REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 50 OF 2007

MIGOTIYO PLANTATION LIMITED.....APPELLANT

VERSUS

LUCY KORIR.....RESPONDENT

(An Appeal from the Judgment and decree of the Resident Magistrate's Court at Eldama Ravine in SRMCC No.31 of 2008 by Hon. Musa Machage)

JUDGMENT

The appeal is lodged by Migotiyo Plantation Limited (appellant) against Lucy Korir (Respondent) in a decision where the Respondent was awarded general damages of Kshs.60,000/= for injuries she sustained while working for the defendant. The injuries involved a sprain on the left hip joint, and bruises on the left hip joint as a result of a fall into a deep uncovered hole which Appellant was said to have negligently left uncovered. The Appellant had denied liability, saying it did not expose the Respondent to any danger and if she got injured, then it was due to her own acts or omission which amounted to negligence.

The Respondent told the trial court that while in the course of her work, she went to answer a call of nature and fell into a 12 foot pit which was not visible as it was covered by overgrown grass. That is how she sustained the injuries referred to. She blamed the appellant for not covering the pit and failing to place any warning about the pit.

On cross-examination the witness stated:

"It was outside the place of work. It was about 11.00 p.m. in the night, I was not seeing properly, it was dark, there was no light out there."

Incidentally the witness was on night shift which begun at 7.00 p.m. and ended at 11.00 p.m.

Boniface Isindu (PW2), a records officer at Nakuru Provincial General Hospital confirmed that the Respondent received treatment for her injuries sustained from a fall into a pit. He recognised the treatment records as originating from the hospital.

In defence, the appellant's records officer **Benjamin Amudayi** said he was not aware of the incident. On cross-examination he confirmed that Respondent was on duty on the date in question as a night grader.

Basically all the three witnesses called by the appellant said they did not know whether the Respondent was injured as they did not witness the incident. However the Appellant's company nurse **VALENTINE MBATHA** confirmed that the Respondent sought First Aid on claims that she had fallen into a pit – she

was eventually referred to Nakuru Provincial General Hospital. This witness' contention was that there was a possibility the Respondent was not injured at her place of work.

The trial magistrate in his judgment held that there was evidence of Respondent having been on duty on the date in question as there was sufficient evidence to confirm that. He also held that there was evidence that the Respondent got injured while in the course of her duty, having only stepped out to relieve herself. Her seeking medical attention that very night served as a confirmation to the trial court that Respondent had been on duty. The trial magistrate held the view that the Appellant had a duty to ensure there were safe working conditions by covering all pits and properly lighting the entire area. He also found that lack of proper toilet facilities within the plantation is what drove the Respondent to relieve herself in the nearby bush and thus suffer injury and the Appellant was held 100% liable.

These findings are challenged on grounds that the evidence did not demonstrate negligence or breach of contract on the part of the Appellant. Further that the trial magistrate failed to accurately record the evidence of the defence especially DW1 and the Respondent had not discharged the burden of proving that she got injured while on duty. The trial magistrate is also accused of failing to take into account the appellant's pleadings and making a finding in favour of the Respondent despite the absence of Doctor's evidence. The General damages are also described as excessive.

The orders sought are that judgment be set aside and substituted with an order dismissing the Respondent's claim.

In the alternative a retrial be ordered before a different court, and/or an order apportioning liability between the appellant and Respondent be made with a view to reducing the damages awarded.

The appeal was disposed off by way of written submissions. The appellant's counsel argues that the evidence led before the trial court clearly showed that the Respondent was not an employee of the Appellant but of Lomolo Limited, and since she did not discharge this burden, the trial magistrate erred in holding the Appellant liable.

Respondent's counsel argues that there is no basis for this limb as the evidence on record both from the appellant's witnesses and the Respondent, confirmed that she was employed by the Appellant. This limb certainly has no basis. DW1 who is in charge of records at the Appellant's company confirmed that the Respondent worked there as a night grader. Certainly there existed an employment relationship and I cannot fault the trial magistrate on that. It is also argued that, even if the Respondent was an employee of the company, then the Appellant had put reasonable measures to safeguard the working environment, and the degree of care was not absolute. Counsel cited the decision in **MWANYULE V SAID t/a JOMVU TOTAL SERVICE STATION** (2004) 1 KLR 47 saying the employer's duty is to take reasonable care and an employee cannot call upon his employer to compensate him for an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment.

The task for which the Respondent was employed was to grade the products at the company. The injury suffered was not in the course of grading the products. She had left her place of work to answer a call of nature. When recalled for further hearing she told the trial court that:-

"There was no latrine at site, used to go to the open field for a call. It was outside the place of work". (emphasismine.)

This must be weighed in the light of DW1's evidence that there was in fact a toilet within the premises. Surely the Appellant had no duty to ensure a safe environment outside the working place. It was not made clear in the evidence presented at trial whether the field was within the Appellant's compound so as to plead or apply the principle of occupier's liability. It is on this account that I concur with the appellant's counsel that the evidence did not support the finding that the Appellant owed the Respondent a duty of care. The evidence as presented showed that the Respondent got injured outside the scope of her duty. I find that the trial magistrate failed to consider the evidence of DW1 who informed the court that

there was a toilet within the premises and even invited the court to visit and confirm. The failure to consider this evidence especially when the appellant had confirmed that she had gone outside the place of work was prejudicial and unsafe to the appellant. I hold that the evidence did not justify the conclusion reached by the trial court.

It is on account of these two issues that I find merit in the appeal and allow it. The judgment and all consequential orders are thus set aside. The costs of this appeal are awarded to the appellant.

Delivered and dated this 21st day of September, 2012 at Nakuru.

H.A. OMONDI
JUDGE