REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 177 OF 2006

(Appeal from the Judgment of the Resident Magistrate at Yatta Madam A. W. Mwangi delivered on 27/9/2006 in Yatta R.M.C.C. No. 382 of 2005)

KAKUZI LIMITED……APPELLANT

VERSUS

DAVID KARANJA NGOKI…….RESPONDENT

JUDGMENT

1. The Appellant, Kakuzi Limited was sued by the Respondent, David Karanja Ngoki for damages. The Respondent vide a plaint dated 28th November 2005 claimed to have been injured when he was cut by a panga while he was working for the Appellant.

2. The claim was denied by the Appellant through the statement of defence dated 22nd March, 2000. The Appellant denied that he was the Respondent's employer. Any negligence attributed to the Appellant was also denied. In the alternative, the Appellant blamed the Respondent either wholly or partly for causing the accident.

3. The Respondent in reply to the defence denied any allegations of negligence.

4. The Respondent (PW1) gave evidence. He stated that he was carrying out work for the Respondent as a casual labourer. That at the material time he was cutting grass using a panga when his left middle finger was cut by the panga.

5. The Respondent blamed the Appellant for failure to provide him with protective gear and the right equipment for carrying out the work.

6. The Appellant closed the defence case without calling any witness.

7. The trial magistrate found the Respondent's case proved on a balance of probability. The trial magistrate held the Appellant 100% liable for the accident. General damages were assessed at Ksh 50,000/= and special damages at Ksh 2,000/=.

8. The Appellant was aggrieved by the said judgment and appealed to this court on both liability and quantum. The grounds of appeal can be summarized as follows:

a) That the Defendant was not liable either under statute law or common law.

b) That the plaintiff was largely or wholly to blame for the accident.

c) That the award of general damages was inordinately high.

9. The appeal was canvassed by way of written submissions which I have duly considered.

10. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings – *See* **Selle –vs- Associated Boat Co. Ltd (1968) EA 123.**

11. The only evidence on record is that of the Respondent (PW1). His evidence is therefore not controverted by any other evidence. The Respondent's evidence is that he was working for the Appellant at the material time. His evidence that he was injured by the panga while cutting grass is corroborated by the medical report and the labour form which were produced as exhibits. A receipt for Ksh 2,000/= charged by the doctor for preparing the medical report was also produced as an exhibit. The Respondent's evidence therefore proved that he was injured while working for the Appellant.

12. On who is to blame for the said injury, the Respondent testified that he was not issued with any gloves and that he was given a panga to cut the grass instead of a slasher. The Respondent's evidence did not go further to show why the slasher could have been a more appropriate tool in the circumstances of this case. During cross-examination, the Respondent further testified that he had cut the grass for about three days when he cut himself without anybody else's involvement. This in my view shows that the panga was solely in the control of the Respondent.

13. The Respondent was involved in manual labour. I agree with Waweru J. when he stated in the case of **Mumias Sugar Co. Ltd vs. Samson Muvinda, Kakamega HCCA No. 58 of 2000** ***(unreported)*** that where an employee is engaged in manual labour that does not require any exceptional skill and injures himself, then such an employee cannot hold his employer liable under statute or common law. At page 3 of his judgment he stated as follows:-

"The respondent's work for which he was engaged involved cutting sugar cane in an open field using a sharp panga. No machinery of any type was used in this exercise. He would hold a cane in one hand and cut its lowest point with a panga in the other hand. It was a simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing or that the same were provided as a matter of course in similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of which the appellant ought to have warned the respondent. To ensure that he did not cut himself with a panga was matter that was particularly within the power and control of the respondent."

14. In the case at hand, I would agree with the Respondent only on the aspect of the Appellant's failure to provide him with protective gear. Gloves would have lessened the severity of the injury or prevented it. To this end, the Appellant was in breach of his statutory duty. Consequently I apportion liability on a 50:50 basis.

15. Turning to the issue of quantum, the sum of Ksh 50,000/= as general damages is reasonable. In the case of **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** the Court of Appeal stated as follows:-

"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.

The appellate court can justifiably interfere with the quantum of damages awarded by the trial

court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

The Ksh. 2,000/= special damages was specifically pleaded and proved.

16. For the above stated reasons, the appeal partly succeeds. I enter judgment as follows:

General damages ……. Ksh 50,000/=

Special damages……... Ksh 2,000/=

Total Ksh 52,000/=

Less 50% contribution …… Ksh 26,000/=

The Respondent shall have the costs of the suit in the lower court plus interest at court rates.

Each party to bear own costs of this appeal.

B. THURANIRA JADEN

Dated and **delivered** at Machakos this 29th day of April, **2015**

B. THURANIRA JADEN

JUDGE