



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.9 OF 2019

[formerly Nakuru High Court Civil Appeal No.3 of 2016]

REDSHANK LIMITED.....APPELLANT

VERSUS

TERESIA AUMA AKWAVI.....RESPONDENT

[being an appeal from the judgement and decree of Hon. I H S Wanyaga, Resident Magistrate Mono delivered on 17th December, 2015 in Molo SPMCC No.173 of 2013]

JUDGEMENT

The appeal herein follows the judgement and decree delivered on 17th December, 2015 in Molo SPMCC No.173 of 2013 following a claim by the respondent that she was employed by the appellant as a general worker and in the course of her employment she was exposed to risk and damage and on 23rd April, 2010 she had an accident which caused injury. The appellant blamed the respondent for negligence and breach of statutory duty and claimed damages for deep cut to the right wrist and severe soft tissue injuries.

The appellant defended it against the claims made and on the grounds that there was no accident reported on 23rd April, 2010 as alleged and the particulars of injury, loss and damage and the alleged negligence and breach of statutory duty did not occur. Where there was accident and injury to the respondent, such arose out of own negligence and failure to take care and precautions or keep from harm's way and cannot be blamed on the appellant. That the claims made are fraudulent on the grounds that there was no injury while at work and the documents and records relied upon is a forgery.

The trial court heard both parties and in judgement made a finding that liability was at 70%:30% in favour of the respondent (plaintiff). Quantum was assessed and general damages awarded at Ksh.60, 000.00 together with special damages at ksh.8, 190.00 and factoring the apportionment on liability total award was ksh.50, 190.00 and costs.

Aggrieved, the appellant filed the appeal on four grounds that the trial magistrate erred in law and fact in finding the respondent sustained injury at her workplace where was evidence to the contrary; the finding that the respondent was treated at Nakuru provincial hospital was in error as in essence she had failed to provide proof; the trial court failed to appreciate the totality of evidence in arriving at liability at 70:30% liability ratio and then awarded damages for non-existent injuries which were not proved.

The appellant in appeal is seeking for the review and or setting aside of the trial court judgement with costs.

Both parties filed written submissions.

The appellant submitted that there was no proof that the respondent sustained injury while at work with the appellant and the alleged accident cannot be attributed and blamed upon the appellant. Section 107 and 108 of the Evidence Act places the burden of proof upon a claimant which the respondent failed to discharge on a balance of probabilities. The respondent testified that she as working for the appellant and while pruning some seedlings, she slipped and fell and sustained injuries to her back and right hand. When cross-examined the respondent testified that she had been working with the appellant for 17 years and thus familiar with her work environment and how to carry out her duties with caution. That the respondent conceded that it had rained and the floor was slippery and had a choice to wait for it to dry up. By assuming risk there was contributory negligence and the respondent is solely to blame as held in **Latimer versus AEC[1953] AC; Mumias Sugar Co. Ltd versus Samson Munyinda, HCCA No.58 of 2000 (Kakamega)**.

The appellant also submitted that the respondent alleged accident was not recorded in the occurrence book on the alleged date of accident. Injury did not occur within the premises of the appellant.

By the trial court finding the appellant liable and apportioning blame was in error as held in **Kiruga versus Kirunga [1988] KLR**. There

was no proof of injury to justify the award of damages by the trial court. the pleading filed set out alleged injuries in the nature of soft tissue injuries. Upon examination of the respondent she confirmed she filed Molo SPMCC No.486 of 2011 and alleged that she was injured on 29th April, 2010 while working for the appellant and thus not possible that she suffered injury on 23rd April, 2010 and remained at work and suffered another injury on 29th April, 2010. Such contradictory evidence put into account renders the claims made and the documents filed a forgery.

The appeal should be allowed with costs.

The respondent submitted that there was proof of injury to the respondent while at work and the records officer at Nakuru provincial hospital produced the records with respect of the respondent. Save to deny that there was no record kept by the appellant in the occurrence book the fact of injury was not disapproved.

The respondent was able to prove her case to the required degree and the trial court analysed the evidence and applied the law to reach a finding that there was liability and made an appropriate award. The appeal should be dismissed with costs.

I have perused the record of the trial court, given consideration to the grounds of appeal and the written submissions of the parties and given the general principle that this court is of first appeal, the duty is to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility.

The respondent testified before the trial court on 12th February, 2015 that on 23rd April, 2010 she was at work when she slipped and fell and got hurt. At the time she was pruning seedlings. Upon injury she was taken to hospital and treated at Nakuru provincial general hospital. The trial court noted her wrist is deformed.

Upon cross-examination the respondent testified that she was never issued with protective clothing and got hurt to the right hand. Upon injury her supervisor took her to the hospital at Nakuru provincial general hospital where she was admitted for 3 days.

To support her claims, the respondent called Dr Obed Omuyoma who produced the medical report. The respondent also produced the treatment notes and her payment slips.

In response, the appellant called Joseph Githinji Mbugua the supervisor and who worked with the respondent. he testified that the respondent was not hurt on 23rd April, 2010 as this was not recorded and produced the occurrence book.

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, both parties agreed that the respondent was an employee of the appellant. The respondent asserted that on 23rd April, 2010 she was at work when she was injured and taken to hospital and admitted for 3 days and there is proof from the records filed from the hospital of this fact. The challenge to the injury and by the appellant is that on 23rd April, 2010 there was no accident recorded and they produced the occurrence book.

The court reading of the record is that there is exhibit 3 to confirm the respondent was admitted at Nakuru provincial general hospital on 23rd April, 2010 following an accident while at work. This record was produced by the primary custodian at the hospital.

The respondent produced an extract of the occurrence book which is clear to the extent that there was a report made on 27th April, 2010; 22nd May, 2010, 30th August, 2010, 27th September, 2010. There is nothing prior to 27th April, 2010 to demonstrate that there was no occurrence on 23rd April, 2010 or any other time before such date. To conveniently pick on a date after the 23rd April, 2010 and file records going up to September, 2010 was to miss the opportunity to controvert the claims made.

The accident at the workplace then unchallenged, the other matter the respondent testified to be that the injury occurred in the manner it did as she was not issued with any protective gear.

Where an employer fails to provide the employee with apparels to ensure safety and avoid harm, where there is an accident as a result, there is liability as held in

Spinners and Spinners Ltd versus Alex Andayi Atieli [2014] eKLR.

There is no material evidence to suggest the appellant complied with its statutory duty by providing the respondent with appropriate work apparel to reasonably reduce chances of injury. The fact of working for the appellant for 1 year is not a defence in a failure to abide a statutory duty to ensure the proper and reasonable safety of the employee. Such duty was breached.

Bearing in mind that it is the trial court that had the advantage of calling the evidence and taking the primary evidence. In **Kiruga versus Kiruga & Another [1988] KLR 348**, the Court of Appeal held that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to

determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

Bearing in mind the judgement by the trial court and the analysis above, this court finds no material to justify a review or the setting aside of the judgment in Molo SPMCC No.173 of 2013 as the court applied itself on the pleadings, the evidence and the law appropriately.

Accordingly, the appeal herein is found without merit. The appeal is dismissed and costs of the appeal awarded to the respondent.

Delivered at Nakuru this 7th day of November, 2019.

M. MBARU

JUDGE

In the presence of:

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