REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 53 OF 2008

(*An appeal from the Decision of Hon. P. A. Olengo, Resident Magistrate at Hamisi in RMC Civil Case No. 83 of 2007 delivered on 4th July, 2008)*

KAIMOSI TEA (K) LTD. …….....……. APPELLANT

VERSUS

THOMAS BUSOLO ESIYE …….....……. RESPONDENT

JUDGEMENT

1. This is an appeal from the decision in REMCC Hamisi in No. 83/07 delivered on 4.7.08. Both the Judgment on liability and Quantum of damages are challenged on the following grounds;

"1. That the trial magistrate erred in law and in fact by entering judgment for the Respondent/Plaintiff notwithstanding the fact that the plaintiff had not proved his case on a balance of probability.
2. That the trial magistrate erred in law and in fact by wholly disregarding the defence evidence and failing to realize that there was no negligence on the part of the Appellant/Defendant.
3. That the trial magistrate erred in law and in fact by awarding manifestively excessive amount of general damages and by disregarding the medical reports produced in court."

2. In the case before the subordinate court, the Respondent had sued the Appellant for, ***inter alia***, general and special damages arising where the Respondent was involved in an accident on 2.8.2005. In the Plaint dated 3.9.07, it is the Respondent's (Plaintiff's) claim that he was engaged in his employment with the Appellant (Defendant) plucking tea when he was pricked on the left leg by a sharp stamp and as a result he sustained serious injuries. It was his case that the accident was caused by negligence on the part of the Defendant, its servants, and/or employees or by the Defendant's breach of the common law duty of case provided under Kenyan Statutory Laws.

3. The particulars of negligence were as follows;

i) Failing to provide the Plaintiff with a safe system for work.
ii) Failing to take reasonable care to see that the Plaintiff would be reasonably safe while working.
iii) In particular failing to provide the Plaintiff with safety working implements and gadgets so as to avert and or minimize such probable accidents.
iv) In the premises failing to discharge its common law statutory duty of care to its employees, the Plaintiff in particular.
v) Causing the accident.
vi) In the alternative and without prejudice to the generality of the foregoing, the Plaintiff shall seek to

rely on the doctrine of ***res-ipsa loquitor.***

4. The particulars of injuries were as follows;

"Painful wound on the left leg."

5. In the Statement of defence dated 24.9.07, the Defendant denied;

a. That Plaintiff was an employee of the Defendant.
b. That the accident occurred.
c. That the Plaintiff was injured.
d. That there was breach of statutory duty of case.

6. Further, that in the alternative, if the accident occurred, it was occasioned wholly or substantially by the negligence of the Plaintiff. The particulars of the Plaintiff's negligence are listed as follows;

(a) Working without paying proper attention and/or keeping proper look out while performing his duties.
(b) Failing to pay proper attention and concentration while performing his duties.
(c) Failing to use protective gear provided and the safe work practices prescribed by the Defendant.
(d) Allowing himself to be injured.
(e) Working in a hurried and haphazard manner when he knew or ought to have known it was dangerous so to do.
(f) Taking unnecessary risks whilst carrying out her work.

7. The Plaintiff filed a reply to the defence denying the allegations in the defence and the particulars of negligence attributed to the Plaintiff.

8. In his Judgment, the trial magistrate apportioned liability at 80% against the Defendant and 20% against the Plaintiff. The Respondent was awarded Kshs.65,000/= general damages and Kshs.2,000/= s special damages. After deduction of the 20% contribution, the total award came to Kshs.53,600/= plus costs and interest.

9. In his submissions, the learned counsel for the appellant combined ground No. 1 & 2 of the Memorandum of Appeal to cover the issues of liability as the first ground of appeal. The issue of Quantum was argued as the second ground. On liability, it is contended that there was no evidence that the Plaintiff was on duty and the injuries were sustained in the course of duty with the appellant. That it was not shown that the Appellant was negligent or taken to provide a safe working environment. Secondly, it is argued that the amount of general damages was excessive at the time (year 2008).

10. There was no input in this appeal by the Respondents although they were duly served.

11. The Plaintiffs evidence is that he was plucking tea leaves when he was pricked by a tea stump. That the Plaintiff had no shoes and was careful and took all precautionary measures but didn't see the tea stump. He stated that he was not issued with "gumboots or canvass". The plaintiff produced the payslips to prove that he was working for the Defendant.

12. **Everline Koyi (DW1),** a nurse at the Defendant Tea Estate testified that the plaintiff was not treated at the Defendant's dispensary on the material date (21.8.05). That the material date fell on a Sunday when no plucking of the tea takes place. The witness however admitted that the plaintiff was an employee of the Defendant. During cross-examination, the nurse stated that she does not work at the farm nor supervise workers who pluck the tea or allocate them work. The Defendant's witness produced no records to show which days tea was plucked and the workers in attendance. No register was produced to show who was treated at the Defendant's dispensary on the material day.

13. Although the nurse dismissed the "patients notes" produced by the Plaintiff (Exh.2) as different in

colour with unfamiliar handwriting, there are no allegation that the "patient's notes" which bear the dispensary stamp are a forgery.

14. The evidence by the plaintiff on what transpired in the field remains uncontroverted. The nurse (DW1) was not working in the field and no records were produced to show who worked on the day. No reasons were produced in court to show if the plaintiff had been issued with any protective gear. The plaintiff's contention is that he requested for safety gear but was not provided any.

15. Did the material day fall on a Sunday? It is an exercise in futility to answer this question because it will not answer the question whether the plaintiff worked on that day or not.

16. I have evaluated the evidence on record and considered the authorities cited by the appellant's counsel. The conclusion I arrive at is that the plaintiff has proved his case on liability on a balance of probability. It is admitted that the plaintiff was an employee of the Defendant. The evidence of the nurse (DW1) as analyzed above is of no probative value regarding what transpired in the field.

17. The Plaintiff has given a version of evidence which is quite probable. I find that the defendant had not provided a safe work environment in that no protective gear had been issued to the plaintiff yet getting pricked while plucking tea was foreseeable.

18. As an appellate court, I have borne in mind the principles applied by the Court of Appeal in the case of **Selle & Another v. Associated Motor Boat Company Ltd. & Others** (1968) EA.

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. The "patient's notes" from Kaimosi Tea Estate Dispensary (Exh.2) describes the plaintiff's injuries as ***"deep pricked wound on the left leg below the knee while on duty plucking tea."*** Those injuries are consistent with the injuries described in the medical report (Exh.4) which describes the plaintiff's injuries as a "painful wound on the left leg" which healed with a scar. The trial magistrate awarded Kshs.65,000/= general damages on a 100% basis.

20. The authorities cited by the plaintiff before the subordinate court by the plaintiff were:

a) NAIROBI HCCC NO.3814 – ZAINABU ABUBAKAR IRERI & ANO. VS GLADYS WAMUYU & ANO.
b) ***NAIROBI HCCC NO. 2164 OF 1991 – VINCENT ODUOR VS K.P.L.C. LTD***. where an award of Kshs.85,000/= was made.

21. In the instant case, the Defendant cited the following authority;

"KISUMU HCCA NO. 18 OF 2005 – LILIAN ACHIENG (a minor suing through RUSALIA ATIENO OMAYA VS NATION MEDIA GROUP" - where Kshs.60,000/= was awarded for general damages in the year 2005 for soft Tissue injuries.

22. I have taken into account what the Court of Appeal stated in the case of ***Ali v NYAMBU t/a Sisera Store [1990] KLR 538:***

"The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that

awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

23. Applying the above principles, I find the award by the trial magistrate was correct. He took into account comparable injuries and awards and did not apply any wrong principle. The comparable awards were made many years ago. Inflation and the cost of living must be taken into account. I find the award both fair and reasonable and I see no reason to disturb the same.

24. I find the Appeal has no merit and it is hereby dismissed with costs to the Respondent.

25. Orders accordingly.

Dated Signed and delivered at Kakamega this 22nd day of November, 2011

B. THURANIRA JADEN
J U D G E