



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL NO. 12 OF 2015
(ORIGINALLY NAKURU HIGH COURT CIVIL APPEAL NO. 115 OF 2013)

BIGOT FLOWER (K) LTD APPELLANT

V

JULIUS MWANIKI WACHIRA RESPONDENT

(being an appeal from the Judgment/Decree of Hon. Boke, Senior Resident Magistrate, Naivasha, delivered on 26th June, 2013 in Naivasha PMCC No. 244 of 2010)

JUDGMENT

1. On 26 June 2013, the learned Magistrate delivered a judgement in which the Appellant was found 80% liable for the injuries sustained by the Respondent in the course of work. The Respondent was awarded Kshs 70,000/-.
2. The Appellant was aggrieved and on 18 July 2013 it filed a Memorandum of Appeal seeking the setting aside/review of the judgment.
3. 8 grounds of appeal were set out as
 1. *THAT the learned trial Magistrate erred in law and in fact in failing to consider and analyse the strong rebuttal evidence led by the Defence witness.*
 2. *THAT the learned trial Magistrate's findings on liability were out rightly misconceived and without basis either on the evidence led or in law.*
 3. *THAT the learned trial Magistrate erred in law and in fact in failing to appreciate the fact that there was no independent corroborative evidence to fortify the Plaintiff's version on the occurrence of the accident thereby presenting a serious evidential conflict.*
 4. *THAT the learned trial magistrate erred in law and in fact and misdirected herself in finding the appellants liable at all notwithstanding the evidence on record to the contrary.*
 5. *THAT the learned trial magistrate erred in law and in fact by failing to consider the evidence 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 Plaintiff was indeed not injured at work on the material date was absent at the work place on the day in quo.*

6. *THAT the learned trial magistrate erred in law and in fact 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 his case on the requisite standards on the basis of scanty evidence whereas there was overwhelming rebuttal evidence.*

7. *THAT the learned trial magistrate failed to appreciate the totality of the evidence before her and the submissions made on behalf of the Appellant.*

8. *THAT the learned trial magistrate erred in law in ignoring the Appellant Counsel's submissions in the trial court before reaching her findings on liability.*

4. It appears that the appeal was admitted by the High Court on 4 March 2015 and on 16 June 2015 the parties proposed that the appeal be disposed of by way of the record and written submissions.

5. Towards this end, the Appellant filed its written submissions on 21 August 2015, while the Respondent did not file any submissions despite Court directives on 16 June 2015 and 17 September 2015.

6. On 15 October 2015, Meoli J directed that the appeal be transferred to this Court for hearing and determination.

7. The appeal was mentioned severally before this Court, but the Respondent did not bother to appear despite service upon his advocate on record of several mention notices, culminating in the directive by the Court on 15 September 2016 that a judgment would be delivered today.

8. In its submissions, the Appellant addressed only 3 grounds of appeal and it is those grounds that the Court is going to examine.

Duty of this Court on appeal

9. But first the applicable legal principles.

10. The duty of a first appellate Court was examined in the case of *Kamau v Mungai* (2006) 1 KLR 150, and was set out in the following terms *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.*

Whether trial Magistrate erred in finding that the Respondent had proved his case to the required standard on a balance of probability

11. The Appellant urged that it proved that the accident involving the Respondent did not occur within its premises through its first witness, the Human Resources Manager that the Respondent was not present at work from 30 August 2004 to 8 September 2004 while the accident was alleged to have occurred on 2 September 2004.

12. The Respondent's testimony was that he was injured in the workplace on 2 September 2004 and that the accident was witnessed by a supervisor and another employee and that he was taken to hospital the same day, after he was given first aid at the Appellant's clinic. At the hospital a Dr. Odhiambo treated him.

13. He produced initial treatment notes.

14. The Appellant's first witness on his part stated that he joined the Appellant in 2008 long after the alleged accident and that his testimony was based on records held by the Appellant and these included a muster roll which served as an attendance record.

15. The trial Court examined the evidence by both parties at length as can be seen from pages 52 to 55 of

the record.

16. The trial Court considered that the Appellant's first witness indicated that he had the Respondent's file which had details of his treatment but noted that the same was not produced in Court.

17. The Respondent's testimony that he was given initial treatment at the Appellant's clinic was not challenged or controverted.

18. It is a notorious fact that all health facilities are under an obligation to keep and maintain patients' records and to demonstrate that indeed the Respondent was not injured in the work place on 2 September 2004, nothing would have been easier for the Appellant to do than to produce the clinic records for 2 September 2004 to disprove the testimony that the Respondent was attended to on that particular day.

19. It is also a fact known to those familiar with factory operations that muster rolls are not primary records of attendance. The details on the muster roll are entered by back office clerical staff using monthly attendance cards issued to employees (at least by the relevant time) and the Appellant could have easily produced the same.

20. In the Court's considered view, the trial Court did not err in law by finding that the Respondent had demonstrated and met the legal burden placed on him. The evidential burden therefore shifted to the Appellant as the employer who kept and maintained (or was expected) attendance/treatment records to produce the same during the trial.

Whether Respondent proved negligence

21. On this issue, the Appellant contended that the Respondent did not show a causal link between the Appellant's negligence and the Respondent's injuries.

22. From the record, it is clear that the trial Court addressed its mind to that nexus when it observed that the Respondent was assigned work which was not normally carried out by him and further that he was not provided with any safety work gear.

23. The Court also appreciated the fact that the Respondent ought to have been alert to his own safety and apportioned liability appropriately.

Assessment of damages

24. The Court has gone through the grounds of appeal as set out in the Memorandum of Appeal and regrets to note that it has not been able to discern the question of quantum as having been expressly challenged.

25. The Court will say no more.

Conclusion and Orders

26. Arising from the above, the Court finds no legal reason or cause to disturb the findings and holdings by the subordinate Court, with the effect that the appeal is dismissed.

27. For the sake of clarity, if the decretal sum had been deposited into Court as was ordered, the same should be released to the Respondent and or his advocate on record.

28. The Respondent did not show any interest in participating in the appeal despite service of mention notices nor did he file submissions, and therefore the Court declines to award him costs of the appeal.

Delivered, dated and signed in Nakuru on this 2nd of November 2016.

Radido Stephen

Judge

Appearances

For Appellant Mr. Terer instructed by Mukite Musangi & Co. Advocates

For Respondent Omwoyo Masese & Co. Advocates

Court Assistant Nixon