REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 462 OF 2007

KAKUZI LIMITED…………………………………APPELLANT

VERSUS

PETER MAINA GITHINJI…………………………RESPONDENT

(Appeal from the original judgment and decree in Thika SMCC No. 909 of 2005 delivered on 15th May, 2007 by Hon. Nyakundi)

JUDGMENT

1. The respondent sued the appellant seeking compensation following an alleged industrial accident which occurred on 18th February, 2004. The trial court heard the matter and found the appellant 70% liable and awarded the Respondent KShs. 60,000/= as general damages.

2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on grounds which can be summarized as follows:-

> ***a) The learned magistrate erred in law and in fact in finding the appellant 70% liable when the respondent did not prove that he was an employee of the appellant.***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: ***Peter v. Sunday Post (1958) at pg. 429***).

4. The respondent's case was that he was working with the appellant as a casual labourer. He stated that on the material day he was assigned the duty of chopping pegs so that trees could be planted. As he was working, the handle of the panga with which he was working came off and the panga hit him occasioning him injury to his finger of the left hand. He claimed that the said injury took two days to heal. The respondent attributed the injury to the appellant's failure to provide him with a good panga. He alleged that he asked the supervisor to give him a good panga but he was not given.

5. It was the Respondent's testimony that he was thereafter issued with a treatment note with two days off duty (P. Exhibit 1). He was examined by Doctor Gikonyo who prepared for him a medical report at KShs. 3000/=. (P. Exhibit 2 -Medical report and P. Exhibit 3 - receipts for KShs. 3000/=). On cross-examination, the Respondent stated that he started working for the Appellant in the year 2003 at the forestry department. He stated that a colleague by the name Joseph Kamau was present when he got injured.

6. DW1, Catherine Wanjiku Mwangi who produced a master roll for Munyu estate as D. Exhibit 1

testified that the name of the Respondent and other two colleagues he claimed worked with the Appellant were not in the master roll of the Appellant. She stated that casual normally come to the Appellant with their own tools.

7. DW2, David Ojwang who stated that he worked in the medical department testified that the register (D. Exhibit 2) he has for the department the Respondent worked in does not bear his name. He denied that the writings on P. Exhibit 1 were his and stated that he is the only one who normally fill the details therein. He however admitted that the writings stating two days off duty and he stated that his suspicion was that the document had been issued to someone other than the Respondent.

8. The appeal was canvassed by way of written submissions. It was the Appellant's contention that the Respondent did not prove on a balance of probability that he was injured in the course of his duty. That the Respondent failed to call witnesses to give an account of the accident. That he did not adduce evidence to show that he was an employee of the Appellant. It was also argued that the Respondent failed to prove negligence to the required standards. Reference was made to **Wilson Nyanyu Musingi v. Sasini Tea & Coffee Ltd Kericho HCCA No. 15 of 2003** where it was held that no evidence was led that in that type of work there was reasonable necessity of any type of protective clothing. On quantum, it was submitted that having not proved negligence, the Respondent was not entitled to compensation. They however suggested an award of KShs.50,000/= in the event negligence is found.

9. The respondent on the other hand contend that the appellant never attacked the validity of the P. Exhibit 1 and that the clinic where the Respondent was treated was the Appellant's staff. On liability, it was argued that even if the casuals were to come with their tools, it was incumbent for the Appellant to issue protective gear. The Respondent on this point referred to **Timsales Limited v. Haron Thuo Ndungu (Nakuru Civil Appeal No. 102 of 2005** where it was held that it was upon an employer to ensure safe working environment. It was urged that the award be not interfered with.

10. I have considered the submissions and the evidence on record. The Appellant disowned P. Exhibit 1 produced by the Respondent to prove that he was an employee of the Appellant and that he was injured while in the course of duty. I must however mention that the documents produced by the Appellant to controvert the Respondent's said allegations are documents which are in custody of the Appellant and were handwritten thereby were prone to alterations. Even if I am wrong on this point. The Respondent testified that he was on the material day working under the supervision of Mr. Mbau whose identity the Appellant did not deny. It is unclear why the Appellant opted to bring DW1 and not Mr. Munyu who was better placed to deny the claims further considering that the Respondent made allegations against him. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to tender, that evidence is presumed to have been adverse to him. It was not suggested that Mr. Munyu was no longer in the employment of the Appellant or he could not be found to clarify the issues or he was not an employee of the Appellant. In the absence of such an explanation, I find and hold that Respondent was an employee of the Appellant.

11. On liability, the appellant did not controvert the respondent’s evidence that he was not provided with gloves to protect his hands. It was the appellant’s statutory duty under the Factories Act (Cap 514 Laws of Kenya) to provide the respondent with gloves considering the risk he was exposed to. The court in **African Highlands & Produce Co. Ltd v. Collins Moseti Ontekwa Kericho HCCA No. 38 of 2002(UR)** while dealing with similar facts held as follows to which I am fortified:

> ***“I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact that under the Factories Act the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that, in the event such an employee is injured, then an employer shall be guilty of breach of a statutory duty. Liability in such event is strict.”***

12. Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213 states:

> ***"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty."***

In my considered opinion in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The respondent knowing that he was using a panga with a bad handle was also under duty to be cautious while working. He too has to shoulder liability. In the circumstances I find that liability as apportioned was reasonable. I have considered the trial court's decision on damages and I find it to be reasonable. I therefore see no need of interfering with the trial court's findings. This appeal has no merit and is hereby dismissed with costs to the Respondent. Orders accordingly.

Dated, Signed and Delivered in open court this 27th day of March, 2015.

J. K. SERGON

JUDGE

In the presence of:

Mrs. Kinyori h/b for Orare for the Appellant

Mwangi h/b Kibonge for the Respondent