REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.31 OF 2018

[Formerly Nakuru High Court Civil Appeal No.51 of 2017]

SUBATI FLOWERS LIMITED.....APPELLANT

VERSUS

JOHN KARIUKI GITHAE.....RESPONDENT

[Being an appeal against the judgement and decree of Senior Principal Magistrate delivered on 6th April, 2017 in CMCC No.642 of 2015]

JUDGEMENT

The facts leading to the appeal herein are that the respondent who was the plaintiff in the lower court was employed by the appellant and on 2nd July, 2012 while at work as a general worker and placing polythene papers on the roof of a greenhouse the metal bar he was stepping on fell causing him to fall on his back and got injured. He was taken to hospital and treated the respondent claimed that the fall arose out of being placed in unsafe work environment and following the negligence of the appellant and he suffered loss and damage.

In defence the appellant denied the allegations made by the respondent and that where there was an accident and injury, such arose out of his negligence when he failed to take any or adequate and reasonable precautions for his own safety or was careless in his duties and failed to check the metal bar he was stepping on and thus contributed to the accident and injury.

The trial court heard the parties and made a finding that the appellant was liable at 100% for negligence and the accident where the respondent got injured. Quantum was assessed and damages awarded.

Aggrieved, the appellant has lodged the appeal on eight (8) grounds challenging the judgement and decree of the trial court on the basis that there was no concise statement of the case with points of determination, there was a disregard that the burden of proof lay on the respondent to proof negligence and particulars of negligence which he failed to do, the court ignored the contradictions in the pleadings and evidence of the respondent with regard to the fact that the appellant had provided safety equipment which he failed to use and therefore the appellant should not have been held wholly to blame for the accident and there should have been contributory negligence and that the award of damages was excessive.

Both parties addressed the appeal by way of written submissions.

The appellant submitted that the respondent failed to proof the particulars of negligence attributed to the appellant as he was provided with safety apparent and helmet but he failed to use it. The particulars of negligence that the respondent was not provide with a safe work environment was not correct and his failure to use the provided safety tool should have been factored in contributory negligence.

The appellant also submitted that the trial court also failed to taken into account the defence made in that the respondent was working with 6 other employees and were all given a helmet and a belt to use while repairing the greenhouses to endure their safety and reduce chances of an accident. The respondent was working with a supervisor who was to ensure he wore the safety apparel. Where the respondent got injured, the appellant was not sorely to blame.

The appellant has relied on the cases of **Eastern Produce (K) Limited versus Christopher Atiado Osiro HCCA No.43 of 2001 (Eldoret)** and the findings that negligence is the omission to do something where a reasonable person guided would not do. In the case of **Stratpack Industries versus James Mbithi Munyao HCCA No.152 of 2003 (Nairobi)** the court held that an employer's duty at common law is to take reasonable steps to ensure the safety of an employee and in this case the appellant did issue the safety apparel to ensure the safety of the respondent while at work.

The Appellant therefore urged the Court to set aside the award of the trial magistrate on quantum of damages and in the alternative, this Court do make its own finding on quantum of damages payable if any, to the Respondent

The respondent submitted that the trial court findings on liability and assessment of damages were based on proper findings and analysis of the case. The respondent was injured while at work and such arose out of the negligence of the appellant in failing to ensure a safe work environment. In the case of **Boniface Muthama Kavita versus Carton Manufactures Ltd [2015] eKLR** the court held that the burden of proof in an action for negligence rests primarily on the plaintiff and this involves the proof of some duty owed to the plaintiff where there is breach of that duty and an injury has occurred.

In this case the respondent was an employee of the appellant and while at work he was allocated duties in unsafe work environment and as a result he fell and got injured. Such injury is attributed to the negligence of the appellant. In the case of **Oluoch Eric Gogo versus universal Corporation Limited [2015] eKLR** the court held that an employer is required by law to provide a safe work environment and if an accident occurs the employer is responsible.

The respondent submitted that in this case the respondent got injured while at work, he was admitted and treated in hospital and the doctor found a permanent disability of 40%, he had to leave work following the accident and the trial court properly assessed the matter and relied on various case authorities to arrive at its judgement and decree.

Determination

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] EA123** that;

> *The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are 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.*

Therefore 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.

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 and whether there was a good defence with regard to the allegations made on negligence and breach of a statutory duty and where the findings of the trial court should be disturbed.

The employment of the respondent by the appellant is not challenged. However, the appellant's case is that the respondent was provided with work tools to reduce chances of an accident which he failed to use

while repairing the roof of a greenhouse.

In **Samson Emuru versus Ol Suswa Farm Ltd Nakuru HCCA No. 6 of 2003** that:

> *The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, … but also to make the place of employment…as safe as the exercise of reasonable skill and care would permit…The duty thus described is a higher… the master is under a duty to make his servants to take reasonable steps to avoid harm arise.*

Where the respondent was therefore instructed to use a helmet and a belt while undertaking his duties of repairing the roof of the greenhouse, it was his duty to do so as such would minimise and or reduce chances of an accident.

The appellant testified before the trial court as follows;

> *… I had gone to replace paper at a greenhouse. When I stepped on the ladder it was a metal ladder. When I had gone to set the paper, the ladder fell and I fell. I was 20 feet. I fell with the ladder. They had given me a helmet. I could not use the helmet because of the work I was doing. …*

Following the fall the respondent was injured and suffered unstable fractures of cervical vertebrae C5 and C6; grade 1 anterolisthesis of C6 over C7; and soft tissue injuries to the left upper limb. He was treated and upon medical assessment by Dr Kiamba the degree of injury was classified as grievous harm with 40% permanent disability.

In defence the appellant called Peter Mwangi Kirogu who was working with the respondent and who testified as follows;

> *… I was working as a greenhouse repairer. We were replacing papers. We were about six. The plaintiff was on top of the papers. On the top he fell. We were all given a helmet and a belt. There is a supervisor on duty. The supervisor was not there when the accident took place. … I have no record that the belt and helmet were being given. The belt did not cut. the metal bars became loose and he fell. This was the metal bar he was handing and stepping on. …*

On this evidence, it is apparent to the court that the claimant had been issued with a helmet but had opted not to wear it on the grounds that he could not use due to the nature of work. However, such tool had been found necessary by the appellant as the employer in the course of the respondent's duties. He failed to use it and as a result he fell and suffered grievous harm.

The trial court in analysing the matter held the appellant liable at 100% on the grounds that;

> *…the main issue is whether a helmet would have prevented the accident.*
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> *According to the plaintiff the work they were doing at the time could not be done while one was having a helmet. Further it is my humble opinion that the helmet would have most unlikely is used to the ladder. So if the ladder fell as it did it means the haven [helmet?] would not have helped. The plaintiff, he would still have fallen with the ladder. The supervisor was very essential as he would guide the plaintiff on an unclear as they worked to ensure the environment and the ladders they were working with were in good condition.*

With respect, work tools issued by an employer are meant to endure the safety and to minimise industrial accidents. Where the respondent was required to use a helmet in the course of his duties, such requirements found necessary by the employer, the failure to use put the respondent in the harm's way and he got injury to the extent of 40% disability. The absence of the supervisor to ensure that the respondent adhered to the work requirements while undertaking such dangerous duties of going on top of a greenhouse without a helmet is the only breach on the part of the appellant.

In this regard, liability ought to have been shared equally by both parties.

The trial court went ahead to address the question of quantum and relied on various cases in its analysis. The court finds no material to disturb the findings on quantum save for the liability apportioned which is hereby shared at 50%:50% by both parties.

Accordingly, judgement is hereby entered for the appellant with a review on the judgement in Nakuru CMCC No.642 of 2015 with apportionment of liability at 50%:50% to each party. The findings on costs payable to the respondent in the lower court are appropriate save for this appeal, each party shall bear own costs.

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

M. MBARU

JUDGE

In the presence of: .....

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