



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**APPEAL NO.16 OF 2018**

**[Formerly High Court Civil Suit No.73 of 2014]**

**THE BOARD OF TRUSTEES ST. ANDREW'S TURI.....APPELLANT**

**VERSUS**

**ANDREW MUHINGI PETER..... RESPONDENT**

[being an appeal from the judgement and decree of Hon. Nyaga, Senior Principal Magistrate, Molo delivered on 20<sup>th</sup> May, 2014 in Molo SPMCC No.32 of 2012]

**JUDGEMENT**

The facts leading to the matter and appeal herein are that on 7<sup>th</sup> November, 2010 the respondent herein was lawfully in the employment of the appellant and while working in the dining hall when as a result of using a defective metal ladder, which was not aided to hold onto the broken metal ladder, he fell and whereof he suffered injury. The claim before the trial court was that the injury and damage caused to the respondent arose due to the negligence of the appellant.

The defence by the appellant was that the respondent was its employee but was working on the Tots Section of the schools and not the dining hall and that where he was injured on 7<sup>th</sup> November, 2010 he was not in the lawful course of his employment at the school dining hall. The claim was made to defraud the appellant by falsely claiming for damages for injuries which were not sustained in the course of lawful employment.

The respondent then amended the claim and pleaded that on 7<sup>th</sup> number, 2010 he was in the course of his employment at the tots classes near the nursery school and where he used a defective metal ladder that was provided to him and since there was no aider to hold to broken ladder, he fell and suffered injury due to the negligence of the appellant. That the accident arose out of breach employment contract where the appellant should have provided a conducive work environment.

In the amended response, the appellant's case was the respondent falsified documents to support his fraudulent claim.

The trial court heard the parties and in judgement made a finding that the respondent, while at work with the appellant, he fell and got injured and which injury aggravated an old condition which he had and such should not be blamed upon the appellant. Liability was thus apportioned at 50% and awarded general damages at Ksh.100, 000.00.

Aggrieved, the appellant filed the appeal on six grounds and which can be summarised as that the trial court erred in law and fact in finding the appellant liable to an extent of 50%, failing to appreciate the evidence in its totality especially the evidence by the supervisor, failing to apply the applicable principles in a claim of negligence, and awarding damages which were manifestly high.

Both parties filed written submissions.

On 4<sup>th</sup> December, 2018 the matter came up in court for hearing directions and parties agreed to file written submissions. The appellant had filed submissions on 27<sup>th</sup> July, 2018.

The respondent was given until 17<sup>th</sup> December, 2018 to file the written submissions.

There was no compliance.

The appellant submits that the finding on liability was erroneous and contrary to section 107 (1) of the Evidence Act which places the burden of prove on the party who alleges and the respondent failed to prove his case on a balance of probabilities and therefore, the finding that the appellant was liable to the accident alleged to have occurred at the place of work had no basis. The Doctor called to testify confirmed that the injury alleged to have been suffered by the respondent was not a day old and the alleged injuries to the respondent did not occur with his alleged fall from a ladder.

The reports from 3 doctors made a finding that the respondent had a pre-existing chronic condition without a causal link to the alleged injury while at work. It was therefore upon the respondent to prove his case with regard to claim for negligence and injury while at work with the appellant as held in **Statpack Industries versus James Mbithi Munyao (Nairobi) High Court Appeal No.152 of 2003.**

The appellant also submits that the evidence by the person supervising the respondent was not properly appreciated where he testified that that the respondent was not injured while on duty on 7<sup>th</sup> November, 2010 as no injury was recorded on this date. No report was lodged with the supervisor. The respondent had been allocated a helper in his duties and the ladder he used in his painting duties was functional and not broken as alleged. Where the respondent was injured, he failed to take caution and contributed to any injuring occurring to him as held in **Latimer versus AEC (1953) AC.**

The appellant also submits that the principles applicable in a claim of negligence were not properly applied by the trial court. without prove of the caustic link between the accident and the appellant, the circumstances obtaining, the appellant having taken all reasonable steps to ensure the respondent had a helper and had work tool in working conditions to avoid any foreseeable accident, the necessary burden was discharged. The respondent was solely to blame for any accident which occurred and the appellant should not be held liable. Where the court finds there is liability, the damages awarded at excessive and an award of Ksh.60, 000.00 would be a fair requital.

As noted above, there are no submissions by the respondent. The appeal is not challenged.

However, on the grounds of appeal and submissions made, the substance of it shall be assessed noting this is a first appeal and on the principle that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. This position was taken in **Selle & Another versus Associated Motor Boat Co. Ltd. & others (1968) EA 123** the court held as follows:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the records, the respondent submitted his employment contract with the appellant and which contract regulated his terms and conditions of service and with regard to health and safety, he was required to monitor his wellbeing, ensure his health and safety while at work, and to report any injury at or in the course of work to his immediate supervisor and school clinic immediately such accident occurred. The respondent was also contractually required to advice the appellant on any injury, illness that he may have incurred prior to his employment.

There were therefore pre-existing terms and conditions of service, and in this case, requiring the respondent as the employee to address his health and safety. The respondent was bound by such terms and conditions.

The respondent also produced an out-patient card from Molo District Hospital which explains treatment on 11<sup>th</sup> November, 2010. There is also an examination request from Crater X-ray Clinic dated 7<sup>th</sup> no ember, 2010.

In his testimony, the respondent's case was that;

.....on 7/11/10 I was at St Andrews Turi. ... I was assigned to paint Turi Tot Section. I was alone, though we should have been at least 2 of us. The school gave me a ladder to use. I fell off while at work. The ladder slipped. I had no helper. I was injured on the right leg at the knee and hip joint. I was taken to Dr Malik, Nakuru. ...

Upon cross-examination, the respondent testified that;

.....the ladder was working. I slipped as I had no helper. I had worked for 33 years. Previously I had a helper. It is me who hoisted the ladder. ...

In his pleadings, the respondent's case is that the appellant was negligent when he was made to work using a faulty and defective ladder where he fell and got injured. That the appellant failed to ensure a safe work environment and as a result, the injury occurred and is liable.

On this basis Where there is alleged injury while at work, and such occurs in the ordinary course of duties allocated, any alleged negligence or breach of statutory duty pleaded as against the employer must be particularised and proved. The employee must demonstrate that he was not negligent in the performance of his duties as held in **ELRCA No.14 of 2018 Oriental Construction Company Limited versus Peter Kariuki Mburu.**

The rationale is that not all industrial accidents taking place at the work place result from the negligence of the employer unless there is sufficient evidence demonstrating there was failure, breach and the negligence of the employee as held in the case of **Timsales Limited**

**versus Stephen Gachie [2005] eKLR.**

The respondent had been at his job, position and role for 3 years. He would attend work with a helper or aider. On this date he alleges to have been injured, he opted to attend work alone. In addressing a matter similar, the court in **SOCFINAF CO. LTD versus Grace Wanjiru Churu [2009] eKLR** held that;

Moreover the possibility of the respondent being injured whilst weeding with the panga using her bare hands was remote as the respondent had worked for over 17 years without any incident. Further, it cannot be said that the provision of hand gloves would have made any difference as the injuries were caused by the panga cutting the respondent. The respondent did not explain why on this particular day the panga cut her when she had been performing the same duties for about 17 years without any mishap.

The respondent was the one in control of the panga. The mere fact that the accident occurred did not connote any negligence or breach of statutory duty on the part of the appellant as the accident may well have been due to the respondent's own negligence. It was therefore upon the respondent to go further and explain in what way the appellant was negligent or in breach of contract/statutory duty, and how that negligence or breach caused the accident. The respondent's evidence was insufficient in this regard. Therefore the respondent failed to prove her case on a balance of probabilities. While it is true that the respondent was injured during the course of her employment it is evident that she could only be compensated for her injuries under the Workman's Compensation Act. The trial Magistrate was therefore wrong in finding the appellant liable to the respondent and this appeal must succeed in that regard.

The respondent had a contract of employment and which required him to observe his health and safety while at work and in this regard, where he opted to work alone and not with a helper in a task and duty which ordinarily he ought to have had such second person, he exposed himself to danger and injury.

**Without any challenge to the appeal, noting the analysis above, the appeal is found with merit and the same is hereby allowed. Costs to the appellant.**

**Delivered at Nakuru this 5<sup>th</sup> day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....