REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.59 OF 2017

[formerly Naivasha High Court Civil Appeal No.16 of 2016]

SCHREURS NAIVASHA LIMITED.....APPELLANT

VERSUS

JACKILINE NYAMOITA NYANG'AU.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Esther K Kimilu, Senior Resident Magistrate at Naivasha and delivered on 1st March, 2016 in Naivasha PMCC No.746 of 2014)

JUDGEMENT

The facts leading to the appeal are that on 30th November, 2012 the respondent while in the course of employment with the appellant was assigned duty of degrading flowers in the grading department and while undertaking such task, she slid on the slippery floor and fell down where she sustained injuries to the right index finger. That such injury and damage arose from the negligence and or breach of a statutory duty of care on the part of the appellant.

The appellant denied all the allegations made by the respondent and on without prejudice stated that where the respondent got injured, such arose out of workplace and should bear liability and the alleged acts of negligence of breach of statutory duty by the appellant does not arise.

The trial court heard the parties and in judgement made a finding that the respondent was injured while at work with the appellant and that upon injury there was a report made with the appellant on 9th November, 2012 where the respondent reported to have been pricked by a thorn when she fell on the floor at home and that the appellant had a duty to ensure a safe work environment and therefore liable in negligence. Liability was then apportioned at 90:10 for the appellant and respondent respectively. The trial court then assessed the quantum and made an award of damages at Ksh.200, 000.00.

Aggrieved, the appellant filed the appeal on six 6) grounds that the trail magistrate erred in law and in fact by finding the appellant liable for the accident whereas negligence was not proved, the cause of the alleged accident was beyond the control of the appellant and therefore there was no negligence and the award of general damages was excessively high considering the alleged injury sustained by the respondent.

Both parties agreed to address the appeal by written submissions.

The appellant submits that in a claim based on negligence and breach of a statutory duty, the party alleging must prove the same on a balance of probabilities. In an action based on breach of a statutory

duty a party must establish that the damage suffered falls within the ambit of the statute and which was breached, there was loss and damage and there are no defences made to the alleged acts of breach.

In this case the respondent testified that while on duty, when picking up a bucket of flowers she slipped and fell. As a result she suffered injuries to the right index finger and attributed such injury to the appellant lack of duty of care. The respondent had the option not to step on the slippery floor but did so without taking precaution and this resulted in contribution to the injury caused. Such is contrary to what a reasonable person ought to do as held in **Blyth versus Birmingham Waterworks Co. Exchequer, 11 Exch.**

The appellant also submits that the appellant did not record any work injury on 30th November, 2012 and the details given by the respondent in evidence are at variance with the evidence submitted by the appellant. The appellant's witness testified that there is a record taken for 9th November, 2012 where the respondent was pricked by a thorn when she fell at home whereas there is no injury report on 30th November, 2012 as pleaded.

On the assessed damages, the trial court gave an excessive amount considering the respondent alleged to have been injured on the index finger and an amount of Ksh.50, 000.00 would have been sufficient.

In response, the respondent submits that there was injury to her index finger on 30th November, 2012 when she went to pick a bucket of flowers which was near a tap. Such accident occurred due to the negligence of the appellant who failed to ensure safety at the workplace or to provide protective gears. Such evidence was not challenged as the witness called in defence is an accountant and was not present when the accident occurred and the nurse to whom the report was made was not called to testify as held in **Joseph Wahome Muturi versus Municipal Council of Nyeri [2008] eKLR.**

The trial court considered all the evidence in its entirety and properly made a finding on liability. There were no evidence or work records submitted by the appellant to challenge the claims made by the respondent. Where an employer fails to provide the employee with apparels to ensure safety and avoid harm, where there is an accident as a result, there is liability as held in **Spinners and Spinners Ltd versus Alex Andayi Atieli [2014] eKLR.**

The award of damages was appropriate noting the apportioned liability and should not be interfered with. this being a first appeal; the court has to analyse and re-evaluate the material on record afresh and reach its own conclusion(s) bearing in mind that it is the trial court that had the advantage of calling the evidence and taking the primary evidence. In **Kiruga versus Kiruga & Another [1988] KLR 348**, the Court of Appeal held that;

> *An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.*

As noted above, the facts lading to the appeal relate to the alleged accident to the respondent which occurred on 30th November, 2012 while she was in the service of the respondent. in defence, the appellant denied such allegations on the grounds that there was no accident on such date and that on 9th November, 2012 the respondent had reported an accident when she was pricked by a thorn while at work.

This then became a relevant matter for determination. Whether there was an accident which occurred on 30th November, 2012 and if so whether the respondent was injured and whether the appellant should be held liable in negligence and in breach of a statutory duty.

Before the trial court, the respondent in evidence relied on her written witness statement dated 10th December, 2014 that;

… on 30th November, 2012 while at work grading flowers in the grading department I was picking a bucket which was on the ground and since the floor was wet I slid and fell down and sustained injury to my right hand's index finger. …

In challenging this evidence, the appellant called Alex Mwai Ngugi the accountant and who was called upon the demise of Elizabeth Wanjiru Njuguna, the company Nurse and who died following a traffic accident on 1st November, 2015. Mr Ngugi testified that;

> *… jackline Nyamoita Nyangau (plaintiff) was working for the defendant. In court I have the original injury book. On 30.11.2012 no injury was recorded. On 9.11.2012 Jackline was injured. She reported of a thorn prick injury after she fell on the floor at home. There is no other injury in relation to Jackline. …*

In analysing the evidence, the trial court found the appellant liable in negligence and breach of a statutory duty on the grounds that;

> *… the defendant witness confirmed that he was not the one keeping injury record. Indeed the defence witness was an accountant for the defendant. Accident records were kept by the nurse who ordinarily would not be at the grading hall at any given time. The defendant witness mentioned they had record for issuance of protective apparent but conveniently avoided availing the said register in court. …*

On the date of the alleged injury to the respondent, 30th November, 2012 there is a record of treatment at Karagaita Health Centre. The respondent was also examined by Dr Omuyoma and who relied on the same record. Indeed, the employment of the respondent by the appellant is not challenged and where the work records as noted by the trial court had been produced, the report to the nurse and what apparels were issued to the respondent, such would have clearly urged the defence on the assertion that the accident arose out of the negligence sorely contributed by the respondent.

The court is persuaded by judgement in the case of **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.*

And the case of **Efil Enterprises Limited versus Dickson Mathambyo Kilonzo [2018] eKLR**

> *If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty … 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. …*

In this regard, the findings on liability are proper and should not be disturbed.

With regard to the award of damages at Ksh.200, 000.00 challenged to be excessive, the court relied on various cases and in this regard the parties in submissions have not diverted from similar cases and authorities.

The respondent pleaded that she suffered injury to the right index finger.

In the case of **Peter Omolo versus Match Masters Limited [2017] eKLR** where the employee suffered

injury to the right index finger and soft tissue injuries, the court awarded Ksh.50, 000.00 in damages. In **Kenya Steel Fabricators Limited versus Tom Moki [2018] eKLR** the plaintiff suffered various injuries including the right index finger and was awarded Ksh.220, 000.00 in damages. And for injury to the right index finger which caused 2% disability the court in **Kennedy Mutinda Nzoka versus Basco Product (Kenya) Limited [2013] eKLR** awarded the claimant Ksh.210, 000.00 in damages.

Putting into account the above cases and the findings of the trial court and the cases referred to therein in assessing the damages due to the respondent, the same are reasonable and should not be disturbed.

The result of the above is that the appeal must fail and is hereby dismissed.

Each party to 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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