REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.8 OF 2019

AGNETA BUSOLO.....APPELLANT

VERSUS

AFRICA BLOOMS LIMITED..... RESPONDENT

[being an appeal against part of the judgement of Chief Magistrate J.B. Kalo delivered on 27th February, 2018 in Nakuru CMCC No.18 of 2018]

JUDGEMENT

The facts leading to the instant appeal is that on 14th June, 2016 the appellant while at work with the respondent was injured and suffered fracture of the right radius and ulna and severe injuries to the right forearm and elbow joint and claimed that such arose due to negligence and breach of statutory duty by the respondent.

The respondent denied these claims and asserted that the appellant was not injured while at work and if she was such arose out of her own negligence and reckless and disregard of her duties.

The trial court heard the parties and in judgement made a finding that the appellant suffered an accident while at work, the employer and respondent herein was liable under the provisions of section 47(1)(a) of the Occupational Safety and Health Act as it failed to provide good working conditions by keeping a walking path with potholes resulting in the accident and injury of the appellant and thus in breach of a statutory duty and hence 100% liable. She was treated for her injuries but failed to produce the treatment card in evidence and thus the alleged injuries were not proved and the court could not ascertain the injuries sustained to be able to make a finding on the amount of damages payable and therefore dismissed the suit with costs to the respondent.

Aggrieved by the judgement of the trial court the appellant filed the instant appeal and on the following grounds that;

1) The learned trial magistrate erred in law and in fact in holding that the appellant had not proved her case for failing to produce her first treatment notes issued at the first point to proof examination and treatment.

*2) The learned trial magistrate erred in law and in fact in failing to consider the reasoning in **Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others [2014] eKLR, Boniface Ndwiga Mbogo vs Jamleck Mwaniki [2016] eKLR** where the court held that the omission to produce the treatment notes was not fatal and the appellant had proved her case as against the respondent.*

3) The learned trial magistrate erred in law and in fact the plaintiff's case was civil in nature where proof is on balance of probability. The evidence on record especially that of the appellant and the doctor was sufficient to prove the appellants case on the balance of probability.

4) The learned trial magistrate erred in law and in fact by failing to award damages yet the appellant had given her credible evidence and in fact the court believed her evidence and blamed 100% on the respondent and ascertained that the appellant had suffered injuries at the respondent's premises.

5) The learned trial magistrate erred in law and in fact by not considering the appellant's evidence where she stated that the appellant as not treated but was just given first aid and painkiller hence no treatment notes were available for production.

6) All inclusive the Magistrate erred in both law and facts and erroneously allowed himself to trip by refusing to consider the two medical reports that were written by Dr Kiamba and Dr Malik which established the injuries suffered by the appellants and what information they relied on while writing their reports especially Dr Kiamba who testified in court that he had seen the treatment card, sick sheet and e-rays from PGH and the appellant was still on treatment.

The appeal is that the decision by the trial court be set aside and the appellant's case be allowed with costs.

Both parties addressed the appeal by way of written submissions.

The appellant submitted that there was prove of the claim before the trial court and which made a finding of liability at 100% against the respondent but failed to follow the principles set out in the case of **Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others [2014] eKLR, Boniface Ndwiga Mbogo vs Jamleck Mwaniki [2016] eKLR** that it is not fatal where there is no production of treatment notes as the appellant had testified in her case and proved there was injury while at work and had produced medical reports and called the doctor who examined her. the failure by the trial court to assess damages was fatal and contrary to the law as held in the case of **Lei Masaku versus Kalpama Builders Limited civil Appeal No.40 of 2007 [2004] eKLR.**

On the injuries suffered of fracture of the right radius and ulna and severe soft injuries of the forearm and elbow joint these should be assessed based on similar case law and the appellant awarded damages.

The appellant also submitted that in **Supreme Court Petition No.4 of 2019** which followed **Court of Appeal Civil Appeal No.133 of 2011** both court agree that no action by an employee with respect of damages for work injury should lie other than through the provisions of section 16 of the Work Injury Benefits Act but the appellant's case is premised on the breach of common law and duty of care by the respondent and filed in January, 2017 and there is a legitimate expectation that upon the passage of the Work Injury Benefits Act such a case should be concluded before the filed it was filed and the appeal herein should be allowed with costs.

The respondent submitted that the trial court considered the evidence before it in the totality and arrived at a correct finding and judgment. There was a finding on liability but damages could not be assessed as there lacked proof of treatment notes with regard to alleged injuries. The facts of the case did not satisfy the required threshold for the court to proceed and assess damages despite making a finding on liability as held in the case of Hon. Daniel Toroitich arap Moi versus Mwangi Stephen Muriithi [2014] eKLR.

The failure by the appellant to produce the first treatment notes left the her case without proof of any injuries and this cannot be proved through secondary evidence by the doctor who examined her as held in **Peter Migiro versus Valley Bakery Limited [2015] eKLR** that initial treatment notes are very important and without their production it would be difficult for a court to ascertain if indeed a claimant was injured. In this case the trial court properly assessed the matter and arrived at a correct finding and the appeal should be dismissed.

As a first appeal, the duty upon this court is to re-evaluate, re-assess and analyse the evidence on record and determine whether the findings by the trial court visa-a-vies the grounds of appeal and the written submissions and the conclusions by the trial court should be disturbed.

The main issue of the appeal is the part with regard to the assessment of damages upon the finding of liability by the trial court. whether this failed the findings in the cited cases of **Beatrice Nthenya Sila v Ruth Mbithe Kitsisa & 3 others [2014] eKLR, Boniface Ndwiga Mbogo vs Jamleck Mwaniki [2016] eKLR.**

Before addressing the issue above, the court had directed the parties to address themselves to the judgement by the Supreme Court in Petition No.4 of 2019 and Court of Appeal in Civil Appeal No.133 of 2011. Only the appellant addressed the same.

It is common cause that the appellant got injured while at work on 14th June, 2016.

These facts were confirmed by the trial court.

The Work Injury Benefits Act, 2007 **provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.** This legislation passed by Parliament and which came into force on 20th December, 2007 created a paradigm shift in compensation to employees with regard to work injury as unlike the Workman's Compensation Act and common law claims previously so addressed as there was a repeal of the laws applicable before the Work Injury Benefits Act, 2007.

In this regard, the trial court also put into account the provisions of **Occupational Safety and Health Act, 2007** which contextualise the safety, health and welfare of workers and all persons lawfully present at workplaces and which the employer should take into account to avoid injury to the employee.

In this regard therefore, the Supreme Court and the Court of Appeal, referenced above placed any claims arising at the shop floor with the Director under the Work Injury Benefits Act, 2007 as the first forum and to this court as the court of appeal. As correctly submitted by the appellant, all claims filed within the findings and judgement by the Supreme Court in Petition No.4 of 2019 should be addressed to conclusion by the court with such matter.

The above put into account, whichever forum the matter and or claim is filed, the applicable stature of application is the Work Injury Benefits Act, 2007 with regard to seeking compensation for any work injury and the Occupational Safety and Health Act, 2007 with regard to addressing the safety, health and welfare of workers and all persons lawfully present at workplaces.

Going back to the instant appeal, is the lack of production or primary evidence and treatment notes in a claim relating to work injury claims fatal to the assessment of damages?

Section 27(2) of the Work Injury Benefits Act, 2007 provides that;

(2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source.

In this case the trial court held the respondent as the employer 100% liable for the accident which occurred to the appellant. What accident did the appellant suffer while at work?

On the record the appellant testified in support of her case that;

> *… on 14/6/2016 I was on duty harvesting flowers. The supervisor told me to remove soil from a greenhouse (9) to another greenhouse (14). As I was carrying soil I slipped and fell on a stone. I was injured on the right arm. I reported to the supervisor who recorded that I had been injured. I went to the first aid was administered and I went home. The following day I went back to and was injected with pain killer. I was referred to PGH I went to PGH on 17/6/2016. X-ray was done. I was not treated because I did not have money.*
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> …
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> in evidence to support her claims the appellant produced receipts for payments, sick off sheet, contract of service, her ID.
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> The respondent called Lucy Wangari Mururi the human resource officer and who testified that the appellant was at work on 14th June, 2016 and was allowed medical leave but did not report back or say where she was ailing from.
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> The appellant also called Dr Kiamba and who produced the medial report which has a history that the appellant had been injured while at work with the respondent on 14th June 2016 and assessed the injuries. There is however no record of the doctor having the advantage of the medical treatment notes the appellant had following injury where he assessed her on 19th September, 2016 following accident on 14th June, 2016.
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> The appellant has relied on the principles of the case of **Beatrice Nthenya Sila versus Ruth Mbithe Kitsisa & 3 others [2014] eKLR** where the court in addressing the issue of treatment notes held that;
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> > *It is obvious the Learned Magistrate believed the Respondents when they gave evidence on the injuries they suffered. Further the Learned Magistrate received the doctor's evidence about those injuries. And finally the Learned Magistrate must have considered the P3 Form which identified those injured and categorized their injuries. The Learned Magistrate, in view of that cannot be faulted in her judgment.*

The appellant also relied on the case of **Boniface Ndwiga Mbogo vs Jamleck Mwaniki [2016] eKLR** where the court made a finding that;

> *There was no doubt that the appellant sustained soft tissue injuries which Dr Thiongo confirmed during cross examination. He also confirmed that he saw the treatment notes from Karau Health Centre. In the criminal case, Dr. Njiru Njuki of Embu Provincial General Hospital testified that the appellant was treated in the hospital and a P3 form filled. He produced the P3 form and confirmed that the appellant suffered the following injuries:-*
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> > *- a healed cut wound scar on the left occipital region.*
> >
> > *- a healed scar on the right index finger*

These two cases cited above and heavily relied upon by the appellant do not relate to work injuries premised under the provisions of Work Injury Benefits Act, 2007 or the Occupational Health and Safety Act, 2007 as noted above and even where the principles at common law were to apply as in these cases, in both case the facts and evidence before the courts are distinctly different from the instant appeal. In **Beatrice Nthenya Sila versus Ruth Mbithe Kitsisa & 3 others [2014] eKLR** the trial court had the advantage of the P3 record as primary evidence even where the treatment notes were not produced and The doctor in **Boniface Ndwiga Mbogo vs Jamleck Mwaniki [2016] eKLR** in making examination and the medical report had the benefit of looking at the initial treatment notes from *Karau Health Centre* and there was a further primary record in criminal proceedings where *Dr. Njiru Njuki of Embu Provincial General Hospital* had testified on the nature of injuries suffered.

These matters put into account, the trial court analysed the evidence before it, made reference to case law and the written submissions by both parties and without the initial treatment notes stating the nature of injuries the appellant suffered, despite making a finding on liability at 100% had no material upon which to proceed and assess damages.

The findings by the trial court are correct to the extent that based on the available evidence, the trial court bound could not *suo motto* move and apply secondary evidence without the initial treatment notes on which basis damages were to be assessed.

Accordingly, on the findings above, this court finds no material evidence in law or in fact to disturb the findings of the trial court in Nakuru CMCC No.18 of 2017. The appeal herein is dismissed. Costs to the respondent.

Dated and delivered electronically this 11th May, 2020.

M. MBARU

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 the Order herein shall be delivered to the parties via emails.

this 11th May, 2020 at 0900.

M. MBARU

JUDGE