



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 17 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 18th November 2017)

P.J. DAVE FLOWERS LIMITED.....APPELLANT

-VERSUS-

BEN WABOMBA WALUBUKHA.....RESPONDENT

JUDGMENT

Introduction

1. The Respondent filed a Complaint on 1st August 2016 at the Chief Magistrate's Court at Kajiado. He averred that he sustained injuries into his eyes in the course of his duty at the Respondent, a flower farm. He further averred that the injuries, pain, loss and damages were occasioned to him due to the Respondent's negligence and breach of statutory duty. In the Complaint, he sought general and special damages, costs of the suit and interest thereon.

2. The learned Magistrate found the Appellant 100% liable and entered Judgment for the Respondent against the Appellant for a sum of KShs. 180,000 plus costs of the suit and interest from the date of Judgment.

3. The Appellant being dissatisfied by the learned Magistrate's Judgment filed the present Appeal at the High Court at Kajiado. Thereafter, the Appeal was transferred to this Court on 5th July 2018 by the High Court at Kajiado by virtue of Article 162 (3) of the Constitution. The Appeal was canvassed by way of written submissions.

4. The Appellant raises the following Grounds of Appeal:

1. THAT the learned magistrate erred in law and fact in finding that the plaintiff was injured while on duty in view of evidence by the defendant to the contrary.

2. THAT learned magistrate erred in law and in fact in finding that the defendant was 100% liable for the Plaintiff's injury in view of the fact that negligence and breach of contract was not proved in evidence.

3. THAT the learned magistrate erred in law and in failing to proportion liability and disregarded the Defendant's submissions while arriving at his Judgment.

4. THAT the learned magistrate misdirected himself in law and in fact in failing to note that the Plaintiff failed to prove particulars of negligence as pleaded in the complaint and failing to appreciate the fact that there was no eye witness.

5. THAT the learned magistrate erred in law and in fact in holding that the defendant was 100% to blame for the occurrence of the suit accident contrary to trite rule of evidence that allegations of negligence, breach of contract and statutory duty must be proved strictly which the Plaintiff didn't.

6. THAT the learned magistrate erred in law and in fact in holding that the Plaintiff had strictly proved his allegations of injury, negligence and breach yet the factual evidential materials and testimonies before him did not amount to the same nor support and justify such a holding.

7. THAT the learned magistrate erred and misdirected himself in law and in fact in failing to apportion liability taking into

account the totality of evidence both oral and documentary before him.

8. THAT the learned magistrate erred in fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Kshs. 180,000 by failing to appreciate and be guided by the prevailing range of comparable award on closely related injuries.

9. THAT the learned magistrate erred in law in making such a high award on damages as to show that the magistrate acted on a wrong principle of law.

10. THAT the learned magistrate's award on damages was so high as to be entirely erroneous.

11. THAT the learned magistrate's award was made without considering the medical evidence before the Court and failed to appreciate the nature of injuries sustained by the Plaintiff and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.

12. THAT the whole judgment on quantum and liability was against the weight of evidence before the Court.

Appellant's submissions

5. The Appellant filed its written submissions but did not cite any authority. In its submissions, the Appellant argued that a party is bound by its pleadings and that there was no evidence to support the finding of the trial Court that the Appellant was 100% to blame for the purported accident. It averred that the Trial Court having failed to consider the Appellant's witness shifted the burden of proof to the Appellant. The Appellant in particular alluded to the fact that the Respondent during trial stated that he was a harvester and not a sprayer. Hence, he was not required to have gloves and masks which were only issued to sprayers.

6. The Appellant argued that the trial Court should have found that the accident did not occur since it is questionable why the Appellant would allow the Respondent to enter a sprayed greenhouse and upon the occurrence of the accident inform its employees to clear the premises. In addition, the Respondent had 5 years' experience and knew the danger of an unsafe environments and the need for protective gear.

7. In respect of the trial Court's finding that the Respondent was never issued with protective gear, the Appellant argued that just because there was no issuance of protective gear to the Respondent in 2015 did not warrant the Court to find that the Respondent wasn't given protective, this being that the Appellant had produced a 2014 issuance register showing that the Respondent had been issued with gloves, gumboots and dustcoat.

8. The Appellant submitted the Trial Court did not consider its witness' testimony on the non-occurrence of the accident. In addition, that the Trial Court did not consider the Respondent's testimony on the Appellant's clinic and failure to seek first aid at the Clinic. The Appellant further submitted that the Court did not interrogate itself why the Respondent was not referred to the Appellant's clinic should the accident have indeed occurred.

9. On the quantum of damages, the Appellant submits that the trial Court ought to have found no correlation between the alleged injuries and the breach of statutory duty. Hence, no damages ought to have been awarded.

Respondent's Submissions

10. The Respondent submitted that this being a first appeal this Court should re-evaluate, re-assess and re-analyse the extracts on record as held in **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

11. The Respondent argued that he was informed by his supervisor to visit Manor Medical Centre hence his absence from the Company Clinic's register. The Appellant cannot therefore plead that his such absence is proof that the Respondent was not injured. This Supervisor was not called by the Appellant as its witness. Instead, the Appellant called the Human Resource Manager Judy Sambay (DW1) who was not aware of the happenings.

12. The Respondent further submitted that the Appellant did not produce its muster roll to indicate that the Respondent worked all day. In arguing the importance of a muster roll, the Respondent cited the case of **Sokoro Saw Mills v Grace Nduta Ndung'u HCA 99 of 2003.** The Respondent argued that the medical report is conclusive evidence that the injury was sustained by the Plaintiff as a result of the chemicals that got into his eyes.

13. The Respondent argued in its submissions that the Appellant's witness DWI testified that protective gear was issued in 2014 but the accident occurred in 2015. It argued that Section 74 of the Employment Act places a duty on the Employer to provide a safe working environment and an employer- employee relationship between the parties created a duty of care as held in **Otieno Nalwoyo v Mumias Sugar Company Limited [2014] eKLR** and **Boniface Muthama Kavita v Carton Manufacturers Limited Civil Appeal No. 670 of 2003.** According to the Respondent this duty of care was breached and the Appellant should be held 100% liable.

14. In respect of quantum, the Respondent argued that the amount awarded by the Trial Court was just and appropriate and need not be interred with. In support of this argument it relied on the case of **Butt v Khan (1977) 1 KAR** in which the Court held that an appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate.

15. The Respondent therefore prayed that the Appeal be dismissed at the earliest.

16. I have considered the averments of both parties. This being a first appeal of this suit, it is imperative that I re-evaluate the evidence adduced at the lower Court before determining this appeal.
17. The Respondent herein filed his claim at the lower Court on 1.8.2016 at the Chief Magistrate's Court in Kajiado. In his Complaint he averred that on 2.4.2015, he was in the course of his employment at the Defendant's premises harvesting flowers when suddenly and without notice, the chemicals that had been sprayed on the flowers splashed into his eyes as a result of which he sustained injuries and suffered loss and damage.
18. He contended that he suffered injuries in the sub conjunctival haemorrhage of the eye bilaterally, he had occasional pain on the injured site and suffered photophobia of the eyes bilaterally. He also averred that he suffered special damages of 3,000/= being fees for the medical report.
19. The Plaintiff contended that he suffered the said injuries, pain, loss and damages due to the negligence and/or breach of statutory duty by the Defendant, its servants, agents and/or employees.
20. He contended that the Defendant owed him a duty as they ordered him to harvest flowers before the sprayed chemicals had dried up and also without providing him with the requisite protective gear, goggles for this matter. He averred that the Defendant did not provide safe work environment.
21. During the hearing of the case at the lower Court, the Claimant gave his sworn testimony and produced the treatment notes from Manor Medical Centre, his medical report, receipt of 3,000/= and demand letter as exhibit.
22. The Claimant in cross-examination, he stated that he was only issued with a dustcoat. He also stated that after injury, he reported to Mr Mbaru, the supervisor who told him to go for treatment. He states that there was a clinic at the Respondent's premises but he could not go in because the place had been sprayed and they were told to go in after four hours.
23. He avers he went for treatment outside the Respondent's premises at Manor Medical Centre and paid Kshs.3,000/=. He also states he went to Isinya Health Centre before going to Manor.
24. The Respondents on their part called a witness who confirmed that the Plaintiff was their employee from 5.8.2010 and left on 6.8.2015. The witness stated that on 2/4/2015 the Plaintiff was on duty and that no incident occurred on that day and there was no injury reports made as per the prescribed form for reporting any industrial accidents.
25. The witness also indicated that there was no indication that the Claimant was seen at their clinic on 2.4.2015. He also denied that they have a supervisor called Mbaru. The witness stated that the Plaintiff's supervisor was Magdalene Wambua and the Production Manager was Jesse Waweru.
26. He further gave evidence that the Plaintiff resigned and signed a declaration that he had never been involved in any accident or even injured. He states that by 2015, the Plaintiff had not been issued with protective gear but he had been issued with gumboots, globes and dustcoat.
27. He stated that he did not know if the place was sprayed that day. He also stated that the clinics outside were only for referrals and that they had no contract with Manor Clinics.
28. In cross-examination the DW1 indicated that the supervisors of the Plaintiff were not being called as witnesses. She also admitted that the last time protective gear was issued was in April 2014 and the Plaintiff indicated that he was injured in April 2015. She also said that the Plaintiff was not entitled to goggles as he was a harvester.
29. She also indicated that they did not have a patients register at their clinic.
30. After the learned Magistrate Hon. S. M. Shitubi considered the evidence of the Parties she found that the Plaintiff's supervisor was Mbaru who the Respondent indicated was not their employee. However the Defendants did not call their supervisor of that day as they alleged as a witness.
31. The learned Magistrate found that the inference she could draw was that if called the said witnesses would have given evidence that would have been adverse to the defence. She also considered that the Plaintiff had not been given a facial mask and that the Defendant was under a duty to provide the Plaintiff with a safe working environment.
32. I have considered the evidence submitted at the lower Court. I also note that it is true that the Appellants failed to produce their own clinic records as evidence.
33. The Appellant's alleged supervisor of the Respondent was also not called as witness.
34. It is my finding that the learned Magistrate Hon. Shitubi considered relevant facts in arriving at the position that the Appellants owed the Respondent a duty of care which they did not keep and this led to the injury sustained by the Respondent as evidenced from the medical report produced in Court.
35. It is my finding that the appeal before me has no merit. I do not find any reason to upset the findings of the lower Court. I dismiss this

appeal accordingly. I confirm the findings of the lower Court. The Appellants will pay costs of this appeal and of the lower Court.

Dated and delivered in open Court this 18th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kinyua holding brief Mucheru for Appellant – Present

Respondent – Absent