REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 95 OF 2008

(Being an appeal from the judgment of Hon. H.M. NYAGA, Senior Resident Magistrate, Nakuru

delivered on 18/4/2997 in Nakuru CMCC No.2227 of 2002)

AFRICAN HIGHLANDS PRODUCE CO. LTD.....APPELLANT

VERSUS

WILFRED OTIENO ODHIAMBO.....RESPONDENT

JUDGMENT

On 30/10/02, the respondent, **Wilfred Otieno Odhiambo** filed a suit against the appellant, **African Highlands Produce Co. Ltd** seeking general and special damages for injuries he sustained on 6/7/2001 while performing his duties with the appellant. In the plaint, he stated that it was a term of the respondent's contract of employment with the appellant that the appellant would take reasonable precautions for his safety while at work and not expose him to risk of injury or damage. The respondent blamed the appellant for providing an unsafe working system so that the conveyor gripped his finger and it was severely cut as he tried to free it and he also slipped and fell on the slippery floor and hit his tooth against the machine as a result of which the tooth broke. The particulars of negligence levelled against the appellant were set out in the plaint.

In the appellant's statement of defence, it was denied that the respondent was an employee of the appellant or that he was lawfully engaged in his work with the appellant or that the appellant failed to provide a safe working system as a result of which the respondent was injured. Instead it was alleged that if the respondent suffered any injury, the same was solely or substantially contributed to by his own negligence.

In support of his case, the respondent testified that he works for the appellant in Kericho and produced the letter of appointment (Ex.1). While on duty on 6/7/2001 filling the conveyor with tea leaves, the belt got cut and cut his left hand on the index finger. When he slipped he fell and one tooth broke. He said that William Ruto was his supervisor and took him o Central Hospital where he was issue with a card Ex.2. He was later examined by Dr. Omuyoma who prepared a report. He was also examined by Dr. Malik – and produced the reports as Exs. 3 & 4. He claimed to still experience pain on the finger and could not grip well or eat well because of the missing tooth. He said that if the conveyor had a guard he

would not have been cut by it and if he had been given gloves or gumboots he would not have slipped and fallen.

The respondent called one witness, Leonard Kibet Korir who works with Finlay (K) Ltd as Assistant Manager. He said that the Finlay (K) Ltd is the former name of the appellant. He denied that on 6/7/2001, the respondent's name appeared in their records. He said that he works for Tiluet Estate where they grow and harvest tea. He said that the appellant has 15 tea estates and 26 tea factories and that Tiluet Estate there is no conveyor belt. He denied that they issue appointment letters like what the respondent produced. He said they have a different stamp which he produced together with the Muster Roll (PEx. 1 & 2). DW1 also denied that the stamp belongs to the company and produced a sample of the stamp. He also denied knowing whose signature is on the document. DW1 also testified that their employees are treated at Central Hospital and the cards normally bear the name of the company but PWx.2 did not have any. He produced a sample. He also said the card should have had a LR number. He produced a list of all supervisors (Wx.4) in there companies and denied that there is any by the name of William Ruto. In conclusion DW1 said that the respondent's claim was a falsified one. In cross examination he admitted that Tiluet is divided into 2; Kipketer and Tiluet and he had not brought all muster rolls for all the companies.

After hearing both parties Mr. Nyagah, Senior Resident Magistrate rendered his judgment on 18/4/2007. He apportioned liability with the appellant bearing 70%. He made an award of Kshs.80,000/- in general damages and Kshs.2,800/- special damages. The appellant is aggrieved by the trial magistrate's decision and preferred this appeal based on the following grounds contained in the memorandum of appeal which Mr. Murimi, counsel for the appellant, condensed into three as follows;

1. **Whether the trial court had territorial jurisdiction to hear the matter;**

2. **Whether the respondent was an employee of the appellant; or**

3. **Whether the claim was proved.**

This being a first appeal, I am not bound by the findings of fact of the trial court and this court is under a duty to re-evaluate the evidence on record and reach its own conclusion. However, I do bear in mind that whereas the trial court had a chance to see the witnesses testify and therefore saw their demeanor, this court does not have that advantage. This caution was stated in **PETER V. SUNDAY POST LTD (1958) EA 424 at page 429**, when the court said:-

"It is a strong thing for an appellate court to differ from the finding on a question of fact of a judge who tried the case and who had the advantage of seeing and hearing the witnesses."

I do bear this caution in mind as I consider each of the issues raised.

1. Whether the trial court had jurisdiction:

Mr. Murimi argued that at paragraph 9 of the statement of defence, it was pleaded that the trial court did not have jurisdiction to hear the matter. He submitted that the appellant is based in Kericho where the cause of action arose and there is a Chief Magistrate's court in Kericho where the suit should have been filed and the suit was filed in total disregard of Sections 14 and 15 of the Civil Procedure Act which provide for territorial jurisdiction. Counsel relied on the decision of **OMWOYO V AFRICAN HIGHLANDS & PRODUCE LTD (2202) KLR 698** and **JULIUS PANYAKO SAMBU V KHALID SEIF MBARUK T/A TAKRIM BUS SERVICES (2004)2 KLR 91.** Counsel urged that the issue of jurisdiction cannot be ignored and the trial court should not have entertained the suit.

In reply to this submission, Mrs Mukira submitted that the appellant has subjected itself to the trial court's jurisdiction and never raised the issue at the trial. She also urged that **Order 42 Rule 1(2)** of the **Civil**

Procedure Rules requires that all the grounds of appeal be set out in the memorandum of appeal but the appellants have introduced it as a new ground at the hearing.

Although the issue of jurisdiction was pleaded at paragraph 19 of the defence, it seems the appellant ignored to raise the objection and submitted itself to the jurisdiction of the trial court. I do agree that ideally, this suit should have been filed in Kericho Chief Magistrate's Court where the appellant carries on business and where the cause of action arose, in compliance with **Sections 14 and 15** of the **Civil Procedure Act**. However, the appellant having kept quiet and submitted itself to the Chief Magistrate's Court for trial, it cannot be heard to turn round and deny the jurisdiction of the court. This case is distinguishable from the **OMWOYO'S** case in that, in that case, the court where the case was first filed did not have pecuniary jurisdiction to try the matter. In the instant case, the court in Nakuru had pecuniary jurisdiction. As regards the case of **JULIUS PANYAKO SAMBU** (supra) like the case of **OMWOYO,** it involved the transfer of a suit before hearing. It had not proceeded to hearing like in the instant case. Further to the above, the issue of jurisdiction is not one of the grounds of appeal. No supplementary memorandum of appeal was filed nor was the court's leave sought to include the ground of jurisdiction under Order 42 Rule 4 of the Civil Procedure Rules. The appellant cannot prosecute the appeal by way of ambush. It is contrary to **Order 42 Rules 1(2) and 4** of the **Civil Procedure Rules** and that ground of appeal must fail.

2. Whether the respondent was an employee of the appellant:

Mr. Murimi submitted that the trial court's finding that the respondent was based at Kipterer Estate was erroneous and did not stem from the evidence adduced. Counsel urged that although the respondent said that he worked at Kipterer, all documents that have been produced were from Tiluet and that the treatment card was not the one issued by the appellant. Counsel relied on **AMALGAMATED SAW MILLS LTD V JOYCE MWIHAKI MACHARIA NKU HCCA 61/07** and **AMALGAMATED SAW MILLS LTD V LUCY WANJIKU NDUNGU NKU HCCA 28/05** where the courts held that if a document one intends to use in evidence is in the possession of the other party, notice to produce should be issued. In the case **of BUDS & BLOOMS LTD V JAMES SAWAMI SIKINGA HCCA 126/05**, the court held that the issue of employmenbt has to be proved. In reply Mrs Mukira urged that the respondent produced a certificate of employment which was produced by consent and its authencity was never put to test. That the Muster Rolls produced were for Tiluet yet the respondent was from Kipketer. As regards entries in the Muster Roll, counsel urged that there is no chronology in the entries, there are no names on both entries (CR) and that there are unexplained cancellations and the said documents were not shown to the respondent during his testimony. She urged that the blank sample of the card produced by the defence was of no relevance and no evidence was adduced to rebut the respondent's evidence.

The respondent testified that he was a casual worker with the appellant and was still working there at the time he testified. He produced an employment card PEx.1. It was dated 3/1/1998, and it indicated the estate factory as Kipteter and had a stamp of the appellant – Tiluet Estate. DW1 admitted that the respondent claimed to be working at Kipterer and that Tiluet is divided into 2; Tiluet and Kipteter. DW1 also accepted that he had not produced all the Muster Rolls for all the estates. The court has no idea whether the Muster Roll for Kipketer was produced. Without any other evidence to the contrary, the respondent did prove that he was an employee of the appellant. I do agree that the Muster Roll produced is not a conclusive document of who the employees are as some numbers do not have names and there were cancellations and overwritings on some names. The trial court correctly noted these anomalies in the defence documents and also noted that the defence had not put these documents to the respondent when he testified. The respondent was not given a chance to comment or dispute the said documents. He did not require to issue a notice to produce as he never wanted to rely on them. Since the appellants were relying on those documents, the respondent should have been cross examined on them and the documents should have been marked during his testimony. The only inference the court can draw for failure to cross re-examine the respondent on the documents is that the appellant was withholding some important evidence from the court.

The respondent produced as PEx.2, a card issued by Central Hospital. The appellant produced a sample of a card PEx.3 to demonstrate that what the respondent produced was not the correct card that is used. The

Clinical Officer from Central Hospital was never called to confirm that the cards belonging to the appellant's employees were kept by them. The card (PEx.2) produced by the respondent bears his names and the place he works, that is, Kipketer Estate. The blank sample of a card produced by the appellant was of no relevance to this case. I am satisfied that the respondent was an employee of the appellant.

3. Whether negligence was proved:

It is the appellant's contention that the respondent's evidence was contrary to the particulars of negligence that were pleaded in the plaint. In reply, Mrs Mukira submitted that the respondent was filling tea on the conveyor belt which broke and it had no guards nor was the respondent provided with protective apparel like gum boots and gloves. That evidence was not rebutted. Counsel submitted that under Section 53 of the Factories Act, provision of protective apparel leads to strict liability. In the plaint at paragraph 5, it was pleaded as follows:-

"5. On or about 6th July 2001, while the plaintiff was duly performing his duties the defendant so negligently provided him with an unsafe system of work that the conveyor gripped his finger and it was severely cut and as he was trying to free it from the conveyor, he slipped and fell on the slippery floor and hit his tooth against the machine and it came out.

Particulars of negligence:-

(a) Failure to take any precautions for the safety of the plaintiff while engaged in his duty;

(b) Exposing the plaintiff to risk of injury or damage of which they knew or ought to have known;

(c) Failing to provide and maintain a safe and proper system of work and to give proper instructions to its workmen including the plaintiff on how to follow that system;

(d) Failure to observe the terms of the contract of employment thereby exposing the plaintiff to a risk of damage of which they knew or ought to have known.

(e) Failure to provide the plaintiff with proper and safety apparel e.g. Gum boots, gloves etc."

It is trite law that the burden of proof is on the plaintiff to prove that the employer failed to discharge his common law duty of care and show a link between his injury and the employers negligence.

In his evidence, the respondent testified that had there been a guard on the conveyor belt, he would not have been injured. The appellant never rebutted this evidence. The respondent also testified that upon being hit by belt, he slipped and fell as a result of which one tooth broke and this would not have happened had he been provided with gum boots. The respondent also stated that he was not provided with gloves because the injury to the hand may have been averted. The evidence was not controverted by the appellant. I do therefore find that the appellant failed to provide the respondent with protective gear and maintain the conveyor in good working condition nor was it fitted with guards. The conveyor is inherently dangerous and so is a slippery floor. In his judgment the trial magistrate made a finding that the respondent may have put his finger on the conveyor belt and that is how he was injured. The respondent did not give details of how he sustained the said injuries when he was filling the conveyor with tea. Under the **Factories Act**, failure by an employer to provide protective gear in dangerous environments invokes strict liability. The respondent too owes himself a duty to care. He did not demonstrate what he did to avoid the injury to himself. He had been working for the appellant for a long time, why had he not asked for gum boots or gloves? In the circumstances I would find as the trial court did, that the respondent contributed to the injuries to himself and do agree with the trial court's finding on liability that the respondent's contribution was 30%.

DAMAGES:

This court is being asked to interfere with the lower court's award for being excessive. I am guided by the principles espoused by the Court of Appeal in **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE V.A.M. LUBIA & OLIVE LUBIA [1982-1988]1 KAR 727 at p. 730** where Kneller J.A. said:-

"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 of 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 V. Manyoka [1961] E.A. 705709, 713; Lukenya Ranching And Farming Co-Operatives Society Ltd V. Kavolot [1970] E.A. 414, 418, 419. This Court follows the same principles."

The trial court made an award of Kshs.80,000/- as general damages. Dr. Malik examined the respondent on 7.11.2003 and found that he sustained a cut over the dorsal surface of the left index finger and partial loss of an incisor tooth. The wound left a scar measuring 2.3cm which healed well but the upper left incisor tooth was missing. He found that he had suffered temporary incapacity for a period of one week followed by a partial incapacity of another week and needed his tooth to be replaced with an artificial one. The respondent suggested an award of Kshs.180,000/- and supported his submission with the case of **ABDUKADIR MOHAMED V. TANA EXPRESS – HCC 351** OF 1989, where the plaintiff sustained laceration of cut extensor tendons of the right wrist, bruises of the right hand hip chest, hospitalized for 15 days. The court made an award of Kshs.140,000/- on 12/10/94. On the other hand, the appellant suggested an award of Kshs.40,000/- as reasonable compensation and relied on **PETER ABUYA V. VIPINGO ESTATES LTD HCC 6212/90** where the plaintiff suffered injuries to the right middle finger with severe piercing resulting in the finger remaining crooked. Also in **APITHAO AMAN V. PUMP MAINTAINANCE E.A. LTD 468/84**, where the plaintiff lost the distal part of the terminal phalanx right finger with half the nail and an award of Kshs.16,000/- was made in 1986. In **AFRICAN HIGHLNADS PRODUCE CO. LTD V. WILFRED ODHIAMBO**, the plaintiffs were awareded Kshs.50,000/- each for soft tissue injuries that they suffered.

Taking into account the fact that the decisions relied upon were made some years back, and the inflationary trends, I find that an award of Kshs.80,000/- was not too high as to be inordinately high or an erroneous estimation. The injury suffered was of a permanent nature and I find an award of Kshs.80,000/- to be reasonable in the circumstances. I therefore find no merit in the appeal. It is hereby dismissed. The respondent will have judgment for the sum of Kshs.80,000/- plus proved special damages of Kshs.2,500/- less 30% contribution.

The respondent will have the costs of this appeal and costs in the trial court. It is so ordered.

DATED and DELIVERED this 7th day of October, 2011.

R.P.V. WENDOH
JUDGE
PRESENT:
N/A for the appellant.
Ms Opiyo holding brief for Mr. Mukira for the respondent.
Kennedy – Court Clerk.