REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.10 OF 2019

[Formerly Nakuru High Court Civil Appeal No.210 of 2009]

BIGOT FLOWERS (K) LIMITED ....APPELLANT

VERSUS

ISAAC NYAMAINYERIA OMABENE....RESPONDENT

[Being an appeal from the judgement/decree of Hon. Njuki the senior resident Magistrate, Naivasha delivered on 2nd October, 2009 in Naivasha PMCC No.1041 of 2007]

JUDGEMENT

The facts leading to the appeal are that on 2nd July, 2007 the respondent herein while on duty and in the employment of the appellant were assigned duty to spray flowers when he skidded and fell down and injured his right knee joint and got injured where he suffered loss and damage. He claimed that the injury arose out of negligence and breach of duty by the appellant and thus claimed damages. The appellant denied the claims and that the respondent did not suffer any injury while in its employment as alleged and where such injury occurred the same was as a result of the respondent's negligence and no damages are due.

The trial court in Naivasha PMCC No.1041 of 2007 heard the parties and delivered judgement on 2nd October, 2009 with a finding that the respondent was the employee of the appellant and while on duty got injured and the appellant was 100% liable and proceeded to assess general damages and made an award of ksh.80, 000 together with special damages as claimed.

Aggrieved, the appellant filed the instant appeal on the grounds that the trial court erred in law and in fact in finding the appellant as liable in dames despite the evidence to the contrary; failing to appreciate the respondent had the burden of proof on the requisite standard, failed to consider the defence and the fact that there was no injury to the respondent while at work and the exact nature of injuries and thus erred in failing to appreciate the principles which apply in claims of alleged negligence and breach of statutory duty and thus seek the judgement and decree be reviewed or set aside with costs to the appellant.

Both parties filed written submissions.

The appellant submitted that from the evidence of the respondent as the plaintiff in the trial court there was no injury reported on the 2nd July, 2007 and the accident register submitted confirmed there was no report. In apportioning liability, the trial court failed to appreciate that in the employment relationship, the respondent as the employee had to blame for the accident and injury which he alleged to have occurred and he got injured. The respondent failed to establish the caustic link between the injuries alleged to have been sustained to the negligent omission and or commission by the appellant and there was no nexus as held in **Tim Sales versus Stephen Gachie HCCA No.79 of 2009.** The respondent testified that before he was injured he saw the ground was watery but he proceeded to walk on it and got injured. He then was the author of his own misfortunes and should bear liability and by the trial court finding the appellant 100% liable was in error.

The appellant also submitted that on the assessment of damages the trial court erred in failing to apply the principles of assessment set in **West (H) & Sons limited versus Shepherd (1946) AC** and where the court held that money cannot renew physical frame that has been battered and shattered and thus courts should give reasonable compensations so as to secure uniformity and general method approach. That judgement should be awarded ksh.30, 000 and judgement be reviewed in this regard or set aside.

The respondent submitted that the evidence that he suffered injury while in the duty of the appellant is not contested and that on 2nd July, 2007 while on duty he fell and got injured on the right knee joint, he reported to his supervisor George Mutunga and who also testified and admitted the issued gumboots were torn and could not have aided to stop injury as the ground was slippery. There was proof of injury, negligence and breach of duty and the finding of liability on 100% was proper and should be confirmed by this court with the dismissal of

the appeal with costs.

Determination

This being a first appeal the court has the duty to analyse the evidence on record and make own findings.

Before the trial court, the respondents claim as the plaintiff was anchored on the facts as summarised above and that the appellant as the employer was negligence on 2nd July, 2007 when he was assigned duty and skidded and fell injuring his right knee joint due to negligence. That the appellant had failed to ensure adequate precautions for him while at work or to provide adequate appliances and or protective gear to ensure safety while at work and that he had not been trained.

In his evidence, the respondent testified that on 2nd July, 2007 he was employed as a general worker with spraying duties at a place which had been irrigated when he slipped and fell and got injured to the right knee. He was given first aid and treated at the hospital and his supervisor was George Muthiga.

Upon cross-examination the respondent testified that the area he was spraying had irrigation water and had seen the same. He had been issued with worn out gumboots.

The appellant called Joseph Wanjikwa the one who was supervising the respondent and testified that the respondent was a general worker and worked in the night hours and no accident was reported on 2nd July, 2007. He had however been issued with protective gear/clothing. Upon cross-examination, Wanjikwa testified that the respondent was supervised by George Muthiga and he took over from him.

From the records, it is apparent to the court that the respondent was in the service of the appellant on 2nd July, 2007 and when he got injured while under the supervision of George Muthiga.

Was the appellant negligent and was there breach of statutory duty?

In the case of **Makala Mailu Mumende versus Nyali Golf County Club [1991] KLR 13** the court held that;

> No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees.

At the shop floor, employer is under a duty to take reasonable care for the safety of employees in all the circumstances so as not to expose them to an unnecessary risk. Where then an employee is injured simply because the employer has not taken such reasonable measures to provide the necessary safety devises, gear or protective clothing, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty.

In this case, the respondent by his evidence testified that he was a general worker and was allocated duties in the spraying and the grounds were irrigated and with water. He was provided with gumboots though worn out.

There were precautions put in place and brought to the attention of the employee. The accident and injury to the respondent as the employee was reassembly addressed save for the worn out gumboots which would not have aided him with regard to the injury to his knee.

In this case the court finds the appellant owed a common law duty of care to ensure the safety of the respondent while he was on duty whereas the respondent as the employee was under a duty to ensure own safety and health and avoid acts of omissions leading to injury pursuant to section 13 of the Occupational Health and Safety Act, 2007.

Section 13(1) (a) **of the Occupational Safety and Health Act which provides;**

> **13(1) every employee shall, while at the workplace:-**
>
> > **a. Ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace.**

The rationale is that an employer cannot keep watch over an employee continuously to undertake his duties as held in Amalgamated **Saw Mills versus David K. Kariuki [2016] eKLR;**

> An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety. …

Therefore, in apportioning liability, the trial court ought to have considered the above and the principles in the case of **Peter Bernard Makau versus Prime Steel Limited [2018] eKLR** that;

> It is true that there are two possible ways a court can apportion liability for negligence. One is on causation, secondly, on blameworthiness. The appellant sued the respondent on negligence acts based on a breach of care owed as a term of employment it

is best that a trial court makes it clear what the appellant negligence entails: Does it involve the events which caused the injury or the severity of the injury? These questions must be answered if no provisions exist in the statute.

In this regard, each party at fault, one failing to ensure the common law duty of care and the other exposing himself to injury, on both causation and capability a 50%:50% liability ought to have applied in in this case.

On the quantum assessed, it is not in dispute that the respondent suffered injury to the right knee joint and was assessed by Dr Wellington Kiamba and the medical report filed with the court. The opinion was that the respondent suffered a lot of pain and continues to suffer pain and classified the injury as '*grievous harm' and should be awarded a temporary disability of 5 months (0n total and 4 partial).*

On this evidence, it is clear that the major injury was the knee joint only. At the trial both counsels made submissions relying on various authorities on award of damages for pain and suffering.

The awards were based on evidence and legal principles placed before the learned trial magistrate. The appellant in submissions has not persuaded this court that in arriving at the quantum on general and special damages the trial magistrate took into account an irrelevant factor, principle or evidence. It is also not demonstrated that the amount so awarded is so erroneous and low so as to occasion an injustice on the part of the appellant. The general acceptable legal principle on award of damages is the aspect that no amount of money can restore an injury or a lost limb.

That being the view of the matter I find no reasons to disturb the award of quantum of damages as arrived at by the trial court save to apportion liability in the terms above set out.

In the circumstances the appeal lodged by the appellant partially succeeds on the issue of liability which hereby apportioned at 50%:50% and therefore review judgement in Naivasha PMCC No.1041 of 2007 in this regard. Quantum assessed shall reflect the reviewed liability ratio. Each party shall bear own costs for the appeal.

Dated and delivered this 18th June, 2020.

M. MBARU

JUDGE