REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 41 OF 2010

PECHE FOODS FACTORY…….....……..PLAINTIFF

VERSUS

JACKTONE OCHIENG ONYANGO…….....……..……DEFENDANT

J U D G M E N T

The appellant herein was dissatisfied with the judgment delivered on 18-3-2010 in which the appellant was demanded that it pays the respondent the sum of Kshs. 77,775/= together with costs and interest. The appellant has filed six grounds of appeal namely:-

1. The learned trial magistrate grossly misdirected himself in treating the evidence and submission on liability before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.

3. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.

4. The learned trial magistrate erred in apportioning liability on the appellant whilst it was established that the plaintiff was not on duty with the appellant on the material date.

5. The learned trial magistrate did not or did not appropriately consider the testimony of the appellant's witnesses and thus arrived at a decision on liability that is wholly unsustainable in law.

6. The learned trial magistrate failed to apply his mind judicially and thereby arrived at a decision on liability that is wholly erroneous.

Essentially the main grounds are on apportionment of liability and whether or not the trial court took into consideration the totality of evidence adduced before it and whether it arrived at the decision on sound principles of law.

The brief facts are that the respondent had been employed by the appellant in its fish processing factory. On 18-4-2005 while filleting fish the respondent sustained injury when he cut himself with a knife he was using. According to the injuries as per the medical report by Dr. Nyamogo he had a deep cut on the left hand specifically the mid and proximal phalanx of the 2nd left hand finger. His evidence was that he was never provided with hand gloves which would have mitigated his injuries. The defendant on the other

hand gave his evidence where he alleged that the respondent was indeed employed as a casual labourer. It acknowledged that the respondent was provided with the necessary working tools and went ahead to produce the exhibits showing the same. At the end of the trial the parties put in written submissions and the court in its judgment apportioned liability at 15% against the appellant and 85% in favour of the respondent. The damages was assessed at Kshs. 90,000/=. The said judgment provoked this appeal.

The issue of whether or not the respondent worked for the appellant was settled at the lower court. The exhibit relied on by the parties clearly showed that the respondent was an employee of the appellant. Secondly, the date of the alleged accident seemed to have been contested by the parties. According to the pleadings (plaint) the accident occurred on 18-4-2005 but during the trial it emerged that the accident occurred on 16-4-2005. The trial magistrate agreed that indeed the accident occurred on 16-4-2005. I don't think such difference prejudiced the parties in any way. The appellant documentation showed that an accident occurred which involved the respondent while he was on duty on 16-4-2005 and not 18-4-2005. That admission is sufficient to deny the appellant any opposition that any miscarriage of justice was occasioned to it.

The big question to answer though is who was liable for the said accident. In his evidence the respondent said **"That day as I cut fish a knife cut my 4th finger in the left hand. I had not been given glove. That day I was not provided with"**. In cross examination he said **"I was cutting fish. The effort used was mine".**

The trial magistrate found for a fact that the respondent was injured. In his plaint the respondent alleged that he was not given protective gear or tools while on duty.

I have however perused the evidence and in particular exhibit D1 and its clear that on 16-4-2005 the respondent was supplied with uniforms, gumboots, water proof aprons, industrial gloves and mouth piece. He signed for them. The magistrate equally came to the same conclusion. It is therefore not true that he was not given the working tools as he has alleged in his plaint and on oral evidence in court.

Was the appellant therefore liable for the accident? The answer is no. The respondent was in physical control of the knife and not the appellant. As quoted earlier, the respondent on cross examination admitted that the effort was his.

The appellant's duty of providing the respondent with the working tools in this case mitigates or shields it from any liability. I find that what the appellant had done was within its statutory duty.

In buttressing the above position I shall quote the persuasive authorities in support namely:-

Wilson Nyanyu Musigisi –VS- Sasini Tea & Coffee Ltd Civil Appeal No. 15 of 2003, Kericho where justice Kimaru said:-

"The appellant admitted that at all times he was in full control of the slasher. This court does not see how such clear fact can by any stretch of imagination be described as disclosing culpability on the part of the respondent. The appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. 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 badly. He injured himself, he now blames the respondent".

In **Samson Muyinda-VS- Mumias Sugar Co. Ltd HCCC No. 58 of 2000 in Kakamega** the honourable justice Waweru said:-

"The respondent work for which he was engaged involved cutting sugarcane in an open field using a sharp 'panga'. No machinery of any type was used in this exercise. He would hold a cane in one hand and cut it, cut its lowest and points with the panga in the other hand. It was a simple operation of which the respondent had full command and control of. It was surely his duty to

ensure that he didn't cut himself with the panga.

No evidence was led that in that type of worked there was reasonable necessity of any type of protective clothing or that the same were provided as a matter of course in similar work elsewhere. There was no proof of hidden danger in the operation of cutting down cane of which the appellant ought to have warned the respondent. To ensure that he didn't cut himself with the panga was a matter that was peculiarly within the power and control of the respondent".

I would not add more. The respondent was in control of the knife. The work was manual. There was no other party holding the knife and exerting and directing the pressure of the same towards the fish. He was in control of his own limbs and body motion. The appellant wasn't. The appellant had done all that he was required to do. The respondent had 8 months experience. I find that he was 100% liable for causing the accident.

Having found that, there is no need of dealing with the issue of quantum although had I to proceed to determine the same would have reduced it to Kshs. 50,000/= taking into consideration the inflation and the related economic situation in this country.

I shall proceed to allow the appeal. The appellant shall have the costs of this application.

Dated, signed and delivered at Kisumu this 20th day of January, 2012.

H.K. CHEMITEI
JUDGE

HKC/va