REPUBLIC OF KENYA

IN THE EMPLOYMENTAND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.11 OF 2018

CARZAN FLOWERS LIMITED.....APPELLANT

VERSUS

ZACHARY MWANGI NJOGU.....RESPONDENT

[being an appeal from the judgement/decree of Hon. L Komingoi, senior principal magistrate delivered on 31st May, 2012 in Nakuru CMCC No.55 of 2007]

JUDGEMENT

The appeal herein arise from the judgement delivered in Nakuru CMCC No.55 of 2007 on 31st May, 2017 on the facts that on or about the 23rd March, 2005 the respondent while in the course of his employment with the appellant as a causal worker was exposed to unsafe system of work where he got injured due to the negligence and statutory breach of the appellant. That he suffered injury to both legs and claimed for general and special damages.

The appellant denied the claims made and on without prejudice gave the defence that where the respondent was injured the same arose out of his own negligence and whatever injury, loss and damage he suffered cannot be attributed to it.

The trial court heard the parties and in judgement made a finding that the respondent got injured while at work and the appellant was liable and apportioned the same at 70% to 30% in favour of the respondent. Damages were assessed and awarded together with special damages and costs.

Aggrieved the appellant filed the instant appeal on seven (7) grounds which can be summarised as follows that the trial court erred in law and in fact in failing to appreciate the fact that the onus of proof was on the respondent as the plaintiff and shifted the same on the appellant but failed to find there was no proof of the case to the required standard, the evidence by the appellant was ignored and or not taken in its totality together with the written submissions, there was no production of the initial treatment card or any other evidence to prove injury and on a balance of probabilities to apportion liability at 70% was erroneous in the circumstances. The trial court hence misdirected itself in the assessment of damages that were excessively high in the circumstances of the case and based on the alleged injuries and thus failed to apply the principles in the award of general damages.

The appellant is seeking that the judgement and decree in Nakuru CMCC delivered on 31st May, 2002 be reviewed and or set aside.

Both parties filed written submissions.

The appellant made submissions with regard to two main issued and findings on liability, the assessment of general damages. That from the facts and evidence tendered the apportionment of liability at 70% was in error as the appellant was not negligent and ought to be absolved from blame. The respondent failed to proof his case to the required standard and there was no material evidence to imply there was negligence as held in the case of **Kiema Muthungu versus Kenya Cargo Handling Service Limited [1992].** The respondent tendered scanty evidence marred with contradictions and he never called any witness to corroborate his case. The truth could not be ascertained. The respondent testified that he was injured at the back of his legs but the examining doctor testified the injuries were to the front side of his legs. The evidence was not credible.

The respondent relied on the doctrine of res *ipsa loquitor* which does not apply to his case. To apply the same rendered the claim baseless.

Without the respondent proving his case, the trial court ought to have dismissed the same and not shift the burden of proof upon the appellant contrary to the principles laid out in the case of **Wareham t/a A.F. Wareham & 2 others versus Kenya Lost Officer Savings Bank [2004] 2 KLR.** Liability of an employer for any injury or loss that occurs to his employees while at work, which would be if the employee fails to

ensure their own safety under the provisions of section 13(1)(a) of the Occupational Safety and Health Act.

In assessing the general damages the trial court applied a ratio that was excessively high in the circumstances of the alleged injuries. Where there was proof of the injuries and guided by similar cases and case law, an award of Ksh.20,000 ought to have been sufficient and the judgement should be reviewed in this regard or set aside.

The respondent submitted that he suffered injury while at work which was witnessed by his supervisor Mr Thiongo who referred him to the company nurse Ms Linda and both accompanied him to Rongai Health Centre for treatment. The treatment notes from the health centre were produced in this regard and Dr Omunyoma corroborated this evidence. the respondent also produced the job card to confirm he was an employee of the appellant at the time of injury to his legs.

The trial court correctly made a finding the appellant was liable and proceed to assess the same base don't he evidence and applicable law and the same should be confirmed by this court and costs awarded for the appeal.

Being a first appeal, this court has the mandate to re-evaluate the evidence so as to reach own decision whether or not to uphold the decision of the trial court.

In the Plaint dated 7th December, 2006 the respondent at paragraph 4 and 5 pleaded that he was injured while at work with the respondent on 23rd March, 2005 when he was pricked on his both legs by broken plastic pipes that were negligently left at his place of work and which inflicted severe injuries upon him.

In his sworn evidence before the trial court on 16th June, 2011 the respondent testified that he was employed as a pump operator with a contract from 2nd December, 2004 to 2nd June, 2005 with duties to irrigate the farm and put fertilizer. On 23rd March, 2005 while at work the pipes bust and pricked his legs and his supervisor Thiongo witnessed the accident and together with the nurse he was taken to a health centre. The respondent produced the medical notes from Rongai Heath Centre. The injury arose due to the failure by the appellant to provide him with protective gear and thus exposed him to injury.

The respondent also called Dr Obed Omyoma who testified that he examined the respondent who was injured on his legs and treated at Rongai Health Centre on 23rd March, 2005.

In defence the appellant called Samuel Chege an administrative manager and with duties to oversee the daily operations and keep records and who testified that the respondent was an employee and on 23rd March, 2005 he remained on duty and worked for 8 hours but on 24th March, 2005 he did not work the full day. On 3rd March, 2005 he worked the whole day and no injury was reported. The accident book had no record of injury. Where there was injury the nurse would take a record and medical requisition chit. The nurse would do a referral to Rongai health centre which was not the case for the respondent. that the respondent was issued with a pair of gumboots and the claims made that there was injury were false.

The trial court having had the advantage of hearing the witnesses and observing the witnesses made its findings that the respondent as injured at work.

The appellant has relied on the provisions of section 13(1)(a) of the Occupational Safety and Health Act, 2007 which statute was not in operation as at 23rd March, 2005 or at the time the suit was filed in the year 2006. Such is immaterial herein.

In the case of **Arkay Industries Limited versus Amani [1990] KLR** the court held that;

> ....the safety of every person employed or working on the premises in which the dangerous machinery is situated. Because of this, it imposes an obligatory duty to ensure such safety in the manner provided therein. It does not, however, impose a strict liability in negligence for where a plaintiff has taken a risk created by the breach of a statutory duty by a defendant that risk may amount to contributory negligence if it is one which is reasonably prudent man in the position of such plaintiff would take.

In this case the respondent established that he was in the employment of the appellant working at pump operator and while at work the pipes did burst injuring his legs where the supervisor and the nurse took him to Rongai health centre. The injury occurred at 4pm and he was paid for the full day. He submitted the medical notes to support his evidence.

The appellant as the defendant then bore the burden to proof that there was no accident and that the same did not arose due to its negligence or with the contribution of the respondent. the witness called Mr Chege was not the direct supervisor to the responded, the supervisor and nurse who accompanied the respondent to Rongai health centre were not called. This duty was upon the appellant as the respondent had established his case to the required decree, on a balance of probabilities.

I do not therefore accept the preposition by the appellant that since the accident was not recorded in the occurrence book then there was no injury. The supervisor present witnessed the injury to the respondent and together with the nurse they accompanied him to the health centre. The trial court observed that the accident record had been altered creating the inference that it was not credible.

On a balance of probabilities, the trial court assessed the matter and taking into account the chances of contribution by the respondent in failing to take personal precaution, correctly held each party liable and apportioned liability at 70% to 30% for the respondent.

Taking into account the findings in **Seascape Ltd Versus Development Finance Company of Kenya Ltd, (2009) KLR** that;

> ....bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.

This court finds the trial court properly applied itself with regard to the question of liability and gave reasons for apportionment of the same. The learned trial magistrate appreciated the evidence adduced and made a proper finding and the appeal on liability lacks merit and is hereby dismissed.

On the issue of quantum, the injuries suffered were said to be minor and when Dr Omuyoma examined the respondent after a year, he found scars and could not recall where the injury was when he gave evidence. it is apparent that these injuries were superficial and had healed well.

On the case law relied upon the trial court, the upper limit of quantum was applied. In similar cases of injury to the legs around the year 2004 to 2005 the award range from 40,000 to 50,000. See **Shem Ongige versus Kenyenya Cooperative Society civil Appeal No.94 of 2006; South Nyanza Sugar Company Limited versus Thomas Omwando Civil Appeal No.55 of 2005** and in the instant case, the award of Ksh.50,000 is not too high or excessive.

According, the appeal on liability fails and there is a review of the award of general damages awarded at Ksh.50,000. Each party shall bear own costs of the appeal.

Dated and delivered electronically this 27 April, 2020 at 1200 hours.

M. MBARU JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15th March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

Issued electronically this 27h April, 2020.

M. MBARU JUDGE