REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 91 OF 2011

1. **KAIMOSI TEA ESTATE**
2. **KIBORGOK TEA ESTATE ……..……..……..…… APPELLANT**

VERSUS

LIFREDA MIDEVA. ……..…….……. RESPONDENT

(Being an appeal from the decision of Hon. P.A Olengo Senior Resident Magistrate in Hamisi Senior Resident Magistrate Civil Case No. 102 of 2011)

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(Before B. Thuranira Jaden J)

J U D G M E N T

The respondent **Lifreda Mideva** filed suit against the appellant, **Kaimosi Tea Estates Ltd (Kiborgok Tea Estate)** seeking to be paid damages for injuries she alleged to have suffered on or about 23/6/2005 while working for the appellant. The respondent blamed the accident on the breach of contract of employment by the appellant, its servants and/or employees.

The appellant filed a statement of defence and denied the respondent's claim.

After hearing the case, the trial magistrate apportioned liability at 20% against the respondent and 80% against the appellant. A sum of Kshs.70,000/= was awarded as general damages less the 20% contributed negligence.

The appellant was aggrieved by the judgment and appealed in 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 80% 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 was not an employee of the appellant.**
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 injuries were sustained while in the course of employment.**
4. **THAT the learned trial magistrate erred in law and fact in failing to hold that the respondent had not proved her case on a balance of probability against the appellant.**
5. **THAT the learned trial magistrate erred in law and fact in attributing liability contrary to the laid down principles of negligence.**
6. **THAT the learned trial magistrate erred in law and fact in failing to dismiss the**

respondent's claim".

The appeal was canvassed by way of written submissions. The firm of **Onyinkwa Advocates** appeared for the appellant while the firm of **Z.K. Yego Advocates** appeared for the respondent. I have duly considered the said submissions.

> **"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."** ***(See Selle & Another)"***

The Respondent, Lifreda Mideva testified as PW3 before the lower court. The respondent's evidence was that she was working for the defendant company plucking tea. That on 25/6/2005 she slipped and fell down after stepping on tea sticks which had been pruned. According to the respondent she was wearing slippers at the material time. The respondent was treated at **Kapsabet District Hospital** and later examined by a doctor who made a medical report. The respondent blamed the defendant for not having supplied her with gloves, overalls and gumboots.

PW2 **Josephat Sawe** a clinical officer at **Kapsabet Hospital** testified that he treated the respondent on the material date for 2 deep cuts on the right thigh. The treatment chit was produced as an exhibit.

DW3 **Dr Samuel Aluda** testified that he examined the respondent and made a medical report. He produced the medical report as an exhibit. According to the doctor, the respondent had sustained a deep cut wound on the right thigh about 6 cm long.

On the appellant's side, DW1 **Alfred Shiluya** testified that the respondent had worked for the defendant for the part of the year 2003. He produced a muster roll that reflected that the respondent did not work for the defendant in June 2003. Although the respondent's claim was however for the year 2005, DW1 stated that the respondent did not work for the defendant in the year 2005.

DW2 **George Ataya Otieno** a check roll clerk at the appellant's company produced a payroll register for the month of June 2005 for casual workers. DW2 stated that the respondent was not a permanent employee. The payroll register for permanent employees was not produced. DW3 a nurse at the appellant's dispensary testified that nobody was treated at that dispensary on the material date (23/7/2005). She produced as an exhibit a "**daily sick register"** for the material date. The respondent's name was not on the said register. The entries in the register were however made by another nurse by the name **Everlyne Koyi**.

Having re-evaluated the evidence adduced before the lower court, I come to the conclusion that the respondent was one of the defendant's employees. The respondent's evidence is that she was an employee of the Appellant. The respondent gave the name of her supervisor as **Alfred Shekuya**. The said supervisor stated that the respondent did not work for the appellant in the year 2005, yet he failed to produce the muster roll for the year 2005 and instead produced a master roll for the year 2003.

DW 2 **George Ataya Otieno** produced the payroll for June 2005 for casual workers only. The payroll register for permanent workers was not produced.

Failure to produce the muster roll and the payroll register for all the defendant's workers at the material time can only be construed to mean the same were adverse to the appellant's case. The respondent's evidence on the treatment received was that she was treated at **Kapsabet Dispensary** which was nearer. This explanation was reasonable. Although the respondent testified that she had not been supplied with

gloves, overalls and gumboots, the appellant's witnesses made no mention of the matter. The gumboots could have enabled the respondent to have a better grip of the slippery surface.

The respondent filed suit on 24/9/2009. The material date is stated as 23/6/2005. This is a period of about four years. The respondent's suit is based on a breach of contract where the limitation period is six years.

In the upshot, I arrive at the conclusion that the respondent's case was proved on a balance of probabilities. The appeal has no merits and is dismissed with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Kakamega this 29th day of May 2013.

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SAID J. CHITEMBWE

JUDGE