REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.3 OF 2016

(Formerly Nakuru High Court Misc. No.1 of 2016)

BIGOT FLOWERS (K) FLOWERS LIMITED.....APPELLANT

VERSUS

LIVINGSTONE ORAMIS EKIRAPA.....RESPONDENT

(Being an appeal from the judgement and decree of Hon. Shadrack Mwinzi Senior Resident Magistrate delivered by Hon. Kimilu Senior Resident Magistrate on 3rd November, 2015 in Naivasha SPMCC No.684 of 2010)

JUDGEMENT

The facts leading to this appeal is that on 2nd March, 2007 the respondent while lawfully on duty with the appellant was loading rolls of drip line into a tractor when he slipped, fell into a hole and got serious injuries. He attributed the fall and injuries to the negligence of the appellant for failing to provide a safe work environment and being in breach of contract of employment and the terms thereof to ensure safety while at work.

The respondent who was the plaintiff before the trial court claimed that as a result of slipping while at work he suffered injury of sprain of the right ankle and was seeking general damages and special damages.

The appellant defended the claim made on the grounds that on 2nd March, 2007 the respondent did not suffer any injury while at work and where he suffered any injury such did not arise from any negligence of breach of contract on the part of the appellant. To the contrary, the respondent as negligent while at work by failing to take care and precaution or use of protective gear and therefore contributed to the accident and injuries suffered.

The trial court heard the parties and in judgement found the respondent was injured while at work and such arose when the appellant failed to give him protective gear and found the appellant liable at 100% and assessed general damages at ksh.135, 000.00.

Following judgement and decree of the Senior Resident Magistrate at Naivasha in SPMCC No.684 of 2010 delivered on 3rd November, 2015 the appellant not satisfied with the same has filed the appeal herein on five (5) grounds which can be summarised as follows;

That the learned trial magistrate erred in law and in fact and misdirected self in finding that the appellant was 100% liable notwithstanding the evidence to the contrary, failing to properly analyse the evidence before the court on the face of replete and glaring discrepancies and made conclusions without supporting evidence, and failing to make a proper assessment of damages awarded to the respondent which were manifestly high in a claim for negligence.

The parties addressed the appeal by way of written submissions.

The appellant's case is that the findings of the trial court on liability are erroneous as the respondent failed to prove his case on a balance of probabilities. The injury suffered could not be purely on account of the accident in quo as the evidence on record is not in tandem with this fact and the appellant cannot be held liable based on submissions as held in the case of **Daniel Toroitich Arap Moi & another versus Mwangi Stephen Mureithi (2004) KLR.** Upon examination, the appellant testified that he failed to take his own precaution while at work to avoid injury and the treatment he received was for asthma and not for the alleged injuries. The defence called submitted an injury summary sheet for 24th February, to 2nd March, 2007 which shows that the respondent was at work on the alleged dates of injury and there was no report of injury reported.

The appellant also submits that the trial court disregarded the evidence before the court and to considered it on its totality and arrived at a wrong finding that liability was at 100%. The respondent testified that upon being injured he was attended to by a first aider and then taken to the company clinic where he was treated and later went to Naivasha district hospital on 4th March, 2007. This evidence was challenged by

the defence that there was no accident report on the subject date as alleged and the respondent remained at work all day registered on the roll as No.14 and he has signed against his name.

The trial court also failed to address the evidence that the medical report by Dr Obed Omuyoma showed the respondent was treated on 4th March, 2007 and the details on the treatment notes and report filed are different.

The appellant also submits that the general damages awarded to the respondent are excessively high. Injury of sprain to the right ankle is an injury where an award of ksh.80, 000.00 is sufficient based on similar decided cases on in this regard. The appellant has relied on the case of **Samuel Wanyoike Kilu versus Duncan Waruri Kamoni {2011] eKLR** where the plaintiff who had suffered an injury of sprain to the left hip was awarded ksh.80,000.00 as well as in the case of **Hassan Versus Nathan Mwangi Kamau Transporters & 5 others Civil Appeal No.123 of 1985.**

The respondent submits that the trail court arrived at a correct finding on liability at 100% based on the evidence and the applicable law. The fact of an accident occurring on 2nd March, 2007 is not challenged and this occurred while the respondent was on duty when he slipped into a hole and dislocated his leg. The appellant is to blame for this accident and injury by failing to ensure a safe work environment.

The respondent produced medical evidence of his injury and was attended to at the District hospital. The failure by the appellant to keep accident records should not be visited upon the respondent as held in **Sokoro Saw Mills Limited versus Grace Nduta Ndungu [2006] eKLR.** It is the duty of the employer to ensure a safe work environment for the employees and not to merely warn them against unusual dangers known to them as held in the case of **Samson Embru versus Ol Suswa Farm Ltd [2006] eKLR.**

There was no treatment for asthma as alleged by the appellant. The injury was a sprain of the right ankle which injury occurred due the negligence of the appellant by failing to ensure a safe work environment for the respondent. On this basis liability was properly held at 100%.

The trial court sufficiently analysed the entire evidence before court and made proper conclusions on liability and assessed quantum based on decided cases and the evidence. The general damages awarded are reasonable in the circumstances and should be confirmed.

Being a first appeal, this court is mandated to reconsider and to re-evaluate the evidence adduced before the trial court so as to arrive at an independent decision whether or not to uphold the same.

In this appeal the issues which emerge for determination can be summarised as follows;

Whether the respondent proved his case that there was injury due to negligence of the appellant;

Based on the findings above, whether damages assessed should be disturbed; and

Whether costs are due.

On the firs tissue, the appellant has challenged the findings of the trial court with regard to the evidence and findings on liability. In evaluating the evidence, the respondent testified as follows;

> … *we were about six (6) people. The pipe rolls were in a bushy grass, I slipped because of a whole which was inside the grass and my leg dislocated. I could not see the whole in advance. I had not been warned that there were holes at the place. I was taken to the first aider Jeremiah. First aid was done and I was sent to the clinic where I was treated. I was applied ointment the same way the first aider had done it and I was given pain killer. I then went back to work but in the evening when I went home, the leg got more swollen so I decided to go to the District Hospital on 4th for treatment.*

Upon cross-examination, the respondent testified that;

> … *Yes, gumboots do not stop one from getting injuries. It was my duty and defendant's [appellant] to ensure that I was not injured.*

To support the respondent's case he called Samwel Nyabuto from outpatient department, Naivasha district hospital who confirmed the respondent was attended to on 4th March, 2007. There was Dr. Obed called and produced the medical report noting the respondent was assessed 3 years after the alleged injury occurred and wrote the report dated 3rd May, 2010. The doctor's opinion was that the respondent was in fair condition and degree of injury was harm.

The defence called Charity Opon the human resource manager who kept records and testified that there was no accident reported from 24th February, to 2nd March, 2007 and the respondent remained at work the whole day on 2nd March, 2007. This witness was relying on the work records as she was not in the employment of the appellant at the time.

From the respondents, evidence and the fact of the master roll not having a report of any accident, this is well explained, the respondent received first aid and ointment upon injury and after going home his leg was swollen when he decided to attend hospital. This explanation is plausible and reasonable.

Having re-evaluated the evidence adduced, I have no doubt that the respondent proved that he was injured while working at the premises of

the appellant. His evidence was corroborated by the evidence of Samwel Nyabuto from Naivasha district hospital and that of Dr Obed. The fact that the respondent had been issued with gumboots is also not lost to the court. this was a reasonable measure taken by the appellant for safety and to ensure a conducive work environment and therefore reduce and or minimise injury to employee working in the field.

There was due care and attention for any foreseeable injury. see **Winfield and Johowicz on the 19th Edition Sweet & Maxwell 2014 at 703;**

> *The lack of care that will constitute contributory negligence varies with the circumstances of each case. thus, the greater the risk of suffering damage the more likely it will be; all other things being equal. that the reasonable person in the claimant's position would have taken precautions in respect of that risk. The reasonable person will be careless and so the claimant who does not anticipate that the defendant might be negligence may be guilty of contributory negligence. However, the law does not require the claimant to proceed with a timorous fugitive constantly working over his shoulder for the acts from others*

The apportionment of liability between the appellant and the respondent in the respective ratios should therefore take the form of both causation and capability. With injury of the respondent while at work, the appellant had taken preventive measure by provision of the necessary apparel.

The respondent established that he slipped and dislocated his foot but this has healed well and Dr Obed assessed the degree of injury as harm.

These facts put into account, liability should have been apportioned at 50% instead of the 100%.

On the above finding, the second issue for determination is whether the court should interfere with the finding on quantum. The court in the case of **Sokoro Saw Mills Limited versus Grace Nduta Ndungu [2006] eKLR** held as follows;

> *On quantum, the principles governing this court in deciding whether or not to interfere with the award made by the trial magistrate was set out in the case of* ***Kemfro Africa Limited & Anor –vs- Lubia & Anor (No. 2) [1987] KLR 30*** *where it was held that an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high, that it must be a wholly erroneous estimate of damages.*

The respondent in this case sustained injury of a sprain to his right ankle. Upon assessment by Dr Obed 3 years later he had healed well and the injury found to be harm.

The trial court well aware of the nature of injury to the respondent assessed the evidence and made reference to decided cases and arrived at a finding. This court finds no material to disturb the assessment of damages.

Accordingly, the appeal succeeds in part and the following orders issue;

a) Appeal on liability succeeds which is hereby apportioned at 50%:50%;

b) Since liability is apportioned the assessment of damages at Ksh.135, 000.00 is hereby reduced to ksh.65, 500.00;

c) Each party shall bear own costs of the appeal.

Delivered at Nakuru this 21st day of March, 2019.

M. MBARU JUDGE

In the presence of:

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