REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.37 OF 2017

(Formerly CIVIL APPEAL NO.69 OF 2011 Nakuru)

AGNES MORAA OMITI..... APPELLANT

VERSUS

KAPI LIMITED.....RESPONDENT

JUDGEMENT

(The appeal is from the judgement and decree of the Chief Magistrate dated 29th March 2011 in Nakuru Chief Magistrate Court Civil Suit No.2550 of 2002)

1. The Appellant was the plaintiff before the Magistrates Court. The appellant's case was that from 14th January, 2000 she was employed by the respondent company as the Supervisor in the Manufacturing section with duties to mix fragrances chemicals for the UDI and coils sections and to carry experiments and other allocated duties. She was constantly exposed to dangerous chemicals. In March, 2001 the appellant started experiencing abdominal pain, skin rushes, chest pains and general malaise for which she was treated and diagnosed as a chronic allergic contact dermatitis. The appellant alleged that as a result of the same she sustained the following injuries;

a. Chronic allergic contact dermatitis

b. Chest pains

c. Skin rushes

2. The appellant attributed her injuries to the negligence of the respondent. She testified that she started working for the respondent company from 1972 until 2000 when she quit her employment. While at work the appellant was treated by the company doctor for pain to the next and back and was terminated by the respondent when she became sick. She blamed the respondent for her ill-health in that she was not supplied with protective clothing and or safety apparel such as gumboots and gas masks and that there was no oxygen in the underground rooms where she used to work.

3. In defence, the respondent denied the allegations of negligence and injuries to the appellant.

4. The trial court made a finding that the appellant had failed to prove her case of a balance of probabilities and dismissed her case

5. The Appellant being aggrieved by that finding has filed this appeal.

6. This being the first appeal I am obligated to reconsider the lower Court evidence assess it make my own conclusion remembering that I neither saw nor heard the witnesses. See the case **Selle versus Associated Motor Boat Company Ltd [1968]E.A. 123**.

7. The appellant in evidence before the lower court testified that she was unable to work due to ill-health. The chemicals affected her after inhaling them. She got a letter from the hospital which she showed her bosses who then stopped her from work. She had been treated by the company doctor. She produced the sick sheets. The appellant then went to the Nakuru hospital and Doctor Vilembwa Mudathi wrote a report on 13th March, 2001. The appellant blames the respondent company for failing to issue her with protective clothing and gadgets to protect her from the chemical. She was only given soap and her uniform was the ordinary ones.

8. The appellant also called Dr Wellington Kiamba a practitioner at Nakuru to support her case and who testified that he examined the appellant on 19th May, 2002 flowing a history of injuries suffered while on duty with the respondent. He also saw the report by Dr Vilembwa

and a letter from the director of occupational health following the appellant suffering chronic allergic dermatitis due to exposure to chemicals.

9. The appellant also called Gabriel Mburu, the Health Records Officer to support her case and who produced a letter by Dr Munduvi Vilembwa dated 13th March, 2001 and recommending that the appellant be retired on medical grounds after suffering chronic allergic contact dermatitis.

10. The defence in the lower court by the respondent herein was that it is under a duty of care to provide a safe working place and not expose its employees to danger and thus always provided a sae working place and did not expose its employees to any danger. The respondent denied the allegations set out by the appellant with regard to negligence and that they did not expose her to dangerous chemicals and the alleged suffering did not occur. The alleged breach of contract was also denied.

11. The respondent called several witnesses especially the personnel manager, Beatrice Wanjiku and who testified that the appellant worked as section head, Wood where there were no chemicals and would supervise other employees and left her employment in 2000 after she got injured on the leg and went for treatment and after which she was to be given light duties. The appellant was referred for further treatment. The appellant later brought a letter from a doctor to be retired on medical grounds. The letter was signed by Dr Zachary W.O. occupational health specialist and which had the opinion the claimant was suffering from depression

12. In judgement the lower court made a finding that;

> ..... Dr Wellington Kiamba who prepared the medical report which was produced herein as an exhibit was clear that he did not treat the plaintiff [appellant] herein. He merely relied on treatment notes which were not produced in evidence. … the alleged dangerous chemicals were not identified and with the evidence on record one cannot relate the alleged ill-health suffered by the plaintiff to the chemicals that were being used within the defendant premises. The court was not told which specific chemicals caused the alleged condition that the plaintiff suffered had. I concur with the defence submissions that Dr Vilembwa's letter which Dr Kiamba relied on in preparing his report was crucial and it was fatal for the plaintiff not to have produced in the same in evidence. I find the plaintiff has failed to prove her case on a balance of probabilities. …

13. The Appellant has filed this appeal against that judgment and has presented the following grounds;

> 1. The learned magistrate erred in law and in fact in failing to give a concise statement of facts reasons for his decision and the points of determination while dismissing the suit
>
> 2. The trial magistrate erred in law and in fact in failing to consider the plaintiff's submissions and holding that no submissions were filed and yet the same were file don 7th *February 2011.*
>
> 3. The trial magistrate erred in law and in fact in failing to consider the evidence on record and failing to find that non production of treatment is not fatal.
>
> 4. The trial magistrate erred in law and in fact in contradicting himself in his judgement and erred in arriving at an erroneous finding.
>
> 5. The trial magistrate erred in law and in fact failing to appreciate the fact the standard of proof in civil cases is on a balance or probability.
>
> 6. The trial magistrate erred in law and in fact in failing to consider that the respondent failed to contradict the evidence of the appellant.

14. The questions of appeal above can thus be summarised as to whether the lower court erred in law or in fact in its findings and judgement based on the facts before it; whether the court failed to consider the filed submissions by the appellant; whether the court erred in its finding that the non-production of treatment records as fatal; whether the there was a contradiction in the judgement and the question and standard of proof met the requisite threshold.

15. In addressing the above grounds, both parties filed written submissions.

16. The appellant submissions are that the field submissions were not put into account by the court and had this been done, the consideration would have assisted the court to make a different finding. The court did not properly weigh the evidence before it on a balance of probabilities as held in the case of **Civil Appeal No.3 of 2008 Tadid Travel & Tours Limited versus Astral Aviation Limited** and the burden of proof being as set out under section 107, 108 and 3(2) of the Evidence Act. The general rule is that the standard of proof required in civil claims if proof on a balance of probabilities or preponderance of probability. And in the case of **George Morara Masitsa versus Tesplast Industries Limited, High Court Civil Appeal No.540 of 2011** and the findings that the claimant therein produced treatment notes to confirm ailments contracted while on duty and which the court found to have been proof on a balance of probabilities. To require the employee to specify which chemical pollutant was responsible for the ailment was to demand that he proves his case against the respondent beyond any cloud of doubt.

17. The respondent on their part submissions are that the evidence adduced by the appellant before the lower court failed to meet the requisite threshold when she failed to prove the same on a balance of probabilities. The allegations that there was exposure to dangerous chemicals lacked proof and as an employee she was head of section as supervisor and on record there is no evidence as to which chemicals she was exposed to. The doctor who testified noted that the appellant had been treated for allergies over the period in questions and the records relevant for the medical report were not produced. The lower court applied the correct analysis and arrived at appropriate findings. Such

findings cannot be interfered with as held in **Kiruga versus Kiruga & another [1988] KLR.**

Determination

18. The core of the lower courts findings in this case is that the appellant failed to prove the case on a balance of probabilities as the treatment notes submitted to prove the allegations of injury and ailment while on duty and being considered the primary documents did not prove which chemicals the appellant was exposed to so as to be related to the ill-health.

19. Is the treatment notes sufficient evidence to prove the allegations made? Did the lower court err in its findings in this regard?

20. The burden of proof as stated in Section 107(1) of the Evidence Act Cap 80 provides as follows-

> 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.

21. With regard to the questions posed on the treatment notes submitted by the appellant and the reliance on the same by Dr Kiamba, The appellant has well relied on the case of **George Morara Masitsa versus Texplast Industries Limited [2015] eKLR** that;

> .... it has not been alleged by the respondent that there were more than one and conflicting medical reports produced and without calling their makers and neither are there any glaring inconsistencies between the treatment notes produced, medical report and the testimony by the appellant. … unlike what is being propounded by the respondent that while medical evidence is entitled to the highest possible regard, the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, and such evidence like other expert evidence must not be rejected except on firm ground.

22. The rationale was given to the fact that an employer is/was expected to make the conditions of employment to the employees safe and not to expose employees to any danger to avoid any harm. In evidence, the appellant testified that;

> ..... I was unable to work due to ill-health. The chemicals affected me. I inhaled the same. I got a letter from hospital which I showed to my bosses. They stopped me when I showed them the letter. I experienced headaches, pain in the next back and spinal code. I used the company doctor. I have some sick sheets and/or cards to prove this.

23. In support of the appellants evidence there was Dr Kiamba who testified that;

> **…**I am Dr. Wellington Kiamba. I practice medicine in Nakuru. I examined the plaintiff on 19/5/02. This was with regard to injuries she suffered while on duty as KAPI. I took history from them and perused documents from Nakuru P.H.H. I perused a letter from the director of occupational health written to the director of KAPI Ltd… the patient had suffered from chronic allergic dermatitis which was due to chemical exposure to chemicals. My examination revealed that she had scars occasioned by scratching. …

24. Upon cross-examination, the witness testified that while examining the appellant;

> ..... I perused the two letters I have mentioned… I was shown treatment records from the hospital. There was treatment record from Dr Rao dated 6/3/01. She had been treated for allergies… she got antacid… she got paracetamol… she said she had an accident. … in never treated the patient. I did not see any medical record from Dr Vilembwa. I was not shown the outcome of the tests from Nairobi… she was allergic to chemical. I could not identify the chemicals. …

25. This witness as a medical practitioner examined the appellant and formed an opinion. This related to alleged injuries while at work. The appellant had testified that she left employment in 2000 and Dr Kiamba had examined her on 19th May, 2002 a period of about two (2) years after exit from employment. This witness, on his own right and as a medical practitioner had the capacity to make an opinion with regard to the appellant's medical condition and complaint that she had suffered work injuries of the nature of *chemicals affecting her*. however, the witness relied on treatment notes from two other medical practitioners.

26. The respondent's witness on the other hand Ms Beatrice Wanjiku admitted the appellant was an employee of the respondent from 1986 to 2000 and was placed at wood section, all employees is provided with gloves, masks and uniform. She also submitted a medical report from Dr Zachary W.O. and which related to the doctor the appellant had been referred to by the employer. Though this medical report is marked for identification by its author/maker This witness also testified that the respondent as the employer was aware that the appellant had been seen by Dr Rao and Badra. That there was a recommendation that the appellant should be retired on medical grounds.

27. There is no interrogation of this witness as to the nature of reasons upon which the company doctor recommended *retirement on medical grounds.* The allegations made that the appellant suffered injuries while on duty interrogated on their merits then required that the defence put forward by the employer be gone into to create the casuistic link between the injuries suffered, the findings of the appellant witnesses on record and the defence made.

28. The basis that that even where a document is produced in court, it must be interrogated with regards to its veracity and application to the matters at hand. There mere production of any evidence is not sufficient on its own. It cannot be left to stand alone. The linkage with the facts presented before court must be established as held in **Kenneth Nyaga Mwige versus Austin Kiguta & 2 others [2015] eKLR** that;

> The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become

> part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

29. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its relevance. Even where the appellant called various witnesses as to her work injury, the treatment notes included, the foundation and relevance was upon her to demonstrate.

30. The record of appeal and in assessing the grounds of appeal, the appellant left the defence to run with the case as it were. When the appellant left employment, it was on medical grounds. That much is not challenged.

31. The question of the Appellant retirement on medical grounds is a given fat. The assessment of the company doctor, the medical records submitted by the appellant in court as part of the evidence confirm this fact, before exit in employment with the respondent, she was ailing. Such ailments are assessed by the Doctor called in evidence by the appellant, Dr Kiamba. The appellant suffered from chronic allergic contact of dermatitis.

32. On balance of probabilities, the appellant had the case proved within the acceptable threshold. However, without the medial records to show the degree of injury and effect of the same with regard to what damages should be payable. The predicated award of Kshs.150,000.00 by the lower court should be 50/50% to the employee and employer respectively.

33. But what were the circumstances of such medical grounds? Without the linkage to the alleged work injury and findings by the witness and medical practitioners, the findings made by the lower court cannot be faulted. The appellant failed to meet the requisite threshold of proof of the case on a balance of probabilities.

The upshot of the above is that the appeal is allowed and the orders of the lower court set aside with judgement for the appellant at Kshs.75,000.00 and costs awarded are at 50%.

Delivered in open court at Nakuru this 17th day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy & Martin

.....

.....