REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.61 OF 2017

[Formerly Naivasha High Court Appeal No.60 of 2014]

BIGOT FLOWERS LIMITED.....APPELLANT

VERSUS

ZAKIAH KAIRUTHI SHABAN.....RESPONDENT

[being an appeal from the judgement and decree of Hon. E Riany, Resident Magistrate delivered on 3rd April, 2014 in Naivasha CMCC No.237 of 2013]

JUDGEMENT

The appeal commenced at the High Court, Naivasha and by orders issued on 19th December, 2017 the same was transferred to this court.

On 6th June, 2018 both parties attended for taking hearing directions and agreed to address the appeal by written submissions. The timelines were allocated for his purpose and a mention date issued for 23rd July, 2018 to confirm the filed written submissions.

The appellant filed written submission on 23rd July, 2017 and for unknown reasons the matter was not placed in the Cause List for the day.

The respondent has since not filed any submissions.

The matter came up in court on 17th December, 2018 when both parties were absent. Judgement was reserved for today.

The appellant filed appeal following judgement and decree in Naivahsa CMCC No.237 of 2013 delivered on 3rd April, 2014 and seeking for orders that the judgement be reviewed or set aside on the grounds that the trial court erred in law and in fact by failing to critically evaluate the evidence on record and failed to appreciate the respondent's case was based on fraud, there was no proof of the case to the required standard, the defence was not considered on its merits and the court thus arrived at a wrong fining on liability and quantum. Other grounds are that the award in damages to the respondent were excessively high and not justified and the judgement failed to meet the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

The respondent who was the plaintiff before the trial court filed the Plaint based on the facts that on 4th January, 2013 while on duty and in the employment of the appellant he was assigned duty of grading flowers at the grading hall when he slipped due to slippery floor and fell down and suffered injury and damage. Such injury arose due to the negligence of the appellant who failed to ensure a safe work environment and to provide a safe system of work and equipment. That the respondent suffered injury of a fracture of the left patella and dislocation of the left knee joint.

The appellant denied the claims made and on without prejudice stated that there was no reported accident at the work place as alleged and where there was any accident it arose outside the work place and with the contribution of the respondent. Such was following the negligence and lack of care and attention of the respondent. the defence was that the claims made are fraudulent on the grounds that the respondent lied under oath in his affidavit that he was injured while at work with the appellant while knowing such was not the case, the alleged injury never arose from any accident at the appellant's workplace and the documents used to file the claim were forged.

In the judgement of the trial court, there was a finding that the respondent was injured while at work and was treated at the clinic and then referred to the district hospital following injury.

The trial court also made a finding that the medical evidence submitted was not challenged. Liability was apportioned at 100%.

The trial court assessed quantum and awarded damages Ksh.350, 000.00.

The appellant submits that in evidence the respondent testified that while at work at the grading section she was provided with protective clothing and rubber shoes but the floor was wet as water had been poured and she slid and fell and got injured.

The respondent never asked for new shoes where the pair she had got worn out and never walked carefully and with diligence to avoid the accident. The injury occasioned to the respondent did not arise from the negligence of the appellant as the appellant had taken due diligence and care to provide the necessary work took to prevent harm and injury to the respondent while at work as held in **Gem Court Ltd versus Charles Andole [2014] eKLR.**

The appellant also submits that the under the provisions of section 6(10 of the Occupational Safety and Health Act the appellant had complied and provided the respondent with the requisite work apparel required in law. the appellant discharged its legal duty to the respondent as held in **Purity Wambui Murithii versus highlands Mineral Water Co. Ltd [2015] eKLR.**

The finding of liability was thus erroneous and the damages assessed were excessive based on the alleged injury to the respondent. The appeal should be allowed or liability apportioned at 50; 50% basis.

As noted above, there is no response to the appeal by the respondent who failed to file written submissions. However, on the substance of the appeal, the court is required to re-evaluate the evidence and record and makes its own findings as this is a first appeal.

In the submissions by the appellant, it is not challenged that the respondent was an employee and that there was an accident on 3rd January, 2013 when she was injured. However the circumstances leading to such injury is challenged on the basis that the respondent had been issued with rubber shoes which got worn out and then failed to ask for a new pair and had this been done the accident would have been avoided.

The appellant also asserts that by providing the required apparel to the respondent while at work, they had discharged their statutory duty under the Occupational Health and Safety Act and the failure by the respondent to seek for new provision of such apparent cannot be a basis for a claim of negligence against the appellant.

In **Nakuru H.C.C No. 65 of 2002, Simba Posho Mills Ltd versus Fred Machira Onguti**, the court held that the failure by the employer to provide a safe working environment to the employee by providing correct and appropriate work tool is in breach of a statutory duty;

> *That the Appellant was under a statutory obligation to provide the Respondents with a safe working environment which included not exposing him to tasks which could result in his sustaining injury. The liability imposed upon the Appellant is statutory. The breach of the statutory liability means that the Appellant was strictly liable for any injury its employee sustains in the course of his employment.*

It was also appreciated that an employee has an equal duty while at work to take reasonable precaution and care to avoid work injury. in **Amalgamated Saw Mills versus David K. Kariuki [2016] eKLR** where the learned Judge in dismissing the appeal held;

> ***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.***

This position does not remove the legal duty of the employer from ensuring a safe work environment to its employees as held in in **Samson Emuru versus Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003** that;

> *The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, … but also to make the place of employment…as safe as the exercise of reasonable skill and care would permit…The duty thus described is a higher… the master is under a duty to make his servants to take reasonable steps to avoid harm arise.*

In **Garton Limited versus Nancy Njeri Nyoike [2016] eKLR**, the court held that;

> *In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury…then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way …*

Putting the above into account, The general principles in apportionment of negligence arises in circumstances where the defendants are not solely to blame for the claimant's injuries. From the pleadings and evidence, the trial court made a finding that the appellant was 100% liable for the acts of negligence and which led to the respondent's injury and damage.

It is true that there are two possible ways a court can apportion liability for negligence. One is on causation, secondly, on blameworthiness.

In this case, the evidence by the respondent before the trial court was that while at work she walked to a place where water had been poured, a place where flowers are graded. She slid, fell and got injured. Respondent was wearing rubber shoes given by the appellant.

From the evidence, the appellant made effort to ensure the safety of its employees and that of the respondent by offering proper apparel and rubber shoes. The circumstances leading to the slip fall and injury of the respondent though foreseen noting the area of work, the provision of requisite apparent was obliviously set to avoid accidents. On the causation and blameworthiness, each party should bear responsibility from the resulting accident.

From the foregoing and noting the respondent has not challenged the appeal, noting the medical evidence and injuries occasioned to the respondent while at work and the circumstances of the same, liability ought to have been apportioned on an equal basis.

Accordingly, taking the above into account, on the quantum assessed, liability is hereby reviewed to 50:50% and therefore the appeal succeeds in this regard. Each party shall bear own costs of the appeal.

Delivered at Nakuru this 31st day of January, 2019.

M. MBARU JUDGE

In the presence of:

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