



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 46 OF 2019

AGOLA FILDA ATIENO..... APPELLANT

v

AGRO CHEMICAL & FOOD COMPANY LTD.....RESPONDENT

(An Appeal from the judgment of the Honourable Onzere E.M. SRM

delivered on 5th November 2019 in Tamu SRMCC No. 18 of 2019,

Agro-Chemical Food & Co Ltd v Agola Filda Atieno)

JUDGMENT

1. In a Judgment delivered on 5 November 2019, the Senior Resident Magistrate, Tamu entered judgment in favour of Agro Chemical Food & Co Ltd (the Respondent) and ordered Agola Filda Atieno (the Appellant) to pay it Kshs 1,043,993/01 together with interest and costs.

2. The Appellant was dissatisfied and on 5 December 2019, she lodged a Memorandum of Appeal with the Court contending:

(1) THAT the learned Magistrate misdirected herself in finding that there was an amount of Kshs 1,874,792/- which could not be settled by the Appellant's medical cover hence was advanced as a loan to the Appellant.

(2) THAT the learned Magistrate erred in law and in fact in finding that the sum of Kshs 827,959/40 was paid to settle the above mentioned outstanding loan while there lacked evidence to show that the Appellant had actually made the said **collected and forwarded** the same to settle any loan which she owed the Respondent.

(3) THAT the learned Magistrate erred in law and in fact disregarding the duty that the Respondent had as an employer to ensure the provision of sufficient and proper medicine for its employees during illness and if possible medical attendances during serious illness.

(4) THAT the learned trial Magistrate failed to find that the (sic) was contract between the Appellant and the Respondent that the sum of monies paid to the Nairobi Hospital were advanced as a loan to the Appellant which she was entitled to pay back.

(5) THAT the learned Magistrate misdirected herself hence erred in law and in fact in disregarding the evidence of the Appellant on record resulting to a wrong decision.

(6) THAT the trial Magistrate erred in law and in fact by overly relying upon the evidence of the Respondent which was not proved.

3. On 5 May 2021, upon the application of the Appellant, the Court granted an interim stay of execution on condition that the Appellant deposited half the decretal amount in Court (the condition was not complied with).

4. The Appellant filed the Record of Appeal on 4 June 2021, submissions on 21 June 2021, while the Respondent filed its submissions on 13 July 2021.

Role of the Court on a first Appeal

5. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering

that it had neither seen nor heard the witnesses and hence making due allowance for that.

6. The Court will keep in mind the above in mind.

7. The Respondent's case before the trial Court was that when the Appellant's medical cover (Kshs 500,000/- inpatient) was exceeded, it paid to the Nairobi Hospital Kshs 1,874,792/- upon the request of the Appellant and that the Appellant later repaid part of the money leaving a balance of Kshs 1,043,993/01.

8. The Respondent produced records including payslips to show that it paid the excess bills to the Nairobi Hospital and that the Appellant had authorised deductions from her salary towards repayments of the excess medical costs.

9. The Appellant's case on the other hand was that she was not aware of the limit of her medical cover and that she had not requested the Respondent to settle the medical bill balance on her behalf with a promise to repay the same.

10. The Appellant further contended that it was the responsibility of an employer under section 34 of the Employment Act, 2007 to meet all the medical treatments costs of its employees.

11. The Appellant and the Respondent were in a contractual relationship.

12. Under section 34 of the Employment Act and the Employment (Medical Treatment) Rules, 1977, the obligation of the employer is to provide for and pay all costs of the medical treatment of an employee unless the illness was contracted when employee was not at work or the illness is self-inflicted. There is also an exception where treatment is provided for free by the government.

13. The Appellant did suggest that the Respondent was under an obligation under section 34 of the Employment Act, 2007 and the Employment (Medical Treatment) Rules, 1977 to meet all her medical treatment costs.

14. The Appellant testified that she fell ill in December 2016, but she did not disclose whether she contracted the illness while at work.

15. There was no evidence that the illness had a nexus with her work or duties.

16. The Appellant exceeded her medical cover limit and it cannot be that she did not know of the limit.

17. It is more probable, as testified by the Respondent's witness that upon discharge, the Appellant could not clear her medical bills and therefore requested the Respondent to pay on her behalf with a promise to repay the same.

18. It is noteworthy that the Appellant even organised a harambee to help her clear the costs of the medical treatment after she was discharged from the hospital.

19. In the ordinary scheme of human affairs and relationship, the Appellant would not have organised the harambee if she was convinced in her mind and heart that her employer (the Respondent) would clear the full cost of medical treatment.

Conclusion and Orders

20. The Court has re-evaluated the evidence and come to the conclusion that the trial Court did not err either in law or fact in making the findings it made.

21. The Appeal is found without merit and it is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF MARCH 2022.

Radido Stephen

Judge

Appearances

For Appellant Mwamu & Co. Advocates

For Respondent Staussi, Asunah & Oluoch Advocates

Court Assistant Chrispo Aura