



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.33 OF 2018

[Formerly Nakuru High Court Civil Appeal No.90 of 2017

CHRISTINE MWANAHAWA IKALA.....APPELLANT

VERSUS

TRANSAFRIC TIMBER LIMITED.....RESPONDENT

[Being an appeal from the judgement and decree of Hon. J B Kalo the Chief Magistrate delivered on 11th July, 2017 in CMCC No.387 of 2012]

JUDGEMENT

The appellant was the plaintiff in Nakuru CMCC No.387 of 2012 filed on 11th April, 2012 on the grounds that she was employed by the respondent as a general labourer and it was an express term of the employment that the respondent was to ensure reasonable precautions for the safety of the appellant. However on 5th November, 2011 while the appellant was on duty an accident occurred due to the negligence of the respondent and she got injured. The claim was for payment of special and general damages.

The respondent as the employer denied there was employment and the particulars of negligence or breach of duty. On without prejudice basis the defence was also that there was no accident reported to the respondent on 10th February, 2012 and any alleged accident occurring and where the appellant was injured arose out of own negligence.

The trial court heard the parties in evidence read judgement on 11th July, 2017 with findings that no liability in negligence had been established against the respondent as injury occurred when she went beyond her call of duty to find out what was wrong with the machine she was working with yet she was not a mechanic and thus failed to report the matter to the respondent to attend to the broken down machine. She failed to ensure her own safety and caution leading to the accident. The failure by the appellant to report that the machine had broken down and by trying to find out the fault led to self-injury which cannot be blamed on the respondent. The suit was thus dismissed with costs.

Aggrieved, the appellant filed five (5) grounds of appeal which can be summarised as that the trial magistrate erred in misapprehending the evidence and arrived at a wrong decision that the treatment card produced did not belong to the appellant, that the case was not proved to the required degree, there was no assessment of damages to redress the injuries suffered by the appellant.

The parties filed written submissions to address the appeal.

The appellant submitted that her right fingers were cut in the process of removing her clothes caught when a mortar caught fire which spread to her clothes and got burnt in the process. She was taken to hospital where her sister, Rose Ekala was named as the patient instead of the appellant as she had

accompanied her sister to the hospital. The appellant blamed the respondent for the injury as there was no information provided when there was a faulty system. For the damage arising out of the negligence of the respondent, there should be assessment of quantum and payment of special damages as pleaded and general damages.

The respondent submitted that the trial court addressed the issue of liability properly as the appellant failed to prove her case to the degree required. The appellant was a machine operator which became faulty and she decided to check on it yet she was not trained as a mechanic. She had worked for the respondent for over 11 years and thus went out to pull timber from the machine and the mortar caught fire when she was injured. In **Stat Pack Industries versus James Mbithi Munyao Nairobi High Court Civil Case No.152 of 2005** the court held that an employee should take reasonable steps to ensure her safety as he employer has no obligation to babysit the employee and constantly follow them in their regular duties. In this case the findings of the trial court should be upheld.

Determination

In addressing the appeal, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

The appellant in her plaint before the trial court pleaded that on 5th November, 2011 she got injured when the respondent failed to take all reasonable precautions for the safety of the employees and got exposed to damager and risk of injury. Such resulted from negligence on the part of the respondent who failed to take any adequate safety measures, compelling the appellant to attend to risky assignments, failing to prove a proper work system, exposing her to danger and failure to provide the necessary protective devises. More fundamentally, the appellant pleaded under paragraph 6(f) that;

The plaintiff shall rely on the doctrine of res ipsa loquitor [the thing speaks for itself].

The appellant also pleaded that there was breach of statutory duty where the respondent failed to provide a safe work environment and was injured when she suffered cut would on the right small finger and cut wound on the middle finger.

To prove injury, the appellant produced the medical report done by Dr. Obed Omunyoma dated 21st March, 2012 with a history of crush injuries to the right small finger and relied on a patient card No.144125/2011 dated 5.11.2011.

The appellant also submitted treatment card from Rift Valley PGH printed on 2nd September, 2012 for Rose Ekala No.144125/11. On the card it is noted that the patient Rose Ekali last visited the hospital on 2nd September, 2012.

It is apparent to the court that the treatment card for the appellant was not produced. The medical report relied upon to corroborate her evidence and claim of injury related to a third party and not the appellant.

The appellant explained this lapse upon cross-examination that she was taken to hospital by her sister Rose Ekali and it was common practice to forget the names and list the person giving patient details. However, where the alleged injury occurred on 5th November, 2011 and the medical card is printed on 2nd September, 2012 and the Dr Obed used the same card for the medical report on 21st March, 2012 the obvious error should have been noted and addressed.

Upon discovery of this obvious lapse, the appellant did not seek to file proper documentary evidence. The record as it stands does not support her case of injury and treatment thereof.

On the substance of the appeal, when a party pleads negligence she has to prove the casual link between

the injury and the duty of care placed upon the employer in negligence thus where an employee is undertaking manual work as is the case hereof, and had done so for over 11 years, she was well acquainted with her job and was required to take reasonable care of her own safety as the employer is not expected to babysit or supervise such manual tasks that need no supervision. The Court in **Amalgamated Saw Mills versus David K. Kariuki [2016] eKLR** held that;

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

The Court of Appeal in the case of **Makala Mailu Mumende versus Nyali Golf County Club [1991] KLR 13** stated thus:

No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees.

In this case, the appellant pleaded that she was employed as a general labourer. She testified that she was trained as a machine operator. The machine got stuck. She switched it off and removed the wood. She went to the corridor to pull the roller when the mortar caught fire and her right hand fingers were cut. The right foot was burnt together with her clothes.

This evidence by the appellant is not supported by her pleadings. Even where the medical report of Dr Obed Omunyoma may have remotely related to the appellant, the injury history is in contrast to her evidence under oath. There is no relationship between the stated injuries following the accident and the noted injuries in the pleadings and the medical report. There is a total contrast.

The pleadings of the doctrine of *res ipsa loquitur* by the appellant thus taken into account, and the findings in **Obed Mutua Kinyili versus Wells Fargo & another [2014] eKLR** that;

It is generally a short way of saying:

'I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant ...' There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer

However in the case of the appellant the facts as presented do not establish negligence on the part of the respondent. To the contrary, by her actions to attend to a machine that was faulty whereas her employment related to general labourer and not that of a mechanic, she exposed herself to danger and injury.

Hence the *res ipsa loquitur* doctrine, properly applied, does not entail any covert form of strict liability.

Without the medical evidence, the treatment card relating to a third party, the trial court did not err or cause any misdirection and properly applied the correct principles of evidence and accordingly dismissed the claim.

The appeal is found without any merit and is hereby dismissed. The appellant shall bear the costs of the appeal.

Delivered in open court at Nakuru this 30th day of April, 2019.

M. MBARU JUDGE

In the presence of: