No. 2746

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 153 OF 2005

KENYA TEA DEVELOPMENT AGENCIES LTD .....APPELLANT

-VERSUS-

ANTHONY NYANDIEKA OGETO ..... RESPONDENT

(Being an appeal from judgment and decree of L. Komingoi, Senior Resident Magistrate in Nyamira SRMCCC No. 69 of 1999

dated and delivered on 27th July, 2005

Consolidated with Civil appeal No. 154 of 2005

KENYA TEA DEVELOPMENT AGENCIES LTD .....APPELLANT

-VERSUS-

TABITHA MORAA NYAKEGO.....RESPONDENT

(Being an appeal from judgment and decree of L. Komingoi, Senior Resident Magistrate in Nyamira SRMCCC No. 73 of 1999

dated and delivered on 27th July, 2005

Consolidated with Civil appeal No. 155 of 2005

KENYA TEA DEVELOPMENT AGENCIES LTD.....APPELLANT

-VERSUS-

JOSHUA OCHANDA ATANCHA .....RESPONDENT

(Being an appeal from judgment and decree of L. Komingoi, Senior Resident Magistrate in Nyamira SRMCCC No. 66 of 1999

dated and delivered on 27th July, 2005

JUDGMENT

These three appeals were on 26th November, 2010 consolidated by consent of the parties involved for ease of hearing and as they arose from the same cause of action and trial in the subordinate court. Kenya Tea Development Agencies Limited (KTDA), brought these appeals challenging the decisions of the subordinate court, given on 27th July, 2005 in which **L. Komingoi**, the then Senior Resident Magistrate at Nyamira Law Courts gave judgment in favour of the respondents in the sum of Kshs. 70,000/=, 70,000/= and 80,000/= respectively as general damages less contribution in the ratios of 40%, 30% and 20% against the respondent in that order. KTDA challenges the decision of the learned magistrate on both liability and quantum of damages. Similar grounds of appeal were advanced in each appeal. They were:-

"1. The learned trial magistrate erred in both law and in fact in awarding to the respondent against the appellant general damages for alleged personal injuries without proof first being led in evidence.

2. The learned trial magistrate erred in both law and in fact in delivering judgment in this suit at kshs. 70,000/= less 40% contribution without first hearing the parties in evidence.

3. The learned trial magistrate erred in both law and in fact in deciding the case without evidence being led first before her through witnesses.

4. The learned trial magistrate erred in both law and in fact in deciding the suit against (sic) the basis of written submissions without first hearing the parties in evidence which could have formed the basis of such submission (sic).

5. The learned trial magistrate erred in both law and in fact in admitting and relying on foreign documents as alleged exhibits which were introduced into the suit through illegal and unlawful means…".

By plaints dated 16th June, 1999, the respondents through **Messrs Khan & Katiku Advocates** impleaded KTDA for general damages following the injuries they all sustained in an industrial accident whilst they worked at Tombe Tea Estate as employees of the appellant. For the first respondent he alleged that he had been employed by the appellant as a factory worker. On 23rd April, 1999 in the course of his said employment and as he was carrying a weighing machine from one weighing bay to another at Tombe Tea Estate, he slid and fell whereupon the weighing machine landed on his left hand injuring it severely. Indeed he suffered a cut wound on the distal phalanx of the left finger.

As for the 2nd respondent, it was his case that on 31st March, 1999 whilst engaged in his employment as a general worker, he was cleaning tea rollers at Tombe Tea Estate when the rotating rollers caught her left hand injuring it severely as a consequence of which she suffered pain, loss and damage. As a matter of fact she sustained cut wound on the tip of the left third finger with profuse bleeding.

Lastly, the 3rd respondent claimed that he had been employed as a clerk at its Tombe Tea base. On 29th June, 1996 he was in the course of his employment at the tea weighing bay when one of his co-employees assaulted him causing him several injuries as a consequence of which he suffered pain, loss and damage. The injuries he sustained as a result were deep cut wound on the right breast region to the 8th rib, cut wound on the interscapular region of the back and penetrating injury with a cut wound on the right hand wrist area.

The respondents all blamed KTDA for the accidents and subsequent injuries. They attributed the accidents and injuries to KTDA's breach of statutory duty towards them as its employees as well as common law negligence. They proceeded to give particulars of breach of statutory duty as well as negligence alleged.

Through **Messrs Ochillo & Co. Advocates**, KTDA entered appearance and filed a statement of defence in respect of each claim. It denied the claims and in particular the alleged accidents, the injuries if at all suffered by the respondents, negligence and particulars thereof attributed to it. It went on to claim in the premises that the respondents claims were fictitious. Finally it averred that if the said accidents occurred, then the same were solely caused by and or substantially contributed to by the negligence of the respondents themselves. KDTA then gave the particulars of negligence it attributed to the respondents and pleaded the doctrine of ***volenti non fit injuria***.
By consent letter dated 5th November, 2001 and filed in court on 20th May, 2005 in all the files, parties to the suits agreed as follows:-

"…This suit be reinstated and judgment on liability be and is hereby entered in the ratio of 60:40 the defendant bearing 60% liability. The medical report on the plaintiff be admitted into evidence as exhibit P1 and an assessment of damages payable be done by court on basis thereof…".

Of course liability in respect of the 1st, 2nd and 3rd respondents was apportioned 60%, 70% and 80% respectively in their favour. Those consents were subsequently adopted by the court on the same date they were filed if the record of the trial court is anything to go by.

Acting on the consent letter, the learned magistrate proceeded to craft and deliver judgments in the suits without the necessity of calling evidence or witnesses. As a matter of fact, what she was engaged in was a mere assessment of damages. In judgments delivered on 27th July, 2005, the learned magistrate awarded damages as follows:-

1st respondent Kshs. 70,000/= less 40% contribution

2nd respondent Kshs. 70,000/= less 30% contribution

3rd respondent 80,000/= less 20% contribution.

No award in respect of special damages was made to the 1st and 2nd respondents. However the 3rd respondent was awarded kshs. 3,000/=. Those judgments triggered these appeals.

When the appeals came up for directions, parties agreed amongst other directions, that they be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

In the light of the consent letters filed and adopted by court as aforesaid, I do not think that KTDA is being candid and bonafide with the court when it complains in the grounds set out its memorandum of appeal and in particular that the judgments in favour of the respondents were delivered without evidence having been led or without first hearing the parties in evidence or their witnesses. The trial magistrate did not err at all when she decided the case on the basis of written submissions without first hearing the parties on evidence. Nor can it complain as it did that the trial court erred in admitting and relying on foreign documents as alleged exhibits which were introduced into the suits through illegal and unlawful.

To my mind these complaints are mere afterthought by KTDA after perhaps it was hit by the awards of damages it least expected. However it cannot blame it on the respondents. Throughout the proceedings, it was represented by counsel. Its counsel willingly and voluntarily entered into the consents aforesaid. The consents themselves were clear and unambiguous. They settled the issue of liability. They also did away with the necessity of calling witnesses. All they required the trial magistrate to do was to assess damages on the basis of the medical reports tendered.

It must have dawned on the counsel for the appellant rather belatedly that they did a sloppy and shoddy job in defending their client in the suits. However it is too late now to turn around, cry foul and blame the court and the respondents for their sloppiness. I think that KTDA and its advocates need to be reminded of the wise counsel by **Omolo J.A** in the case of **Omar Transporters Limted & Anor –vs- Assa Okwemba Onyango**, **Civil Application No. Nai 62 of 2002 (UR)** when he rendered himself thus ***"… legal business can no longer be handled in such a sloppy and careless manner. Some clients must learn at their cost that the consequences of careless and leisurely approach to work by their advocates must fall on their shoulders…".*** I cannot put it any better than that in the circumstances obtaining in this appeal. Suffice to add that it is too often easy for advocates to blame courts for their own obvious ignorance and misapprehension of the law or the judicial process.

In so far as KTDA was party to the consents which were not coerced or extracted from it by the respondents involuntarily and since the same had not been reversed, varied or set aside by the time the learned magistrate crafted and delivered the judgment, they were binding on the parties. The learned magistrate had no other recourse but to act on them. See **Flora –vs- Wasike Destimo Wamboko (1982-88) 1 KAR 625**. Again, a consent being in the nature of a contract, it binds the parties to it. As stated by **Shields J.** in the case of **Lochab Transporteres Ltd -vs- Kenya Orent Insurance Ltd (1986) eKLR** ***"…Once a contract has been made, that is to say, once parties, whatever their in most states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good, unless and until it is set aside for failure of some condition on which the existence of the contract depends, or fraud, or some equitable ground. Neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a***

mistake …". Yet it is precisely the result that the appellant is hoping to achieve by these appeals. That cannot be allowed. The appeal on liability therefore fails on the grounds aforesaid.

As regards, damages I do not think that there is a serious ground of appeal in that regard. And even if there was, the law regarding when an appellate court can interfere with an award of damages by the trial court is settled. In **Kemfro Africa Ltd** t/a **Meru Express Service**, **Gathogo Karimi –vs- A. M. Lubia and Another (1982-88) 1 KAR 727**, **Kneller J. A** (as then he was), rendered himself, as material as follows:-

"… the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango –vs- Mnayoka (1981) E. A 705 at pg 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd -vs- Kavoloto (1970) E.A 414…".

This court follows the same principles. From the foregoing quotation it is quite clear that in assessing damages, a trial court exercises discretionary jurisdiction and such jurisdiction is always to be exercised on the basis of sound legal principles and evidence. The respondents suffered what are generally referred to as soft injuries in medical and legal parlance. The award for such damages at the time the learned magistrate delivered her judgment varied from as low as kshs. 20,000/= to as his as kshs. 250,000/= depending on the seriousness of such injuries. The awards herein fell within those parameters. The court was satisfied as to the nature and extent of the injuries the respondents sustained. The court was therefore entitled to and had ample evidence before it to come to those figures. I see no basis for interfering with the figures.

All in all I find these appeals to be absurd and indeed an abuse of the court process. They are dismissed with costs to the respondents.

Judgment dated, signed and **delivered** at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE