



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 142 of 2003

NANDI TEA ESTATES LIMITED.....APPELLANT

VERSUS

HENRY KIPROTICH TANUI.....RESPONDENT

(Being an appeal from the judgment of the Hon. Principal Magistrate,

F. A. Mabele, dated 20th November, 2003 in KAPSABET PMCC NO. 89 of 2001)

JUDGMENT

This appeal is from the judgment and decree of the learned Principal Magistrate, **F. A. Mabele**, dated 20th November, 2003, in Kapsabet Principal Magistrate's Court, Civil Case No. 89 of 2000. The appellant, **Nandi Tea Estate Co. Ltd**, was the defendant and the respondent, **Henry Kiprotich Tanui**, was the plaintiff. The learned Principal Magistrate awarded the respondent Kshs 200,000/= as general damages for pain and suffering and Kshs 1,660/= as special damages for an injury sustained by the respondent in the course of his employment with the appellant. That decision triggered this appeal.

The respondent pleaded that on or about 29th March, 2000, he was injured in the cause of his employment of pruning tea due to the negligence and breach of contract of employment and or the terms thereof on the part of the appellant, its servants or agents. In the particulars of negligence, the respondent alleged that the appellant failed to take adequate measures to ensure that the respondent was safe while engaged in his employment and further that it failed to provide protective clothing and gloves. As a result of the said accident, so the respondent pleaded, he sustained very serious injuries to wit, traumatic amputation of the left thumb, severe loss of blood and severe pain.

The appellant delivered a defence in which it, *inter alia*, denied that the respondent was its employee and that he was injured as alleged. The appellant also denied the particulars of negligence and the injuries. In the alternative, it pleaded that if any accident occurred, the same was solely and/or substantially contributed to by the respondent's negligence in that:-

- > He engaged in an occupation he was not commissioned and or permitted to carry on;
- > That he failed and or refused to adorn the protective regalia provided to him by the appellant;

- > That he failed to concentrate on his work;
- > That he failed to appreciate the hazard posed by the sharp tools that he was using;
- > That he deliberately exposed himself to the risk of injury that he knew or ought to have known to have existed in the circumstances and inflicted the injury upon himself.

At the trial, the respondent testified that on the material date, he was assigned the duty of preparing poles for use. While so engaged, wind pushed the stem of a tree that he was cutting and the panga he was using slipped and cut him on the left thumb almost severing it. He was taken to Nandi Hills District hospital where he received treatment and the thumb amputated. He received further treatment at Moi Teaching and Referral Hospital and was later examined by Dr. **S. Aluda** who prepared a medical report of the injury. The report was produced by consent. He blamed the appellant because it did not furnish him with proper apparel such as gloves.

The appellant's case was presented through **David Kebenei**, (D.W.1), its Supervisor, **Daniel Táchira** (D.W.2), the respondent's co-worker, and **Obadiah Sang**, (D.W.3), the appellant's Clinical Officer. D.W.1 acknowledged that the respondent on the material date cut his thumb while cutting posts but that the same was due to his negligence. In his view, gloves would not have prevented the injury but would have made it more likely. D.W.2 supported the testimony of D.W.1. He reiterated that the respondent was not cautious while working and that gloves would not have been of much help. D.W.3 testified that on the material date, he attended to the respondent who had cut himself.

In his judgment, the learned Principal Magistrate concluded that the appellant was 100% liable in negligence notwithstanding that he had not amended his plaint to correct what he was doing at the time he was injured. He made that conclusion because, in his view, the appellant had not supplied the respondent with gloves.

The grounds of appeal as set out in the memorandum thereof raise one principal issue that the learned Principal Magistrate erred in law and in fact in finding the appellant 100% liable because:-

- **First; evidence showed that the respondent substantially contributed to the injuries;**
- **Secondly; he had conceded some level of contribution in his submissions; and**
- **Thirdly; that the appellant had demonstrated that the respondent was liable in negligence.**

The appellant has also challenged the learned Magistrate's findings that the disparities between the respondent's evidence and the pleadings could be cured by amendment when no application in that regard had been made. The appeal on quantum was abandoned at the hearing of this appeal.

I have perused the record of the trial court. I have also given due consideration to the grounds of appeal and the submissions of counsel. Having done so, I take the following view of the matter. Starting with the last ground, I agree with the general principle that a court should not exercise its power to order amendments *suo motu* after the trial except to correct minor slips and omissions which serve the purpose of perfecting the record. (See **Wareham t/a A.F. Wareham & 2 Others -vrs- Kenya Post Office Savings Bank [2004] 2 KLR 91.**) In this case however, the learned Principal Magistrate concluded that it did not matter that the respondent had pleaded having been cut while pruning tea but orally testified of having been cut while cutting posts. In the trial court's view, the disparity was not prejudicial to the appellant. I do not think much should turn on that disparity as in my view, the same is in the realm of a minor slip or error and the learned Principal Magistrate was entitled to proceed as if the amendment had been sought and granted.

Turning now to the principal complaint of the appellant that the learned principal Magistrate erred in law and in fact in his finding on liability, the following facts have emerged.

- The respondent pleaded, so far as material, that the appellant failed to provide him with protective clothing and gloves.
- At the trial, in the lower court, in his evidence in chief, he did not demonstrate how gloves would have prevented the injury he inflicted on himself.
- In cross-examination, he testified as follows in part:

“I was the one cutting the stick. It was

10.00 a.m. As I was holding the stick

to cut it, there was a lot of wind and

pushed the stick to one side from the top.

I had not looked up and when I tried

to cut the stick, the panga cut me.”

The respondent’s above testimony did not demonstrate that the failure to provide the gloves caused the accident. Indeed, save for merely saying that gloves should have been furnished, he did not, as his testimony shows, blame the appellant. The wind blew against the stick he was cutting and when he tried to cut it, he cut himself. In the language of **Waweru J** in the case of **Mumias Sugar Co. Ltd –vrs- Samson Munyinda, Kakamega HCCA No. 58 of 2000 (UR)**, the respondent was engaged in a simple operation of which he had full command and control. It was his duty to ensure that he did not cut himself with his panga. He did not lead evidence to show that in that type of work, there was reasonable necessity for wearing gloves or that in the tea industry or similar industry, gloves were furnished as a matter of course to employees engaged in cutting posts. There is no inherent danger in cutting posts with a panga and indeed such an exercise is carried out by many people in their ordinary lives without wearing gloves.

The appellant’s complaint on the findings on liability are buttressed by two further considerations. First, the appellant called three witnesses in support of its case. D.W.1 and D.W.2 testified that the injury the respondent suffered was self inflicted. Secondly, the appellant had specifically alleged negligence against the respondent particulars whereof it pleaded. The respondent did not in a reply deny those allegations and when he testified, he said nothing about those allegations.

The learned Principal Magistrate did not give any or adequate consideration to the above matters as he ought to have done. He therefore misapprehended the evidence adduced before him. I am in the premises entitled to interfere (See **Ephantus Mwangi & Another –vrs- Wambuga [1983 & 84] 2 KAR 100**).

The respondent failed, on a balance of probabilities, to establish negligence against the appellant. He did not also establish breach of any duty, statutory or otherwise on the part of the appellant. There was therefore no basis for awarding the respondent any damages.

The upshot is that this appeal is allowed. The judgment of the learned Principal Magistrate awarding to the respondent Kshs 200,000/= as general damages and Kshs 1,660/= as special damages plus costs and interest is set aside and is substituted with an order dismissing the respondent’s suit.

With regard to costs, it is my view that the same should not follow the event given the relationship that existed between the appellant and the respondent. Accordingly, I order that each party bears its own costs of this appeal and the suit before the learned principal Magistrate.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 8TH DAY OF MAY, 2012.

**F. AZANGALALA
JUDGE.**

Read in the presence of:

M/s Limo for the appellant.

**F. A. AZANGALALA
JUDGE**