REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.29 OF 2017

(formerly Nakuru High Court Civil Appeal No.41 of 2011)

RAHAB NYAMBURA MWANGI ....APPELLANT

VERSUS

NJORO CANNING FACTORY (K) LTD ....RESPONDENT

(being an appeal from the judgement and decree of Hon. W. Kagendo Principal magistrate delivered on 9th March, 2011 in Nakuru CMCC No.1216 of 2006)

JUDGEMENT

The appeal is filed following judgement and decree in Nakuru CMCC No.1216 of 2006 delivered on 9th March, 2011. In the judgement of the court, the appellant was found to have failed to prove her case and the same was dismissed with costs to the respondent.

Being aggrieved with the entire judgement the appellant lodged on an appeal based on the following grounds:

1. That the Learned Magistrate erred in law and in fact in finding that the plaintiff had not proved her case to the required standards

2. That the Learned Magistrate erred in law and erred in failing to consider the evidence and submissions of the plaintiff by failing to make any findings on the evidence of the plaintiff witness.

3. That the learned trial magistrate erred in law and in fact by finding the plaintiff 100% liable for the accident without giving any reasons for her findings.

4. That the learned trial magistrate erred in law and in fact in disregarding the issue of employment as proved by the plaintiff by production of the Certificate of Service as Exhibit 4.

5. The learned trial magistrate erred in law and in fact by addressing Nakuru CMCC No.1217 of 2006 in relation to the existing suit i.e. Nakuru CMCC No.1216 of 2006 and yet the cause of action and particulars of injuries were totally different.

6. the learned trial magistrate erred in law and in fact in failing to properly analyse, comment and or make a finding on the plaintiff's evidence and submissions before her and therefore misdirected herself in arriving at the wrong conclusion not at all supported by evidence.

7. The learned trial magistrate erred in law and in fact by failing to discharge her duty by being biased and determined to defeat the plaintiff's case.

8. The learned trial magistrate erred in law and in fact by introducing new issues which were not raised during the trial thus arriving at wrong findings.

9. The learned trial magistrate erred in law and in fact by addressing the issue of service of the verifying affidavit and Reply to defence that the appellants were not served and yet there was no evidence of the same and no issue raised on that.

On these grounds the appellant is seeking the judgment delivered on 9th March, 2011 be set aside, judgment be entered in favour of the

appellant together with costs.

The basis of the appeal is that the appellant in the Plaint dated 22nd May, 2006 claimed that she was an employee of the respondent company and on 21st January, 2004 while on duty she slipped, fell down from a ladder and sustained injury. Such arose due to the negligence of the respondent who had exposed her to danger and safe work environment. There was breach of contract of employment where the respondent failed to provide a safe and proper system of work and exposed the appellant to injury.

The appellant pleaded that following the accident she suffered severe soft tissue injury to the left hip joint, soft tissue injury to the left knee joint and soft tissue injuries to the left ankle.

The defence before the trial magistrate was that the appellant was not injured while at work on 21 st January, 2004 and the particulars of negligence set out denied and where the appellant was injured if at all, such arose out of own negligence for failing to attend to her duties properly and climbing the ladder without due care and precautions.

The appellant replied to the defence and denied the alleged negligence on her part.

The trial court in judgement made findings that the appellant was employed by the respondent under a seasonal contract as an electrician and such employment was not continuous and as at 21st January, 2004 she was not an employee of the respondent. injury did not take place while the appellant was in the service of the respondent. the suit was dismissed with costs.

The parties addressed the appeal by way of written submissions.

The appellant submits that the trial magistrate erred by finding that the appellant as not an employee of the respondent and that injury did not occur while at work on 21st January, 2004. These findings are contrary to the evidence adduced before the court where the respondent had issued the appellant with letter of recommendation confirming employment and which covered the date when she was injured while at work. Had these materials and evidence been properly assessed, the court should have had a different finding and judgement.

The appellant also submits that it was not proper for the trail court to be influenced by other suits filed by the appellant. The defence that there was CMCC No.1217 of 2006 and the finding by the court that the suit was tied to CMCC No.1216 of 2006 was erroneous. The suit raising this appeal related to injuries the appellant sustained while at work with the respondent. this should have been addressed on the merits.

The respondent submits that the learned trial magistrate in judgement relied on evidence on record and arrived at correct findings. The burden was on the appellant to prove that she was employed and inure din the service of the respondent which she failed to discharge. There was no record card produced with regard to the alleged incident and no treatment notes were produced. Where the appellant went for treatment on 18th November, 2005, this was 2 years after the alleged accident occurred on 24th January, 2004.

The respondent also submits that the finding of the rail court that the appellant was 100% liable for the accident is correct where the acid dent arose out of won negligence and not in the course of duty. All the material before court was analysed and proper findings made.

I have considered the evidence, submissions from both counsels and my singular duty to re-evaluate the entire case and come up with my own findings.

This is a first appeal from the trial court. the well settled principles in the case of **Selle Versus Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126** have since been long settled to guide me in the determination of this appeal. the court held:

> *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 appear earlier that he has clearly failed on some part to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence. In the case generally.*

These principles form the approach of this court in the matter and the following issues therefore arise for determination;

Whether there was employment between the parties;

Whether injury occurred with the employment due to negligence; and

Whether there was a misdirection and error on the part of the trial magistrate.

From the record, the proceedings before the trial court started with preliminary objections that the suit was filed should be struck out for her Verifying affidavit being defective. The court delivered ruling on 2nd June, 2008 and gave the appellant leave to file a fresh Verifying Affidavit.

This issue is revisited in the judgement of the court delivered on 9th My, 2011 where the suit was dismissed and it was noted the Verifying Affidavit to the suit was defective. The court did not address itself as to whether the appellant as the plaintiff had complied 3iht he ruling delivered in this regard on 2nd June, 2008.

For the court, noting hearing proceeded from such date, I take it the appellant complied with the ruling of the court and the respondent had no good cause to object to the proceedings. the defective Verifying Affidavit having been addressed.

In evidence, the appellant argued her case and stated that on 21st January, 2004 she was doing piping so as to fix electricity but did not complete the job as when climbing on a ladder, one De Souza was holding the ladder and was called by the boss and therefore left quickly. When the appellant tried to check the ladder, it started sliding since she was wearing sandals. she fell and got injured.

The appellant blamed the accident on the respondent on the grounds that the ladder required to be supported which was not done and she had not been provided to proper tools like a helmet. She did not have boots.

Upon cross-examination, the appellant testified that she was treated following the fall but the treatment cards are dated 18th November, 2005. After She got injured while at work and pain persisted for 2 years. She resigned from her employment and sought treatment at the provincial general hospital where she got the treatment cards.

Exhibit 4 is a Certificate of Service which *prima facie* support employment of the appellant with the respondent. for the period when the accident occurred on 21st January, 2004 the appellant was in the service of the respondent. whether on seasonal or piece rate contract, general duties or causal, the Certificate of Service places the appellant on the *locus* of the respondent premises.

On whether injury resulted due to the negligence of the respondent, the appellant testified as follows;

> … *that day I did not complete my job. I had climbed on a ladder. One De*
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> *Souza was hiding [holding] the ladder. I was putting sandals to support the pipes. then De Souza was called by boss one Michael Oluoch. De Souza left quickly and left me behind. I tried to check. Then the ladder started sliding. I fell down and got injured on the left knee. …*

While addressing the question of what constitutes negligence at the workplace the court in **Rashid Ali Faki versus A.O. Said Transporters [2016] eKLR** relied on **Winfield and Jolowicz on Tort, 13th Edition at page 2003,** and which defines Employer's liability, and Employee's burden of proof, to comprise:

> …*..a duty of care, and it follows that the burden of proving negligence rests*
>
> *with the Plaintiff Workman throughout the case. It has even been said if he alleges failure to provide a reasonable safe system of working, the Plaintiff must plead and therefore prove what the proper system was, and in what way it was not observed.*

Therefore 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 or she was not negligent in the performance of duty as held in **ELRCA No.14 of 2018 Oriental Construction Company Limited versus Peter Kariuki Mburu.**

In **Nairobi High Court Civil Case Number 152 of 2005 between Stat Pack Industries versus James Mbithi Munyao**, it was held that an employer's duty is to take all reasonable steps to ensure the Employee's safety, but he cannot babysit an Employee. He is not expected to watch the Employee constantly. The Employer has no obligation to follow the activities of the Employee, even where the Employee has decided to go outside the scope of his employment.

Under the applicable statute at the time of 21st January, 2004 the Occupational Safety and Health Act for a suit premised on negligence to stand the employee had to prove the following;

(a) That the defendant owes the plaintiff a legal duty.

(b) That the defendant was in breach of that duty.

(c) That as a result of the breach of that duty the plaintiff suffered damage.

In this case the court finds the appellant failed to discharge this duty. The findings of the trial court through focused on a different reasons leading to the dismissal of the suit, where properly analysed, the appellant did not make a good case of negligence on the part of the respondent as the employer. The use of a ladder in the ordinary course of the appellant's work and the use of sandals and being on the lookout when undertaking her duties called for her due attention and care as the employer, the respondent herein was not required to keep constant watch over her work as correctly set out above in the case of **Stat Pack Industries versus James Mbithi Munyao.**

On the issue **as** Whether there was a misdirection and error on the part of the trial magistrate the appellant has faulted the court on the grounds that the submissions made were not considered, there was no consideration of the evident and exhibits relied upon and that the decision of the court was influenced by the previously filed and considered case.

In analysis the evidence in its entirety, in the judgement of the trail magistrate the material before court was considered especially the treatment records submitted by the appellant in support of her case and the fact that these were obtained way after the alleged injury at work and dated on 18th November, 2005 a period of over a year after the alleged accident occurred on 24th January, 2004.

Reference was made to CMCC No.1216 of 2006 and the trial court noted that the suit related to injuries on a different date but had been filed after the appellant had left the employment of the respondent. the trial court was therefore not satisfied the appellant had been injured while at work with the respondent as alleged. The court held as follows;

> *The upshot of all this is that the court is not satisfied that the plaintiff was injured at the place and date she alleges.* and *if she did, then it appears she had made it a business to get injured whilst at work.*
>
> *If she had been injured on 13/1/2003 and established that the defendant's system of work was not safe as pleaded in the other suit why would she again seek "seasonal employment" in an environment she had established was not safe?*

The existence of any other suit filed with the court put into account was therefore contradistinguished and a finding made.

For the reasons above, though different from those of the trial magistrate in Nakuru CMCC No.1216 of 2006 the appeal herein is found without merit and is hereby dismissed. Each party shall bear own costs.

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

M. MBARU JUDGE

In the presence of: …………………………. ……………………………