



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. 90 OF 2011

KAIMOSI TEA ESTATES LTD

(KIBORGOK TEA ESTATE) **APPELLANT**

VERSUS

SAMWEL MUSULUMA MAHAVI RESPONDENT

(Being an appeal from the judgement and decree of Hon. P.A. Olengo Senior Resident Magistrate in Hamisi Chief Resident Magistrate Case No. 105 of 2009 dated 9th June 2011)

(Before B. Thurania Jaden J)

J U D G M E N T

The Respondent, **Samuel Musulima Mahasi** on 24/9/2009 filed suit against the Appellant, **Kaimosi Tea Estates Ltd (Kiborgok Tea Estate)** seeking to be paid damages on account of injuries which he claimed to have sustained while in the employment of the appellant on or about 23/6/2005. The Respondent blamed the injuries on the appellant, stating that the appellant, its servants or agents were in breach of the contract of employment.

The claim was denied through the statement of defence filed by the appellant. According to the appellant, if the alleged accident occurred, it was wholly caused and/or substantially contributed to by the plaintiff's negligence or breach of contract. The appellant averred that the Respondent's case was statute barred under the **Limitation of Actions Act, Cap 22 Laws of Kenya**.

The Respondent in his reply to the defence however denied the allegations of negligence attributed to him.

After a full trial, the trial magistrate found the case had been proved on a balance of probability. The trial magistrate in his judgment apportioned liability at 80% against the defendant and proceeded to award general damages at Kshs.70,000/= and special damages Kshs.1,500/=. After taking into account the 20% contribution, judgment was entered in favour of the Respondent at Kshs.57,200/= plus costs and interests.

The appellant was aggrieved by the said judgment and appealed to this court on the following grounds:-

1. **THAT the learned trial magistrate erred in law and in fact in holding the appellant liable at the ratio of or at all in view of the evidence on record.**

2. **THAT** the learned trial magistrate erred in law and in fact in failing to hold that the respondent had failed to establish that he was an employee of the appellant herein and thereby failing to establish Nexus.
3. **THAT** the learned trial magistrate erred in law and in fact in failing to hold that there was no evidence adduced by the respondent to show that indeed the alleged injuries were sustained while in the course of employment with the appellant.
4. **THAT** the learned trial magistrate erred in law and fact in apportioning liability contrary to the laid down principles of negligence when none was proved by the respondent.
5. **THAT** the learned trial magistrate erred in law and fact in failing to take into account the evidence by the appellant's witnesses.
6. **THAT** the learned trial magistrate erred in law and fact in failing to hold that the respondent had not proved his case on a balance of probability against the appellant.

The respondent's evidence was that on 23/6/2005 he was working for the appellant at **Kiborgok** Tea Estate. While plucking tea, he fell into a hole and sustained injuries. He was treated at **Kapsabet** District Hospital and thereafter a medical report prepared by **Dr. Aluda**. The Respondent blamed the appellant for not having supplied him with protective clothing like gumboots, overalls or gloves. The respondent also blamed the appellant for failure to erect any signboards to give a warning regarding the presence of the hole.

PW2 **Dr Samuel Aluda** produced a medical report which reflected that the respondent had suffered blunt trauma to the chest and the spinal column. He also produced a receipt for Kshs.1,500/= for his charges for making the medical report. PW1 **Josphat Same** a clinical officer who treated the respondent produced the treatment notes as an exhibit.

The defence evidence in **RMCC Hamisi 102/09** was adopted as the defence in **RMCC 105/09** which is the subject of this appeal.

DW1 **Alfred Shikuu** a supervisor at **Kiborgok** Tea Estate gave evidence relating to the year 2003. The material date herein is 23/6/2005.

DW2 **George Ataya otieno** produced the check roll record for June 2005. The checkroll record was for casual workers only and did not contain entries for permanent employees. The Respondent's name was not reflected therein.

DW3 **Brigit Vichinya** a nurse at the appellant's dispensary produced the "**daily sick register**" for June 2005 and stated that no patient was treated at the dispensary on the 23rd June 2005 (material date).

The respondent's case was that he was at **Kapsabet** District Hospital. The evidence adduced by DW2 **George Ayaya Otieno** was not comprehensive enough to cover all the work registers. The evidence of the nurse (DW3) included all the registers at the dispensary.

The respondent's evidence in respect of his employment status was in my view more probable than the evidence adduced by the appellant. Although the copy of the NSSF card produced by the respondent reflected that the respondent's employer was **Kitet** Tea Estate, the respondent however clarified that he was working for the appellant on the material date.

On the other hand, the evidence of the respondent on how the accident occurred was very sketchy and contained no details of the kind of hole he fell into and what caused him to fall into the hole. The respondent's account of evidence relating to the accident was as follows:-

"I was plucking tea when I fell down with tea on my back. I fell into a hole. I got injured and I went to Kapsabet District Hospital."

During cross-examination the respondent stated that he did not know of the existence of the hole. Without any description of the hole it is not clear whether a warning sign was required or why the respondent did not see the hole in the first place. It is also not clear how gloves, gumboots, overalls or any other protective gear would have saved the situation. The plaintiff's evidence failed to prove any negligence or breach of contract on the appellant's part.

The accident herein occurred on 23/6/2005 according to the pleadings and the evidence adduced in support thereof. The plaint is dated 18/9/2009 and was filed in court on 24/9/2009. This is a period of more than four years. Under the provisions of **section 4 (2)** of the **Limitation of actions Act Cap 22 Laws of Kenya**, a claim based on the tort of negligence ought to be filed in court within three years of the occurrence of the accident.

The respondent's claim was however based on contract. The limitation period in contract is six years. The respondent's suit was therefore not time barred.

However, having arrived at the conclusion that the respondent failed to prove his case on a balance of probabilities, I allow the appeal with costs to the appellant.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 18th day of April 2013.

SAID J. CHITEMBWE

JUDGE