REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

APPEAL NO.2 OF 2016

BEAUTY LINE LIMITED.....APPELLANT

VERSUS

BENEDICT NYAMORA MONENE.....RESPONDENT

(an Appeal from the Judgment of Hon. Magistrate, Naivasha Chief Magistrate Court No.663 of 2013 delivered on 22nd September, 2015)

JUDGEMENT

The Appeal herein relates to judgement of the lower court, Naivasha Chief Magistrate Court Case No.663 of 2013 delivered on 22nd September, 2015 and where the appellant was found liable at 90:10 and damages assessed at kshs.300, 000.00 less 10% contribution and special damages at Kshs.5, 000.00 plus costs and interests.

Aggrieved, the appellant has filed this appeal and in the Memorandum of Appeal seeking for orders that the judgement of the lower court be reversed and set aside and the respondent to pay the costs.

The grounds of appeal are that;

1. The learned trial magistrate erred in law and in fact and misdirected herself in delivering judgement in the plaintiffs favour when the plaintiff had not proved his case to the required standard.

2. The learned trial magistrate erred in law and in fact in disregarding the evidence adduced on behalf of the defence in particular, the evidence that the plaintiff had been provided with protective gear.

3. The learned trial magistrate erred in law and in placing reliance on medical report grounded on doubtful documents

4. The learned trial magistrate erred in law and in awarding damages based in injuries that had not been proved.

5. The learned trial magistrate erred in law and in fact in holding that the defendant was liable despite there being evidence to the contrary and further erred in apportioning liability in the ratio of 90:10.

6. The learned trial magistrate erred in law in failing to take into consideration the submissions tended on behalf of the defendant.

7. The learned trial magistrate erred in law and in fact in entering judgement in general damages in the sum of Kshs.300, 00 which was manifestly excessive in the circumstances.

8. The decision was arrived at on consideration, to the extent that this was done, of the wrong principles of law.

The appeal was admitted on 4th September, 2017 at High Court, Naivasha and orders of stay of execution allowed subject to a deposit of Kshs.150, 000.00 and on 25th February, 2016 the matter was placed with the court for hearing and disposal. Hearing directions were taken and parties agreed to file written submissions.

As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another versus Associated Motor Boat Co. Ltd.& others (1968) EA 123** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 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 (**Abdul Hammed Saif versus Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

The duty of the court in a first appeal in also to apply an objective criteria of review and make a finding as set out in the case of **Kenya Power & Lighting Compant Ltd versus E K O & another [2018] eKLR**

> *The appropriate standard of review established in these cases can be stated in three complementary principles:*
>
> > *a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;*
> >
> > *b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and*
> >
> > *c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.*

On this basis as set out above, the issues to be addressed herein in this appeal is whether the trial magistrate erred in finding that the respondent had proved his case on the required standard and on a balance of probabilities; whether the respondent proved a case for negligence; whether there was an appropriate assessment of damages and the question of costs.

The facts leading to the judgement and orders of the lower court are that the respondent herein was employed by the appellant as a General Worker and on 24th December, 210 while in the course of his duties as a sprayer, he was directed to go and repair the green house where he fell down from the top and sustained injuries. That such accident arose out of the negligence of the appellant as the employer and he sustained injuries of a fracture of the 3rd, 6th and 5th right side of the chest and with a permanent incapacity of 20%.

In defence, the appellant case was that where the respondent got injured while at work such was as a result of his negligence sorely caused and or substantially contributed by himself when he exposed himself to risk, worked without such instructions, worked outside of his work scope, allowed himself to be injured and acted without due care and attention.

In the judgement of the lower court, there was a finding that the respondent reported on duty on 24th December, 2010 and was allocated general duties as a sprayer and later given duties in the cutting section and where he was told to climb on top of the green house to repair the roof despite the fact that it was a wet afternoon. That the paper roof had been blown away by the wind and flowers were being rained on. The respondent slid and fell down from 30 feet height injuring his chest. The court also made a finding that the appellant had failed to produce crucial records to support its defence that the respondent had been issued with protective gear or a safety belt to climb up the greenhouse and that the accident registrar had not been produced. The court also made a finding that the respondents had not been coerced to climb the greenhouse on a wet day and should have been mindful of his own safety while at work and that on his own volition he exposed himself to the accident at work and thus liability was apportioned at 90:10.

The appellant's case is that the respondent was an employee wherein he was provided with protective gear in the course of his work but was not told to climb a greenhouse for the purpose of repairing it. The respondent was assigned duties of spraying crops and was then supplied with gumboots, gloves and an apron and such items were to be carried during work duty. The appellant did not require its workers to repair the green houses as they had contracted Amiran Ltd to service and maintain its greenhouses but the lower court disregarded this evidence and made a warn finding that there was an accident without proof or record of the same.

In evidence, the respondent produced medical notes and called a medical doctor as a witness. Such records are not challenged. The question the accident is not controverted.

On the record, the appellant's witness is not identified but noted to be statement of the HR Manager and who produced documents which were challenged and a ruling made that such documents remained to be identified.

The trial court examined the record, he evidence by both parties and considered all material before it. The respondent's evidence was not challenged in any material way noting there were no records by the appellant identified at the trial to challenge his case.

It is the duty of an employer to keep work records, and particular under the Work environment to ensure that an account for each employee is maintained. Failure to do so can only invitee claims such as these. Where the respondent was allocated duties of a sprayer on 24th December, 2010 and was later assigned cutting duties but he opted to undertake duties of repairing a greenhouse outside the scope of his duties and where such work had been assigned and contracted to be undertaken by Amiran Limited, such material should have been submitted with the lower court for assessment and analysis to ensure a finding on such facts. The failure to produce such records cannot be addressed by this court at this stage. From the record, the defence in the lower court closed its case without enduring material evidence was availed to the court so as to challenge the respondent's case.

On this basis, it is the court's considered view that the trial court applied itself within material evidence before it and on an appropriate threshold of a balance of probabilities made its findings. The trial court did not err in law by finding that the respondent had demonstrated and met the legal burden placed on him.

There is a casuistic link between the appellant's negligence and the injuries sustained by the respondent as his place of work. On the record, the trial court addressed itself on the same and made a correct finding. Even where the respondent was a general worker and provided with work gear without any material evidence that there was a company Amiran Limited required to undertake the duties the respondent was undertaking to repair the greenhouse, where he was allowed to undertake the same in the course of his duties, the resulting accident and injury places the burden on the appellant to address.

The trial court however appreciated that the respondent placed in the circumstances he was faced with on 24th December, 2010 he ought to have been alert on his safety and therefore assigned a liability. The basis of 90:10 is however not addressed.

Putting the record into account and the findings of the trial court, the circumstances leading to the accident of the respondent and the finding that he put himself in the harm's way, liability then ought to have been 50:50.

In assessing damages, the issues set out above in the memorandum of appeal, the court finds no legal reason to disturb the findings save for the apportionment of liability which shall be 50:50.

Where the sum of kshs.150, 000.00 was deposited with the court as directed an appropriate sum shall be released to the parties putting into account the apportionment above at 50:50 on the award by the trial court of Kshs.300, 000.00 in damages. On costs, each party shall bear own costs.

Delivered in open court at Nakuru this 31st day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant…….

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