REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 5 OF 2013

CHRISTINE KONG'ANI JUMA .....APPELLANT

-V E R S U S –

FLEXPAC INTERNATIONAL LIMITED.....RESPONDENT

(Being an appeal from the judgement, ruling and order of before Hon. C. Otieno – SRM at Kikuyu Civil Case no. 71 of 2009 delivered on 14th December 2012)

JUDGEMENT

1) Christine Kongani Juma, the appellant herein, filed an action against Flexpax International Ltd, the respondent herein before the Principal Magistrate's Court, Kikuyu in which she sought for damages for the injuries she allegedly sustained on 5.11.2006 while at the respondents premises where she was employed. The respondent filed a defence to deny the plaintiff's claim. Hon. C. A. Otieno, learned Senior Resident Magistrate heard and dismissed the case on the basis that there was no proof on a balance of probabilities of liability against the respondent. Being aggrieved, the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds of appeal:-

1. The learned magistrate erred in fact and in law in finding that the appellant did not adduce any evidence to proof her case on a balance of probability.

2. The learned magistrate erred in fact and in law in failing to consider and attach any weight to the appellant's evidence and that of her witness.

3. The learned magistrate erred in fact and in law in finding that the respondent's witness was more credible without attaching any reasons thereto.

4. The learned magistrate erred in fact and in law in failing to consider the appellant's submissions and the annextures thereof in respect of damages as to a wrong application of the applicable principles of law.

5. That the learned magistrate erred in fact and in law in dismissing the appellant's suit in the face of the evidence on record.

6. The learned magistrate misapprehended the evidence in material respect and arrived at an award on quantum of damages that was inordinately low.

3) When this suit came up for hearing learned counsels recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial. I have further considered the rival written submissions. The appellant (PW2) and one Dr. Cypranus Okoth Okero (PW1) testified in support of the appellant's case. The appellant (PW1) told the trial court that she worked as a casual labourer for the respondent between 2003 and 2006. She claimed that on 5.11.2006 she had her right thumb cut by a ruby machine she was operating. First aid was administered by the appellant's supervisor before being taken to Kikuyu Nursing Home. She blamed the respondent for failing to issue the respondent with gloves. The appellant also stated that she still felt pain on her injured thumb whenever she carried out a lot of work. She said that she had been trained for two months before beginning to operate machine and that she had been feeding tapes into the machine with her hand after the stick broke. Dr. Cypranus Okoth (PW2), a medical practitioner stated that he examined the appellant on 9.3.2015 found that the appellant sustained a deep cut on her right hand and was treated at Kikuyu Nursing home. PW2 also noted that at the time of examination the thumb was deformed and tender on palpation. He assessed permanent disability at 5%. The respondent tendered the evidence of Walter Mungai, (DW1) Human Resource Manager who confirmed that the appellant had been its employee. DW1 averred that the appellant must have used her hand and not the screw provided when putting tapes in the machine she was working on. DW1 further averred that there were notices barring employees from placing their hands in the hopper. DW1 further stated that the appellant did not need gloves. DW1 wholly blamed the appellant for being negligent.

5) The learned Senior Resident Magistrate found as matter of fact that the appellant was an employee of the respondent. He also claimed that the appellant was injured while at her place of work. The learned Senior Resident Magistrate further found that the appellant admitted having used her bare hands to feed the machine with tapes. After considering the rival submissions, the learned Senior Resident Magistrate formed the opinion that there was no role played by the appellant in the accident since it was her who put her hand into the machine. The learned magistrate proposed an award of ksh.70,000/= for general damages.

6) On appeal, the appellant put forward a total of six (6) grounds. However, a careful examination of those grounds will reveal that two questions have been posed to this court to decide. First, is the question as to whether or not there was sufficient evidence to establish liability. Secondly, whether or not the proposed award of damages was inordinately low.

7) On the first question on liability, the appellant is of the view that she demonstrated she was not issued with gloves and that the respondent had failed to install guards or provide adequate supervision to prevent her thumb getting entangled with the machine. It was argued that the respondent had provided the appellant with a defective stick which broke down while on use. The respondent on the other hand argued that the findings of the trial magistrate cannot be faulted. It is pointed out that the appellant admitted in cross-examination that she did not know what caused the accident. The appellant is also attributed as having stated that she was provided with a stick to feed the tapes into the cycling machine but the same broke up. It is the respondent's submission that the appellant did not explain what caused the stick to break up therefore there was no other finding the trial magistrate could have arrived at.

8) I have on my part re-considered the evidence. There is no doubt that the appellant presented evidence showing that she was injured while operating the respondent's machine in her place of work. She tendered evidence showing that she was not issued with gloves. The respondent has contested this assertion claiming that it would have been worse if the gloves had been issued. The witness summoned by the respondent is the Human Resource Manager (DW2). There is no evidence that he was an expert on the machine the appellant operated. There is therefore doubt on his evidence as to whether or not gloves should have been issued. The recorded evidence indicates that DW1 claimed the appellant must have used her hand and not the stick to push the tapes into the machine. It is apparent from the recorded evidence that DW1 was not at the scene therefore that piece of evidence is speculative and presumptious. With respect, I agree with the appellant's submission that one can make inference that the stick given to the appellant was defective hence its breakage. The appellant has insisted that had she been issued with

gloves her injury would have been lessened. It is admitted by the appellant that she underwent training on how to operate the machine. If indeed she underwent some form of training and that wearing gloves was a requirement, then she should have obtained one from the respondent. I am convinced she contributed to her misfortune. The respondent on the other hand cannot escape blame. It would appear there was no supervisor nor protective guards to prevent injury. It was wrong for the trial magistrate to wholly blame the appellant for the accident yet it is apparent that the parties should share blame. Consequently, the appeal is allowed and the order dismissing the suit is set aside and is substituted with an order entering judgement in favour of the appellant and against the respondent with liability being apportioned at 50%. This decision is informed by the fact that the appellant did not request to be supplied with gloves and the assertion that she could have been negligent in causing the stick to break.

9) The second question relates to quantum. The appellant is of the view that the proposed award of ksh.70,000/= is inordinately low. The respondent is of the view that the award was made conscientiously and without any error. I have on my part reconsidered the arguments of the parties made before the trial magistrate. There is no dispute that the appellant's thumb is deformed with a permanent disability of 5%. It is argued that an award of ksh.70,00/= is not commensurate with the nature of injuries. The appellant had asked for an award of ksh.200,000/=. The appellant relied on **Nakuru H.C.C.C. no. 22 of 1988 Akay Industries Ltd =vs= Abdallah Amani** where the court of appeal gave an award of ksh.200,000/= for the amputation of the mid-finger and index finger mangled.

10) The appellant also relied on **Mombasa H.C.C.C no. 484 of 1987 Richard Muthoka Moki =vs= Kenya General Industries Ltd** in which the High Court awarded ksh.190,000/= for a fracture of the base of the proximal phalance of the 4th finger and lacerated wounds on the palm and 4 fingers.

11) The respondent had proposed an award of ksh.60,000/= for general damages. The respondent relied on authorities which were off mark, in that they were in respect of injuries of different parts of the body other than the fingers. After a careful reconsideration of the rival submission made before this court and those made before the trial court, I am convinced by the appellant's argument that the award proposed by the trial court is ordinately low hence must be set aside. Having taken into account the decided cases cited in respect of near similar injuries, I am satisfied that an award of ksh.200,000/= is sufficient and commensurate to the injuries suffered.

12) In the end, the appeal is allowed with the following consequential orders:

i. The order dismissing the suit is set aside and substituted with an order of entry of judgment in favour of the appellant and against the respondent.

ii. Liability is apportioned in the ratio of 50%.

iii. The award of ksh.70,000/= as general damages is set aside and is substituted with an award of ksh.200,000/=.

iv. The order awarding ksh.10,000 as special damages (special damages & doctors fees) remains unchallenged.

v. The total award is (200,000+10,000) i.e. ksh.210,0000/=

Less 50% 105,000/=

Net amount ksh.105,000/=

vi. The appellant to bear costs of the suit and theappeal based on ksh.105,000/=.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent