

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 84 OF 2011

KAIMOSI TEA ESTATE APPELLANT

V E R S U S

JOHN NGAIRA KARAN RESPONDENT

(Appeal arising from the judgment of [P.A. OLENGO, SRM] from the original Civil Case No.160 of 2009 in Hamisi Senior Resident Magistrate Court.)

J U D G M E N T

The respondent was involved in an industrial accident on the 5/12/2006 while plucking tea. He filed Civil suit No. 160 of 2009 before the Hamisi Court and was awarded general damages of KShs.75,000/= less 30% contribution. The appellant is against that decision and contends in his memorandum of appeal that the apportionment of liability is contrary to the evidence on record, that there was no employment relationship between the appellant and the respondent, that there was no negligence on the part of the appellant and that the damages were excessive.

Counsels for both parties agreed to file written submissions to argue the appeal. I have gone through the submissions of the parties and the appellant contends that it was not the employer of the respondent. The respondent was using a knife when he cut himself and negligence cannot be attributed to the respondent. It is also stated that the damages awarded were excessive. On his part counsel for the respondent urges the court to uphold the findings of the trial magistrate. It is contended that the appellant wanted to absolve itself from blame by introducing a contract between itself and **GEORGE WILLAMSON (K) LTD. COMPANY**. It is further submitted that the appellant was properly held liable and an award of KShs.350,000/= could have been the reasonable compensation.

I have gone through the record of appeal. The record of the trial court shows that three witnesses testified for the respondent. The respondent was PW1. His evidence is that on the material day he was pruning tea using a knife when the knife hit a dry stick and bounced. He was cut on his right leg. He reported to his supervisor and was taken to Kapsabet district hospital. He blamed the appellant for failing to provide him with gumboots and gloves. He had done the job for over 10 years. **PW2 DR. SAMUEL ALIDA** examined the respondent and summarised the injuries as a cut wound on the right leg. **PW3 JOSPHAT SAWE** was based at Kapsabet district hospital and stitched PW1's wound. The appellant called **JOSEPH KITUR**, its employee who testified as the defence witness. He testified that Kaimosi Tea Estate used to be managed by the Nandi County Council. All issues involving the staff were to be handled by the Nandi County Council.

The main issue for determination is whether there was negligence on the part of the appellant resulting to the occurring of the accident. The issue as to whether the respondent was employed by the appellant is a nonissue as it is clear that it is the appellant who used to pay the staff. The staff were not aware of the agreement between the appellant the Nandi County Council. On the manner in which the accident occurred it is clear to me it was a self-involved accident. The respondent was pruning tea using a knife when the knife hit a dry stick. It is alleged that he had no gumboots and gloves. That is how the accident occurred. The respondent was the one who was in control of the knife and ought to have exercised due care and diligence in carrying out his work. Had he done that the knife could not have jumped and hit his leg. The absence of gloves cannot be said to be the cause of the accident. Similarly the absence of gumboots cannot be the cause of the accident. The respondent himself was careless and cannot simply be compensated on the basis that there was negligence on the part of his employer. The

respondent's recourse is compensation through the Workmen Compensation Act. No amount of negligence can be attributed to the appellant. The respondent was to blame for the occurrence of the accident.

I do find that the trial court erred in law by attributing 70% negligence on the part of the appellant. The respondent was entirely to blame for the occurrence of the accident. He had done the work for about 10 years and was competent enough to handle the knife. The addition of gloves on his hands could not have helped as he is the one who caused the knife to hit the dry stick. In the end I do find that the appeal is merited and the same is allowed. The decision of the trial magistrate is hereby set aside. Each party shall meet its/his own costs of this appeal and the cost of the subordinate court case.

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

SAID J. CHITEMBWE

J U D G E