



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 631'B' OF 2008

MATHARA HOLDINGS LTD..... APPELLANT

VERSUS

DAVID OMWERI OINO..... RESPONDENT

(Being an appeal from the original Judgment in Limuru Senior Resident Magistrate's Court Civil Case No. 490 of 2005 by

Hon. A.O. Aminga - R.M. on 11/5/2005.

JUDGMENT

1. This appeal arises from the Judgment delivered by the learned Senior Resident Magistrate **A.O. Aminga** at Limuru Senior Resident Magistrate's Court on **11/5/2005** - SRM CC No. **490 of 2005**.
2. The respondent **David Omweri Oino** filed suit against the appellant **Mathara Holdings Ltd**. He sought to be paid damages on account of injuries that he alleges to have sustained while working at appellant's tea estate.
3. The respondent claimed that he was pruning tea in the appellant's farm when the knife slipped and cut him on the left leg on bouncing upon hitting a dry stick.
4. He blamed the appellant's firm for not issuing him with protective gear like gumboots. He alleged that the area where the incident occurred was sloppy and slippery and that it had been drizzling. He produced a treatment card from Seth Medical Clinic as an exhibit.
5. He called PW2 a medical practitioner one **Doctor C. Okere** who had examined him with a view of preparing a medical report. He produced medical report as exhibit 2 and confirmed that the respondent sustained a deep cut on the left knee.
6. In defence, the appellant denied that the respondent was their employee and that he got injured at their work place. The appellant through **Gichuki** (DW1), produced as exhibit 1 casual workers wage sheet. He also produced as exhibits labour allocation schedule, cash requests certificates and payment vouchers.
7. The trial magistrate in his considered judgment held that the respondent proved his case on balance of probabilities. He apportioned liabilities **30%** against the respondent and awarded him **Kshs.90,000/=** as general damages, special damages at **Kshs.8,500/=** plus interest and costs of the suit.
8. The appellant being aggrieved by the said decision appealed to this court. In its memorandum of appeal, it raised 10 grounds of appeal challenging the decision of the trial magistrate. It stated that, the magistrate failed to appreciate the nature of the respondent's claim against the appellant.
9. It stated that the trial magistrate disregarded a cardinal rule of evidence that he who asserts must prove thus the respondent was duty bound to prove that he was appellant's employee which he did not. It went ahead to state that the trial magistrate erred in finding the appellant owed a duty of care to the respondent.

10. The appellant blamed the trial magistrate for finding appellant negligent and/or that it had negligently contributed in the incident leading to respondent's injuries. It complained that the trial magistrate erred in finding that the exhibits produced by the appellant had been sneaked into evidence and were tailor made for the case. The appellant concluded by complaining that the trial magistrate erred in not finding that the respondent did not prove his case on a balance of probabilities and thus not entitled to the award made.
11. In the appellant's submissions, **Macharia Kahonge Advocate** for the appellant argue that (in grounds 1 to 4 combined) as their first limb of submission, the appellant produced documents to prove that the respondent was never appellant's employee. Such documents were; records of casual employees, cash request certificate and petty cash voucher.
12. It was submitted that the respondent did not rebut such evidence nor call a co-employee to confirm he worked for the appellant as an employee.
13. In the second limb of submission, appellant submits that, respondent having failed to prove he was appellant's employee then culpability in common law tort/negligence or statute cannot arise.
14. It was further submitted that, the respondent did not present a contract of employment by the appellant to support his claim. It was further submitted that, respondent was not operating on any machinery but was engaged in a simple task where he was in full control of the device he was using. And that he was in full control of the same and therefore not entitled to any damages thereof.
15. The appellant also attacked the award made by the trial magistrate on the basis that **Kshs.90,000/=** amount was not anchored on any authorities and that the figure was plucked from the air. The appellant feels that the award was inordinately high in all the circumstances.
16. The appellant attached and relied on the authority of **Civil Appeal No. 15 of 2003 at Kericho - Wilson Nyanyu Musigisi versus Sasini Tea and Coffee Ltd, (Kimaru J) where court held that;**

“where employee is engaged in manual labour that does not require any exceptional skills and injures himself, then that employee cannot hold his employer liable under statute or common law.”

The respondent has opposed the appeal herein and submitted that the same has no merit and should be dismissed with costs.

17. In his written submissions via Advocates **Mwangi Wahome** and Company, the respondent argues that, the appellant filed defence and denied that the respondent was their employee at the material date of the incident and also denied negligence on its part. It is submitted that appellant called one **Gichuki** during hearing of the suit, a farm manager at the material time. He produced documents to prove that the respondent was not appellant's employee at the material time and further alleged that at the material time there was no pruning going on.
18. The respondent submits that the evidence by the appellant aforesaid was suspicious and unreliable. He pointed out that, the documents produced as evidence were merely sneaked in at the stage of defence case. None of them had been used in cross-examining the respondent thus denying the respondent chance to comment on them or contradict them. It was also submitted that, the witness called was not the maker of the documents or their custodian.
19. It was further argued that the witness was not the immediate supervisor of the respondent but merely allocated duties to supervisors who in turn allocated duties to the employees such as the respondent. It was thus argued that none of such supervisors was called to testify in reinforcement of the appellant's case and thus the testimony was hearsay. It was further submitted that, the appellant did not rebut respondent's testimony to the effect that no formal employment contracts were signed with employees and that no identification job card was given to the respondent.
20. On quantum, the respondent submitted that, the trial magistrate relied on the authority of **Cathrine Wanjiru Kingori Versus Gibson Theuri Gichungi HCC. No 320 of 1998** in which an award of **Kshs. 250, 000/=** was made on similar injuries and thus respondent submits that an award of **Kshs. 90,000/=** was not inordinately high to warrant interference with the same award.
21. This being the first appeal, this court is under a duty to analyze and re-evaluate the evidence and consider facts and law to reach its independent decision. In reaching its decision this court is required by law to put in mind the fact that it neither saw nor heard the witnesses who testified

before the trial court (*see Selle versus Associated Motor Boat Company Ltd 1968 EA 123*).

In the instant appeal, there are two salient issues herein namely:-

- a. Whether the respondent was an employee of the appellant at the material day?
 - b. Whether the appellant was liable for negligence to the respondent's alleged injuries?
22. The respondent testified during the trial that, on **11/2/2005**, he was pruning tea using a knife. The pruning knife slipped and cut him on the left leg. The knife cut leg after bouncing upon hitting a dry stick. He stated that he was not issued with any employment identification and the register was kept by the supervisor.
23. On cross-examination he said that the appellant did not issue any documents and that he had nothing to show that he was employed. He said that gumboots would have prevented him from slipping before cutting himself. He admitted that he did not require any training to perform the pruning.
24. I have re-evaluated the evidence adduced by the respondent and considered the submissions filed herein by the appellant and the respondent. On the first issue as to whether the respondent was appellant's employee, the respondent testified that, he was a casual worker of the appellant and especially on 11/2/2005. He was not issued with employee's identification card. He stated that the supervisor kept employees register. In cross examination he said that he did not have any document to show that he was employed. He said the reason was that the employer was not issuing any documents to that effect.
25. The appellant via DW1 tea estate manager denied ever employing respondent as its employee. He produced employees wage sheet DEx1 among other documents. This was to prove that the respondent's name was not in the same document as an employee.
26. On cross examination he confirmed that he was not the maker of the documents and that the maker had not signed it. These were the documents which were never shown to the respondent during his testimony and were produced during hearing of defence despite respondent counsel objection. The documents raise doubt as to their authenticity and thus the evidential value is diminished. The appellant ought to have called the maker of the same, the supervisor(s) in charge of casual(s) on the material dates and casual(s) who were on duty to support the defence on the respondent status as to employment by the appellant.
27. The court agrees with the trial magistrate that the respondent was an employee at the material date and favours the respondent's version on the account of his employment by the appellant.
28. On the second issue as to whether the appellant was liable for negligence to the respondent's alleged injuries, the undisputed facts are that, he cut his left leg (left knee) by pruning knife when it hit a dry stick and bounced back. He contends that the appellant is to blame for not providing him with any protective devices.
29. The trial magistrate found that the appellant owed respondent a reasonable duty to provide protective gear like gum boots which would have minimized or prevent the effect of injuries like ones sustained by the respondent. The respondent admitted that he cut himself while pruning tea when the knife hit a dry stick and that the task he was undertaking required no training. He controlled the pruning knife and hit the dry stick. Where is the omission and/or commission by the appellant which could have prevented the cutting herein?
30. The respondent was undertaking manual work. He was not operating a machine. He was pruning tea using a knife. He controlled the rate and the mode of use of the knife. The respondent has not demonstrated how the provisions of protective gear and especially gum boots would have prevented the cutting of the knee upon the bouncing back of the pruning knife after hitting a dry stick. I agree with *Kimaru J in Kericho HCCA No. 15 of 2003 - Wilson Nyanyu Musigisi versus Sasini Tea and Coffee Ltd. at page 5 to 6*;

“This court wonders how the respondent can be made to be liable in the performance of such a manual task. The appellant was given a duty. He performed it badly. He injured himself. He now blames the respondent. In law only compensation that can be paid to the appellant is under workmen compensation Act. This act mandates the employer to pay his employee in case he is injured while

at his place of work. Such compensation is paid on NO FAULT basis.”

In the instant case, the respondent seeks compensation under common law of negligence. He is required to prove the blameworthiness of the employer which he has not.

31. In *Mumias Sugar Co. Ltd. versus Samson Muyinda - Kakamega HCCA 58 of 2000 (unreported)*, Waweru J held that;

“where an employee is engaged in manual labour that does not require any exceptional skill and injures himself, then that employee cannot hold his employer liable under statute or common law.”

In this case the respondent cannot blame anybody for injuring himself. He was in control of the pruning knife and it is not demonstrated how the employer could have helped to prevent the injuries sustained even with supply of the gum boots. In the above case, **Mumias Sugar Co Ltd, Waweru, J** continued to state;

“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.

...It was surely his duty to ensure that he does 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 was provided as a matter of course in similar work elsewhere.

There was no prove of hidden inherent danger in operation of cutting down cane of which the appellant ought to have warned the respondent...”

The above holding obtains in our instance case.

32. On this second issue the appellant succeeds and the court holds that the trial magistrate erred in blaming the appellant for the injuries sustained by the respondent. The court thus holds that the appeal has merit and therefore sets aside the entire judgment of the trial magistrate and substitutes the same with order dismissing the respondent suit.

33. As pertains to the issue as to costs, the court finds that the trial was delayed and prolonged by the appellant and also it is not clear as to whether the respondent has been paid under workmen compensation Act. In the circumstances of this case, the court orders each party to bear his own cost.

DATED and SIGNED at MACHAKOS this 17TH day of SEPTEMBER, 2014.

CHARLES KARIUKI

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI, this 18TH day of SEPTEMBER, 2014.

H.P.G. WAWERU

JUDGE