



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
APPEAL NO. 07 OF 2015

(Being an Appeal from Hamisi SRMCC No. 16 of 2004)

(Before Hon. Lady Justice Maureen Onyango)

NYAYO TEA ZONES DEVELOPMENT CORPORATION.....CLAIMANT

-Versus-

CATHERINE MBOGARESPONDENT

J U D G E M E N T

This is an appeal from the decision of Learned Magistrate in HAMISI SRMCC NO.16 of 2004. In that suit the plaintiff (now Respondent) sued the Appellant for general damages for pain, suffering and loss of amenities, special damages of Kshs.1000, costs and interest. The Respondent alleged that she was injured on 7th November, 2008 while discharging her duties as tea plucker at the Appellant's plantation. She averred that the injuries were caused by the gross negligence of the Appellant and/or its breach of common law and statutory duties. The appellant filed a defence denying the allegations in the plaint and averred that if there was any accident or injury, the same was caused by the Respondent's own negligence.

After hearing the case the learned Magistrate in the judgement found that the Appellant was liable at 80% while the Respondent's contribution was 20%. The Learned Magistrate awarded general damages of Shs.80,000 and Special damages of |Shs.1,000. Dissatisfied by the judgement, the appellant filed this appeal in which it has raised the following grounds of appeal -

1. THAT the learned Magistrate erred in law and in fact in entering judgement in favour of the plaintiff against the defendant contrary to the evidence on record.
- 2.THAT the learned Magistrate erred in law and fact in making a finding that the defendant was 80% liable in negligence when the injury is self inflicted.
- 3.THAT the learned Magistrate erred in law and in fact in finding the defendant in breach its duty of care.
- 4.The learned Magistrate erred in law and in fact by making a finding that the plaintiff was injured on the date he claims and while on duty when there was evidence to the contrary.
- 5.The learned Magistrate erred in law and in fact by failing to take into account and consider the evidence on record and defendant's submissions.

6.The learned Magistrate erred in law and in fact in awarding the plaintiff damages in the circumstances of the case.

This Appeal was originally filed as Kakamega HCCA No.169 of 2010 and was transferred to this court by an order of 9th July 2015 after directions had been taken and parties had filed written submissions. The parties agreed that this court should go ahead and prepare judgment based on the submissions already in the file.

In a first appeal as this one the duty of the court is to re-evaluate the evidence and arrive at an independent conclusion, but to always keep in mind the fact that the trial court had the advantage of hearing the witnesses and taking into account their demeanour. (see **Selle & Another v Associated Motor Boat Company Limited & Others [1968]EA 123** and **Mwangi v Wambugu [1984]KLR 453**).

I have considered the pleadings, the submissions and the records of appeal.

The main facts are not in contention. According to the evidence of the Respondent (PW1) she was at work plucking tea at Kimali Tea Farm on 7th November, 2008. While going to weigh the tea leaves she slipped and fell into a trench. She sustained a dislocation on her right leg and was treated at Kapsabet District Hospital. She produced Medical Treatment Records and Medical Report as well as a Receipt for Shs.1,000.

PW2 a Clinical Officer at Kapsabet District Hospital testified that he attended to the Respondent with a history of falling into a ditch and her right knee was injured. The right knee was swollen and tender. His assessment was that the age of the injury was within 12 hours. He applied a firm bandage to the injury. He expected complete healing of the injury.

For the Appellant DW1 testified that she was her supervisor of the Respondent who was on duty on 7th November, 2008. She did not witness the Respondent getting injured. The Respondent was at work the whole month.

DW2 testified that he was a tea plucker and the Respondent was his neighbour. He testified that he did not hear about the Respondent's injury and the Respondent was at work on 17th and 18th November, 2009.

In the appellant's written submissions, it is submitted that the Respondent did not prove or establish her case on a balance of probability and that she made contradictory allegations that she could not prove.

The Appellant submits that the Respondent's allegation that there was no eye witness cannot be true as she worked in a plantation with many other employees. The Appellant further submitted that the injuries were severe and the Respondent would not have reported for work the following day if she was injured at all. It is further submitted that the Respondent did not make any report of injury on the material day. It is further submitted that DW2 the Respondent's neighbour and workmate confirmed that the Respondent was at work on the date of alleged injury and the following day. It is submitted that it is not logical for the Respondent to have failed to report to her supervisor if it is true she was injured.

The appellant further submits the Respondent having worked from 1986 the Respondent was well versed with the tea plantation and ought to have known about the existence of the trench. That is was therefore her negligence that led to the accident.

The Appellant relied on the case of **Brooke Bond (K) Limited v Francis Motugutu Bokea (Kericho HCCA No.31 of 2004)** and **Stephen Odhiambo Ondu v Hayer Bishan Singh & Sons Limited (Kisumu HCCA No.201 of 2002)**.

On Quantum the Appellant submitted that should the court find that the Appellant is liable, adequate compensation for the injuries sustained by the Respondent would be Shs.50,000. The Appellant relied on the case of **Ziphorah Wambui Wambaira & 17 others v Gachuru Kiogora & 2 Others [2004]eKLR**.

For the Respondent it was submitted that the appeal lacks merit and should be dismissed with costs. The Respondent submitted that the trial court was right in finding the Appellant liable and apportioning negligence at 80:20% for reasons that the Respondent had proved that she was injured while on duty as proved by the treatment records. It was submitted that the Appellant did not rebut the Respondent's evidence that she was not warned of the presence of trenches at the place of work and was in breach of the duty of care. It was further submitted that DW1 admitted that the Respondent was not provided with gumboots, that DW1 and DW2 gave conflicting evidence in respect of the name of the supervisor and that the Daily task Register produced by the Applicant as D Exhibit 1 did not contain the Respondent's name. It was further submitted that the Appellant failed to produce the daily accident injury register. The Respondent submitted that the facts of the case relied upon by the Appellant were not applicable to the instance case.

Determination

The determination of this appeal revolves around the issue whether the injuries for which the Respondent was treated at Kapsabet District Hospital were sustained while the Respondent was at work at the Appellant's tea plantation, and whether the appellant was negligent for not providing the Respondent a safe working environment.

There is no dispute that the Respondent suffered the injuries referred to in her plaint being tenderness and dislocation of the right knee joint. During the hearing the Appellant did not lead any evidence to rebut the Respondent's contention that the injury was sustained when she fell into a ditch while taking tea for weighing and therefore in the course of duty. Respondent's evidence that she was injured while at the tea plantation, that there was no witness to her injury and that there was no clinic in which she was required to make a report of the accident was not contested. The issue on whether the Respondent was able to work the day after the accident in view of the nature of her injuries was not raised in the proceedings during the trial, and neither was evidence led by the Appellant to disprove the allegation by the Respondent that there was a trench that she was not aware of in the plantation.

As was stated in the case of **EPHANTUS MWANGI v DUNCAN MWANGI WAMBUGU [1984] eKLR**, an appeal court will not normally interfere with a finding of fact by a trial court unless it is based on no evidence or on a misapprehension of the evidence or if it is demonstrated that the trial court acted on a wrong principle. In the present case, I find that the evidence of fact on record support the findings of the trial court that there was evidence of injury of the Respondent, and her evidence that the injury occurred while in the course of work for the Appellant due to negligence of appellant was not controverted.

On the issue of quantum, the Appellant did not demonstrate that the award of Kshs.80,000 for general damages and Shs.1,000 for special damages, or contribution at 80:20 liability was so manifestly high or unreasonable as to warrant interference on appeal.

For these reasons I find the appeal without merit and dismiss it with costs to the Respondent both on Appeal and at the trial court.

DATED SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE