



New Wide Garments EPZ (K) Limited v Kioko (Employment and Labour Relations Appeal 4 of 2022) [2024] KEELRC 1515 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1515 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
EMPLOYMENT AND LABOUR RELATIONS APPEAL 4 OF 2022**

MA ONYANGO, J

JUNE 6, 2024

FORMALLY HCCA NO. 78 OF 2017

BETWEEN

NEW WIDE GARMENTS EPZ (K) LIMITED APPELLANT

AND

RUTH KANINI KIOKO RESPONDENT

(Being an appeal against the judgment of Honourable A. Lorot H.R, Senior Principal Magistrate at Machakos in Machakos CMCC No. 448 of 2013)

JUDGMENT

1. The Appellant herein was sued by the Respondent in Machakos Chief Magistrates Court *vide* a Plaint dated 4th April 2013 and amended through Amended Plaint dated 21st March 2014 and further amended *vide* Further Amended Plaint dated 29th October, 2015 in which the Plaintiff, now the Respondent in the instant appeal sought for compensation as a result of an accident that she alleged to have sustained while in the course of the Appellant's employment. After hearing the parties, the Appellant was found to be liable for the accident and the trial court awarded the Respondent Kshs 300,000 as General damages, Kshs 7,500 as special damages plus costs and interest thereon.
2. The Appellant being dissatisfied with the said judgment lodged the instant appeal on the following grounds as raised in its Memorandum of Appeal:
 - i. That the learned trial magistrate erred in law and in fact by arriving at a conclusion not supported by the evidence on record.
 - ii. That the learned trial magistrate erred in law and in fact in not considering the Appellant's defence that the Respondent's claim was fraudulent in view of glaring discrepancies in the Respondent's evidence and documents produced in court.



- iii. That the learned trial magistrate erred in law and in fact in finding that the Respondent had proved her case on a balance of probability despite the glaring discrepancies in the Respondent's evidence and documents produced in court.
 - iv. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's defence and the evidence that the Respondent had absconded from her work and was not injured at the Appellant's premises.
3. The Appellant seeks the following orders: -
- i. That this appeal be allowed with costs
 - ii. That the judgment delivered by the learned magistrate on 18th May 2017 be set aside

Background of the case

4. The Respondent was the Plaintiff in the trial court. She sued Protex Kenya EPZ Limited and New Wide Garments EPZ(K) Limited, the Appellant herein and averred that she was an employee of Protex Kenya EPZ Ltd whose operations have since been taken over by the Appellant.
5. She contended that on 6th February 2021, while in the course of her employment, she sustained a blunt abdominal trauma which accident caused her to have an involuntary abortion. She attributed the accident to the negligence and breach of the legal and contractual duty on the part of the Appellant. She therefore sought general damages for pain, suffering and loss of amenities; special damages of Kshs 2500, costs of the suit and interest.
6. In its Statement of Defence dated 5th May 2014, the Appellant stated that it was incorporated on 4th February 2011 and commenced its operations on 23rd March 2012. The Appellant denied the allegations made in the Further Amended Plaintiff and in particular that the Respondent was injured at its factory on 6th February 2011. The Appellant averred that the Respondent was not at the factory on 6th February 2011 as she had absconded her duties from 1st February 2011.
7. The Appellant maintained that the Respondent's claim was fraudulent and a misrepresentation and prayed that it be dismissed with costs.
8. The trial court upon considering the evidence on record and submissions by the parties, found the Appellant liable and entered judgment against it in the sum of Kshs 307,500.

The Appeal

9. This appeal was initially filed in Machakos High Court where directions were taken that the appeal be canvassed by way of written submissions. The appeal was transferred to this court *vide* a ruling of Hon Justice G.V Odunga delivered on 5th May 2022 on grounds of jurisdiction. The Appellant's submissions were filed on 26th August 2021 while the Respondent filed her submissions on 14th April 2022.

Appellant's submissions

10. The Appellant submitted that in its statement of defence, it stated that 6th February 2011 was a Sunday and not a working day. That the Respondent filed the amended plaintiff in order to change the date of the accident from 6th February 2011 to 3rd February 2011. The Appellant maintained that the Respondent was not at her place of work on the said 3rd February 2011 as she had absconded duty from 1st February 2011. It is therefore the Appellant's submission that contrary to her pleadings that she was injured on



3rd February 2011, the supporting documents show that the Respondent sustained the alleged injuries on 6th February 2011.

11. In support of the Appellant's position that the Respondent was not a truthful witness, the Appellant submitted that in her written statement, the Respondent did not state that the machine had malfunctioned and only stated that she was hit in her abdomen by one of the machines as she walked out. It is submitted that in her evidence, she stated that the machine malfunctioned when she was using it.
12. The Appellant submitted that the defence witness informed the court that the Respondent had absconded duty from 1st February 2011 and never went back until 14th February 2011. It is stated that DW1 produced the punching card which showed that the Respondent punched out on 1st October 2011 and was absent from 2nd February 2011 to 12th February 2011.
13. It is the Appellant's submission that the trial court ignored the evidence of DW1 which showed that the Respondent had absconded her duties from 1st February 2011 to 12th February 2011 and therefore could not have been injured at the Appellant's factory on 3rd February 2011.
14. The Appellant further submits that in the judgment the trial court cast the burden of proof on the Appellant when it stated that: "the defendants had the opportunity of calling other worker or supervisor; or even the mechanic who is mentioned by the plaintiff to say no such accident occurred."
15. According to the Appellant, the burden of proof rested on the Respondent and not the Appellant as provided for under section 107(1) and section 109 of the *Evidence Act*. The Appellant submitted that the burden of proof was on the Respondent to show that an accident occurred on 3rd February 2011. In support of this position, the Appellant relied on the cases of; *Eastern Produce(K)Ltd v Shikuku Kisamartin* (2005) eKLR, *Statpack Industries v James Mbiti Munyao* [2005] eKLR, *Timsales v Stephen Gachie* (2015) eKLR.
16. The Appellant submitted that the Respondent did not fully establish that the Appellant was responsible for the alleged injury and that with the glaring contradictions in the Respondent's testimony and documents, the Respondent did not fully discharge her duty of proving her case on a balance of probability.
17. The Appellant submitted that had the trial court taken into account the discrepancies in the Respondent's documents, evidence and statement, it would have arrived at a different finding of law and fact.
18. The Appellant urged the court to reconsider the matter, set aside the judgment of the trial court and proceed to dismiss the Respondent's case as against the Appellant.

Respondent's Submissions

19. The Respondent on her part concentrated on the issue of jurisdiction which has since been overtaken by events. The other substantive issues identified by the Respondent for determination are:
 - a. Whether the Respondent was an employee of the appellant and present at work on the material date.
 - b. Whether the Appellant breached his duty of care to the Respondent.
20. In addressing the issue on whether she was an employee of the Appellant, the Respondent submitted that she produced an employment card during trial which evidenced that she was an employee of the Appellant. With regard to the issue whether she was present at work on the material date, the



Respondent submitted that the Appellant wanted to discredit her case on account of the inconsistency or error in her witness statement as filed in court. She submitted that although the said witness statement indicates an erroneous date of 6th February 2011 as the date of the accident, the said witness statement is not a pleading per se and is therefore not binding on the maker.

21. According to the Respondent, she explained to the court what informed the mistake which was that she had been admitted for 3 days from the date of the accident to the date of the discharge being 5th February 2011 and a discharge summary issued on 6th February 2011. The Respondent submitted that the discharge summary, PExb 2 reflects the correct position that the Respondent was injured on 3rd February 2011, was admitted at Athi River Community Hospital from 3rd February 2011 to 5th February 2011 and was issued with the summary discharge on 6th February 2011.
22. The Respondent submitted that the testimony of the defence witness and the exhibits produced by the Appellant are not enough reason to dismiss her claim.
23. On whether the Appellant breached its duty of care to the Respondent, it is the Respondent's submission that having established that an employer owes an employee an utmost duty of care, in addition to the faulty machine the plaintiff was working on, the Appellant had not provided her with any protective gear to aid in carrying out her duties.
24. In conclusion, the Respondent submitted that she had discharged her burden of proof on a balance of probabilities and the trial court did not make an error in finding the defendant 100% liable for the accident.
25. The court was urged to dismiss the appeal with costs and to uphold the trial court's finding.

Analysis and Determination

26. This case being before me as a first appellate court, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own decision in the matter. As the first appellate court however, I must exercise caution since I did not have the advantage of seeing and hearing the witnesses. See *Selle & another -vs- Associated Motor Boat Co. Ltd & others* [1968] EA 123.
27. I have carefully considered and evaluated the evidence afresh. I have also considered the written submissions by the rival parties to this appeal and at the trial court. It is my view that the issue for determination is whether the Respondent proved her claim against the Appellant on a balance of probabilities.
28. It is disputed by the Appellant that the Respondent sustained the injuries she complained of while in the course of duty. According to the Appellant, the Respondent was not at work during the period she alleged to have been injured as she had absconded duty from 1st February 2011 to 12th February 2011. In support of this position, the Appellant's witness, DW1 Paul Otieno Joma produced a punching card, DExh 1, which indicated that the Respondent was not on duty on the date she alleges to have been injured. An occurrence book, DExh 2 was also produced to show that the Respondent did not make a report of the injury as is the standard practice.
29. The Respondent first filed a plaint in which she alleged that she was injured while at work on 6th February, 2011. When the Appellant pointed out in its defence that 6th February 2011 was a Sunday and the factory was closed, the Respondent applied for leave to amend her plaint to change the date of injury to 3rd February, 2011.
30. I have further noted that the original medical report filed by the Respondent (her exhibit No. 4) has an amendment of the date of injury from 6th to 3rd February 2011. The amendment on the printed



medical report is by hand and was not explained by the Respondent. Further, the receipt from Athi River Community Hospital Respondent's Exhibit No. 3 also has an amendment of the date which was also not explained. The demand letter refers to the date of accident as 6th February, 2011. It is further curious that the Respondent was discharged from hospital on 5th and issued with a Discharge Summary on 6th February, 2011. My understanding is that the Discharge summary is issued at the point of discharge. The circumstances under which this happened in this case were again not explained by the Respondent.

31. The court further noted that in her witness statement the Respondent stated that while working for the Appellant on 6th February 2011 she was walking out from her workstation when one of the machines hit her on her abdomen. That she fell down and was injured on her back. She stated that this was because the workspace is usually congested with machines.
32. At the hearing the Respondent testified that there was a smell from her machine like it had a defect with the motor. That she called the mechanic who did not work on it. That she continued sewing and after 2 hours the machine began smoking. That she saw smoke, jerked and fell on a machine nearby on her back. That she went to hospital that evening and was admitted.
33. She testified that she went back to work on 5th February, 2011 and was summarily dismissed on grounds that she was not at work on 3rd and 4th. She testified that she was not on duty for half day on 3rd.
34. Under cross examination the Respondent stated that when her machine started smoking the supervisor reassigned her to another machine. She further stated that she did not report the injury to anyone.
35. On its part the Appellant submitted a letter of termination of the Respondent's employment dated 5th February, 2011 in which the reason for termination was that she had absconded duty from 1st February, 2011 until the date of the letter. It was the Appellant's evidence that the letter was issued to the Respondent on the same date. The Appellant further produced a letter of resignation dated 5th February 2011 in which the Respondent claimed pay in lieu of notice, maternity leave of 3 months, salary for February 2011 and annual leave for one year. The Respondent admitted under cross examination that she wrote the letter to claim her terminal dues.
36. The Appellant further produced the attendance/clocking card of the Respondent which reflects that she was absent from work from 12.30 on 1st February, 2011 up to 12th February 2011.
37. In addition, the Appellant produced a letter from Athi River Health Centre dated 3rd August, 2011 in which it is stated that the Respondent was attended to at the facility during her pregnancy during which she developed complications and was given complete bed rest to save the life of the unborn baby. The medical chit does not indicate that the Respondent did not carry the pregnancy to full term. The Appellant further filed a document from Mukuru Nursing Centre Maternity indicating that a person by name Ruth Kanini Kioko gave birth at the facility to a baby boy. This may be an indication that the Respondent may have carried her pregnancy to full term and therefore did not abort due to the injury allegedly sustained in the accident that is the subject of this suit. This may explain her demand for maternity leave in the letter of resignation.
38. From the discrepancies in the evidence on record, there was serious doubt as to whether the Respondent was injured on 3rd or 6th February, 2011, whether she was at work on the dates she alleged to have been injured and whether she sustained any injury at all. There is further doubt as to whether she aborted after the alleged injury at work or carried the baby to full term and delivered in May 2011.
39. Sections 107, 108 and 109 of the *Evidence Act* provide for burden of proof as follows-



107. Burden of proof
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. Incidence of burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
40. It is my finding that the Respondent did not discharge the burden of proof on a balance of probabilities that she was injured while at work in the Appellants premises on 3rd February, 2011 or on any other date. She further did not discharge the burden of proof that she had an abortion arising from the alleged injury.
41. The upshot is that the appeal succeeds. The judgment delivered by the learned magistrate on 18th May 2017 in Machakos CMCC No. 448 of 2013 be and is hereby set aside and substituted with an order dismissing the suit with costs.
42. The Appellant is awarded costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 6TH DAY OF JUNE, 2024

MAUREEN ONYANGO

JUDGE

