REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 111 OF 2011

KAIMOSI TEA ESTATE ..……. APPELLANT

V E R S U S

BOAZ MADAHANA MWENDO …….. RESPONDENT

(An appeal arising from the judgment of [P.A. OLENGO, SRM] dated 29.6.2011 in Hamisi Senior Resident Magistrate Court in Civil Case No. 150 of 2009)

J U D G M E N T

The respondent filed civil suit number 150 of 2009 before the Hamisi Senior Resident Magistrate's Court against the appellant seeking general damages arising from an industrial accident. He was awarded **KShs.75,000/=** as general damages less 30% contribution. The appellant preferred this appeal on the grounds that the decision is contrary to the evidence on record, the trial magistrate failed to apply the relevant principles involving agency relationship, the court applied the wrong principles of the law and the damages awarded are excessive.

Parties filed written submissions. The appellant contends that the trial magistrate misdirected himself by holding that the respondent was an employee of the appellant yet the contrary was proved. Counsel for the appellant maintains that the appellant was merely a managing agent and the Tea estate was owned by the County Council of Nandi. Therefore the respondent ought to have sued the County Council of Nandi instead of the appellant as the managing agents cannot be held vicariously liable in the circumstances. Counsel also maintains that the amount of damages awarded was excessive. On his part counsel for the respondent opposed the appeal and maintains that it is the appellant who used to pay the workers and should be the one to be held liable. The respondent was not a party to the management agreement between the appellant and the County Council of Nandi.

The record of appeal shows that three witnesses testified before the trial magistrate. The respondent testified as PW3. He stated that he was employed as a tea plucker by the appellant. On 20.12.2006 he was in the cause of his duty when he fell as he was taking tea to the tractor. He blamed the appellant as he had no protective tools including gumboots and gloves. He was taken for medical treatment and sought general damages. His evidence is that he was employed by the appellant. PW2 Dr. Samuel Aluda examined the respondent on 20.12.2006 and itemized the injuries as blunt trauma on the left index finger leading to dislocation of the finger. PW1 Josphat Embeko was a clinical officer based at Kapsabet District Hospital. He attended to the respondent on the 20.12.2006. He noted that the respondent sustained dislocation of the left finger. The finger was bandaged for two weeks.

The defence witness was one Joseph Kitur. He had testified in a different case and his evidence was adopted as defence evidence. He is a field assistant employed by the appellant. His evidence is that the respondent was a permanent employee of the appellant but was under the County Council of Nandi. There was an agreement between the Nandi County Council and Kaimosi Tea Estate dated 1.11.2006 whereby Kaimosi Tea Estate was to take over all the operations at the estate. The County Council was to provide the protective gears. All labour disputes were to be handled by the County Council of Nandi and the managing agent was only to control the quality of the tea leaves. Kaimosi Tea estate provided the pay slips as the County Council did not have the software to produce them. The owner of the tea estate is the Nandi County Council.

The main issue for determination is whether the respondent was an employee of the appellant,

whether the respondent proved his case and whether the amount of damages awarded is excessive. On the first issue it is clear that the employees knew that they were employed by the appellant and they were not privy to the contract between the Nandi County Council and the appellant. When the suit was filed it would have been easy for the appellant to have enjoined the principle in the suit. Taking a back seat and simply alleging that its role was to manage the quality of tea leaves could not help the appellant. It was the appellant who was overseeing the day to day operations of the tea estate. Another option would have been for the appellant to deal with the cases and include the expenses such as damages awarded as part of its operation costs and deduct such amounts as its expenses. The pay slips indicated that it was the appellant who was the employer.

The respondent's case was that while taking tea to a tractor he slipped and fell. He was wearing slippers with no gumboots or gloves. He also had no protective clothing. The defence witness did not dwell on how the accident occurred and the respondent's evidence was not controverted. The trial magistrate attributed 30% negligence to the respondent. From evidence on record I do find that the finding of the trial court was proper and fair. The respondent had worked for two years before the incident. I entirely agree with the findings of the trial magistrate on the issue of liability. With regard to quantum the medical report from Eldoret Medical Clinic dated 5.10.2009 shows that the respondent sustained blunt trauma to the left index finger and dislocation of the same finger. Counsel for the respondent had sought damages of **KShs.350,000/=** while the appellant offered an award of **KShs.60,000/=.** The court awarded damages of **KShs.75,000/=.** I do find that the award is fair and there is no justifiable reason to alter it.

In the end, I do find that the appeal lacks merit and the same is hereby dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 19th day of May 2014

SAID J. CHITEMBWE

J U D G E