



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 15 OF 2017

(Originally Nakuru High Court Civil Appeal No. 140 of 2011)

CARZAN FLOWERS (K) LIMITED

APPELLANT

v

ALLAN JEBET KEINO

RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. L. KOMINGOI, Senior Principal Magistrate,
Nakuru, delivered on 4th August, 2011 in Nakuru CMCC No. 2092 of 2006)

JUDGMENT

1. Allan Jebet Keino (the Respondent) instituted legal proceedings against Carzan Flowers (K) Ltd (the Appellant) before the Magistrates Court alleging breach of contract/negligence.
2. In a judgment delivered on 4 August 2011, the trial Court entered judgment against the Appellant at 70% liability, general damages of Kshs 70,000/-, special damages of Kshs 2,500/- and costs and interest.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal listing 6 Grounds of Appeal to the effect

1. **THAT** the learned trial Magistrate erred in law and fact in finding that the Plaintiff had proved his case to the required standards despite the fact that the Plaintiff did not produce in evidence his alleged initial treatment card allegedly obtained from Rongai Health Centre despite numerous High Court decisions cited before her which have laid the principle that failure to produce in evidence the initial treatment card which is the initial evidence of injury/treatment is fatal to a claimant's claim in a disputed industrial claim like the case herein.

2. **THAT** the learned trial Magistrate erred in law and fact in holding that the Plaintiff had proved his case to the required standards only on the ground that the Plaintiff's supervisor and nurse had not been called to testify notwithstanding the fact that the said employees were no longer in the appellant's employment and despite the fact that the witness who testified for the appellant had first-hand accounts as to whether or not the respondent was injured while working for the appellant.

3. **THAT** the learned trial Magistrate erred in law and fact in failing to take into account the very elaborate defence documents which showed inter alia beyond any shadow of doubt that the respondent had not been injured while working for the appellant as alleged as demonstrated by the following factors:-

- a. The Respondent did not sign the incident book which he was obligated by the contract of

employment to sign in case of an injury.

b. From the respondent's job card, payslip and employment record summary the respondent worked full time without any hitch on the date he is alleged to have been injured which cannot be expected of an injured employee. c. The respondent's name does not appear in the appellant's medical bill which is a list of all the employees referred to Rongai Health Centre for medication at the relevant period. d. The respondent was not issued with a medical requisition for the purported injury despite having been issued with medical requisitions on two previous occasions when he was referred to Rongai Health Centre for medication.

4. **THAT** the learned trial Magistrate erred in law and fact in holding that the respondent had proved his claim for negligence against the appellant notwithstanding the fact that the respondent's only complaint was that he slipped because of rain water which cannot be attributed to the appellant and non-provision of protective apparel namely gumboots despite the respondent own concession in evidence and documents which proved that he had been provided with a new pair of gumboots just two months prior to the alleged date of injury.

5. **THAT** the damages awarded to the respondent are excessive and not in accord with decided authorities on analogous injuries.

6. **THAT** the learned trial Magistrate's judgment is wholly against the weight of evidence and all known legal principles and should be set aside *ex debito justitiae*.

4. On 19 January 2017, the High Court transferred the Appeal to this Court, citing jurisdictional grounds and on 22 June 2017, this Court gave directions as to the filing of submissions.

5. The Appellant filed its submissions on 19 September 2017 while the Respondent had filed his submissions on 11 September 2017.

6. The submissions were highlighted on 2 October 2017.

Role of this Court on first appeal

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

8. The Court will keep that interdict in mind while re-evaluating and assessing the evidence presented before the trial Court.

Liability/Proof of injury in the workplace

9. Grounds 1 to 3 speak to the question whether the Respondent proved to the required standard that he sustained an injury in the workplace on the material date.

10. In an attempt to discharge the burden of proof, the Respondent testified that on 21 July 2005 while spraying he fell down and some sticks on the ground injured his left leg after which he got first aid from a supervisor and a nurse and later visited Rongai Health Centre where he got treatment and was issued with a treatment card.

11. The Appellant in staving off the Respondent's contentions asserted that he (Respondent) was not injured as alleged because his name was missing from an Invoice from Rongai Health Centre for the month of July 2005; his job card indicated he worked the full day of 21 July 2005, 22 July 2005 and 23 July 2005 and there was no medical requisition note sending the Respondent to any medical facility.

12. The Respondent did not deny that the Appellant had an agreement with Rongai Health Centre and another medical facility to treat its employees who got injured in the workplace.

13. If indeed the Respondent got injured at the workplace as alleged and got treated at Rongai Health Centre, there is no plausible reason why his name was missing from the Invoice from the facility for the month of July 2005 and which invoice was sent to the Appellant to make payment.

14. The authenticity of the treatment card from Rongai Health Centre is therefore doubtful.

15. In light of the documentation produced before the trial Court as considered against the verbal testimony of the Respondent, it is more probable that the Respondent was not injured in the workplace as alleged.

16. The trial Court therefore fell into error in concluding that the Respondent had discharged the burden of proof placed on him.

Conclusion and Orders

17. In conclusion the Court sets aside the judgment of the trial Court and substitutes thereof an order dismissing the suit.

18. Monies which were deposited in the bank to secure stay pending appeal should be released to the Appellant and/or its advocates.

19. Each party to bear own costs of the Appeal and before the trial Court.

Delivered, dated and signed in Nakuru on this 1st day of December 2017.

Radido Stephen

Judge

Appearances

For Appellant Ms. Nasimiyu instructed Mukite Musangi & Co. Advocates

For Respondent Ms. Oseko instructed by Githiru & Co. Advocates

Court Assistants Nixon/Martin