



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CIVIL APPEAL NO. 3 OF 2015

(Originally Nakuru High Court Civil Appeal No. 79 of 2012)

HOMEGROWN (KENYA) LTD

APPELLANT

v

CONSEPTER MORAA

RESPONDENT

(An appeal from the judgment of the Principal Magistrate, Naivasha (Hon. E. Boke) delivered on the 28th day of March 2012 in Naivasha Chief Magistrate's Court Civil Suit No. 340 of 2007)

JUDGMENT

1. In a judgment delivered on 28 March 2012, Hon. E Boke found for the Respondent herein and entered judgment against the Appellant on liability at 80% and awarded the Respondent Kshs 120,000/- general damages for pain and suffering and Kshs 3,000/- as special damages.
2. The Appellant was dissatisfied with the judgment and on 16 April 2012, it lodged a Memorandum of Appeal in the High Court against the judgment.
3. The record indicates that on 10 March 2015, the Resident Judge directed that the appeal be transmitted to this Court.
4. As a consequence, the file was placed before me on 31 March 2015 but none of the parties were present. I directed the Deputy Registrar to notify the parties to appear before me on 25 June 2015.
5. On 25 June 2015, only the Appellant was represented and the Court directed the Appellant to serve a notice on the Respondent to appear for directions on 9 July 2015.
6. Mr. Njuguna for the Appellant and Mr. Nyamwange for the Respondent appeared on 9 July 2015 and they agreed that the record of appeal was in order and that the appeal be determined through written submissions.
7. The Appellant therefore filed its submissions on 23 July 2015 while the Respondent's submissions were not in the file by this morning.
8. The Appellant raised some 10 grounds of appeal. 8 of the grounds were on liability, 1 was on quantum of damages awarded and 1 was that the judgment was not supported by law or facts.
9. The Court will deal with the appeal on those 3 broad grounds.
10. But first the applicable legal principles. This being a first appeal, this Court is called upon and is expected to reconsider the evidence on record, reevaluate the same and draw its own conclusions.

Liability

11. The Appellant has challenged the lower Court judgment and contended that the Respondent *did not adduce evidence that she was an employee of the Appellant at the material time, was on duty at the material time, was injured in the workplace as alleged, to prove negligence and that the damages awarded were excessive*

Employment status and presence on duty at material time

12. The question of whether the Respondent was an employee of the Appellant or was at work on 23 January 2006 was joined in the pleadings. During her testimony, the Respondent produced a pay slip and salary review letter to demonstrate that she was an employee at the material time.
13. The Appellant's only witness was a nurse aid and her duties could not have included maintenance of employee records.
14. In dealing with the issue, the lower Court made reference to the failure by the Appellant to produce the relevant muster roll. The Learned Magistrate also made reference to the Respondent's supervisor Dinah.
15. The said Supervisor was not called to testify. The failure to call her or her whereabouts was not explained.
16. On the basis of the Respondent's testimony and pay slips, the lower Court had sufficient material to reach the conclusion that the Respondent was an employee of the Appellant and was on duty on the material date.
17. The lower Court did not shift the legal burden on these questions to the Appellant. With the material placed before the Court, the evidentiary burden shifted to the Appellant.
18. It is employers who keep records such as attendance and nothing could have been simpler than for the Appellant to produce the records or call a relevant witness from personnel department.

Was there an injury

19. The Respondent's testimony was that she was sent to the first aid clinic where she was attended to. The Appellant however produced and relied on registers from the clinic to advance a position that the Respondent did not get injured as claimed. The lower Court however believed the Respondent.
20. The Court also observed that these registers were not shown to the Respondent during cross examination and that there was evidence that not all accidents/injuries were recorded in the registers.
21. The lower Court relied on treatment notes from Naivasha District Hospital where the Respondent sought treatment. No evidence to show the notes were not genuine was produced.
22. In my view, the lower Court had sufficient material to believe the Respondent's assertions that she was injured in the workplace.

Was negligence proved

23. The lower Court examined the question. The evidence on record was that the floor on which the Respondent was working was wet and that she was not supplied with gumboots (or such other shoe to prevent skidding).
24. The Magistrate also observed that the Respondent ought to have been extra careful. She apportioned her 20% liability.
25. With the material placed before her, the Magistrate was perfectly within the applicable principles to apportion liability as she did.
26. The primary obligation to ensure a safe working environment and provide protective gear to employees is upon employers. The Appellant did not call any witness or produce any records of protective gear it had issued to the Respondent.

Quantum of damages

27. According to a medical report produced, the Respondent had suffered soft tissue injuries on the right knee, left knee and left hand.
28. The Magistrate considered an authority cited by the Respondent, (*Fanny Esikalo v Dorothy Muchene*, Nairobi HCCC No. 624 of 1991 where Plaintiff sustained multiple soft tissue injuries and judgment was in 1993) where an award of Kshs 150,000/- was made, and also considered inflation and awarded Kshs 120,000/-. She also considered the case of *Loise Nyambeki Oyugi v Omar Haji Hassan* HCCC No. 4150 of 1991 where Plaintiff sustained multiple soft tissue injuries

- and was awarded Kshs 20,000/- in 2001.
- 29.The injuries sustained by the Plaintiffs in the cases cited by the Respondent herein were more severe than those sustained by the present Respondent. But about 10 years had elapsed.
- 30.Inflation during the 10 years was a relevant factor for the Court to consider. It is not clear why the parties were citing such old authorities.
- 31.It can be assumed that legal counsel should be aware that in injury cases, authorities as near as possible to the time of injury/determination should be cited to the Court.
- 32.With this in mind, the Court is of the view that the assessment of general damages should be left undisturbed.

Whether judgment is supported in law and facts

- 33.The Appellant did not draw the attention of the Court to the facts or law which were ignored by the lower Court.
- 34.An examination of the record leaves no doubt that the Appellant conducted its case casually and is now attempting to have another bite at the cherry.
- 35.The end result is that the appeal has no merit and is dismissed with no order as to costs, the Respondent having failed to file written submissions.

Delivered, dated and signed in Nakuru on this 17th day of December 2015.

Radido Stephen

Judge

Appearances

For Appellant	Wangai Nyuthe & Co. Advocates
For Respondent	R.M. Mochache & Co. Advocates
Court Assistant	Nixon