



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

APPEAL NO.1 OF 2020

JULIA WANJIKU MUTURA.....APPELLANT

VERSUS

OSERIAN DEVELOPMENT CO. LTD.....RESPONDENT

JUDGEMENT

1. The Appellant herein being dissatisfied with the judgment of Hon. S. Muchungi (RM) delivered on 11th December, 2015 at Naivasha Chief Magistrates Court under cause number CMCC No. 734 of 2012 preferred this Appeal by way of Memorandum of Appeal dated 27th January, 2016, and filed through the firm of Mboga G.G and Company Advocates. The appeal is premised on the following grounds;

- 1) That the learned trial magistrate erred in law and in fact in failing to hold the Respondent negligent notwithstanding the availability of evidence in that regard.**
- 2) That the learned trial magistrate erred in law and in fact in not awarding damages which were ordinate in the circumstances as to an amount he could have awarded for the loss suffered by the Appellant.**
- 3) That the learned trial magistrate erred in law and in fact in using wrong principles to dismiss the suit.**
- 4) That the learned trial Magistrate erred in her findings on liability more particularly on contributory negligence without considering that the plaintiff was under authority to perform her duties as an employee and the defendant did not call any evidence to rebut the Appellants assertions.**

It prays for Orders That;

- a) The lower Court Judgment and Decree be set aside.**
- b) Judgment be entered for the plaintiff against the defendants at 100% liability and the amount of damages payable be assessed.**
- c) Costs of the Appeal and the lower Court plus interest be awarded to the Appellant.**

Brief facts

2. The Appellant/Plaintiff in the lower court case alleged that on 19th January, 2012 she reported to work as usual and was assigned duties of pruning flowers by the supervisor one Mr. Njenga. On her way to the flower farm which was a stone throw away she slid and fell and sustained injuries to her right thigh and hip joint. She stated that the ground was muddy and slippery and she was not wearing any gumboots since the Respondent had not provided any protective gear to her. Nevertheless, that she proceeded to the flower farm, reported the incident to the supervisor and continued working. On waking up the next day, the pain had persisted and she sought for medical attention at the Respondent's infirmary where she was treated and then referred to Naivasha District Hospital for further treatment. The doctor at Naivasha District Hospital found her to have suffered soft tissue injury on the right thigh and right hip joint, which injuries were equally ascertained by doctor Obed Omuyoma who prepared a medico-legal report and ascertained the degree of injuries as harm. The Appellant blamed the accident on the Respondent herein who she alleges did not provide safety gear for her leading to the accident.

3. The Respondent on the other hand denied ever employing the Appellant and denied any liability. The Respondent averred that it provided

all its employees with safety gear which included gumboots and that the accident if any was caused entirely by the recklessness of the appellant. The matter proceeded for hearing and judgment delivered for the Respondents as against the Appellant and the suit was dismissed with costs to the Respondent.

4. This appeal proceeded by way of written submissions with the Appellant filing on 4th August, 2021 while the Respondent filed on 31st August, 2021.

Appellant's submissions.

5. The Appellant submitted that the Respondent as the employer of the Appellant failed to provide the appellant with protective gear to avoid the accident. It was argued that section 6(1) of the Occupational Safety and Health Act mandates an employer to ensure safety of the working environment of their employees. This was reinforced by the case of **Garton Limited V Nnacy Njeri Nyoike[2016] eklr** and the case of **Boniface Muthama Kavita V Carton Manufacturers Limited[2015] eklr**.

6. It was submitted that, the evidence of the said injury and treatment thereof was retained by the Respondent who failed to issue the appellant with the treatment notes making it difficult to confirm the said injuries. In addition, that the Appellant's colleague, PW-2 confirmed that the appellant was their colleague and that she had been taken to the clinic after falling and sustaining injuries. This according to the appellant was sufficient evidence to affirm that indeed the appellant had suffered the injuries while at the Respondent's premises. The Appellant argued further that the injuries were sustained due to the failure by the Respondent to issue her with gumboots which fact was never controverted by the Respondent. In this she cited the case of **Mumias Sugar Company Ltd V Charles Namatiti CA 151/87**.

7. It is the appellant's submission that she proved her case on a balance of probability and the trial court erred in dismissing it. She therefore urged this court to set aside the judgment of the trial court and allow the appeal as prayed and further suggested damages of Kshs 500,000 basing her argument on the case of **Spin Knit Ltd V Alloys Adwera [2006] eklr** which court had awarded Kshs350,000 for similar injuries.

Respondent's Submissions

8. The respondent on the other hand submitted that the appellant during hearing in the trial court testified that it had rained the previous night and the ground was muddy. That she stepped on a stone on the way and slipped causing her injuries. It was then submitted that the appellant injuries were caused by stepping on a stone on her way to the farm therefore that the injuries were due to her negligence or lack of care while walking at the respondent's farm. This was aptly held by the trial Court that the slippery floor was cause by rain and that could not be controlled by the Respondent.

9. It was then submitted that the fact that the Respondent did not call any witness or adduced any evidence did not in any way lessen the burden placed on the appellant to prove her case. In this they cited the case of **KPLC V Nathan Karanja Gachoka & Another [2016] eklr**.

10. In conclusion the Respondent submitted that the trial's Court decision was sound based on sound principles and urged this Court not to disturb it and instead dismiss the Appellant's Appeal with costs to them.

11. I have examined the evidence and submissions of the parties herein. This being the appeal in the 1st instance, this court has a duty to re-examine the evidence of the parties before making any determination.

12. From the evidence of the appellant (claimant) in the lower court, the appellant was a harvester at the respondent's firm. She averred that she was walking to work at 7am and it was raining. She stepped on a stone and fell injuring her leg. She was treated at the company clinic and later at Naivasha District Hospital. The doctor who examined her confirmed that she suffered harm. She blamed the respondent for injury as she had not been supplied with gum boots.

13. In cross examination she indicated that she had no proof that she was working for the respondent. She however indicated that the treatment document dated 16/2/2012 was proof that she was injured at work.

14. She called 1 witness PW1 who stated that she was the appellant's colleague at work and also indicated that the appellant was injured while going to work in the assigned place. That it had rained and was slippery.

15. PW2 indicated that she is the one who took the appellant to the company clinic for treatment and later she was treated at Naivasha District Hospital. PW2 also indicated that the appellant did not have gum boots.

16. The witness also indicated that she witnessed the appellant fall on a stone but didn't bleed. PW2 and PW4 both gave evidence on medical history of the appellant and PW3 indicated that he examined her and found she suffered injury after falling while at work. PW4 produced the appellant's treatment notes from Naivasha District Hospital showing she was treated there on 16/2/12 and her complaint was painful thighs.

17. The respondents didn't adduce any evidence at the lower court. From the evidence above, it is apparent that the appellant was injured while heading to work. The respondents averred that she was not their employee but the appellant submitted her renewal contract for seasonal employee dated 18/8/2008 showing that her contract had been renewed by the respondent up to 20/10/2008. She therefore had some relationship with the respondent. She also exhibited her job card showing that she was an employee of the respondent and this did not have an expiry date.

18. This coupled by the evidence of PW2 is an indication that the appellant was an employee of the respondent.

19. The respondent had contended that they never had employment relationship with the appellant but I find this is not the correct position because they had employed her on a seasonal contract and also issued her with a job car.

20. I therefore find that the appellant had been employed by the respondent.

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21. The next issue for this court to consider is about the injury. She suffered and if the respondent were responsible or contributed to the same.

22. The appellant and her witness gave evidence of the circumstances under which the appellant was injured. PW3 and PW4 both established that she was treated at Naivasha District Hospital and evidence was that she was injured while going to work within the respondent's premises.

23. Who was responsible for this injury? The appellant have averred that she was injured within the respondent's premises because the road was slippery and rocky and she had not been supplied with gumboots.

24. The respondents on the other hand denied any failure on their part insisting as per their pleading that there was no evidence of their culpability submitted by the respondent to prove they had supplied the appellant with any gumboots. It was their failure to provide the gum boots to the appellant and in the knowledge that the work environment was dangerous that shows negligence on the respondent's part.

25. I therefore find that the appellant was indeed injured and this was partly due to the negligence of the respondents who didn't supply her with gumboots in the rough slippery terrain.

26. In terms of liability I find the respondent 80% liable the appellant 20% liable on quantum I find that given the nature of injury suffered by the appellant damages of kshs.200,000/= will be appropriate less 20% which comes to 160,000/=.

27. I therefore find that the trial court erred in not making an appropriate finding given the evidence submitted before it.

28. I allow the appeal and substitute the damages payable to the appellant to be 160,000/= plus costs and interest at court rates with effect from the date of this Judgment.

29. The appellant is also entitled to costs payable in the lower court.

DATED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okoth holding brief Kinyanjui for Respondent – present

Appellant – Absent

Court Assistant – Fred