



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**APPEAL NO.31 OF 2017**

**[formerly High Court Appeal No.161 of 2012]**

**CARZAN FLOWERS (K) LTD..... APPELLANT**

**VERSUS**

**JANET CHEBET MARITIM..... RESPONDENT**

(judgement herein follows an appeal from the judgement/decree of Hon. Mwaniki, Senior Resident Magistrate, Nakuru delivered on 7<sup>th</sup> August, 2012 in CMCC No.369 of 2007)

**JUDGEMENT**

On 7<sup>th</sup> August, 2012 the Senior Resident Magistrate Hon. Mwaniki delivered judgement in CMCC No.369 of 2007 and from which the appellant filed this appeal and seeking the same be reviewed and or set aside with costs.

The grounds of appeal are that;

- 1. The learned trial magistrate erred in law and in fact and misdirected himself on the finding of liability on the part of the appellant notwithstanding the evidence on record to the contrary.*
- 2. The learned trial magistrate erred in law and in fact and in failing to appreciate the fact that the onus of proof was on the plaintiff and therefore shifted the burden by holding that the plaintiff had proved her case to the requisite standard on the basis of scanty evidence whereas there was overwhelming rebuttal evidence.*
- 3. The learned trial magistrate erred in law and in fact and by failing to appreciate in totality the evidence before the court and submissions of the defence and critically analyse the same and accord it due weight to the extent that it was able to prove that the subject accident did not occur on the material date alleged by the plaintiff.*
- 4. The learned trial magistrate erred in law and in fact and in finding that the plaintiff had on a balance of probabilities proved that she was injured on the material date whereas the initial treatment card was not produced in evidence.*
- 5. The learned trial magistrate erred in law in failing to appreciate and apply the principles applicable in a claim for negligence to the extent that the court did not address itself on the issue of causation as between the defendant's negligence and the plaintiff's injury.*
- 6. The learned trial magistrate erred in law and in fact and in awarding general damages that was manifestly excessive in the circumstances and therefore failed to appreciate the principles applicable in award of damages.*

From the record the appeal was filed at the High Court Nakuru as HCCC No.161 of 2012 and wherein no action was taken a Notice to Show Cause was issued to the parties why the same should not be dismissed for want of prosecution. On 31st October, 2014 parties attended and court issued directions on the hearing of the appeal.

On 27th April, 2017 the High Court, Nakuru transferred the Appeal to this court the same arising from an employer and employee relationship.

On 13th October, 2017 the appeal was admitted before the court. On 4th December, 2017 the court issued hearing directions. Both parties filed their written submissions.

The appellant addressed three (3) grounds of the appeal and on which basis the court will examine.

As a first appellate court, the court has the duty to re-evaluate the evidence, assess it and reach its own conclusions and noting that it had neither seen nor heard the witnesses and hence making due allowance for that as held in the case of **Kamau versus Muigai [2006] 1 KLR**. Similar findings on the need to re-evaluate the evidence and sees it was also affirmed in the case of **Selle & another versus Associated Motor Boat Co. Ltd.& others (1968) EA 123**;

*... 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 ...*

The appellant's first ground of submissions is whether the trial magistrate erred in finding the respondent had proved his case to the required standard on a balance of probability.

The appellant urged that there was prove that the alleged accident never occurred within its premises. The injuries suffered by the respondent could not possibly be on account of his employment with the appellant as the evidence on record is not in tandem with this fact.

The respondents' evidence was that she was an employee of the appellant and on 13th March, 2006 while picking flowers fell into a ditch, was stabbed on the face by a piece of stick and was taken to Rongai hospital for treatment. Upon the accident, this was reported to the supervisor Mr Mitei she was then examined by Dr Omuyoma and who compiled a medical report.

The appellant in evidence called Mr Samuel Gichoho the Administrative Manager and who testified that the respondent was an employee of the appellant and was not injured on 13th March, 2006 and her job card for the day indicate she was at work the entire day and was not injured and there was no record on the accident record. The records kept indicate that the respondent was working in the green house and the appellant had a contract with Rongai Health Centre and Catholic Dispensary and the workers in this month went to the Catholic Dispensary. On 20th March,, 2006 the respondent went to the dispensary for malaria treatment. Where an employee is injured at work, this is reported to the supervisor and taken for first aid by a nurse and then referred to hospital if need be.

The respondent called Dr Omuyoma as the witness and who testified that on 9th March, 2007 he examined the respondent and;

*... there was a Traffic Accident on 12<sup>th</sup> March, 2006. She suffered a deep cut would on the right side of the face and she was treated at Rongai Health Centre. ... the degree of injury was classified as harm; I did rely on treatment card OP.441/06 from Rongai Health Centre on 12/03/06. ...*

The respondent produced a medical legal report by Dr. Obed Omuyoma dated 9th March, 2007 and notes;

#### **HISTORY INJURIES SUSTAINED AND TREATMENT GIVEN**

*On the 12<sup>th</sup> March, 2006 the above mentioned fell in to a ditch while carrying some flowers from Carzan Flowers LTD (K) and sustained the following injuries:-*

1. *Deep cut would of the right side of the face.*

*He [she] was taken to Rongai Health Centre where she was put on the following treatment. ...*

The trial court examined the evidence by both parties. There as a finding that;

*It is not in dispute that the plaintiff was defendant's employee and was on duty on 13/3/2006. It would appear the plaintiff did sustain injuries at around the time the present injuries allegedly occurred. she said that was on 13/3/2006*

*... on a balance of probability I find the plaintiff was injured while on duty. On negligence, the plaintiff had an obligation to proof that defendant never provided a safe system of work. The plaintiff said she slipped and fell into a trench where a hole was. ...*

In the court considered view, the trial court did err. The evidence by the respondent is at variance. Whereas the respondent asserted that she was injured while at work on 13th March, 2006 the appellant witness testified that there was no accident reported on the material day. The procedure was to have a report made with the supervisor and the nurse would do first aid and refer to a hospital where there was need.

Indeed the Dr. Omuyoma evidence was that the history given by the respondent was that she was injured on 12<sup>th</sup> March, 2006. This evidence is given much emphasis in the medical report submitted in evidence. That where the respondent had an injury, such occur on 12th March, 2006 and when the Doctor examined the respondent, the same history was given.

I take the evidence of the respondent was crucial to the entire claim before the court. the variances on the record, evidence and findings by the trial court justify a review of the same as set out in the appeal herein.

The other ground for appeal is whether the respondent proved her case on a balance of probability.

On the findings that the trial court erred and relied on evidence where material facts was in contrast, the basis and findings therein in the judgement and decree of the trial court must be set aside. To proceed on a wrong finding and make an assessment for damages negates the principles requiring a party to prove its case on a balance of probabilities and thus impede on justice. Where the facts of the case had been properly put into account, the same analysed on their merits, it would have been apparent to the trail court that on 12th March, 2006 there was no accident reported to the appellant.

Equally, where there may have been an accident and the respondent treated on 13th March, 2006 this was not reported to the appellant as the employer and there was no treatment at any facility where the appellant had its employees treated. A keen look at the records of the respondent and the evidence of her key witness Dr Omuyoma would have brought out these material variances.

**Accordingly, the appeal is hereby allowed. The judgement and decree of the trial court is hereby set aside. Each party shall bear own costs.**

**Delivered in open court at Nakuru this 17<sup>th</sup> day of September, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:.....