



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. 63 OF 2018

(Originally Kiambu High Court Civil Appeal No. 65 of 2017)

GATOKA LIMITED.....APPELLANT

v

IMMACULATE RWAMBA.....RESPONDENT

(An appeal from the Judgment of the Honourable Court, B. N. IRERI,
Principal Magistrate delivered on 10th May 2017, in CMCC No. 238 of 2013
at Thika Chief Magistrates Court, Immaculate Rwamba v Gatoka Limited)

JUDGMENT

1. Immaculate Rwamba (Respondent) sued Gatoka Ltd (Appellant) before the Thika Magistrates Court alleging breach of statutory duty/negligence leading to injury in the workplace.
2. In a judgement delivered on 10 May 2017, the trial Court found in favour of the Respondent and awarded her general damages of Kshs 800,000/- and special damages of Kshs 2,000/-.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal before the High Court contending
 1. The Learned Magistrate erred in law and on facts in making a finding that the Respondent was injured in the course of her work on 17th February 2012 at the Appellant's farm without any evidence tendered by the Respondent save her own verbal testimony.
 2. The Learned Magistrate erred in law and on facts in admitting as credible and truthful the Respondent's evidence that she was injured in the course of her duties in the Appellant's farm, without any documentary proof or corroboration by any other witness.
 3. The Learned Magistrate erred in law and on facts for failure to admit as credible and truthful, the Respondent's own admission that she was not injured at work.
 4. The Learned Magistrate erred in law and on fact for failure to admit as credible and truthful the Appellant's corroborated testimony that the Respondent was not injured at workplace.
 5. The Learned Magistrate erred in law and on fact for making a contradictory finding that the Respondent reported the injury to the supervisor (Wa Mary) and on the same basis making a finding that the supervisor John Kimani (Wa Mary) did not produce any document to prove that he was a supervisor.
 6. The Learned Magistrate erred in law in trying to shift the burden of proof to the Appellant (to prove Defence) instead of demanding strict proof of the Respondent's case against the Appellant.
 7. The Learned Magistrate erred in law and in fact by failing to address and make a finding on all issues raised by the Appellant in his pleadings, evidence and submissions.
 8. The Learned Magistrate erred in law and in fact for failure to take into account the Defence's oral testimony that the statements

were written on 18th February 2012.

9. The Learned Magistrate erred in law and in fact in admitting as credible and truthful the Respondent's contradictory evidence that she did not know Mary Nyambura, and at the same time admitted as credible and truthful the Respondent's evidence that it is Nyambura who cut a tree that injured her.

10. The Learned Magistrate erred in law and in fact in considering hearsay, irrelevant and/or immaterial evidence in finding the Appellant wholly or particularly liable in the suit.

11. The Learned Magistrate erred in law and in fact in making an award in favour of the Respondent without proving her case on the required standard (balance of probability).

4. On 26 November 2018, the High Court transferred the Appeal to this Court for hearing and determination, and when the parties appeared in Court on 3 December 2019, the Court directed the parties to file and exchange submissions.

5. The Appellant filed its submissions on 11 December 2019 while the Respondent filed her submissions on 15 January 2020.

6. The Court has considered the record and the submissions in which the Appellant condensed the Grounds of Appeal into 4.

Role of the Court on the first appeal

7. The role of a first appellate Court has been the subject of discussion in numerous decisions from the High Court and the Court of Appeal.

8. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*, the Court of Appeal stated as follows regarding the duty of a first appellate court:-

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

9. **Similar sentiments were made in *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2 EA 212* wherein the Court of Appeal held, *inter alia*, that:-**

On a first appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

10. The Court will bear the above principles in mind.

Whether Respondent was injured at the place of work

11. It was not disputed that the Respondent was at work on 17 February 2012. The dispute raised by the Appellant was as to whether the Respondent sustained an injury in the workplace on that day.

12. The Respondent's testimony was that a fellow employee called Nyambura cut a coffee tree which injured her in the eye, and that after being sent to the office by a supervisor called Wamary alias John Kimani, an employee in the office called Julia instructed her to go to the hospital.

13. The Appellant produced two witnesses.

14. The first witness was Wamary. He stated that he was the Respondent's supervisor and that on the material day, he allocated work to the Respondent but in the course of the day, the Respondent sought for permission to go attend to a sick child. The witness maintained that the Respondent had not sustained any injury by the time she left the farm.

15. The witness also stated that the Respondent's colleagues informed him that she got injured while picking firewood and that he only became aware of the injuries to the Respondent on 18 February 2012.

16. The Appellant's second witness was a colleague of the Respondent. She confirmed the narration by the first witness that the Respondent left to attend to a sick child and that by the time the Respondent was leaving, she had no injuries at all.

17. In concluding that the Respondent was injured in the workplace, the trial Court observed

They also did not produce any document to prove that the said John Kimani DW2 was the supervisor of the Plaintiff at that time. They attached handwritten statements purportedly recorded by the Plaintiff, DW 1, DW2 and one Monica Waitera. The statements had different dates. The one purportedly recorded by the Plaintiff was recorded on 17.2.2012 as well as that of Mary Nyambura and that one John Kimani all recorded before the Human Resource Office, I do not find the statements as logical as the same are purportedly recorded the same day the

Plaintiff claims to have been injured, yet DW1 and DW2 claim that the Plaintiff left work on that day at 1.00 pm. When then did she record the statement about the injury if at all she was not injured on the same day? These statements created more doubts than answers on the defence case.

18. It is true the Appellant filed a statement it recorded from the Respondent in which she was explaining/stating about the injury to the eye. The statement was recorded on 17 February 2012.

19. The Appellant's witnesses (John Kimani and Mary Nyambura) also recorded statements on 17 February 2012 purporting that the Respondent had not sustained any injuries on 17 February 2012.

20. This Court is equally perplexed why the Appellant caused statements to be recorded on 17 February 2012 by its two witnesses to disown any alleged injury sustained by the Respondent, if indeed there was no incident and later allege that they became aware of the injury the next day.

21. At the very least, the statements not only raise credibility concerns on the Appellant's defence, but suggest that the statements were recorded in anticipation of litigation, as eventually turned out.

22. The Court agrees with the trial Court that the Respondent demonstrated that she was injured in the workplace on 17 February 2012.

Contradictory judgment

23. The Appellant also assailed the judgment on the ground that it was contradictory because the Respondent admitted during examination-in-chief that she did know Mary Nyambura but conceded during cross-examination that the said Mary Nyambura was the one responsible for cutting the coffee tree which injured her.

24. The Court has reviewed the typed proceedings (handwritten notes were not placed before the Court, instead proceedings for a related original file for one Elias Wainaina was inserted inside this Appeal file).

25. The Respondent denied knowing one Mary Nyambura during cross-examination but admitted that a Nyambura was the one directly responsible for the incident.

26. Without the benefit of the handwritten notes, or having the benefit of seeing the witnesses, it is probable that Mary Nyambura and Nyambura could have been different persons.

27. And if the Court were wrong on that conclusion, there was strong evidence that the Respondent was injured in the workplace which outweigh the discrepancy on identity of Nyambura.

Consideration of Appellant's evidence

28. The Court has again reviewed the proceedings before the trial Court.

29. It is not correct that the Appellant's evidence was considered.

30. The trial Court considered and discounted the credibility of the evidence as demonstrated by the analysis outlined in paragraph 17 above. As an illustration, it was not explained why John Kimani and Mary Nyambura recorded statements on 17 February 2012 disowning the injuries, they say they became aware of on 18 February 2012.

Standard of proof

31. The Appellant further challenged the trial Court's judgment on the premise that the Respondent did not produce any medical treatment records from the first health facility visited, Gatanga Dispensary.

32. The Respondent's testimony was that she first visited Gatanga Dispensary but was referred to Thika Level 5 Hospital. If the Respondent was not treated at Gatanga Dispensary, logically there would be no records to produce. The Respondent produced a Patient's Card issued by Thika Level 5 Hospital where she had been referred to. It was dated 17 February 2012.

33. The Court finds that the failure to produce any treatment records from the Dispensary does not mean the Respondent did not meet the standard of proof expected of her.

Conclusion and Orders

34. The Court has reviewed, re-evaluated and analysed the proceedings before the trial Court, and has not found any errors of law or fact in the impugned judgment.

35. The order which commends itself to the Court is therefore to dismiss the Appeal. It is so ordered.

36. The Appellant did not challenge the trial Court's findings on general and special damages and the Court will not disturb the same.

37. The monies deposited in Court should be released to the Respondent's advocate on record.

38. The Respondent to have costs before the trial Court and of the Appeal together with interest at Court rates from 10 May 2017.

Delivered, dated and signed in Nairobi on this 2nd day of March 2020.

Radido Stephen

Judge

Appearances

For Appellant Wanjama & Co. Advocates

For Respondent Mwaura, Kamau & Co. Advocates

Court Assistant Judy Maina