



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
APPEAL NO.55 OF 2017
[Formerly Naivasha High Court Civil Appeal No.34 of 2014]

HOME GROWN KENYA LIMITED.....APPELLANT

VERSUS

AURELIA WANJIRU GITAHI.....RESPONDENT

(The appeal is from the judgment and decree of Hon. S. Muchungi Resident Magistrates

in Naivasha PMCC No.485 of 2009 delivered on 20th September, 2013.)

JUDGEMENT

1. The Appeal is premised on the facts that the Respondent herein, Aurelia Wanjiru Gitahi filed claim before the lower court on the allegations that she was employed by the appellant and while on duty on 2nd April, 2005 she slid and fell where she sustained injuries to the hip joint. She was rushed to the hospital and treated and blamed the appellant for the accident and claimed damages for negligence.

2. The defence before the lower court was that the respondent was not at work on the material date alleged to have had an accident and got injured. She did not produce any medical records of any injuries and that the appellant has its own clinic and medical centre and has no record of the respondent as having been attended to therein. No accident occurred or was reported on 2nd April, 2005 and the claim is a fabrication and therefore denied liability.

4. The court heard the parties on their evidence and entered judgement with a finding that the appellant had failed to issue the respondent with protective gear while at work and although the outpatient register in the farm clinic does not have her name or the accident register and there was no entry on the material date of 2nd April, 2005. The lower court also held that both parties were to blame for the accident at 50% and made an award for damages at Kshs.100, 000.00 reduced on liability to Kshs.50, 000.00.

5. Aggrieved by the findings and judgement of the lower court in Naivasha PMCC No.485 of 2009 delivered on 20th September, 2013 and the appellant who was the respondent therein filed this appeal challenging the whole of the judgement on the grounds that;

1. The learned trial magistrate misdirected herself and erred in law and fact by writing and delivering the judgement against the weight of evidence.

2. *The learned trial magistrate misdirected herself and erred in law and fact by disregarding the truthful, cogent and reliable testimony of the appellant/s witnesses and instead relying on the untruthful, contradictory testimony of the respondent's witnesses.*

3. *The learned trial magistrate misdirected herself and erred in law and fact by finding that the respondent was involved in an accident and injured on the appellant's premises, holding the appellant liable and entering judgement in favour of the respondent in the face of glaring, credible and convincing testimony by the appellant's witnesses to the contrary.*

4. *The learned trial magistrate misdirected herself and erred in law and fact by apportioning liability against the appellant without any cogent and reliable evidence of any accident having occurred in the first place, and without any cogent and reliable evidence before court to support such apportionment on an accident that never happened.*

5. *the learned trial magistrate erred in law and fact and misdirected herself or disregarded the ratio decidendi in **HCCA No.152 of 2003, Statpack Industries vs James Mbithi Munyao and HCCA No.15 of 2003 Wilson Nyangu Musigisi vs Sasisni Tea & Coffee Ltd and HCCA No. 230 of 2004 Timsales Limited vs Willy Ng'ang'a Wanjohi.***

6. *The learned trial magistrate misdirected herself and erred in law and fact by assessing and awarding unreasonable, excessive general damages as Kshs.100, 000/- in respect of an accident that never happened and against the weight of evidence while there was no evidence or basis at all in law or in fact in support of such an award.*

7. *The learned trial magistrate erred in law and fact by delivering judgement wholly unsupported by evidence on record.*

8. *the learned trial magistrate erred in law and fact and misdirected herself on the ratio decided, or disregarded the trend in award of damages in HCCC No.4150 of 1991, Loise Nyambeki Oyugi v Omar Haji Hassan and HCC No.778 of 1991 Evanson Babu Njuru v Paul Nyamotenyi.*

9. *The learned trial magistrate misdirected herself and erred in law and fact by failing to consider the appellant's written submissions on court record.*

10. *The judgement of the trial court as written and delivered cannot be supported in law or fact.*

5. For the reasons set out in the grounds of appeal the appellant is seeking that the judgement of the lower court be set aside and the respondent's claim be dismissed with costs.

6. Parties attended for hearing directions on 30th July, 2018 and agreed to file written submissions. Only the appellant filed their written submissions on the 2nd October, 2018.

7. The submissions are centred on the issues of liability.

8. The appellant submissions are that the respondent was not at work on the day of the alleged accident and before the lower court the clinic register and accident registers were produced and indicate there was no report of an accident or the respondent having been attended to on the 2nd May 2005 the date of the alleged accident and injuries. No treatment notes were produced to show the respondent was treated at the district hospital.

9. The appellant also submits that the award of damages awarded at kshs.100, 000.00 was excessive compared to similar cases as held in **Simon Tavet versus Mercy Mutitu Njeru [2014] eKLR**. An award of Kshs.50, 000.00 would have been adequate. Where there are soft tissue injuries, an award of Kshs.40, 000.00 would have been sufficient.

The court has discretion to disturb the award of damages as held in the case of **Kemfro Africa Limited**

Determination

10. As noted above the respondent did not file their written submissions. On the scheduled date to confirm the filing of written submission on 2nd October, 2018 the respondent remained absent from court.

11. 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 ...

12. On the single issue addressed on liability the trial court in addressing the same made a finding that both parties were to blame for the accident where the respondent was injured. The evidence before the trial court from the respondent was that;

....On 2/4/05 I was on duty at the defendant company at the grading section and slipped and fell and got injured. There as water on the ground and I was wearing my rubber shoes. I got injured on the right leg at the hip joint. I went to the company clinic and was treated. The following day I had gotten well and went to Naivasha District Hospital.

13. In the judgement of the lower court the date of the accident is stated to have been 2nd March, 2005. But all the records relate to the accident having occurred on 2nd April, 2005.

14. The respondent called Dr W Kiamba and who testified that he examined her on 6th June, 2009 following injuries sustained on 2nd April, 2005 and where he noted that she had sustained serious injuries with temporary disability. The respondent also called Isiah Toroitich who previously worked at Naivasha District Hospital and attend to the on 3rd April following a history of right hip injury.

15. In defence the appellant called Beatrice Nyakaya who formerly worked for the appellant as a first aider. The respondent had clinic but there was no case reported with regard to an accident by the respondent. The appellant would refer some cases to the Naivasha district hospital but the records were kept which was not the case for the respondent. She was not registered as having had an accident. No accident was reported on 2nd April, 2005. The appellant also called Susan Bulali and who testified that the respondent was off duty on the material date of the alleged accident ton 2nd April, 2005 and no record that she had an accident reported while at work.

16. On this evidence the trial court made findings that the appellant's case was contradictory ad full of evasions;

.....they admitted that the defendant had four farms and clinics with major

Medical Centre but while producing their documents only a set from one clinic was produced, not for all the 4 clinics. The outpatient register and accident register had no indication of the farm/farm clinic. Only the muster roll reflects Flamingo Farm where the plaintiff used to work.

17. Did the respondent have an accident while at work on 2nd April, 2005? This then became an apparent

question for the court to address based on the evidence before it. By answering the question, then all else would have fallen into place. On the other hand, failure to address this question resulted in an eschewed finding.

18. Whether the respondent was at work on 2nd April, 2005 the appellant produced the master roll and is part of the record. Ms Bulali testified in this regard that on the material date the respondent was not at work.

19. Where the respondent got injured on 2nd April, 2005 she only went to the Naivasha District Hospital on the next day the 3rd April, 2005. Where she was not at work on 2nd April, 2005 where did the accident occur?

20. The place of injury therefore became apparent as a challenged issue. Without delving into it on the basis of the defence the trial court erred in its findings. The purpose and subject of the material evidence presented before the trial court was to assist in addressing the entirety of the matter and ensure that such records were put into account while addressing the claims made.

21. Without addressing the place of accident and injuries being at the work place and despite the respondent having been an employee of the appellant, the trial court had no basis going into apportioning liability. The foundation of the claim was lost.

For these reasons, the court find merit in this appeal and is hereby allowed. The judgement of the trial court in Naivasha PMCC No.485 of 2009 delivered own 20th September, 2013 is hereby set aside. Each party shall bear own costs.

Dated and delivered at Nakuru this 1st day of November, 2018.

M. MBARU JUDGE

In the presence of: