REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 36 OF 2010

KIPKEBE LIMITED……...APPELLANT

-VERSUS-

DISMAS NYANGAU OMAYIO…….RESPONDENT

JUDGEMENT

(Being an appeal from the judgment and decree of Hon. Were (SRM) dated 26th February, 2010, in the original Keroka SRMCC.NO. 386 of 2009).

In a plaint dated 13th August, 2009 and filed in the Senior Resident Magistrate's court at Keroka on 26th August, 2009, the respondent then as the plaintiff initiated a suit against the appellant, then as the defendant seeking special damages of Kshs. 6,500/=, General damages for pain, suffering and loss of amenities, costs of the suit and interest. The suit was informed by the alleged injuries that the respondent sustained in the course of his employment with the appellant on or about the 12th of May, 2006. At all material times to the suit, the respondent claimed to have been employed by the appellant as factory worker. On the material day, he was pruning tea when the knife he was using slipped and cut his third left finger thereby occasioning him severe bodily injury. He attributed the accident to the breach of statutory duty of care as well as common law negligence towards him by the appellant. The respondent went on to give the particulars of breach of statutory duty of care and common law negligence he attributed to the appellant.

The appellant vide its defence dated 28th September, 2009 and filed in court on the even date denied in toto all the averments and or allegations against it contained in the plaint and put the respondent to strict proof of each and every allegation. In particular it denied that the respondent was its employee, that he sustained injuries in the course of such employment and that the alleged injuries were as a result of negligence on its part. It went on to plead in the alternative that if the respondent was ever injured at his work station then the alleged accident occurred as a result of the respondent's own making and extreme negligence exhibited in the course of his duties and circumstances beyond the control of the appellant but due to exclusive malfeasance on the part of the respondent. The appellant then proceeded to give the particulars of negligence it attributed to the respondent.

At the plenary hearing of the suit before **J.Were, SRM**, only the respondent testified in support of his case. He stated that he had been employed by the appellant since December, 1990 as a tea picker. On 12th May, 2006, he was pruning tea when he was injured on the left hand on the middle finger. He informed the supervisor of the accident who in turn escorted him to the estate clinic called Kiptenden for treatment. Later the manager called him and he filled the workmen compensation form, but he was never

compensated. Subsequently, he saw **Dr. P. Ajuoga** who examined him and prepared a medical report regarding the nature and extent of his injuries. He paid him Kshs. 6,500/= for the service.

He blamed the appellant for the accident on the grounds that it did not provide him with an overall coat and gloves to work with. He subsequently left employment of the appellant and was paid his terminal dues but without being compensated for the injuries. He tendered in evidence the work ticket showing that on that day he was working for the appellant, medical report by **Dr. P. Ajuoga,** receipt issued by **Dr. P. Ajuoga** for payment of the medical report, letter given to him on leaving appellant's employment, salary slip and a copy of the cheque for his terminal benefits given to him by the appellant

Cross-examined, he stated that though he was injured on 12th May, 2006, he did not sue the appellant then as he had expected it to compensate him. He was cut on the left middle finger when the knife he was using slipped and cut him. He denied that the claim was fraudulent.

The respondent having closed his case, the appellant offered no evidence in rebuttal. In other words, the appellant closed its case without calling any evidence to controvert the respondent's case or evidence.

In reserved judgment delivered on 26th February, 2010 the learned magistrate held:-

"…….the defence did not call any evidence to controvert the plaintiff's evidence. Is the plaintiff's case proved? From the evidence on record. It is not in dispute that the plaintiff was an employee of the defendant. It is also not in dispute that the plaintiff was on duty on the material day and that he had been allocated to prune tea. It is however his evidence as correctly stated by the defence counsel that the plaintiff was in control of the knife that cut him. I would also note that pruning tea is not a specialized function. It is also noteworthy that the plaintiff had worked for the defendant for about 15 years as at the time of the incident. That points top some experience gained in the functions he was assigned. On the flipside however that did not discharge the defendant from his obligation to provide its workers with the appropriate protective wear. In the present instance gloves were relevant. The upshot is that there was negligence by the plaintiff and also a failure on the part of the defendant to properly discharge its obligations under the contract of employment. In that regard I would apportion liability at 50:50 as between the plaintiff and defendant. From the medical report of Dr. P. Ajouga the plaintiff did sustain (a) A deep cut wound to the left third finger. He received treatment at the defendant's clinic where the wound was stitched. He was also given analgesics, antibiotics and ant tetanus. At the time of examination he had scars and pain in the affected area. It was the doctor's opinion that the injury would fully heal with no permanent disability. The plaintiff's advocates have proposed Kshs. 200,00/= in general damages and one authority has been cited. The defendants did not submit on quantum of damages. The cited authority is for more severe injuries than that present. Noting the present injuries therefore and guided by the conclusions of the doctor I do deem that an award of Kshs. 70,000/= (seventy thousand) is fair and reasonable and I allow the same.Special damages pleaded and proved Kshs. 6,500/= which are awarded plus the costs of the suit and interest at court rates till full payment……".

The above determination aggrieved the appellant and therefore triggered the instant appeal in which the appellant cited or advanced seven (7) grounds to fault the judgment and decree of the learned magistrate aforesaid. These were:

"1. The learned trial magistrate erred both in fact and in law in failing to hold that it was the respondent's responsibility to ensure that he did not cut himself with a knife and that by his own negligence, the respondent was the author of his own misfortune.

2. The learned trial magistrate erred both in law and infact in failing to find that the respondent having injured himself and having admitted so, no liability could be attributed and/or inferred against the appellant.

3. The learned trial magistrate erred in law and infact by disregarding the principle of stare-decis, by

departing from the series of authorities relied upon by the appellant notwithstanding the fact that the said decisions were accurate in point and were binding upon him, thereby causing him to err in principle and in law.

4. The learned trial magistrate erred in law and infact by proceeding to assess and award the respondent damages whereas the respondent failed to prove that he sustained any and/or the purported injuries, in view of the fact that medical evidence adduced were insufficient and of no probative value.

5. The learned trial magistrate erred in law and infact by awarding the respondent general damages in the sum of Kshs. 70,000/= which damages were excessive in the circumstance and not proved at all.

6. The learned trial magistrate erred in law and in fact by holding the appellant liable at 50% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the appellant and neither was the same proved or at all.

7. That the learned trial magistrate erred in law and in fact by failing to dismiss the respondents' suit with costs to the appellant……..".

When the appeal came up for directions before me on 30th November, 2010, it was agreed that the same be canvassed by way of written submissions. Parties subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

The appellant has in its submissions faulted the learned magistrate for acting on hearsay evidence on the basis that the respondent did not call witnesses from his place of work, did not produce initial treatment notes from where he was treated initially nor did he call **Dr. P.Ajuoga** to produce the medical report. This submission or objection is coming too late in the day. The appellant did not object to the production of the medical report by **Dr. P. Ajuoga** then by the respondent as secondary evidence. Nor did it insist that the maker of the document other than the respondent be called to produce it. The appellant having consented to the medical report being tendered in evidence by the respondent cannot now turn round and purport to object to the same. The document having been tendered in evidence without objection, the trial court was bound to act on it. I do not see how the witnesses from his place of injury would have advanced his case either. The respondent was categorical as to how the accident occurred and where he was injured. He testified that after the injury, he was escorted to the appellant's clinic at Kiptaden. It was upto the appellant to rebut that evidence with other credible or cogent evidence. As already stated, the appellant never called any evidence in rebuttal. Accordingly, the respondent's evidence on the issue was unchallenged. If such witnesses were to confirm or corroborate that indeed the respondent was an employee of the appellant and was injured in the course of employment, that in my view had been settled and indeed was a non-issue. The respondent tendered in evidence various documents that indicated and confirmed that he was infact such an employee and injury he sustained as a result. Finally, though the issue of the respondent's alleged employment was raised in the defence, it was not pursued during the trial for the magistrate to deliberate on the same and make a determination. It is only being renewed now and from the bar which is not permissible.

The respondent stated in cross-examination that ***"….I was cut by the knife that slid and cut me as I cut the tea. I was the one using the knife…I cut myself….."*** That evidence was neither controverted nor challenged by the appellant. However in his judgment, the learned magistrate stated that the respondent had worked with the appellant for over 15 years prior to the date of the alleged accident, and as a result he had acquired experience and was well conversant with the dangers his line of duty portended then. There was no basis for that conclusion. There was no evidence led as to the respondent's experience and the dangers that his line of duty portended. Judicial officers are always expected to act on the material or evidence before them and not to advance fanciful theories in the absence of evidence led or legal basis to support such theories. The same would go for his holding that cutting tea leaves was the type of assignment that did not require specialized training. There was no evidence led by the appellant to support and or advance such conclusion. It would appear therefore that because of his views and theories aforesaid quite unsupported by the evidence, the leaned magistrate reached without any basis in law or fact the conclusion that both the appellant and respondent were equally to blame for the

accident. He therefore apportioned liability at 50:50%. The appellant had denied negligence on its part and in the alternative contributory negligence on the part of the respondent in its defence. However, as we all know pleadings are no more than mere allegations. Those allegations must eventually be proved at the plenary hearing by cogent evidence. If no evidence is led in proof of them as it happened here they forever remain just that, mere allegations. There was therefore no basis upon which the learned magistrate should have apportioned liability. It was either the appellant was 100% to blame for the accident or not. On the evidence on record, unchallenged though, the learned magistrate ought to have held the appellant 100% liable. However, since there is no cross-appeal by the respondent on that issue, I will leave the matter at that.

The respondent testified that he was entitled to gloves and an overall for the kind of work he was engaged in. There was no contrary evidence from the appellant. It was therefore not necessary for the respondent to prove that there was a contract of employment which had specified that the appellant must provide those items to the respondent and that in the event that the respondent had them, how they would have prevented him from cutting himself. That is the evidence that the appellant should have called in rebuttal.

The appellant too has faulted the learned magistrate for disregarding the High Court Decisions which had been cited to him by the appellant which were binding on him, correct in point and would have guided him in reaching the right decision on liability. This accusation is not entirely correct. Authorities are no substitutes for evidence. They cannot be dealt within in vaccum. In any event I think that it was on the basis of those decisions that the trial magistrate advanced theories about experience and the kind of work that the respondent was engaged in as not requiring any specialized training or skill. But as already indicated elsewhere in this judgment, that conclusion was wholly unsupported by evidence on record. One thing that runs through those authorities though is that those cases were defended and evidence led on those aspects of the defence. That was not the case here. Clearly then those authorities are distinguishable with circumstances that obtained in this case during the trial. It is not an accepted dogoma as the appellant seems to suggest in its submissions that no liability can arise as against an employer where an employee has inflicted upon himself some injury in the course of his employment. Each case must therefore be deemed and determined on its own facts and circumstances.

In a nutshell, it is not apparent from the foregoing that the learned magistrate grossly misdirected himself by failing to properly analyse the evidence adduced before him and thus reached erroneous decision as claimed by the appellant save ofcourse, on the issue of apportionment of liability.

On the issue of quantum, I note that though it is raised as a ground of appeal, the appellant has not addressed it in its submissions. I can only assume that it abandoned it. Even if it had canvassed it, I do not think that I will have been persuaded to interfere with the award. It was within the accepted range for soft tissue injuries awards at the time.

The upshot of the foregoing is that the appeal lacks merit and is accordingly dismissed with costs to the respondent

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

ASIKE-MAKHANDIA
JUDGE