



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 256 OF 2008**

**AL'S REFRIGERATION LIMITED.....APPELLANT**

**VERSUS**

**TERESIA NJOKI NJAAMUNYI**

**EAST AFRICAN GROWERS LIMITED.....RESPONDENTS**

(Appeal from original judgment and decree in Milimani Commercial Courts Nairobi, CMCC No. 574 of 2004 delivered on 18<sup>th</sup> April, 2008 by Hon. Mr. Were)

**JUDGMENT**

1. The 1<sup>st</sup> respondent sued the appellant and 2<sup>nd</sup> respondent seeking compensation following an industrial accident that occurred on 4<sup>th</sup> May, 2003. The trial court found the appellant fully liable and awarded the 1<sup>st</sup> respondent KShs. 80,000/= in general damages and KShs.2000/= special damages.

2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

*i The learned trial magistrate erred in law and in fact in finding the appellant fully liable for the incident that occurred on 4<sup>th</sup> May, 2003 and the subsequent injuries sustained by the plaintiff.*

*ii The learned trial magistrate erred in law and in fact in failing to consider the fact that second respondent gave no evidence on whether or not the memorandum dated 2<sup>nd</sup> May, 2003 was brought to the attention of the second respondent's employees.*

*iii The learned trial magistrate erred in failing to appreciate that the memorandum dated 2<sup>nd</sup> May, 2003 was given by the first respondent to the appellant as a confirmation that there would be no employees during the maintenance of 4<sup>th</sup> May, 2003.*

*iv The learned trial magistrate erred in failing to consider the fact the second respondent did not provide protective gear to the first respondent and its other employees.*

*v The learned trial magistrate erred in law and in fact in failing to make an adverse inference against the second respondent who failed to call key witnesses to testify during the hearing.*

*vi The learned trial magistrate erred in fact and in law in holding that Mr. Mwangi, an*

*employee of the second respondent was under the control and supervision of the appellant's witness during the maintenance on 4<sup>th</sup> May, 2003.*

*vii The learned trial magistrate erred in holding that the appellant's witness did not place any responsibility on the aforesaid Mr. Mwangi in the exposure of ammonia gas on the 4<sup>th</sup> May, 2003.*

*viii The entire judgment in the circumstances was erroneous for the following reasons:*

*a. The judgment is not in accordance with the Civil Procedure Rules*

*b. The learned trial magistrate failed to consider which party had the burden of proving each matter in issue*

*c. The judgment is not supported by evidence tendered by the parties*

*ix The damages awarded are excessive.*

3. The 1<sup>st</sup> respondent testified that she was on the material day working under supervision of the 2<sup>nd</sup> respondent when the supervisor Mary Anyango alerted her that they should leave the premises due to ammonia leakage. She stated that the only protective gears she had on was a dust coat. PW2, Dr. Kiama Wangai produced a medical report and confirmed the 1<sup>st</sup> respondent's injuries as blunt vision and photophobia, difficulty in breathing chest pain and cough. His prognosis was that the injuries were caused by inhalation of ammonia gas.

4. DW1, Johnstone Papale Shivachi and DW2, James Kungu Ndatake testified that there were notices issued to the employees and that no employee was to be at work on the day maintenance was being done.

5. It was the appellant's contention in its submissions that there was no employer-employee contract between it and the 1<sup>st</sup> respondent therefore it was not liable. On this point it relied on numerous authorities thus:

*i Selle v. Associated Motor Boat Co.& Others (1968) E A 123*

*ii Melitus v. Kericho Highland Service Co. Ltd (1971)EA 318*

*iii Uganda Commercial Bank v. Kigozi (2002)1EA 302*

*iv McDermid v. Nash Dredging and Reclamation Co. Ltd (1987) 1 All ER 878*

6. That the appellant could do nothing more than giving notices as they did to alert the workers not to visit the area during maintenance. The appellant argued that the workers were provided with protective gears during working hours and that on the material day, the 1<sup>st</sup> respondent was at work willingly despite the memorandum alerting the workers on maintenance having been issued. On quantum, it was the appellant's argument that the award was too high considering that the 1<sup>st</sup> respondent suffered minor injuries.

7. The 2<sup>nd</sup> respondent on its part argued that it took precautionary measure by giving a notice of the likelihood of ammonia gas emission on the material day. It relied on several authorities to attribute liability to the appellant.

8. I am fortified by the case of *Nawiundu v. A.G (1972) E.A P. 108* where Salmond on Torts 15<sup>th</sup> Ed at page 620 was quoted as follows:

*“It is clear that the master is responsible for acts actually authorized by him for liability won’t exist in this case even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as models although models of doing them. In other words, a master is responsible not only for what he authorizes his servant to do, but also for the way in which he does it.*

*If a servant does negligently that which he was authorized to do carefully or if he does fraudulently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master, will answer for that negligence, fraud or mistake...”*

9. The appellant was doing maintenance work under instructions of the 2<sup>nd</sup> respondent. In the circumstances I find that the appellant was liable for the accident and uphold the judgment of the trial court. On quantum I have considered the age of the cited authorities and the nature of the injury and I find the award to be reasonable.

Dated, Signed and delivered in open court this 14<sup>th</sup> of November, 2014.

J.K.SERGON

**JUDGE**

In the presence of:

.....for the Appellant

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent