REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRCA/10/2020

CITATION: EQUATOR FLOWERS (K) LIMITED VS OMAR NYABOGA

JUDGMENT

1. By a Memorandum of Appeal filed on 6th April, 2011 the appellant faulted the judgement of the Lower Court (Honourable Innocent Maisiba) delivered on 16th March, 2011 on grounds among others that:

i. The learned Magistrate erred in law and fact in failing to hold that the Plaintiff did not prove his case on a balance of probability.

ii. The learned trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned.

iii. The learned trial Magistrate erred in law in fact in failing to apportion liability judiciously.

iv. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the tissue injuries allegedly suffered.

v. The learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case.

2. The appellant therefore prayed that this Court sets aside the judgement of the trial Court and allows the appeal with costs.

3. In support of the Appeal Kibichy for the appellant submitted among others that it was not in dispute that the respondent was an employee of the appellant however the appellant denied that he got injured while at work. The respondent did not prove on a balance of probabilities that he was injured in his place of work as alleged. According to Counsel, the respondent's testimony clearly indicated that he was not sure if the injuries he allegedly sustained were caused by the appellant's negligence. He also stated that his injuries may have been caused by outside factors.

4. According to Counsel, the appellant's witnesses stated that the respondent was provided with protective gear and further that the employees in spray department were normally trained and subjected to regular medical checkups.

5. The respondent was required to prove a causal link between his injuries and the appellant's negligence because the law recognizes that not every injury is as a result of someones negligence as was held in the case of Statpack Industries Ltd v James Mbithi Munyao HCCA No 152 of 2003.

6. Mr. Kibichy therefore submitted that it was thus not sufficient for the respondent to rely solely on the ground that he was employed by the appellant. The respondent should have established a sort of negligence or source of breach of contract. It was therefore erroneous for the learned Magistrate to hold that the appellant was to blame for negligence when the respondent did not express to Court what step the appellant ought to have taken to avoid injury. No particulars of negligence were proved as against the appellant and thus no liability should attach against the appellant at all.

7. According to Counsel, the duty care owed by the appellant to the respondent was not proved and neither was the appellant expected to babysit the respondent. The respondent should have exercised due care and skill more so far that was within his control.

8. On quantum Counsel submitted that the respondent pleaded that he had difficulty in breathing, wheezing chest pain and chronic dry cough. The respondent also pleaded fatigue and allergic bronchospasm. The medical report also confirmed that the injuries had healed and that the pains would subside with use of analgesics. All evidence tendered whether testimonial or documentary confirmed that the injuries were minor and had healed.

9. Mr. Kibichy therefore submitted that the injuries in issue were soft tissue hence the sum awarded was not commemorate with injuries pleaded. The damages awarded were in the Counsel's view inordinately high and manifestly excessive.

10. Mr. Karuiki Mwaniki on the other hand submitted that the respondent used to occasionally receive treatment from the appellant's company doctor before proceeding to Uasin Gishu District Hospital for further treatment. The results provided revealed that the respondent had contracted occupational asthma disease due to nature of his occupation and exposure to chemicals while spraying at the flower farm.

11. Counsel further stated that the appellant's witness (DW1) stated that the respondent was provided with protective gear he however could not prove this as the memorandum alleged to have been signed by the respondent did not relate to the respondent and was never signed.

12. According to Mr. Mwaniki, from the proceedings and record it could be concluded without any reasonable doubt that the respondent contracted an occupational disease as a consequence of the appellant's breach of regulations by failing to provide him with protective apparel as required under section 6(1) of the Occupational safety and Health Act, 2007.

13. Regarding quantum, counsel submitted that an award of Kshs. 150,000/= to the respondent was on the lower side since the effect of occupational asthma disease and allergic bronchospasm were more serious and usually took long to heal.

14. This is a first appeal and the operating principle is that the court will reconsider the evidence, evaluate the same and draw its own conclusion. It should however, be born in mind that the Court neither saw or heard the witnesses.

15. The appellant has contended among others that the Learned Trial Magistrate erred in law and fact in failing to hold that the respondent did not prove his case on a balance of probability and that the Learned Trial Magistrate erred in Law and fact by failing to dismiss the respondent case.

16. The Learned Magistrate in his judgement found from page 67 to 69 of the record of appeal, observed at page 68 as follows:

> "The judgement of the Medical Officer was that the respondent had occupational health disease … Defence called two witnesses. DW1 confirmed the plaintiff was an employee of the defendant company but he instead resigned on personal grounds …He did not produce any evidence to show that the plaintiff was provided with protective gear and signed for the same.

17. Section 6(1) of Occupational Safety Health Act, 2007 provides".

> "Every occupier shall ensure the safety, health and welfare at work of all persons working at his work place.

18. Section 6(2)(d) further provides

> "the duty of the Occupier includes maintenance of any work place under the Occupiers control in a condition that is safe and without risk to health and the provision and maintenance of means to access to access to and agrees from it that are safe and without such risk to health".

19. The appellant contended that the Learned trial Magistrate erred in law and fact in failing to evaluate the evidence judiciously and further in failing to dismiss the respondent's case.

20. The Court has carefully reviewed the proceedings and judgement of the Trial Court and does not seem to agree with the appellant's contention that the trial Magistrate failed to evaluate the evidence judiciously.

21. The trial Court noted that the appellant did not provide proof that the respondent was provided with safety gear necessary for the performance of his duties. Further from the record to medical practitioners were called to give evidence. Both doctors agreed that the Claimant had undergone treatment for coughs and chest pains.

22. Although the appellant contended that the respondent could have contracted the illness away from work, their own witness DW2 (Mr. Calvin Nyakire) did not allude to the same in their report or evidence before the Court.

23. The Learned trial Magistrate had sufficient material before him to persuade him that the plaintiff had proved his case on a balance of probabilities. This ground of appeal is therefore found without merit and it hereby rejected.

24. On the issue of quantum, for this Court as the appellate Court, to interfere with an award it must be demonstrated that the award is either inordinately too high or too low that it must have been arrived at by omitting to consider relevant facts or taking into account irrelevant facts. The appellant herein contends that the respondent's injuries were soft tissue in nature hence an award of Kshs. 30,000/= would have been reasonable. On the contrary the respondent according to both doctors who saw him suffered occupational asthma disease and allergic bronchispasm. These are not soft tissue injuries.

25. The Court is in agreement with the Counsel for the respondent that the effect of occupational asthma and allergic bronchospasm were serious and could take long to heal. In the circumstances an award of Kshs. 150,000/= is not inordinately high to warrant interference by the Court.

26. In conclusion the entire appeal is found without merit and is hereby dismissed with costs.

27. It is so ordered

GIVEN under my hand and Seal of this Court on 2021-12-01 12:02:10

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: **2021-12-01** **12:02:10**