REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 816 OF 2004

GARTON LIMITED.....APPELLANT

VERSUS

MICHAEL NGANGA MWANGI.....RESPONDENT

(Being an appeal from the Judgment of the Resident Magistrate At Gatundu

(Hon. D. Morara delivered on 3rd February, 2005 in Gatundu RMCC No. 367 of 2003)

JUDGEMENT

This is an appeal from the judgment of the lower court in a suit where the respondent sued the appellant following injuries he

sustained while on duty. The respondent was an employee of the appellant. While in the course of his duties he was injured when he was cutting coffee trees. From the pleadings he was using "a panga" with which he hit a tree trunk as a result of which it sprang back resulting to a cut to his left thumb.

It was his case in the lower court that the appellant failed to provide him with a safe and sound working environment or protective devices such as gloves. The respondent also alleged that the appellant ordered him to perform duties with dangerous gadgets such as a sharp "panga" without any form of protection, and that the appellant caused him to sustain severe injuries.

The appellant denied the respondent's claim in the statement of defence and pleaded that he was solely to blame or substantially contributed to the injury. Particulars set out included failure to head his own safety and conducting himself in a careless and reckless manner, and failing to keep proper look out. The respondent was also blamed for failing to make use of the protective gear provided. The date of the injury was said to be 8th January, 2002.

After a full trial in the lower court, the trial court found in favour of the respondent and made an award of Kshs. 80,000/= general damages and Kshs. 2,000/= special damages. The appellant was aggrieved by the said judgment and filed the present appeal where the trial court was faulted for not taking into account the totality of the evidence adduced, and for holding that the injuries were sustained within the appellant's premises. The trial court was also faulted for accepting the plaintiff's documented evidence which had been exposed to be untrue.

As the first appellate court, I have the duty to evaluate the evidence presented before the trial court and make independent conclusions. This I have done.

Upon sustaining the alleged injury, the respondent said he went to Kibereke clinic and produced a medical document to that effect. It is clear from that exhibit however that, the document is dated 10th November, 2002 and this must have been long after the alleged injury. There is no evidence that he attended the clinic soon after the injury.

The respondent also told the court that he returned to work after one month after sustaining the injury. However, the appellant's payroll register shows that the respondent did not take leave at all, and this is clearly shown at serial number 17 which has the respondent's name, his identification number and the employment number. This information introduces a negative aspect of the respondent's credibility.

The judgment of the trial magistrate was very brief. It did not also comply with the provisions of Order 21 rule 4 which states as follows,

"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision

thereon, and the reasons for such decision."

The foregoing notwithstanding, it is difficult to see how any blame could be attributed to the appellant in the peculiar circumstances of this case. The respondent was in possession of the instrument which he was using to cut the coffee plants. He was in control of the said instrument. The direction of use and the target was also within his control. He did not need any supervision in the process of conducting such duties. How then can it be said that the employer is to blame? In the case of **Wison Nyanyu Musigisi vs. Sasini Tea and coffee Limited (2006) e KLR** Kimaru J. observed as follows,

> **"The appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be made to be liable in the performance of such a manual task."**

In yet another case, **Kakuzi Limited vs. Sabina Mokeira Nyaboro (2013) e KLR** Onyancha J. stated as follows,

> **"She held a sharp panga and controlled the same as wisely and carefully as she alone knew how. Her command and control of the panga while using it to prune, was clearly exclusive to herself and no one else. Not even the employer supervisor who may have been in the vicinity can be said to have interfered with the respondent's hold on and command and control of the panga. The duty to ensure her safety and security from the use of operation of the said panga lay in exclusive and personal control of the respondent."**

The above two cases are in fours with the case that was before the trial court. In personal injuries, not every injury should be blamed on the employer. This was such injury. I cannot attribute any negligence or breach of duty of care on the part of the appellant in the circumstances of this case. The respondent's case in the lower court was fit for dismissal.

Had the respondent succeeded however, he would have been entitled to Kshs. 40,000/= general damages because the nail that had fallen off had fully grown back, going by the medical notes dated 10th November, 2002 which he produced.

In view of the above, I have come to the conclusion that this appeal must be and is hereby allowed. Each party shall bear their own costs.

Signed at Nairobi this 8th day of December, 2020.

A.MBOGHOLI MSAGHA

JUDGE

Dated, signed and delivered online via Microsoft Teams at Nairobi this 16th day of December, 2020

J.K. SERGON

JUDGE