REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.60 OF 2017

[Formerly Naivasha High Court Appeal No.66 of 2014]

BIGOT FLOWERS LIMITED.....APPELLANT

VERSUS

PETER JAKOYO ANYANGO.....RESPONDENT

[Being an appeal from the judgement and decree of Hon. P. Gesora, Magistrate delivered on 27th October, 2016 in Naivasha CMCC No.502 of 2013]

JUDGEMENT

On 31st July, 2013 the respondent filed suit against the appellant in Naivasha CMCC No.502 of 2013claimaing special and general damages on the grounds that he was an employee of the appellant at Naivasha and on 6th January, 2012 while performing his duties he was involved in an industrial accident thereby sustained severe injury due to the appellant's negligence, breach of contract and or in breach of statutory duty. That the appellant had failed to ensure a safe work environment, failed to give warnings of dangers while at work or ensure a safe system of work. The respondent was injured due to the negligence and breach of duty by the appellant.

The appellant denied the allegations made by the respondent.

In the judgement, the trial Magistrate found that the Appellant had a statutory duty to ensure that the work environment was safe to the employees and in particular the Respondent herein. This duty, it was held entailed the provision of safe working environment including protective apparel. That had this been done it would have ameliorated chances of injury in the event of an accident. The court made a finding on liability and apportioned the same at 15% to the respondent as the plaintiff who was established to have been a casual employee of the appellant.

Aggrieved by the judgement and decree of the trial court, the appellant filed this appeal on six (6) grounds that;

> *1. The trial magistrate erred and misdirected himself as to the facts and evidence on record in respect of the circumstances surrounding the alleged accident of the respondent and therefore erred in law in his assessment of liability.*
>
> *2. The trial magistrate failed to and/or erred in analysing the inconsistencies in the evidence on record which show that the respondent had left before the date of accident and the trial court consequently failed to dismiss the respondent's case on this account.*
>
> *3. The trial magistrate erred and misdirected himself as to the facts and evidence on record in respect of whether the respondent was actually on duty at the appellant's premises on the date of the accident as alleged and the trial court consequently failed to dismiss the respondent's case on this account.*
>
> *4. The trial magistrate erred and misdirected himself in his application of the principles required to prove he causal link between the alleged negligence of the appellant and the respondent's injury.*
>
> *5. The trial magistrate erred and misdirected himself as to the exact and nature of the respondent's injuries and therefore erred in law on his assessment of damages awardable to the respondent which was manifestly excessive.*
>
> *6. The trial magistrate erred in assessing damages and failed to apply the principles applicable in award of damages and comparable awards made for analogous injuries.*

The appellant submitted that the respondent failed to show any causal link of the alleged injury to the negligence of the appellant. In his evidence he testified that on 6th January, 2012 he was working on the roof of the greenhouse when he fell and suffered soft tissue injuries. The circumstances leading to such fall were never stated or described and the manner of injury is therefore left to conjecture and without nexus to the appellant and negligence cannot be impugned. The burden of proof was on the respondent to demonstrate the existence of the pleaded facts and not mere allegations as held in **Bonham Carter versus Hyde Park Hotel Ltd (1948) 64 T.R.**

The appellant also submitted that it was incumbent ton the respondent to prove negligence as liability cannot be apportioned without fault. The particulars of the alleged negligence were never proved as held in **Spin Knit Ltd versus Albus Adwera, HCCA No.204 of 2002 (Nakuru).** And without any causal link with the appellant negligence cannot be inferred as held in **Stat pack Industries Ltd versus James Mbithi Munyao (2005) eKLR** and under section 13(1) of the Occupational Safety and Health Act the law provides that an employee should ensure his own safety and health and that of other employees who may be affected by his actions while at work.

The respondent was not in the employment of the appellant as he had resigned by notice dated 15th September, 2011. There was no re-employment of the respondent as confirmed by the human resource manager who confirmed the payment of terminal dues and clearance. The respondent is not registered on the temporary employee's muster roll which then removed him from the appellant's work place. The respondent was not injured within the appellant's premises and there was no employment as such had ceased.

The respondent submitted that the trial court applied correct principles of law in addressing liability which an appellate court should not interfere with as held in the case of **Mohammed Mahmoud Jabane versus Highstone Butty Tongoi Olenja Civil Appeal No.2 of 1986** that unless it is shown that the trial court took into account factors which he should not have taken or that he failed to take into account matters which should have been taken into account or there was a misapprehension of the facts and evidence or acted upon the wrong principles, then the appellate court should not interfere with the findings of fact.

In this case, the respondent submitted that he was an employee of the appellant when he left on 17th October, 201 and was re-employed in December, 2011 as a causal employee and paid daily. He fell and was injured on 16th January, 2012. It was the duty of the employer to ensure a safe work environment as held in **Samson Emuru versus Ol Suswa Farm Ltd, HCCA No.6 of 2003 (Nakuru).** The findings of the trial court on liability and premised on the correct principles and the assessment of general damages and special damages should be upheld.

I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle versus Associated Motor Boat Co. [1968] EA 123** that the 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 the 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.*

In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved his case. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides that;

> *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*

See the case of **Anne Wambui Ndiritu versus Joseph Kiprono Ropkoi & Another [2005] 1 EA**.

In this case, the respondent's case was that he had an implied and or express term contract of employment with the appellant to take all reasonable precautions for his safety while working for them and not to be exposed to risk of damage or injury but on 6th January, 2012 while on duty he was involved in an industrial accident and sustained injury. The respondent testified as follows;

> **…** *On 6.1.2012 I was injured while on duty with the defendant [the appellant]. I was maintaining the green house. I was not issued with protection gear. I was examined by Dr. Omuyoma who prepared a report. … I resigned on 8.9.2011. I was employed as a casual labourer in the same company. …*

When the respondent was cross-examined, he testified as follows;

> *I was injured on 6.1.2012. This was after I resigned and re-employed by the same company. We used to sign the attendance registers.*

To this evidence by the respondent, the appellant called the human resource manager, Charity Opon who testified that he kept the work records for all employees of the appellant and the respondent was employed on 24th October, 2006 and he resigned through his notice on 15th September, 2011 and left employment on 17th October, 2011. The respondent had been issued with an employment contract which he terminated and his last working day was on 15th October, 2011. He cleared with the company and was paid his terminal dues and he acknowledged on 18th October, 2011. The respondent has maintained muster rolls for causal employees and the one for 6th January, 2012 does not show injury to the claimant as he has since left the company way before in the year 2011. He was never re-employed.

Mureithi Kahero also testified in support of the appellant before the trial court when he stated that he as a supervisor and the respondent had been his colleague where he remained on duty until October, 2011 and was not re-employed. In the muster roll for January, 2012 the claimant was not at work with the appellant as he had since left his employment and was not re-employed.

The evidence of these witnesses was not challenged in any material way by the respondent.

The fact of the respondent's employment with the appellant as at 6th January, 2012 became a material aspect to the entire case. The trial court in addressing this fact held as follows;

> ***…*** *the medical report is clear that the plaintiff was treated at Naivasha District Hospital and the history captures therein that he was injured while on duty on 6th January, 2012. This piece of evidence corroborates the plaintiff evidence. I consequently find and hold that the plaintiff was a causal employee of the defendant on the day in question and was injured while on duty. The plaintiff fell while working on a green house. …*

These findings of the trial court are not supported by the pleadings, or the evidence adduced before court.

First, the respondent did not plead that he fell from a green house. Paragraph 5 of the Plaint is to the effect that on 6th January, 2012 while the respondent was on duty he was involved in an industrial accident where he sustained injury. The details of the *industrial accident* are not given.

When the respondent testified in court on 14th September, 2015 his evidence was that he was injured while on duty attaining a greenhouse because he was not issued with any protective gear. This evidence does not give material particulars of the circumstances leading to such injury while the respondent *was maintaining the green house.* Therefore, the findings that the respondent was a causal employee of the appellant and he fell while working from a greenhouse are devoid of any material before the court.

Secondly, it is trite the employment is between the employer and employee and cannot be conferred by a third party. The primary evidence with regard with employment is to be found from the employer based on the work records.

Upon the evidence that indeed the respondent was an employee of the appellant until he resigned and hi last working day was on 15th October, 2011 this became material to the trial as to how the respondent was to be found on the shop floor and where he alleged to have been injured. The work records produced by the appellant became material and should have been interrogated in this regard.

This court has had a chance to look at the muster roll produced as Defence exhibit 6, this is a record of employees on duty on 6 th January, 2012 and forms a crucial piece and record of the appellant in confirming the employees at work on such date. This record of the respondent is kept in accordance with the provisions of section 9 of the Work Injury Benefits Act, 2007 and which provides as follows;

> *(1) An employer shall—*
>
> *(a) keep a register or other record of the earnings and other prescribed particulars of all employees;*
>
> *(b) at all reasonable times produce the register or record on demand to the Director for inspection; and*
>
> *(c) retain the register, record or reproduction referred to in paragraph (1) (a) for a period of at least six years after the date of the last entry in that register or record.*
>
> *(2) An employer who fails to comply with any provision of this section commits an offence.*
>
> *(3) Any employer registered under section 8 who ceases to carry on business for any reason, shall notify the Director before winding-up the business.*
>
> *(4) An employer who keeps records of remuneration is deemed to keep records in accordance with this section.* [underline added].

Upon the appellant submitting the required work record(s) and on the evidence of its witnesses which removed the respondent from the company premises, the findings on injury while at work were without any material evidence. The burden on the respondent as the person alleging employment and injury while at work was not discharged to the required degree on a balance of probabilities.

Without there being a linkage of employment between the parties, a clear thread in the claims made was lost. Even where there may have been causal employment, which is not established here, and the respondent got injured on 6th January, 2012 and was treated at Naivasha District Hospital, The rule of law is that a master is not responsible for the wrongful act done by his servant unless it is done in the course of employment and it is deemed to be done if it is either (a) a wrongful act authorised by the master; or (b) a wrongful and unauthorised mode of doing some act authorised by the master as held in the case of **B W K versus E K & another [2017] eKLR**. Also see ***Salmon on Torts*, 6th ed 1924 at 100.**

On this basis, the trial court erred in failing to address the issue of employment between the parties and by proceedings to address the issue of liability and apportion the same on the appellant was foundationally without justification. In the case of **Statpack Industries versus James Mbithi Munyao [2005] eKLR** the court held as follows;

> ***…*** *there was no evidence presented to the lower court to enable the court to draw a fair conclusion that the accident was caused by the negligence and/or breach of duty of care by the Appellant employer.*

Similarly in this case, this position holds. On this basis, the appeal must succeed.

> **Accordingly, for the reasons set out above, this appeal is allowed with costs to the appellant. The judgement and decree of the lower court is hereby set aside.**

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of: .....

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