REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 58 OF 2020

(Formerly Kiambu HCCA 114 of 2019)

Before Hon. Lady Justice Maureen Onyango

KOFINAF LIMITED T/A GETHUMBUINI ESTATE **APPELLANT**

VERSUS

RHODA MAITHYA **RESPONDENT**

(Being an appeal arising from the judgment of Hon. L. M. Wachira, Senior Principal Magistrate

which was delivered on 20th August 2018 at the Senior Principal Magistrate's Court

at Gatundu in Civil Suit No. 112 of 2011)

JUDGMENT

Introduction

1. The instant appeal is against the decision of Hon. L. M Wachira, Senior Principal Magistrate at Gatundu. It was initially filed at the High Court in Kiambu and subsequently transferred to this Court for judgment. The Appellant filed its record of appeal on 28th June 2019. Pursuant to the court's directions parties dispensed with the appeal by way of written submissions which were highlighted on 20th January 2021.

2. In its Memorandum of Appeal dated 14th September 2018, the Appellant challenges the impugned judgment on the following grounds:

i. The Learned Magistrate erred in law in failing to take into account that the Respondent did not prove that Kofinaf Limited and Gethumbuini Limited were the same entity

ii. The Learned Magistrate erred in law in shifting the burden of proof to the Appellant

iii. The Learned Magistrate erred in law and fact by failing to appreciate that the Appellant had taken all necessary measures to ensure the Respondent 's safety and general safety of the work premises

iv. The Learned Magistrate erred in law in holding that the Respondent had not been provided with protective clothing and/or gear in spite of evidence adduced by the Appellant showing that boots were not required for the tasks performed by the Respondent at Gethumbuini Estate

v. The Learned Magistrate erred in law in failing to consider that there was no causal link between the Respondent 's injury and the Appellant. The Respondent had not provided any evidence to show that the injury sustained was occasioned by the negligent act or omission of the Appellant hence in the absence of a causal link, the Appellant cannot be reasonably held liable for the Respondent 's injury.

vi. The Learned Magistrate failed to consider that the Respondent 's injury was caused by her negligent conduct. That the Appellant had no knowledge or forewarning of the said injury and it was thus highly unreasonable to hold it liable for the same

vii. The Learned Magistrate erred in law in failing to consider that the Respondent has not proved her case on a balance of probability. The fact that the injury occurred at her place of fact does not *ipso facto* connote that the Appellant was negligent.

viii. The Learned Magistrate failed to appreciate that the doctrine of *volenti non fit injuria* was applicable in the circumstances. The Respondent had full knowledge of the extent of the risk that lay ahead when she attempted to climb a coffee tree that could not support the weight of a person thus to demand that the Appellant ought to have done more than was required was to raise the threshold beyond that set by statute.

ix. The Learned Magistrate erred in law and in fact in taking into consideration issues that were not pleaded which were thereby

inadmissible.

x. The Learned Magistrate failed to consider the Appellant's submissions and various court authorities

xi. The Learned Magistrate erred in law in apportioning 100% liability on the Appellant despite the evidence adduced to show that the accident was occasioned by the Respondent 's blatant disregard for safety regulations.

xii. The Learned Magistrate's decision to award damages of Kshs.152,000 was manifestly excessive and warranted in the circumstances

3. Consequently, the Appellant seeks the following orders:

i. The appeal be allowed

ii. The judgment of the Senior Principal Magistrate's Court against the Appellant delivered on 20th August 2018 be set aside in its entirety

iii. Costs of the appeal be borne by the Respondent

Brief Facts of the Case

4. This appeal stems from a personal injury claim by the Respondent wherein she sued the Appellant for injuries she sustained in the course of her employment with the Appellant on 11th August 2011. The Respondent had been instructed to prune coffee bushes. While undertaking that duty, she slipped and fell sustaining a cut to her right leg. After considering evidence presented by both parties, the trial court found the Appellant 100% liable for failing to provide a safe system of work and the requisite work implements to the detriment of the Respondent and awarded the Respondent damages of Kshs.152,000.

Appellant's Submissions

5. The Appellant contends that the trial court erred in law and in fact in reaching the conclusion that it was 100% liable to the Respondent yet the Respondent did not prove her case on a balance of probabilities as required by law. It is submitted that he who alleges the existence of a fact must prove it. The Appellant placed reliance on the case of **Sameer Jethwa v Francesco di Nello & Another (2015) eKLR** where the Court of Appeal pronounced itself as follows:

> *"A plaintiff (Appellant) cannot throw material at the Court without discharging his/her onus of proof and expect success."*

6. With regard to whether the proper party was sued the Appellant submitted extensively on its assertion that the Respondent sued the wrong party. The Appellant reiterates that it stated in its defence that it was a company registered independently from Gethumbuini and that it only managed the estate. It denied trading or carrying on business as Gethumbuini Estate. The Appellant contends that it was the Respondent 's burden to prove that she sued the right party which burden she failed to discharge. The sum total of her evidence on this issue is that she was paid by Kofinaf. DW 1 in his testimony however clarified that Kofinaf was engaged in managing several coffee estates including Gethumbuini Estate, Rwera, Mchana, Kangaita and Orchards. Its management role did not extend to assuming liability for injuries sustained by Gethumbuini's employees. The two were distinct and separate legal entities, each with its own assets and liabilities. The Appellant notes that in the Respondent 's ex-parte testimony prior to issuance of the interlocutory judgment that was subsequently set aside, she stated that she was employed by Gethumbuini Estate as a coffee pruner, not Kofinaf. She only made reference to Kofinaf after the Appellant filed its defence.

7. The Appellant continues that no documentary evidence such as an employment contract, job card or payment slip was produced by the Respondent to demonstrate that Kofinaf was her employer. DW1, a credible witness who had worked at Gethumbuini for over 20 years knew the Respondent as an employee at the estate. The Respondent corroborated the same stating that she worked therein for 8 months following her move from Nginyo Kariuki Estate, Kiambu. DW1 presented a copy of the Appellant's payroll for the month of August 2011 when the alleged accident took place. It listed the Appellant's skilled and unskilled employees who worked at Gethumbuini Estate. Neither the Respondent nor DW1 were listed therein which fact was not challenged by the Respondent .

8. It is the Appellant's case that the particulars of negligence against it were not proved. The same involve the proof of duty of care owed, breach of that duty, a causal connection between the injury sustained and the breach and damages sustained as a result. In relation to breach of statutory and contractual duty of care it was submitted that a contract of employment is a condition precedent for its crystallization as was held in **Kiamokama Tea Factory Limited v Joshua Nyakoni (2015) eKLR**. The Appellant avers that the Respondent failed to prove any

such terms breached by itself.

9. Further, the Appellant submits that the Respondent failed to demonstrate that her evidence was reasonably foreseeable by the Appellant. She testified that on 11th August 2011, while pruning coffee berries on top of a coffee tree she slid and fell sustaining a cut wound to her right leg. It was her position that the accident could have been avoided if she was given a ladder and gumboots. The Appellant opines in tandem with DW1's testimony that the same was not possible because coffee trees due to their frailty cannot sustain the weight of a ladder or a human being. Moreover, they grow to only 2 metres in height hence it is possible for a pruner to reach the top branches while still standing. Since the trees are short, ladders are not required. The Appellant contends that the trial court should have taken judicial notice of this fact. It continues that as per the case of **Rashid Ali Faki v A. O Said Transporters (2016) eKLR**, a person alleging an unsafe system of work should prove what the proper system was and in what relevant aspects it was not observed. In this case, the Respondent should have demonstrated how gumboots and a ladder would have come to her aid. Relying on the holding in **Abdalla Baya Mwanyule v Said t/a Jomvu Total Service Station (2004) eKLR**, it submits that mere existence of an employment relationship does not suffice in establishing negligence on the part of the employer as the employer's duty is to take *"reasonable care"*.

10. The Appellant also faulted the Respondent for giving conflicting accounts of the manner in which her accident occurred. The first being that she was on top of a coffee tree when she slid and fell; the second version was that she fell while climbing its branches and thirdly that she was on the ground when the accident occurred. On further questioning, she stated that she stood on cut stems resulting in the accident then added that it had been raining making the ground slippery. The Appellant contends that it is apparent that it played no role in the Respondent 's accident, she was the sole author thereof. The work she was engaged to perform was largely manual in nature requiring no exceptional skill so the Appellant should not have been held liable. The Appellant cited the holding in **Wilson Nyanyu Musigisi v Sasini Tea and Coffee Limited (2006) eKLR** to buttress her position. Similarly, it placed reliance on the case of **Statpack Industries v James Mbithi Munyao (2005) eKLR** where the Court held thus:

> *"An employer's duty at common law is to take all reasonable steps to ensure an employee's safety. But he cannot babysit an employee. He is not expected to watch over the employee constantly."*

11. In relation to proximate cause, the Appellant contends that the direct cause of the alleged accident was the Respondent 's action of climbing a coffee tree. That she had a duty to take reasonable precaution to avoid injury while undertaking her duties. To this end the Appellant relied on the case of **Sotik Tea Highlands Estate Lts v Francis Nyaberi Omayo (2007) eKLR.**

12. The applicant finally submitted on the issue of damages which it deems were inordinately high in the circumstances. First of all, it is submitted that the Respondent did not incur any medical costs following the accident. DW1 testified that she was rushed to Kikuyu Dispensary where her superficial cut was stitched. Further, Gethumbuini Estate paid all her medical bills and she did not suffer permanent incapacity. The Appellant contends that the damages awarded were not commensurate with the injury sustained nor guided by the range of awards in the authorities cited by the parties. It prayed for the court's intervention in revising the award based on the reasoning in the case of **Capital Fish Kenya Limited v The Kenya Power and Lighting Company (2016) eKLR** whereby the court expressed itself as follows:

> *"We are only too aware that an appellate court should not interfere with the discretion exercised by the trial court unless it is demonstrated that in exercising its discretion, it did not do so judicially but whimsically or idiosyncratically. In the absence of the trial court's reason for the decision, we cannot determine whether the exercise was judicious. In such circumstances, we must intervene."*

Respondent's Submissions

13. The Respondent in its submissions condensed issues for determination into three; namely whether Kofinaf Limited and Gethumbuini Estate were the same entity, whether the trial court was justified in finding liability in favour of the Respondent against the Appellant and lastly whether the quantum of damages was manifestly excessive.

14. On the first issue, the Respondent made reference to the payroll produced by DW1 for the month of August 2011 that bore the names of the two entities. She contends that it can be correctly inferred that the Appellant is the main player with Gethumbuini being one of its subsidiaries. According to DW1 in his testimony on cross-examination, payment of all bills and casuals came from Kofinaf hence the trial court did not err in concluding that Kofinaf was the employer of the Respondent as it paid her wages.

15. On liability, it was submitted that the Appellant admitted failing to provide the Respondent with protective devices as well as working tools. That DW1 was not present at the time of the Respondent's accident and was therefore precluded from making any conclusions as to the manner in which it occurred as well as the weather conditions at the time. The Respondent stated that the ground was slippery as it had rained which fact could not be sufficiently rebutted by the Appellant's general assertion that it does not rain in August. She averred that if she had been issued with gumboots, their treads would have given her proper grip and prevented her from slipping on the wet and slippery ground. The boots would have also protected her from injuring her leg on protruding objects and a ladder would have assisted her in reaching the branches owing to her short stature.

16. In relation to quantum it is the Respondent's case that an award of damages of Kshs.150,000 is quite moderate for someone who was admitted for two days and received 21 stitches. She contends in accordance with the pronouncement in **Morris Mugambi & another v Isaiah Gitiru [2004] eKLR** that this court should not interfere with the award unless satisfied that the lower court acted on wrong principles of law in making an award of damages which amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. To this end, the Respondent cited **Eldoret Civil Appeal No. 11 of 2000 Wiyumiririe Saw Mills v Paul Kariuki** and **Meru HCCC No. 17 of 1983 Lucy Ntibuka v Benard Mutwiri** where damages ranging Kshs.230,000 – 500,000 were awarded. She implored the court to dismiss the appeal with costs.

Analysis and Determination

17. This being a first appeal, it behoves this Court to consider the case in its entirety on matters of both fact and law, notwithstanding that the court does not have a similar opportunity as the court of first instance to engage in intricacies such as the demeanour and delivery of the witnesses. The court is guided by principles set in the case of **Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** guiding Appellate Courts such as this one in the determination of such appeals. In the said case it was held that:

> *"Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial. Judge's findings of fact appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."*

18. From a consideration of the parties' pleadings, submissions, the court record and the applicable law, the issues arising for determination are as follows:

i. Whether the employment relationship was correctly inferred between the parties,

ii. Whether the Learned Magistrate erred in law and in fact for finding the Appellant wholly liable for the Respondent's injury,

iii. Whether the trial court erred by awarding damages that were not commensurate to injuries sustained, and,

iv. Whether the Appellant is entitled to orders sought

19. Regarding the first issue, I agree with the Appellant that it is trite law that he who alleges must prove. The Appellant vehemently avers that it was not the right party to be sued in this case. That notice was given to Gethumbuini Estate to take up the matter but due to a communication breakdown they never did despite being notified in good time *(ground b at page 18 of the Record; paragraph 4 at page 20)*. However, from the Appellant's conduct in having sufficient notice of the case, defending it after the fact and not taking up judicial recourse available to it to absolve itself of liability, the court is baffled as to how exactly the Appellant expects liability to be assigned another party which was not enjoined in these proceedings. A casual worker is not expected to know the inner workings of business entities such as Gethumbuini and Kofinaf. A casual worker is entitled to assume that the person who pays his/her salary is the employer. Further, the Appellant gave evidence on behalf of Gethumbuini, called a witness who worked at Gethumbuini and even produced payroll records headed ***"KOFINAF CO. LTD – GETHUMBUINI ESTATE"*** from the same entity. The Appellant did not bother to file an application challenging its wrongful joinder nor did it attempt to enjoin Gethumbuini in the proceedings as a co-defendant or third party for liability to be attributed fully or apportioned to it. Sections 108, 109 and 112 of the Evidence Act provide as follows:

> **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.**
>
> **112. Proof of special knowledge in civil proceedings**
>
> **In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

20. In accordance with the above provisions, the Appellant raised the issue of it being wrongly sued and introduced the notion that Gethumbuini Estate should have been liable. It was the party that stood to suffer loss by bearing liability if the same was not proved. The relationship between the Appellant and Gethumbuini was special knowledge privy to the Appellant. The court record *(page 198 of the Record of Appeal)* re-stated in the trial court's judgment *(page 177-178)* shows that DW1 stated that the Respondent was a casual worker at Gethumbuini Estate who was known to him. That she cannot have been on the payroll as she was a casual worker. He confirmed that casual workers were not issued with protective gear, there was a supervisor on the scene who made a report of the Respondent's injury and that Gethumbuini Estate paid for her treatment.

21. Further, DW1 stated as follows verbatim with regard to the Appellant being their employer:

> *"Kofinaf is like a head office and all funds come from Kofinaf for the payments of all bills and casuals. I was working for Gethumbuini, and we were being paid with funds from Kofinaf (shown payroll). It is headed Kofinaf-Gethumbuini Estate. If Kofinaf did not pay, we would not be paid. So strictly, the employer was Kofinaf."*

Since the Appellant's witness himself corroborates the Respondent's testimony that she was indeed employed by the Appellant and injured in the course of employment; the Appellant's appeal fails on grounds (i), (ii), (iii) and (iv).

22. Secondly, on the issue of the Appellant's liability for the Respondent's injury, in light of the foregoing I find that the same was sufficiently proved. The Appellant admittedly failed to abide by its statutory obligation to provide protective gear to the Respondent consequently compromising her safety. Gumboots would have prevented the fall or substantially alleviated its effect. The Appellant's inaction was in contravention of Section 101(1) of the Occupation and Safety Health Act, 2007 which provides as follows–

> **101. Protective clothing and appliances**
>
> **(1) Every employer shall provide and maintain for the use of employees in any workplace where employees are employed in any process involving exposure to wet or to any injurious or offensive substance, adequate, effective and suitable protective clothing and appliances, including, where necessary, suitable gloves, footwear, goggles and head coverings.**

23. Lastly, the Appellant is of the opinion that damages of Kshs.150,000 was too high for a minor soft tissue injury. In considering this issue, the court is guided by the case of **Butt v Khan (1981) KLR 349** which set the following tenets:

> *"An Appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*

24. The authorities cited by the Respondent had no bearing on the current case as they related to more serious injuries while those cited by the Appellant, to wit, **Simon Hungu & Another v Vincent Barasa Wafula & Another (2014) eKLR** and **Simon Muchemi Atako & Another v Gordon Osore (2013) eKLR** bore awards of Kshs.100,000 and Kshs.120,000 respectively for soft tissue injuries. Compared to these an award of Kshs.150,000 cannot be termed as manifestly excessive. It is reasonable and within an acceptable range with a slight variation attributed to inflation as correctly stipulated by the trial court. I see no reason to interfere with the same.

Conclusion

25. From the totality of evidence, pleadings and legal arguments advanced by the parties, the appeal lacks merit and is dismissed with costs to the Respondent.

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JUNE 2021

MAUREEN ONYANGO

JUDGE

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 has 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.

MAUREEN ONYANGO

JUDGE