REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 113 of 2007

Editorial Summary

1. *Civil application*

2. *Subject of main Subordinate court case*

TORT/CONTRACT

2.1 Work place injury

2.2 Male adult aged 22 years old

on 10th July 2003.

2.3 Alleged on 10th July 2003 was employee

of defendant.

2.4 Assigned work in forest to make pegs with

cutlass (panga)

2.5 Reported to supervisor Mr Karia

2.6 Referred to clinic on 10th July 2003 and

treated.

2.7 Referred to medical doctor (general

practitioner) on 31st March 2006 almost 3 years later

2.8 Injuries

cut wound – site left index finger

i) Analgesics
ii) Cleaning stitching of cut wound
iii) Follow up

2.9 Filed suit against employer 28th April 2006.

2.10 Employer defence – employee was negligent alternatively no injury occurred.

2.11 In evidence, the employees documentation not true

2.12 Employee was never an employee.

3. Trial court held:

Liability:
employer liable at 80%
employee liable at 20%

Quantum:
General damages

Pain and suffering	*Ksh. 65,000/-*
Special damages	
medical report	*Ksh. 1,500/-*
Dr. attendance fee	*Ksh. 5,000/-*
Total	*Ksh. 71,500/-*
Less 20%	*Ksh. 14,300/-*
Total	*Ksh. 57,200/-*

4. Appeal by employer original defendnat

4.1 Trial magistrate erred in holding and finding defendant was negligent and liable to extent of 80% … as there was no sufficient support to such a finding.

4.2 By apportioning liability at 80% to 20% … [the] finding was not based on an accurate analysis of the facts presented to court…"

5. Submissions:

By Appellant

5.1 Appeal is against liability

5.2 Appellant in control of his panga case law of

Wilson Nyanu Musigisi

Vs

Sasini Tea & Coffee
CA 15/03
Kimaru J.

By Respondent:

5.3 *Appeal be dismissed.*

5.4 *Lord Denning – employers should take reasonable cause for safety of workmen. Proper systems [must be used] in which to use appliances.*

5.5 *Clifford – Vs – Charles H. Challen & Sons Ltd (1951) (1) KBD 95*

6. *Held:*

i) *Respondent in control of the cutlass.*

ii) *No negligence proved by employer.*

iii) *Reliance on the 'no fault' workman's compensation claim should be made.*

7. *Case Law:*

By respondent:

a) *Clifford – Vs – Charles H. Challen & Sons Ltd (1957) (1) KBD 95*

Cohen Lj, Denning Lj, Asquith Lj

By appellant:

b) *Karunguru Estate Ltd*

Vs

Kaciuma Thuranira
HCCA 205/05 (Nbi)
Sitati J

c) *Wilson Nyanyu Musigisi*

Vs

Sasini Tea & Cofee Ltd

HCCA 15/03 Kimaru J

d) *Mumias Sugar Co. Ltd*

Vs

Samson Muganda

(Kakamega) HCCA 58/00 Unreported

Waweru J

8. Statute Law:-

a) *Halsbury Laws of England*

4th Edition, Volume 16

Para 560

b) *Winfield & Jolowiz on Tort*

By W.V.H. Rogers

14th Edition London Sweet & Maxwell

Page 213

9. Advocates :

i) *N. Mutegi instructed by M/s Mulwa & Mulwa & Co Advocates for appellant*

ii) *M.J. Kisia instructed by M/s Kisia & Co Advocates for respondent*

KAKUZI LTD ……..……...…...……. APPELLANT

VERSUS

PAUL KINUGI NGUGI ……..……...…… RESPONDENT

J U D G M E N T

(Being an appeal from the judgment of E. Boke Resident Magistrate in SRMCC 112 OF 2006 delivered on 30th January 2007 at Kandara Court)

I. BACKGROUND

1.The respondent original plaintiff, one Paul Kinugi Ngugi, had sued the appellant Kakuzi Limited for damages sustained in his place of work.

2.His evidence was that he was employed as a casual labourer in the forest section. His task was to carve

out pegs with a cutlass (panga in Kiswahili).

3.On the material day of 10th July 2003, whilst undertaking this task, he cut himself with the cutlass. Injuries was caused to his 5th left index finger. He was referred to the clinic where the finger was cleaned, stitched and analgesics administered.

4.Almost three years later, he went to the medical doctor of his choice who examined him and made a report undated but examination was done on the 31st March 2006.

5.The respondent filed suit in the magistrate's court at Kandara on the 28th April 2006.

6.Upon hearing the evidence of the doctor, the employee and the representative of the employer, the trial magistrate came to the conclusion that the employer was negligent by not providing gloves to assist the employee in his work. The employer was held to be liable at 80% whilst the employee was held to be liable at 20%

7.It was therefore that the trial magistrate awarded the following quantum on

7.1 General damages

Pain and suffering	Ksh. 65,000/-

7.2 Special damages

Medical report	Ksh. 1,500/-
Doctor's court attendance fee	Ksh. 5,000/-
Total	Ksh. 71,500/-
Less 20%	
Net	Ksh. 56,200/-

(Date of judgment 30th January 2007)

8.The employer being aggrieved filed this appeal on the

27th February 2007.

II APPEAL

9. The trial magistrate erred in holding and finding [the] defendant was

9.1 negligent and liable to [the] extent of 80% … as there was no sufficient support to such a finding.

9.2 By apportioning liability at 80% to 20% … [the] finding was not based on an accurate, analysis of the facts presented to court…

III SUBMISSIONS

i) By Appellant:

10. The appeal was basically against the liability and the contributory negligence arrived at by the court.

11. Relying on the case law of:-

Wilson Nyayu Musigisi
Vs

Sasini Tea & Coffee Ltd

Kericho HCA 15/2003
Kimaru J

The appellant argued that in the above decision, an employee in a similar situation as in this appeal was in control of the working instrument used and sustained injuries. The employer was not made liable in negligence. It was held that the employee's remedy laid in the workman's compensation, on a "no fault" payment under the workman's compensation negligence need not be proved. In a civil suit, negligence on the part of the employer requires to be proved. As the employee was said to be in control at the time the accident occurred.

12. Likewise in this case, the appellant wished that the magistrate court's decision be reversed and the employee be found wholly liable as the employee was in control of the cutlass.

ii) By the Respondent:

13. The respondent prayed that the appeal be dismissed. This is because the employer should have taken reasonable care for the safety of the workman.

14. Whereas the respondent relied on the Halsbury's Laws of England 4th Edition Volume 16 para 560 and on Winfield & Jolowiz On Tort by W.V.H Rogers 14th Edition London Sweet & Maxwell, no text book or photocopy of the book had been provided.

15. The advocate relied on the passage that stated in his written submissions:-

16. In relying on the authority of

Clifford – Vs – Charles H. Challen

(1951) IKB 495
(Cohen LJ, Denning LJ, Asquith LJ)

in which Denning LJ outlined the duty of an employee to their workman stated:

"The standard which the law requires is that they should take reasonable care for the safely of their workmen. In order to discharge that duty properly, an employer must have allowances for imperfection of human nature. When he orders his men to work with dangerous substances, he must provide proper appliances to safeguard them…"

17. This the respondent argued had not been demonstrated. The appellants should be held liable for the injuries sustained.

III OPINION

18. The **Wilson Nyayu Musigisi – Vs – Sasini Tea & Coffee Ltd** case (supra) relied on the decision of

Mumias Sugar Co. Ltd
Vs
Samson Muyinda

in which the employee in each of the respective cases were manual labourers. The Sasini Tea case, the employee cut himself with a slasher on his right leg and alleged that he was not provided with gum boots to protect his legs – below the knee.

19. The Mumias Sugar case, the employee was cutting sugar cane using a sharp cutlass (panga). He cut himself.

20. Both Hon. Judges held that the manual work required no exceptional skills to do. The cutlass and or slasher had been in the respective employees control.

21. The above decisions are persuasive in nature. This court is not bound by them.

22. Another case is that of

Karunguru Estate Ltd
Vs
Kacuma Thuranira
CA 205/05 Sitati J

In which the casual labourer had "a dry stick prick his unprotected small finger while he was pulling coffee strips onto a head."

23. An award of Ksh. 120,000/- made for soft tissue injuries was reduced to Ksh. 40,000/- as general damages. This was on grounds that the wound became septic.

24. I would be persuaded that no award would be given in this case to the employee. I say so due to the fact that he was indeed in control of the said cutlass (panga) and needed to be in control, paying diligent attention to the work he was doing. The two former authorities are persuasive.

25. The authorities relied on by the respondent Halsbury's Laws of England and the text book on Tort speak of machinery where special exceptional skills is required to use.

26. The case law of **Clifford – Vs – Charles H. Challen & Sons Ltd** (supra) involves chemicals that were used at the factory and that the employer was aware they were dangerous. The employees were worried that if the chemicals came in touch with their skin, they must wash their skin immediately. The employer put up signs to this effect but not in the room where the appellant plaintiff had been working. There was also no bucket of water to wash. The rule was implemented with laxity.

27. In this appeal, the respondent was in control of the cutlass he had. He was injured. His option would have been to apply for the workman's compensation – a 'no fault' system where negligence on the employees is not required to be proved.

28. I would accordingly dismiss the appeal on the grounds provided above. Nonetheless, I wish to just note that the defendant produced a master roll for one Peter Nagaya Njora No. 56458, a casual labourer. The name of Paul Kiungi Ngugi does not appear on the master roll for the 10th July 2003 when the incident occurred. The note given to the court as exhibit No. 2 was disputed by the defence as being a false document.

29. The defence should have at once amended their plaint to include the issue of fraud and that the respondent was not their employee. This they did not do and are bound by their pleadings.

30. I nonetheless rely on my decision made on merits that the respondent failed to prove that the appellant was negligent. I would allow this appeal with costs to the appellant. That the costs in the

magistrate's court to be awarded to the original defendant. The suit therein stands dismissed.

DATED THIS 24TH DAY OF OCTOBER 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

i) N. Mutegi instructed by M/s Mulwa & Mulwa & Co Advocates for appellant

ii) M.J. Kisia instructed by M/s Kisia & Co Advocates for respondent