REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

HCA NO.12 OF 2008

(Appeal from the Webuye Resident Magistrate Hon. Mr. J. O. Magori in CC No.238 of 2005)

WILLIAM NYONGESA WASILWA.....APPELLANT

VS

SHAJANAND INDUSTRIES LTD.....RESPONDENT

JUDGMENT

The Appellant's suit against the Respondent for general and special damages was dismissed with costs by the Resident Magistrate Court at Webuye on 4/3/2008. He had on 21/9/2005 filed a plaint claiming that while on duty at the Respondent's factory on 19/3/2004 he had been hit on the left ankle joint lateral aspect by a fork jembe and got injured. He blamed the Respondent in negligence for not providing or maintaining an adequate or suitable working system and environment, hence the accident. The Respondent filed a defence denying that the Appellant was its employee. It denied that the Appellant was at its factory on the material day or that the accident had happened. Lastly, the claim of negligence was denied. During trial, only the Appellant testified. Medical chits evidencing injury were produced by consent. The defence did not lead any evidence. The trial court found that the Appellant had not proved that he was employed by the Respondent. It was found that the medical chits were suspect. The case was dismissed with costs.

Mr. Onchiri for the Appellant and Mr. Owinyi for the Respondent filed written submissions on the appeal. Mr. Owinyi defended the judgment which Mr. Onchiri challenged. I have considered the entire record and the submissions of counsel. It is the responsibility of this court to subject the entire evidence to fresh and exhaustive scrutiny to be able to arrive at its own independent conclusions on the matter, but while appreciating that the trial court had the advantage of seeing and hearing the witness before it **(Peters v. Sunday Post Ltd [1958] EA 424).**

There is no dispute that the Appellant was under the duty to prove his claim and on balance of probability. He had the responsibility to prove that he was the employee of the Respondent and on duty at the time of the accident; that he was injured; and that the injury was caused by the negligence acts of the Respondent by itself, or through its agents and employees. Mr. Onchiri took the position that the

Appellant proved all these. Mr. Owinyi thought otherwise.

The Appellant testified that he was employed by the Respondent as general labourer and that he was on duty on this day when a fellow employee asked Japheth Kaludi accidentally hit him with a fork jembe at the ankle joint. He was cross-examined and he repeated the evidence. The Respondent called no evidence to controvert this, or at all. The court did not accept that evidence because the Appellant did not produce a document to evidence employment. The court, I find, fell into error by requiring documentary evidence, or further evidence, to support the issue of employment. Once the Appellant testified on oath that he was employed by the Respondent, he was not shaken on cross-examination and there was no evidence to the contrary, the court was bound to accept that evidence and to find that the burden placed on him had been discharged. To demand further evidence would be to demand a higher degree of proof than is required in a civil case.

There was further reason why the court should have accepted the Appellant's testimony that he was employed by the Respondent. The record shows that counsel, by consent, produced medical chits (exhibits 1 (a), (b) and (c) which showed the fact of injury and treatment, and they also indicated the history of the injury: that the Appellant was injured while on duty at the Respondent's factory. There was no way that the Respondent was going to resile from the evidence produced by agreement through the consent. Infact, after the parties had agreed to put in the documents by consent the court had no business casting aspersions on them.

The result is that the Appellant was employed by the Respondent as a general labourer and was injured while on duty. The question was whether the Respondent was responsible in negligence for the injuries. The particulars of negligence were given as follows:

a) failure to maintain adequate or suitable plants and appliances to enable the Plaintiff to carry out his work;

b) failure to provide or maintain a safe and proper system of working or to instruct its workmen including the Plaintiff to follow the system; and

c) exposing the Plaintiff to a risk injury and damage to which the Defendant knew or ought to have known.

During the evidence, the Appellant testified that he was hit by accident by a fellow employee who used a fork jembe. He stated as follows:

" I blame the company. I was not given gloves or gumboots for protection. We were working in unsafe environment. The place was dark."

In the plaint it was not alleged that the Respondent was negligent because he had not been provided with gloves or gumboots to the Appellant. It was not alleged the factory, or place of work, was dark. It was not alleged that the Appellant had been hit and injured by a fellow worker. It was an ambush and improper for evidence to be led on matters that had not been pleaded in the plaint. In other words, the evidence led was at variance with what had been pleaded in regard to negligence. The result was that the Appellant had not proved that the Respondent was to blame for the accident. In any case, the Appellant did not show that the Respondent could reasonably foresee that a fellow employee was going to hit and injure him.

It is for these reasons that I dismiss the appeal with costs.

Dated, signed and delivered at Bungoma this 7th day of May, 2012.

A. O. MUCHELULE

JUDGE