IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.64 OF 2008

MWANGI KIBUCHI & MRS. KIBUCHI T/A KAYS FARM SUPPLIES.....APPELLANTS

VERSUS

HENRY NGESA ANAYA.....RESPONDENT

[An Appeal from the Judgment of Hon. T. Matheka, Senior Resident Magistrate, in Nakuru R.M.C.C.No.1196 of 2005

dated 25th April, 2008]

JUDGMENT

The appellants, Mr. and Mrs. Mwangi Kibuchi t/a Kays Farm Supplies, were sued by the respondent, Henry Ngesa Anaya, in a claim for compensation for injuries allegedly suffered by the latter in the course of his employment by the former. The respondent blamed the appellant for the slippery floor on which he slipped while carrying a sack of sun flower, fell and injured his left knee. He sought before the court below an award of Kshs.150,000/= in general damages relying on the cases of **Zainab A. Ireri & Another** Vs. **Gladys Wamuyu & Another,** Nbi. HCCC No.3814 of 1990 and **Joshua A. Mikele** Vs. **Shun Gebrezghir Yendego,** Nbi, HCCC. No.3443 of 1991. He also prayed for an award of Kshs.2,500/= in special damages.

The appellants on their part denied liability on the following grounds;

i) that they did not employ the respondent as claimed by the respondent;

ii) that the respondent did not suffer any injuries on the day in question as alleged

iii) that the respondent was not employed in the section where he would be required to carry sacks of sunflower

iv) that the respondent's claim ought to have been brought under the **Work Injury Benefits Act.**

In the alternative and without prejudice, the appellants deposed that the respondent was himself to blame for being negligent. The learned trial magistrate (T. Matheka, SRM) after considering the evidence presented before her by both sides, submissions by counsel for the parties and authorities cited found the appellant and the respondent equally liable at 50% each and awarded the respondent Kshs.25,000/= in damages.

The appellants were aggrieved and brought this appeal challenging the decision on liability and quantum on the following condensed grounds:

i) that the magistrate failed to find that the respondent was not involved in an accident on 4th December, 2004;

ii) that the respondent did not prove his claim against the appellants and;

iii) that the trial court lacked jurisdiction to entertain the claim.

I have considered these grounds and the response by counsel for the respondent contained in the written submissions. I have also taken into consideration submissions by learned counsel for the appellant, authorities cited by both counsel and hold the following view of the matter. It is common ground that the respondent was employed in some institution in which the appellants, Mr. & Mrs. Mwangi Kibuchi had interest. The broad issues that fell for determination by the court below and which are the main grounds in this appeal are whether;

i) the appellants were properly sued

ii) the respondent sustained any injuries on the 4th December, 2004

iii) the appellants were to blame for the injuries

iv) the trial court had jurisdiction to entertain the claim

v) the respondent was entitled to an award of damages and what quantum.

From the medical reports admitted in evidence by consent, it is apparent that the respondent sustained soft tissue injuries. The appellants have submitted that the respondent in his Further Amended Plaint sued Mr. Mwangi Kibuchi and Mrs. Kibuchi t/a Kays Farm Supplies yet no evidence was adduced against them. The evidence was against Kays Premium Feeds Limited. Initially the respondent sued Kays Farm Suppliers Limited. By an amended plaint that name was changed to Kays Premium Feeds Limited and by a further amended plaint to Kays Farm Supplies which is the registered name of the business carried on by Ronald Mwangi Kibuchi and Lydiah Wambui Kibuchi w/o Ronald Mwangi Kibuchi, according to a copy of Certificate of Registration that is on record.

The respondent sufficiently explained the confusion in the appellants' business name in his affidavit sworn in support of the application for amendment of the plaint dated 14th August, 2007. In paragraph 3 he said:

"THAT most of the items at my place of work including packing materials like sacks read; Kays Premium Feeds Limited (Annexed hereto and marked Exh. HNI is a photo of a sack)"

Secondly, according to the National Social Security Fund (NSSF) card, the respondent's employer is shown as Kays Farm Suppliers. Thirdly, the correct names of the appellants were obtained and the plaint amended after the respondent had testified. Evidence cannot be amended but perhaps counsel for the respondent ought to have recalled him. That failure was not fatal as there was sufficient evidence to prove on a balance of probability that the appellants were the respondent's employers. The appellants cannot be heard to complain over a confusion they themselves authored.
I turn to the question of jurisdiction of the trial court to entertain the dispute. It was submitted that the respondent's claim came within **sections 16** and **58(2)** of the **Work Injury Benefits Act**, which provide that no action lies by an employee or his dependant for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employer and no liability for compensation on the part of such employer will arise, save under the provisions of the Act. That any claim in respect of an accident or disease occurring before the commencement of the Act be deemed to have been lodged under the Act. It was incumbent upon the appellants to demonstrate that the respondent was an employee in terms of that Act; that the respondent suffered permanent or temporary disability as defined in the Act.

Then there is the issue of the decision of this court (Ojwang', J) in the case of **Law Society of Kenya** Vs. **Attorney General**, Nbi. HC Pet.No.185 of 2008 in which the learned judge held that **section 58(2)** of the **Act** is contrary to the terms of the Constitution while **section 16** and other related provisions offend the employer's guaranteed rights to due process of the law. The court declared that **sections 16, 58(2),** among others, are inconsistent with the Constitution and hence null and devoid of the status of law. That decision, I am aware, has not been overturned. The learned magistrate therefore had jurisdiction.

I turn now to the substantive part of this appeal, namely whether the respondent sustained the injuries in question while on duty at the appellants' premises and whether the latter were to blame.

The respondent explained how he was carrying a sack of sunflower weighing almost 100 kgs to a customer's motor vehicle when he slipped on the oily floor and fell. He attributed the state of the floor to sunflower oil and blamed the appellants for not sprinkling saw dust on the floor and providing him with gum boots.

It is the appellants' contention, however, that the respondent was a machine operator and had no business carrying sacks to customers' motor vehicles, a preserve of day-casual workers; that even the day-casual workers would use trolleys and not their back; that the premises floors are properly constructed and; that the workers are provided with masks, shoes and gloves. D.W.2 Simon Ndegwa Njaragano, however confirmed that he did not have the record of the loaders, or a record to show that the respondent was in the production section as machine operator; or the record of injuries/accidents or any evidence of protective gadgets issued to workers.

Without production of statutory registers or record to prove the foregoing, the appellants failed to discharge the burden on them. The respondent on the other hand has shown by his testimony and medical evidence that indeed he suffered injuries as a result of a fall due to state of the floor. I find no fault in the learned magistrate's conclusion that the appellants were
liable.

The issue of contributory to negligence has not been raised before me. It must be born in mind that an appellate court will only interfere with the quantum of damages awarded by the trial court if that court, in assessing the damages took into account an irrelevant factor, or left out a relevant account or that the amount is so inordinately high that it must be wholly erroneous estimate of damage. The learned magistrate considered the injuries suffered by the respondent compared it to decided cases and took into account the respondent's contribution before making the award which, in my view, cannot be described as so inordinately high in those circumstances.

The appeal must for those reasons fail and is hereby dismissed with costs.

Dated, Delivered and Signed at Nakuru this 2nd day of June, 2011.

W. OUKO
JUDGE