellant submitted that the judgment of the trial Court did not give cogent reasons on the issue of liability. The Appellant further argued that the apportioning of liability at 80:20 had no basis and was speculative. It was further submitted that whereas the Appellant had provided the Respondent with protective clothing, she was unable to show what it was, that it had failed to do.
10. It was the Appellant's further position that the ailment suffered by the Respondent was not a one-off but continuous hence it was incumbent upon her to notify her supervisor of the challenges encountered.
11. The Appellant further submitted that the trial Court failed to evaluate the omission and commissions on its part and ended up at a wrong decision on liability.
12. On quantum, the Appellant submitted that the ailment suffered by the Respondent had no time duration as it was occupational. In the Appellant's view, Kshs 50,000/= would suffice if this Court were to find it liable.



13. The Respondent did not file written submissions.

Analysis and Determination

14. This being the first appeal, the Court is duty bound to revisit and exhaustively re-evaluate the evidence presented before the trial Court and draw its own independent conclusion but bearing in mind that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses. This position was reaffirmed by the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Company Ltd & Others*, [1968] EA 123.
15. Having considered the Appeal, the evidence on record and the Appellant's Submissions, the following issues stand out for determination:
 - a. Whether the Respondent established that she sustained an occupational ailment and whether the Appellant was liable;
 - b. What damages if any, should be awarded to the Respondent?

Whether the Respondent established that she sustained an occupational ailment and whether the Appellant was liable

16. The Respondent's case at the trial Court was that she was employed in the Appellant's grading department as a sizer. That the grading room is located next to the cold room and its low temperatures are felt from there. She stated that from February 2013, she felt sick experiencing chest pains, stomach pains, headaches, and shivering. She reported to the senior supervisor, Charles who referred her to the Human Resource Manager Amos, who in turn gave her a note for treatment at the company's clinic where she was treated.
17. Her illness persisted and she went to Kitengela Pona Services Hospital where she was diagnosed with pneumonia and admitted from 16th to 20th April 2013. From 5th to 9th May 2014, she was admitted again and she resumed her duties. She was not well yet. From 18th to 22nd August 2014, she was admitted in hospital again and she resumed duties. On 28th September 2014, she became sick again and she went to Kitengela Medical Services where she was admitted for four days and discharged on 3rd October 2014. The Respondent averred that the Appellant took care of her hospital bills.
18. The Respondent further stated that she then reported to her supervisor that she wished to stop working at the flower farm since the chemicals affected her. She blamed the Appellant for failing to ensure a safe and orderly work environment and failing to provide her with protective gear.
19. In support of her case at the trial Court, the Respondent exhibited a copy of a medical report by Dr. Okoth Okere dated 17th July 2015. In the medical report, Dr. Okere noted that the Respondent was employed by the Appellant in good health. That she was not supplied with proper protective gear, a good mask and good gloves. In the opinion of Dr. Okere, the Respondent sustained chronic bronchitis for a period of two years while in employment, and this condition could have been prevented if she had been supplied with good protective gear.
20. The Respondent further exhibited copies of discharge summaries dated 21st April 2013 indicating that she was admitted on 16th April 2014 and discharged on 20th April 2013. As per the discharge summary, she was diagnosed with pneumonia. In another discharge summary dated 22nd August 2014, the Respondent was admitted on 18th August and discharged on 22nd August 2014. The diagnosis was noted as pneumonia/typhoid.



21. Another discharge summary dated 3rd October 2014 indicates that the Respondent was admitted on 28th September 2014 and was discharged on 3rd October 2014. Her diagnosis was also indicated as pneumonia.
22. On its part, the Appellant called evidence through Judy Sambay and Jacob Nabilai Makokha. Mr. Makokha who testified as DW2, stated that at the grading department, where the Respondent was stationed and where he works as a supervisor, the workers are provided with dust coats, gumboots and gloves for their work. He stated that the Respondent never complained of having any injury in February 2013 or any other problem. That she worked for the entire month of February 2013 apart from the days she was officially on duty. That the only thing the Respondent reported to him was that she had stomach ulcers. He further stated that whenever the Respondent complained of stomach ulcers, she was given sick off to seek treatment. It was Mr. Makokha's evidence that the Respondent left the Appellant's employment without any complaints.
23. In support of its case, the Appellant exhibited a copy of the muster roll which notably, is in respect of February 2014 while the Respondent's claim was that she became unwell in February 2013. Besides, it was the Appellant's case that the Respondent was at work for the entire month of February 2013. Therefore, the said muster roll did not do much to address the issue in contention.
24. The Appellant further exhibited a copy of a form indicating that the Respondent was issued with Personal Protective Equipment (PPE) in particular, dust coat, gloves and gumboots. As per the said form, the said items were issued on 25th March 2014 and 2nd April 2014.
25. The Appellant further exhibited a copy of a medical report dated 6th June 2016, prepared by Dr. Wokabi who made the following observation:

“The medical and clinical evidence availed gives a picture of one who enjoyed (sic) very frequent poor health over a period of 2 years when she worked in the flower farm. She was sick with 3 different ailments as described. Except for the pneumonia which can be caused by being in a cold environment none of the others was specific to being in such an environment. Even the pneumonia she was treated for cannot be categorically considered to have been due to the workplace. However, under today's circumstances, I can give her the benefit of doubt. The good thing about occupational ailments is that one gets out of the offending environment they recover fully. The ailments she suffered then not leave any permanent residual complications. As such she has no demonstrable permanent disability.”
26. Section 6(1) of the [Occupational Safety and Health Act](#) provides as follows: -

“Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in the workplace.”
27. My deduction of the aforesaid provision is that, as a general rule, the employer is liable for any injury or loss that occurs to its employees while at the workplace as a result of the employer's failure to ensure their safety.
28. In *Wilson & Clyde Coal Co. vs English* (1938) AC 579, it was held that employers are under a duty to provide adequate material and a safe system of work.



29. And further, in Halsbury's Laws of England, 4th Edition vol. 16 Para 560, it is stated that:
- “At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...So as not to expose them to an unnecessary risk.”
30. In this case, the Appellant did not adduce evidence demonstrating that the Respondent was issued with protective gear as of February 2013, the period she alleges her occupational ailment started.
31. I say so noting that the PPE issuance form exhibited by the Appellant at the trial Court, indicates that the Respondent was issued with the protective equipment on 25th March 2014 and 2nd April 2014. The question is what about the period preceding that?
32. It is thus my conclusion that the Appellant did not prove at the trial Court that at all material times, the Respondent was provided with the necessary protective gear to allow her undertake her duties.
33. Further, it is noteworthy that from the record, the Respondent's ailment started as far back as April 2013 and continued well into sometimes in October 2014. The record further bears that in the course of that period, the Respondent was admitted at least three times with the diagnosis being pneumonia. Further, as per the Respondent's assertions, her work station was located near the cold room. From the foregoing, I am led to conclude that it is more than probable that the Respondent suffered from pneumonia as a result of the alleged proximity to the cold room and the attendant conditions at her work place.
34. What's more, it is notable from the medical report by Dr. Wokabi, that at the time he examined the Respondent, she did not reveal any sign of poor health. It would thus mean that her health condition during the time she worked for the Appellant was triggered by the working environment.
35. In light of the foregoing, I am persuaded that the Respondent established that she sustained an occupational ailment while working for the Appellant. To that extent, the Appellant was liable.
36. To this end, I find no reason to cause me to interfere with the trial court's finding on the issue of liability.

What damages if any, should be awarded to the Respondent?

37. The trial Court awarded the Respondent general damages in the sum of Kshs 180,000/=. Notably, the learned Magistrate did not advance any reason for awarding the said amount as general damages.
38. On its part, the Appellant has urged the court to award general damages in the sum of Kshs 50,000/= in the event it is found to be liable. Despite fronting this argument, the Appellant did not point the Court to any authorities to support this position.
39. In Catholic Diocese of Kisumu vs Sophia Achieng Tete [2004] 2 KLR 55, the Court of Appeal set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some



relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

40. And further, the Court of Appeal in the case of Arrow Car Limited vs Bimomo & 2 others [2004] 2 KLR 101 held that in the assessment of damages, the general method of approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.
41. Bearing in mind the foregoing authorities and taking into account the circumstances of this case, the question that I am now confronted with is whether this Court should interfere with the damages awarded by the trial Court and if so why?
42. In the case of Purity Wambui Murithii vs Highlands Mineral Water Co. Ltd [2015] eKLR, the Court of Appeal sustained an award of Kshs 150,000/= by the High Court where the employee had sustained soft tissue injuries on her left elbow, pelvic region, lower back and left knee. Further, the employee in that case could not carry heavy things on account of the injuries to her back and she had to wear a spinal cossette to support her back. At the time, she was still undergoing physiotherapy. Worthy to note is that the court took into account the employee’s contribution to her injuries, in which case, liability was apportioned at 50%.
43. In the case of Sylvester Oduor Othwila vs Phoenix Aviation Limited (2014), the employee had worked for Phoenix Aviation Limited, for close to four years and his work mostly consisted of spraying aircrafts in a closed hangar in order to guard against polluting the environment. As a result, he developed chest problems which led to the termination of his employment. The Court awarded him Kshs. 225,000/= plus costs and interest at court rates from the date of the award until payment in full.
44. Further in the case of Faith Mutindi Kasyoka vs Safepark Limited [2019] eKLR, the Court awarded the employee a sum of Kshs 300,000/= on account of having developed inhalation injuries to the lungs and the stomach. In the said case, the employee started developing chest complications eight (8) months after she had been employed at the employer’s production department which specialized in the making of plastic containers.
45. Turning to the case herein, the Respondent was examined by Dr. Wokabi, and in his report dated 6th June 2016, he noted that she did not reveal any sign of poor health. Further, Dr. Wokabi noted that the Respondent did not demonstrate any permanent disability.
46. In light of the foregoing, and drawing parallels with the aforementioned authorities, in my estimation, the award by the trial Court of Kshs 144,000/= as general damages is fair.

Orders

47. Against this background, I find no reason to cause me to overturn the decision by the learned trial Magistrate with regards to the liability and quantum. Accordingly, the instant Appeal fails and is dismissed with an order that the Appellant shall bear the costs in this Court and at the trial Court.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2024.

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STELLA RUTTO

JUDGE

In the presence of:



For the Appellant Mr. Omangi

For the Respondent No Appearance

Court Assistant Kemboi

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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