No. 2769

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 19 OF 2005

KENYA TEA DEVELOPEMNT AGENCY LIMITED.....APPELLANT

-VERSUS-

JOSHUA NYAKUNDI NYAKONI.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. Ingutya Senior Resident Magistrate

in original Kisii CMCC No. 631 of 2004 delivered on 13th January, 2005)

This is appeal is by the defendant in the subordinate court. In the suit the plaintiff who is the respondent in his appeal was awarded general damages of Kshs. 200,000/= and special damages of kshs. 3,500/= in respect of injuries sustained by him following an industrial accident. The plaintiff's case then was that at all material times he was an employee of the defendant as a casual worker at Kiamokoma Tea Factory. On or about 28th January, 2004, he was lawfully engaged in the course of his said employment sweeping the spillages around the machine when the conveyor belt trapped his left arm as a result of which he sustained injuries. As a consequence he suffered pain, loss and damage. The injuries he suffered were deep cut wound on the left forearm, bone profusion at the wound in the left forearm and blunt chest injuries.

He blamed the accident on the defendant, on account of breach of statutory duty as well as common law negligence towards him. He proceeded to give particulars of breach of such statutory duty and the common law negligence he attributed to the appellant.

The defendant as expected contested the plaintiff's, claim. It denied each and every allegations made against it and averred that the allegations were fictitious, pretentious and strange. It denied breach of statutory duty and common law negligence as well as the particulars thereof attributed to it. It went on to plead that if the plaintiff was its employee, then it provided safe working conditions for him and always ensured reasonable and practical precautions were available to him prior to him undertaking any task or job. It further averred that, if the said accident occurred, then the plaintiff was absolutely negligent and or overwhelmingly contributed to the same. It proceeded to give the particulars of negligence it attributed to the plaintiff.

At the hearing of the suit, the plaintiff testified that on 28th January, 2004 he was working in CTC room in Kiamokoma factory. He was sweeping tea leaves from the conveyor belt which was not covered. His left hand was caught by the conveyor belt and was injured. He was also hit by a bar on the chest in the process. He was taken to Kisii General Hospital and treated. The accident was reported to the employer who issued him with workmen compensation forms (LD forms). Later he saw **Dr. Ezekiel O. Zoga** who examined him and prepared a medical report and billed him for kshs. 3,500/=. He blamed the defendant for the accident on account of the conveyor belt not being covered, he had not been properly instructed on his work, he was not given gloves nor overalls. The broom he was using was very short and infact he had asked for new broom to no avail.

Cross-examined, he stated that he was employed by Kiamokama Tea Factory which was under the management of the defendant. He was never given a letter of appointment. Kiamokama never gave letters of appointment.

Dr. Ezekiel O. Zoga, testified that he attended on the plaintiff on 13th January, 2004. He confirmed that he sustained a fracture of Ulna bone. He was put on plaster. There was residual deformity of the forearm and he needed intensive physiotherapy. He prepared a medical report to that effect and charged the plaintiff kshs. 3,500/=.

At this juncture the plaintiff closed his case. When it came to the defence case, the defendant opted not to tender any evidence to controvert the evidence of the plaintiff and in support of its defence.

In a reserved judgment delivered on 13th January, 2005, the learned magistrate held:

"…The defence did not call any evidence to controvert that of the plaintiff. I have considered the evidence on record very carefully. I find on the same issue of liability that the plaintiff proved his case on a balance of probabilities. I have no doubt that the accident did occur and that it was caused by failure on the part of the defendant to ensure that the conveyor belt was covered to avert the obvious danger that the plaintiff faced daily as he worked at the CTC machine. I find that the defendant failed to discharge its fundamental duty to ensure that the plaintiff worked in a safe environment. I hold the defendant 100% liable. I am satisfied that the plaintiff established the fact that the tea factory in which he worked was directly managed by the defendant as an independent agency. As such the defendant takes responsibility as such independent managing agent.

On the issue of quantum, I find that the plaintiff proved the injuries sustained on a balance of probabilities. Considering submissions by counsels and relevant authorities. I assess general damages at kshs. 200,000/= I also award special damages of kshs. 3,500/=.

Consequently, I enter judgment for the plaintiff in the said sums together with costs…".

That judgment and decree prompted this appeal. Through **Mose & Mose advocates**, the appellant faulted the learned magistrate on the following grounds:-

"1. The learned magistrate erred in law and fact in disregarding the apparent lack of privity of contract between the appellant and the respondent herein.

2. The learned magistrate erred in law and fact in not finding that the respondent was a stranger to the appellant and as such owed no duty of care, statutory or otherwise.

3. The learned magistrate erred in law and fact in failing to appreciate that there was no nexus or scintilla of connection between Kiamokama Tea Factory Limited and Kenya Tea Development Agency Limited regarding the claim in CMCC No. 631 of 2004.

4. The learned magistrate erred in law and fact in failing to appreciate that the workmen compensation form was marked as an exhibit but same never produced rendering its authenticity dubious to conclusion.

5. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault.

6. The learned magistrate erred in law and fact in failing to appreciate that the medical report was incompetent as the doctor who purported to have examined the respondent had never treated the respondent and therefore examined scars and not injuries.

7. The learned magistrate erred in law and fact by awarding kshs. 200,000/= as general damages and kshs. 3,500/= as special damages plus costs without any justification or evidence to warrant the same.

8. The learned magistrate erred in law and fact in failing to appreciate that the suit culminating in the award was incompetent, in shambles and incapable of attracting damages even nominally…".

When the appeal came up for directions before me on 3rd March, 2011, **Mr. Mose** and **Mr. Ogweno**, learned counsel for the defendant and plaintiff respectively agreed amongst other directions to canvass the appeal by way of written submissions. The submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

It is common ground that the defendant did not call any evidence in support of its defence. Thus it failed to controvert the plaintiff's cause of action by calling any witnesses to counter the plaintiff's assertions. In law pleadings are mere allegations. They must be supported by evidence if a party expects a judgment in his favour. In this case, the plaintiff made allegations in his plaint. He followed up those allegations by calling evidence in proof thereof unlike the defendant. The defence filed by the defendant cannot on its own take the place of evidence. The defendant may have denied that the plaintiff was its employee, the occurrence of the accident, the injuries sustained by the plaintiff as a result, if at all, and negligence attributed to it. However, it needed to go further and tender evidence in support of those contentious. It did not. Without the evidence, they remained mere averments.

The plaintiff stated that he worked for Kiamokama Tea Factory which was being managed by the

defendant. The defendant tendered no evidence to rebut that assertion. It must therefore be true. The defendant however in his written submissions attempted to portray Kiamokama Tea Factory and the defendant as being separate and distinct legal entities. That Kiamokama Tea Factory was a limited liability company and having employed the plaintiff, he ought to have sued it and not the defendant. That there was no privity of contract therefore between the defendant and plaintiff. This is all fine. However where is the evidence? None. The defendant is merely advancing these arguments in its written submissions in this appeal which is inadmissible. The trial court cannot in the in the circumstances be faulted in its finding based on the evidence on record then that the plaintiff had established that the tea factory was directly managed by the defendant as an independent agency. There was no evidence that Kiamokama Tea Factory was a limited company which could sue or be sued.

With regard to whether or not, the plaintiff was an employee of the defendant, he testified that he was employed at Kiamokoma Tea Factory which was managed by the appellant. He was never given a letter of appointment. In any event being a causal employee, it is not expected that he will be issued with such a letter. In any case the defendant did not challenge that evidence by any other tangible and cogent evidence.

The learned magistrate found that the accident was caused by failure on the part of the defendant to ensure that the conveyor belt was covered to avert the obvious danger that the plaintiff faced daily as he worked at the CTC machine. This is a finding of fact. It is a finding that I should reluctantly interfere with. As stated in the case of Butt –vs- Khan (1981) KLR 349 ***"… The appellate court cannot interfere with the decision of trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates …".*** I do not discern such misgivings here. The defendant has submitted though that before a party can be held liable for any omission and or commission he or she must be proved to be at fault. There was no tangible evidence put forth by the plaintiff to prove that the defendant was at fault and therefore could not be held liable for any omission. That it is trite law that there can be no liability without fault.

The plaintiff led evidence to show how the defendant was liable. He had pleaded in his plaint that the defendant failed to make or keep safe his place of work, failed to take any or any adequate precaution for his safety while he was engaged in his work, exposed him to a risk of damage or injury of which it knew or ought to have known, failed to provide suitable gloves or other adequate equipment to enable him carry out his work safely and finally employed the plaintiff without instructing him. Through his unchallenged evidence, the plaintiff was able to prove some of the above breaches of statutory duty and common law negligence. The conveyor belt was not covered. It was up to the defendant to prove that ordinarily the conveyor belt is not covered or it was covered. The plaintiff also testified that he was not instructed on how to carry out his work. It was up to the defendant to counter that by saying that it had instructed him and or that such work did not ordinarily require training. It did not. The plaintiff further testified that he required a long broom, gloves and overall for the kind of work he was engaged in. It was up to the defendant to counter those assertions. It did not. At the end of the day, what the plaintiff was saying is that it was up to the defendant to provide a safe working environment for him. It failed to do so, hence the accident and its liability.

With regard to damages awarded and in particular, general damages, I do not think that I will be justified to interfere with the same. As stated in the case of **Arrow Car Limited –vs- Bimomo & 2 Others (2004) 2 KLR 101 "….** ***In deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, an appellate court must be satisfied 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…".*** The appellant has not been able to demonstrate that the award of kshs. 200,000/= for a fracture of the ulna bone was manifestly high as to amount to a wholly erroneous estimate of damages. In my view the award was within the acceptable range for that kind of injury at the time.

The upshot is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE