**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO. 253 OF 2011**

**KIPKEBE LIMITED…….....…….....……..APPELLANT**

**VERSUS**

**THOMAS AMORO NGARISA …….....…….RESPONDENT**

**(*Being an appeal from the judgment and Decree of Hon. J.WERE(SRM)***

***dated 10th day of November 2011 Keroka SRMCC.NO. 221 OF 2009)***

**JUDGMENT**

**Introduction**

1. The appellant **KIPKEBE LIMITED** was the Defendant before the trial court whilst the Respondent BENARD NYANDEGA NYAMBANE was the plaintiff. The learned trial magistrate held the appellant liable for the injuries which the Respondent sustained when while in the course of his employment with the Defendant at Kipkebe and when applying fertilizer he sustained chemical burns on both hands and as a consequence of which he suffered, pain, loss and damage.

2. The trial court held the appellant 60% to blame for the incident whilst the Respondent was to shoulder 40%. General damages were assessed in the sum of Kshs.100,000/-, special damages assessed in the sum of kshs.6,500/-. The respondent was awarded costs of the suit and interest at court rates.

3. The appellant was dissatisfied with the judgment and decree of the learned trial magistrate HON. WERE Senior Resident Magistrate dated and delivered on the 10th day of November, 2011 and filed the following grounds of appeal:-

i. **THAT the learned trial magistrate erred both in fact and in law when he entered judgment in favour of the Respondent who failed to discharge the burden of proof to the requisite standard.**
ii. **THAT the learned trial magistrate failed to properly evaluate evidence tendered before him.**
iii. **THAT the learned trial magistrate erred in law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained the purported injuries, in view of the fact that medical evidence adduced was insufficient and of no probative value.**
iv. **THAT the learned trial magistrate erred in law and in fact by awarding the Respondent general damages in the sum of kshs.100,000/- which damages were excessive in the circumstances and not proved at all.**
v. **THAT the learned trial magistrate erred in law and in fact by holding the appellant liable at 60% whereas the evidence on record did not disclose any negligence or breach of any duty of**

**care on the part of the appellant and neither was the same proved.**

vi. **THAT the learned trial magistrate erred in law and in fact by failing to dismiss the Respondent's suit with costs to the appellant.**

The appellant therefore prays that:-

i. **The judgment and/or decree of the learned trial magistrate dated 10th day of November, 2011 be set aside and/or quashed.**
ii. **The Honourable court be pleased to substitute an order dismissing the Respondent's suit in the subordinate court vide the original KEROKA SRMCC.NO. 221 OF 2009.**
iii. **Costs of the appeal herein and those incurred in the subordinate court be borne by the Respondent.**
iv. **Any such and/or further orders that the Honourable court shall deem just and expedient in the circumstance.**

**Issues for determination**

4. The appeal herein was canvassed by way of written submissions. The issues for determination raised by the appellant in his submissions are:

i. **Whether it was proved that the Respondent sustained the alleged injuries.**
ii. **Whether negligence and/or breach of duty was proved against the appellant.**
iii. **Whether the award in general damages was excessive as to warrant interference by this Honourable court.**

The submissions

5. On the 1st issue it is submitted by the appellant that the Respondent failed to discharge his burden of proof as stipulated under sections 107 and 108 of the Evidence Act.

6. Secondly it is the appellant's submission that the Respondent did not prove negligence or breach of contract or duty against the appellant. It is argued by the appellant that the Respondent was doing manual work of applying fertilizer and the same did not require any specialized skills or training. That the Respondent was in control of his work and if he did it negligently then he cannot blame the appellant for the injuries he sustained. The appellant further argues that not every accident at the place of work is necessarily as a result of employers breach of duty of care particularly like in the instant case where the employee was engaged in manual work that did not require exceptional skill.

7. Lastly on the issue of general damages the appellant have that the principles to be considered by an appellate court when considering whether to interfere with the trial court's assessment of damages are the following:-

i. **When the award is inordinately high or low as to represent an entirely erroneous estimate.**
ii. **The trial court proceeded on wrong principles, or misapprehended evidence in some material respect.**

8. It is argued for the appellant that as a matter of principle damages must be within limits set out by previous, comparable decided cases and also within limits the Kenyan economy can afford. That there must be uniformity in awards in cases involving similar injuries.

9. It is argued for the appellant that the following injuries:

- **Chemical Burns on both hands**
- **Chemical Burns on the Stomach**

do not indicate any anticipated permanent disability. That the trend is that in previous cases of injuries

similar in nature to those allegedly sustained by the Respondent herein an award of kshs.20,000/- to 50,000/- would suffice. It is argued by the appellant that there was therefore no basis whatsoever for awarding the sum of kshs.100,000/- which is excessive in the circumstances. It is further submitted for the appellant that an award of kshs.100,000/- was inordinately high, unjustified and not within the trend of comparable previous cases.

10. The Respondent on their part submitted on the first issue that the respondent proved his case on a balance of probability, based on a document LD 104/1 which was a notice by employer of an accident causing injury on a workman which confirmed that the Respondent was an employee of the appellant, that he was on duty on 24/04/2008 and that he sustained chemical burns while applying fertilizer to the field while in the appellant's employment and lastly that he was sent to Kipkebe Health Centre by the appellant for treatment.

11. Secondly it is the Respondents submissions that they proved that he sustained injuries while in the appellants employment by producing the following documents in evidence before the trial magistrate:

i. **LD form 104/1 PH. Exhibit.3.**
ii. **Treatment Card PH Exhibit.2**
iii. **Medical report PH Exhibit.4.**

12. Lastly on the issue of whether the appellant was negligent it is submitted for the respondent that the appellant was negligent because it did not supply a helmet to the respondent to enable him carry out the duties he was assigned by the appellant and to do so in safety.

13. On the issue as to whether general damages of kshs.100,000/- was excessive it is submitted for the Respondent that the principles to be observed by an appellate court in deciding whether it is justified in disturbing quantum of damages are now well settled. These are that the appellate court must be satisfied that either the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant factor or that short of this, the amount is so inordinately low or so inordinately high that it presents a wholly erroneous estimate of damages.

14. It is submitted or the Respondent that there is nothing to warrant disturbing damages as awarded and thus the appeal should fail in its entirety with costs to the Respondent and interest to run on the award issued from 15th November, 2011.

**Duty of this court**

15. Before considering the merits of this appeal and being the first appellate court it is prudent to re-evaluate all the evidence on record and to draw my own conclusions. From the record, the Respondent herein had two witnesses who testified on his behalf.

**The Respondent's case**

16. PW1 THOMAS AMORO NGARISA told the trial court that on 24th April, 2008 he was on duty at Kipkebe Tea Factory where he was an employee. He produced a copy of his payslip being PExhibit.1(a) for the month of November 2008 and another for 1995 Pexhibit 1(b) as proof of his employment. He testified that he was applying fertilizer on the tea. While doing so it burnt both his left and right hands and also burned the stomach. He said that he blamed the appellant for the injury he suffered because he was not given gloves to use which would have protected him from being burnt by the fertilizer. He also told the trial court that he needed an apron to protect his stomach which the appellant did not supply as it was the appellant's duty so to supply.

17. The Respondent testified that Peter Okeri was his supervisor and that he was sent to Kipkebe dispensary where he was treated and discharged. He told the trial court that the original of the treatment card was with the company but he only managed to bring a photocopy of the same MFI 1-2. He added that an LD 104 form was filled for him but he only managed to bring a copy as the original remained with

his employed (MFI. 1-3). He also testified that he was seen by Dr. Ajuoga who prepared a medical report for him and which cost him kshs.6500/-. He produced the medical report and receipt in evidence as Exhibit 5. He concluded by saying that he had not fully healed as he still had pain on the injury site. He prayed for compensation for the injury and sought the costs of the suit and interest.

18. During cross-examination the Respondent confirmed that he was injured while applying fertilizer on the 24/4/2008. He confirmed also that he had no gloves or apron while working. He stated that it was his first time to apply fertilizer at Kipkebe as he had been removed from plucking tea. He had no documentary evidence to show the transfer but told the court that he was a casual employee; and that he He was asked to assist because there were few people that day. He reiterated his earlier statement on cross examination.

19. In re-exam he reiterated that he was injured by the fertilizer. He further testified that he was seen by Dr. Ajuoga and he blamed the appellant for the injuries he suffered.

20. Pw2 Dr. P.M Ajuoga a consultant surgeon told the court that he examined THOMAS AMORO who had a history of an accident on 24th November, 2008. He explained that the Respondent suffered chemical burns on both hands and abdomen. That on examination he had severe S.T.I though he had healed with no permanent disability. He told the court that he charged Kshs. 6,500/=. He also testified that he had used the treatment card for Kipkebe health facility in filling the LD 104 part II. He produced the medical report and receipt in evidence PEx4

21. On cross examination Dr. Ajuoga told the court that he did not treat the Respondent and he could therefore not tell the authenticity of the documents he was relying on. He told the trial court that he saw the Respondent one (1) year after the said accident.

22. PW3 Peter M. Mokaya told the court that the Respondent suffered from chemical burns for which he produced the treatment card showing that the Respondent was attended to on the 24/4/2008. The card was marked as PEx2 and it was signed by PW3 who attended to Respondent at the Factory Clinic.

**The Appellant's case**

23. DW1 JOSEPH MBUGUA was the first to testify on behalf of the appellant. He told the court that he was a check roll clerk and had worked for the company for 15 years. He confirmed to the court that he knew the Respondent who was a tea plucker at the Factory. He further told the court that he had records of the 24/4/2008 which confirmed that the Respondent was on duty that day and he plucked 33 Kgs of tea. He however denied the Respondent that was injured and that he went to hospital that day. According to his records, namely the attendance register the Respondent did not report any injury nor ask for permission to go for treatment.

24. DW1 also testified that the Respondent could not have been treated for injuries at the appellant's dispensary without his knowledge. On cross-examination DW1 confirmed that the Respondent was an employee of the appellant company and that he was on duty on that material day.

25. DW2 DAUDI KIPCHIRCHIR KOECH told the court that he was a clinical officer at Kipkebe Limited where he treated employees and kept the documents O.P.D. register and treatment cards. He testified that in the O.P.D. register he entered the records for patients seen on each day and it was not possible to treat patients and fail to record in the register. He testified that on the 24/4/2008 they did treat the Respondent at their clinic. He produced his register for 24/4/2008 which he said showed that the Respondent was not treated at the company clinic that day. He said he had treated 20 other patients. He produced a copy of the O.P.D. register DEx 2.

**Judgment of the Trial Court**

26. On the issue on liability the learned trial magistrate found that on a balance of probability the Respondent was injured on the material day. He also found that from the evidence the Respondent had

worked with the Appellant since 1995 and he had always worked as a tea plucker and that it was his first time to apply fertilizer. The trial court found that on that material day the Respondent had not been supplied with gloves or apron and as a result he suffered chemical burns in the hands and the stomach. The trial Court also stated that the Respondent must have been aware that pluckers would keep off the field whenever the fertilizer had been applied for the very reason that it was harmful on contact, with the exposed body and also if inhaled. The court stated that it was the duty of the Respondent to insist on being provided with gloves and apron amongst other items but there was no evidence that he did so. Further the trial court found that the Respondent's failure to ask for the protective clothing did not absolve the appellants from the responsibility to provide the protective gear to its workers even without being compelled by the workers. The court found that there was no evidence or register produced to show that the appellant provided the said essential protective gear to her workers. After making the above considerations he apportioned liability at 60:40 in favor of the Respondent.

**Findings**

27. I do appreciate the reasoning by the trial magistrate. It is my considered view that the Respondent should have been more vigilant when carrying out the duty of applying fertilizer, but it would have even been more appropriate if he had been given the protective gear to wear. If he had been supplied with the same, the protective gear could have protected the Respondent from the said burns.I am not saying that the protective gear is 100% secure but it could have protected the plaintiff to some extent.

28. In my considered opinion therefore, the Respondent proved that his injury was caused by an event which was reasonably foreseeable and which could have been prevented by the appellant by taking reasonable precaution. In MUMIAS SUGAR CO. LTD –VS- GEORGE MULUNDA MAENDE(KAKAMEGA) CIVIL APPEAL NO. 20 OF 2001 the High court expressed itself in the following manner

**"The Respondent was cutting cane with a panga. He had the skill to do so and had cut cane for four(4) years without gloves and without any accident. It is patent that the absence of gloves did not cause the accident. The absence of gloves may have exacerbated the injury as the panga hit the hand directly".**

29. I am in full agreement with the above finding. As concerns the circumstances herein, the Respondent was working for the first time in that section therefore he may not have had the expertise or knowledge about the effects of the chemicals he was using. Having said that I find no good reason in law or in fact to interfere with the issue on liability.

30. Finally on the issue of quantum I find no reason in law or in fact for interfering with the award of kshs.100,000/- as the same is neither inordinately high nor low. It has been proved that the Respondent was an employee of the appellant company. He was on duty on that fateful day and it was his first time to work in that particular section. The doctor also confirmed that the Respondent suffered seven soft tissue injuries.

31. The company therefore had a duty to the Respondent considering that he was working in a new section. This duty was breached thus the injuries sustained by him which have been proved by Dr. Ajuoga(PW2) were as a result of the said breach. The clinical officer (DW2) could not have examined the Respondent on that fateful day because he (DW2) was not on duty.

**Conclusion**

32. I find that the appeal herein lacks merit and the same is dismissed with costs to the respondent.

**Dated and delivered at Kisii this 23rd day of October, 2014**

**R.N.SITATI**

**JUDGE.**

In the presence of:-

Mr. Soire h/b for O.m Otieno for the Appellant.

Mr. Nyangosi (present) for the Respondent

Mr. Bibu - Court Clerk.