REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO.100 OF 2011

BETWEEN

KIPKEBE TEA LIMITED …………………… APPELLANT

AND

DUKE NYANG'AU. ……………………………… RESPONDENT

(Being an appeal from the ruling and decree of Hon. J. Were, SRM,

dated 19th August 2011 in Original Keroka SRM Civil Suit No. 472 of 2011)

JUDGMENT

1. By a plaint dated 15/10/2009 the respondent Duke Nyangau sued the appellant Kipkebe Limited for special and general damages arising out of an accident on 26/4/2005 while the respondent was in the course of his duties with the appellant.

2. It was pleaded that the accident and subsequent injuries was as a result of breach of statutory duty and negligence on the part of the appellant. It was further pleaded that as a result of the said accident the respondent suffered the following injuries:-

(a) Dislocation on the right hand at the wrist joint.

(b) Deep cut wound at the right elbow.

3. By a defence dated 12/11/2009 the appellant denied that the respondent was its employee and further stated that if the respondent was its employee, then the same had taken all reasonable precautions and prescribed such safety measures as were necessary to ensure that all her employee were adequately protected from risk of damage and or injury.

4. It was further pleaded in the alternative that if ever the respondent was injured then the accident occurred as a result of the respondent own making and extreme negligence particular whereof were pleaded as follows:-

(a) Executing his assignment contrary to the express instructions given by the supervisor on duty.

(b) Going about his duties in reckless and haphazard manner without regard to personal safety.

(c) Failing to apply common sense and due diligence in discharging common duties which does to require specialized training.

(d) Causing the alleged accident with sole intention to seek compensation.

5. Based upon the said pleading, the matter proceeded for hearing before J. Were then SRM in which he apportioned liability on 80:20 basis and awarded Kshs.120,000 in general damages and special of Kshs.6500/=.

6. Being aggrieved by the said judgment, the appellant filed this appeal and raised the following grounds of appeal:-

1. The learned trial magistrate erred both in fact and in Law in failing to properly evaluate and analyze the evidence on record thus arriving at erroneous decision.

2. The learned trial magistrate erred in law and in fact by holding the appellant 80% liable for the alleged accident or at all.

3. The learned trial magistrate erred in Law and in fact by awarding the respondent general damages in the sum of Kshs.120,000/=,which damages were excessive in the circumstances and not proved at all.

4. That learned trial magistrate erred in law and in fact, by failing to dismiss the respondent's suit with costs to the appellant.

7. Directions were given that this appeal be heard and determined by way of written submissions and the evidence on record which have now been filed.

APPELLANT SUBMISSION

8. On behalf of the appellant it was submitted that the respondent evidence demonstrated his own negligence and carelessness by putting on long sleeved shirt in an area which he knew he ought not to have put on such a shirt and going near the machine thus allowing his shirt to be caught up in the machine, it was further submitted that the respondent completely failed to prove any fault against the appellant and in support thereof the cause of *Kiema Muthuku .vs. Kenya Cargo Handling Services Ltd* *(1991) 2KAR 25*8 was submitted.

9. It was submitted that the appellant would not be liable even if

the respondent sustained injury since not every accident at the place of work is necessarily as a result of employers breach of duty of care where the employee is engaged in manual work that does not require exceptional skills and in support thereof the case of *Wilson Nyanyu Musigisi .vs. Sasini Tea and Coffee Ltd (Kericho HCC 15 of 2003* was submitted.

10. It was submitted that the evidence on record showed that the respondent was not injured on the alleged date. It was further submitted that the injuries sustained by the respondent were of a minor nature and therefore an award of Kshs. 120,000/= was inordinately high and therefore ought to be interfered with by the appellant court and an ward of Kshs.40,000/= was proposed based upon the cases of *Sokoro Saw Mills Ltd .vs. Grace Ndugu (2006)eKLR and Evanson Babu Njuru .vs. Paul Nyamotengi Nairobi (HCC No. 778 of 1991)*

RESPONDENT'S SUBMISSION

11. It was submitted that the appellant court would only interfere with the trial courts finding of facts unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on wrong principles in reaching the finding. It was further submitted that the amount of quantum can only be interfered with if the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

12. It was submitted that the respondent had proved his case and that apportionment of liability on the basis of 80%:20% was fair and just and that on a balance of probability the respondent had proved that he sustained the injuries herein.

13. On quantum it was submitted that the award of Kshs.120,000/= was not inordinately high and in support thereof the following case were cited.

1. **JESSE MBURU & GRACE WANJA WAINAINA .vs. ANN KAREMI MUGAMBI NAKURU HIGH COURT CIVIL APPEAL NO. 136 OF 2009, (2012) eKLR.**

2. **JOEL KIMITHU MWANGI .VS. SHADRACK KUIRA (2010) eKLR.**

3. **CENTRAL ELECTRICAL INTERNATIONAL C. LTD .VS. MAURICE OMONDI (2007) eKLR**

14. This being a first appeal, the court is supposed to reasces the evidence tendered before the trial court which I hereby do. According to Pw1 Dr. P.M. Ajuoga the respondent suffered dislocation at the wrist joint, deep cut on the left elbow and bruises in the left shoulder. Under cross examination he testified that the did not see the injuries when fresh and only examined the respondent four years after the injuries. This evidence was challenged by that of DW1 Daudi Kipchrchir Koech a clinical officer with the appellant who testified that the respondent was not treated at appellant dispensary.

15. The respondent however produced before court a treatment card and note allegedly issued by the respondent dated 26/4/2005 and in his evidence in chief testified that he was employed by the appellant as a casual doing general work for (1) year and seven (7) months. He stated that he was injured on 26/4/2015 while cutting the tea at the factory using a machine when the roller belt was cut holding his cloth. Under cross examination he testified

that the said machine was thereafter switched off by a technician called Mr. Oduor.

16. On behalf of the appellant Dw2 Daniel Kerata Omwanza confirmed that the respondent was on duty on 26/4/2005 and that the same was not taken to the dispensary.

17. In finding for the respondent on liability at 80:20 the trial court had this to say.

> "***He stated that he was injured by a tea picking machine when it held his right hand. He attributed the accident to inadequate training on how to manage the machine. He had worked with the machine for about three (3) weeks. The defendant witnesses did not adduce any evidence on the allegations by the plaintiff about lack of training on how to manage the machine. That definitely was the duty of the defendant. I do however note that the accident occurred because the machine held his shirt. It was his duty to ensure that there was*** **not a danger to** ***himself."***

18. Based on the evidence tendered as analysed herein, I therefore find no fault with the trail court finding on liability, would therefore not interfere with the same and confirm liability at 20%:80%.

19. It should be noted that the respondents case is distinguishable from the case of **WILSON NYANYU MUSIGISI** supra since the appellant herein was operating a machine to which he had not

been trained by the appellant and further distinguishable from the case of **KIEMA MUTHUKU .vs. KENYA CARGO HANDLING** supra since the plaintiff had proved negligence on the part of the appellant herein.

20. On the issue of quantum the evidence on record confirms that the respondent sustained dislocation of the right wrist joint, deep cut wound on the right elbow and bruises on the left shoulder. The issue therefore for determined is whether the award of Kshs.120,000/= was inordinately high so as to be interfered with by the appellant court.

21. I have looked at the following case:

1. **MARTIN WAWERU MUTHUKE .vs. MAHENDRA SHAH HIGH COURT AT EMBU CIVIL APPEAL NO. 70 OF 2008**. Wherein Justice W. Karanja as she then was confirmed an award of Kshs.60,000/= in respect of the plaintiff who had sustained dislocation of right wrist joint together with cuts and bruises.

22. It is also noteworthy that the cases submitted before the trial court were not of similar injuries to those sustained by the respondent and therefore they are not of similar awards and therefore the trial courts decision in respect of quantum is liable to be interfered with since he took into account irrelevant factors.

23. I would therefore allow the appeal on quantum and reduce the award of general damages to Kshs.100,000/= having taken into account the decision of **MARTIN WAWERU MUTHUKE** supra and the rate of inflation.

24. Since the appellant has partially succeeded in this appeal the same shall be entitled to half lost of this appeal.

Delivered, signed and dated on this 16 th day of June, 2015.

J. WAKIAGA

JUDGE

In the presence of:

Mr Otieno advocate for the appellant.

No appearance by Miss. Aboga for the respondent.