**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KNEYA AT KISII**

**CIVIL APPEAL NO. 72 OF 2010**

NYANSIONGO TEA FACTORY LTD……...PLAINTIFF

**VERSUS**

BATHSEBA NYABOKE……DEFENDANT

**JUDGMENT**

1. The respondent was the plaintiff in SRMCC. NO. 390 of 2003 at Keroka. She filed the suit against the appellant claiming general and special damages following an accident that occurred at the appellant's premises on 13th December, 2001. In her plaint, the respondent stated that she was an employee of the appellant and on the material day, she was carefully executing her duties as assigned by the appellant when she was pierced by an iron at the C.T.C. machine as a result of which she sustained serious body injuries.
2. The respondent alleged that the said injuries were occasioned by breach of statutory duty and negligence on the part of the appellant and set out the particulars thereof. With regard to the injuries the same were particularized as hereunder:-

a. *Exposing the plaintiff to a danger or risk which the defendant knew or ought to have known that the plaintiff will be injured.*
b. *Failing to warn the plaintiff of the dangers involved in her work.*
c. *Providing the plaintiff with unsafe system of work.*
d. *Failing to provide the plaintiff with a safe system of work.*
e. *Failing to give the plaintiff adequate instructions.*
f. *With regard to injuries the same were particularized as hereunder:-*
g. *Deep cut wound on the chest.*

3. The appellant in turn filed a statement of defence and denied the respondents claim in total. The appellant stated that it was a stranger to the alleged accident on 13th December, 2001. Without prejudice to the aforesaid denial, the appellant averred that the alleged accident was caused or contributed to by the respondent's negligence particulars of the alleged negligence were set out in the defence and included inter alia allegation that the respondent ignored to wear protective devices that were otherwise provided even after being asked to do so.
4. During the hearing Dr. Obed Omungoma a medical practitioner in Nakuru town testified as PW1. He told the court that on 15th November, 2003 he examined the respondent who had had a history of an industrial accident on 13th December, 2001. That the respondent had sustained a cut on the chest, and she was taken to Kisii District Hospital for cleaning and dressing.
5. He however informed the court that at the time he examined the respondent, she was fully

recovered though she had a permanent scar on her breast about 3cm long. He also told the court that he relied on a card from Kisii District Hospital which he produced as PExh.1, he charged the respondent Kshs. 2,500 and produced a receipt of the said payment as PExh.2. He also produced the card from Kisii Hospital he had relied on as MFI.03.

6. On cross-examination he revealed that the respondent's injuries were soft tissue injuries. PW2 was the respondent he told the court that the appellant was her employer and on 13th December, 2001 she reported to work at 1.a.m. and her duties were among others standing at the machine and feeding the leaves into the machine. However, on the material day, she did not complete her work as she got injured on the chest part at about 10a.m. Apparently, the conveyor had been stopped, tea leaves had been placed in a conveyor and when the conveyor had been re-started, the tea leaves fell on her and in turn she fell on the metal. The respondent further explained that the C.D.C machine was where tea leaves were grounded.
7. After being injured she was first taken in for first aid then referred to Kisii District Hospital. She produced a copy of her sick sheet as MFI-3 and explained that the original remained in hospital. She also corroborated PW1's evidence that she went to PW1 to examine her and paid kshs. 2,500 for the medical report. She blamed the appellant company for the accident as she had no equipment to protect her i.e. she needed an apron or dust coat. She also complained that the dust coat was badly placed.
8. However, she confirmed that she was now fully healed from her injuries and reiterated that she was careful as she executed her work as she worked as per the company procedures.
9. On cross-examination she revealed that she had worked on the material day for about 6 hours. After the accident, she was giving sick sheet which she took to hospital and after treatment she took it back to the appellant. She identified the person who gave her a sick sheet as Hellen, she was treated at about 2p.m. and then discharged. She also admitted that she made a copy of the sick sheet the next day before she surrendered it. She also confirmed that the sick sheet had no stamp from the appellant and it was not a certified copy.
10. She also revealed that all workers were given overalls, and some are provided with gloves but she was not in the section of being provided with gloves. She also explained that the metal (that injured her was to converge the tea not to spill), the metal was permanent, it was on two sides, it should have been folded to blunt it and avoid danger and this was the 2nd time she had suffered the fate as the 1st time she was not cut.
11. Inaddition to this, she revealed that the metal is part of the machine, it was not brought with the machine but the metal additions were made by the technicians. That she saw the metal was sharp even before the incident and she could not do anything to avoid the incident because if she had tried to evade, she could fall into the machine as she could not go backward. This marked the end of the respondent's case.
12. The appellants on their part called Nyabuto Nyaundi a senior supervisor with the appellant company. He confirmed to the trial court that on 13th December, 2001 the respondent was on duty to discharge tea leaves from troughs and place them on a conveyor which inturn would take them to a crushing machine. He also confirmed that respondent was on duty upto 11p.m. He also informed the court that he had a record which shows the respondent was not injured on the material day as she was on duty the 2nd subsequent days and her name was not among those injured on the material day. He further stated that the following day the respondent worked for 9 hours.
13. Furthermore, he told the court that there was no entry on that day of any injury, the workers were provided with safety gears and she had a dust coat cap and gloves. He also confirmed (respondent) that her (respondent's) duties presented no dangers of getting a cut wound as the place was well arranged and no worker has ever been injured in that section. He further stated that the respondent was trained in her job, was inducted on how to work and the safety precautions for her work safely.
14. Lastly he stated that the respondent had a supervisor by the name of David Mokanga and reiteratd that the accident did not happen at all as the plaintiff worked in the subsequent days. He produced the allocation book master roll and accident book in evidence which were marked as PExh.1, PExh.2 and 3).
15. On cross-examination, he revealed that the appellant company keeps a record of the sick sheet issued, he did not have the record in court of those given sick sheets on 13/12/2001 and he denied

the fact that the sick sheet (produced by the respondent) is from the appellant company.

16. This marked the close of the defendants case. In its judgment the trial court apportioned liability at 70:30 in favour of the respondent. Thus the trial court proceeded to give an award of kshs. 50,000 and allowed special damages as pleaded i.e. kshs. 2,500 plus costs of the suit and interest at court rates till full payment.
17. The appellant being aggrieved by the above judgment has preferred an appeal to this court. In his Memorandum of Appeal dated 21st April, 2010 the appellant has advanced the following grounds:-

1. *The learned trial magistrate erred in law and in fact in finding that the cost of the suit are payable to the plaintiff's advocates and not to the successful litigant.*
2. *The learned trial magistrate erred in law and in fact in not taking into consideration the submissions by the respondent's advocates*
3. *The learned trial magistrate erred in law and in fact in relying on extraneous facts and factors.*

18. This court, being conscious of its role as the first appellate court as stated in **Selle vs. Associate Motor boat Co. Ltd [1968] E.A. 123** has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.
19. On looking at the grounds of appeal advanced by the appellant's advocate the appellant has contended that the trial court relied in extraneous factors. For this court to determine whether the trial court was right in arriving at the decision it did, we need to recap the evidence adduced at the trial court. It is worth noting that the issue of the respondent working for the appellant company was never in dispute as the appllant acknowledged that fact. However, respondent did in fact state that she was injured in the material day at about 10a.m. by a conveyor machine and stated with detail that the said machine had 2 metal (sharp edged) hanging loosely, she knew that the two metal (sharp edged) edges imposed a danger to her duty of feeding dry leaves to the conveyor before the conveyor transported them to the machine which in turn crashes them . She also stated that she had previously been injured by the said machine but although she had not incurred serious injuries. It was therefore not a wonder that the trial court apportioned liability of 70:30. On the other hand, the appellant although confirming that the appellant was on duty that day stated that she was not injured at all on the material day and in fact proceeded to state that the respondent went to work the following day according to the appellant's Muster Record was marked as DExh.12,&3.
20. **Liability**

This being a civil matter the burden of proof is always on a balance of probability. The respondent as evidence of the fact that she had been injured produced a sick sheet bearing the names of the appellant company describing her injuries which was signed by its factory manager. The respondent's testimony was also corroborated by the evidence of PW2 a medical doctor who examined the respondent about 2 years after the said incident and noted that she had a scar on her chest and opined that the injuries suffered by the appellant were soft tissue injuries.

21. In my humble view, it was the onus on the appellant's part to adduce evidence that clearly rebutted the respondent's evidence on the injuries she suffered. The appellant for example could have adduced evidence from the respondent's immediate supervisor on that material day or even led evidence from the factory manager stating that the signature on the respondents sick sheet was different from his. Furthermore, the appellants records could have easily been tampered with to show that indeed there was no accident on the part of respondent on the material day. Therefore on a balance of probability, I agree with the trial court that indeed the respondent was injured on the material day during the course of her work at the appellant's company.
22. On quantum, the learned trial magistrate considered the authorities given to him by respective advocates representing the parties before he arrived at an award of kshs. 50,000. It is trite law that award of general damages is an exercise of discretion by a trial court and the award depends on the peculiar facts of each case. The award must, however, be reasonable and neither extravagant nor oppressive. The trial court has to be guided by such factors as previous awards for similar

injuries and such other relevant factors.

23. In the matter that was before the trial court there was a medical report which opined that the injuries suffered by the respondent was a scar on her chest about 3 cm long that had healed though at the time of examination, respondent experienced pains. Furthermore the doctor (PW2) on being cross-examined classified the injuries suffered by respondent as soft tissue injuries.
24. Although the learned trial magistrate apportioned a ratio of 70:30 to the respondent as liability, he never deducted the said amount 30% from kshs. 50,000 which he awarded to the respondent as general damages. Thus the amount kshs. 50,000 the respondent should be awarded as general damage should be less 30% as contributory negligence on the respondent's part. Therefore the correct amount which the respondent should have been awarded as general damages should have been:

*Contributory negligence 30/100 x50,000= 15,000*

*General damages = 50,000-15,000= Kshs. 35,000*

*General damages= 35,000*

*Special damages = 2,500*

*Total Kshs.* ***37,500***

Therefore, the above appeal by the appellant succeeds partly on quantum as the amount the appellant is liable to pay the respondent is kshs. 37,500. The respondent also gets the costs both in the trial court and this court from the date of the trial court's judgment. This judgment applies, mutatis muntandis to HCCA. NO. 71 OF 2010.

**Dated and delivered at KISII this 20TH day of March, 2015**

**C.B. NAGILLAH,**

**JUDGE.**

**In the presence of:-**

Kaburi holding brief for Nyachiro for the appellant.

Mboga (absent) for the respondent

Edwin Mongare Court Clerk.