REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

(CORAM : F. AZANGALALA, J.)

CIVIL APPEAL NO. 88 OF 2010

BETWEEN

NYAYO TEA ZONE DEVELOPMENT CORPORATION::APPELLANT

AND

SHADRACK WANJALA JASON:::RESPONDENT

(Being an appeal from the Judgment and Decree of the Learned Senior Resident Magistrate B. N. Mosiria, dated 28th April 2010 at Iten Senior Resident Magistrate's Court Civil Case No. 46 of 2009).

JUDGMENT

This appeal is from the judgment and decree of the Learned Senior Resident Magistrate B. N. Mosiria dated 28th April, 2010 in Iten Senior Resident Magistrate's Court Civil Case No. 46 of 2009. The appellant Nyayo Tea Zone Development Corporation was the defendant and the respondent Shadrack Wanjala Jason was the plaintiff. The Learned Senior Resident Magistrate entered judgment against the appellant and in favour of the respondent on liability in the ratio of 60%: 40% and awarded the respondent Kshs. 100,000/- as general damages and Kshs. 1,500/- as special damages and thus triggered this appeal. The respondent had been employee of the appellant and alleged, in his plaint, that on or about 10th October, 2007 while in the course of his employment as a tea picker, he was pricked by a tea stamp in the sole of his right foot and right arm as a result of which he suffered bodily injuries, loss and damages which he claimed from the applicant on the basis that the appellant, its agents and/or servants and/or employees had been negligent and/or had been in breach of contract and/or statutory duty. In the alternative the respondent relied upon the doctrine of *res jipsa loquitor*.

In the written statement of defence delivered by the appellant it denied the respondent's claim and specifically denied, *inter alia*, that the respondent was its employee and was injured as alleged or at all; that it or its agents/servants/employees were negligent or in breach of contract or statutory duty. In the alternative it pleaded that if the accident occurred as alleged then the same was wholly occasioned and/or substantially contributed to by the respondent's negligence.

In this appeal to this court the appellant has raised six (6) grounds of appeal all which challenge the Learned Magistrate's findings on liability and the award of the said damages.

The respondent's case before the Learned Senor Resident Magistrate was that at the time of the alleged accident he was employed by the appellant as a tea plucker at Kapcherop. After work it started raining at about 3:00 pm. As he ran seeking shelter he slid and fell down injuring his right foot and right leg. He reported to his supervisor but received no help from him. He then went to Kapcherop District Hospital where he was treated. Later medical report was prepared by Dr. Aluda to whom he paid Kshs. 1500/-. He blamed the appellant for not providing a conducive working environment and for not assisting him.

In cross examination he stated the the rain made him fell and that although he completed plucking tea at 1 pm the tea could only be carried at 3 pm.

The respondent called Dr. Samuel Aluda (PW2) who testified that he had examined the respondent on 17th October, 2007 and observed that he had a pricked wound in the sole of the right foot and right forearm. He prepared a medical report of those injuries which report he produced before the Learned Magistrate.

The respondent also called Maurice Cheserek (PW3) who produced treatments given at Kapcherop Health Center on 10th October, 2007. In cross examination PW3 testified that he saw the respondent the morning after he was injured he and complained of a thorn prick in the right leg only.

The appellant's case on the hand was presented through Daniel Ojijo Odondi (DW1) who was its supervisor at Kapcherop Rea Zone. He testified that the respondent indeed worked for the appellant and on the material day reported at 7.30 am and plucked tea up to 1pm. When he left without suffering any injury. He further told the court that the respondent worked on the subsequent days and left duty without making any complaint. He produced D1 which was the Daily task and green leaf record kept by the appellant.

DW1 further testified that the respondent was not exposed to any danger at all and did not require and was not furnished with gumboots. However like all other employees he was given protective wear a long apron.

In cross examination DW1 maintained that the respondent's work did not require gumboots and that it not rain on the material date to make the ground slippery. He further stated that the respondent was looking on flat land and could not step on such a surface.

After analysing the evidence which was before her, the Learned Resident Magistrate found that the appellant owed the respondent a duty of care and by failing to provide gumboots it breached that duty. She also found that the respondent had contributed to the negligence in a larger measure than the appellant ratio of 60% against the respondent and 40% against the appellant.

When the appeal came up for hearing on 5th July, 2011, counsel agreed to file written submissions which were duly in place by 11th October, 2011. I have read those submissions and the authorities relied upon by counsel. I have also given due consideration to the record of the Learned Senior Resident Magistrate. Having done so, I take the following view of the matter.

This is a first appeal. It is therefore by way of a retrial. I must re-evaluate the same and draw my own conclusion, bearing in mind that I have neither seen nor heard the witnesses testify and should give allowance for that **(See Selle and Another -Vs- Associated Motor Boat Company Limited and others [1968] E.A 123)**. It is also trite that I am not necessarily bound to follow the trial court's findings of fact if it appears either that he court failed to take into account particular pertinent, circumstances or if the impression based upon the demeanour of witnesses is inconsistent with the evidence adduced **(See Abdul Hameed Saif -Vs- Ali Mohamed Shoran [1955] 22 E.A. 270).** I am also alive to the principle enunciated in the decision of the Court of Appeal in **Peters -Vs- Sunday Psst Limited [1958] E.A 424.** which was expressed as follows at page 1429:

"It is a strong thing for an appellate court to differ from the finding on question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

With the above principles in mind, I ask myself whether the appellant had demonstrated sufficiently that the trial court's findings of fact were not based on evidence or were based on a misapprehension of evidence or that the trial court clearly acted on wrong principles in reading those findings of facts. I see also **(Ephantus Mwangi & Another -Vs- Wambugu [1983/84] 2 KEA 100).**

In the appeal before me, the basis upon which the Learned Magistrate found against the appellant on liability was mainly that the appellant had breached its duty of case by not providing the respondent with gumboots. In her own words:

"The defendant witnesses say the company only provided water – proof coat but no gumboots. Indeed this is a clear admission by the defence that it did breach the duty of care that it owes to its employees.....

It is common knowledge that tea plantation farms have sharp sticks and stamps which could probably cause injury to fact and hence gumboots are most essential."

The respondent had indeed pleaded that he had not been furnished with gumboots. In his entire evidence however, he never referred t gumboots at all. He blamed the appellant because they did not give him assistance when he was injured and further because conditions of work were poor as he had no uniform. The respondent did not also state anywhere in his evidence that the field upon which the plucking of the tea was taking place had sharp sticks and stamps. In his own words:-

"There was rain which came and I tried to run to shield (sic) then I slid and fell, it was 3 pm I had finished plucking the tea and sticks of tea did not injure me I did get injured on right hand and leg."

From the above testimony, it is plain that it was not the absence of gumboots which caused the injury to the respondent. The respondent was running for shelter from rain and slid and fell down. The respondent did not allege that the field was strewn with stamps and knocked himself against them resulting in the fall. He slid as he ran for shelter. There was no way the gumboots would have prevented the sliding and falling. In the respondent's own words:

"It was raining so it made me fall."

It is plain therefore that, the respondent's falling had nothing to do with his not having gumboots. The respondent did not himself say so.

There was then the testimony of Daniel Ojijo Oluoch (DW1). He testified, *inter alia*, that the respondent worked upto 1pm of the material date and then left. According to him, the last worker left at 2 pm. He produced D EX1 without challenge from the respondent. The exhibit clearly showed that on the material date the respondent, left work at 1pm. DW1's testimony was not shaken in cross-examination. The respondent himself had testified that by the time he fell and injured himself he had finished plucking tea at 1pm and was waiting for it to be carried. He did not state that he would be involved in the carrying of the tea after it had been plucked and weighed. He did not demonstrate his role after the end of plucking after 1pm.

DW1 was clear in his testimony. In his own words:-

"There was no accident i caused and there was no accident in the first place. It was a holiday that day the last people who left farm was at 2pm. If plaintiff left at it (sic) he could not have weigh tea there, I had finished and lorry came and taken tea leaves."

The record is clear that DW1 was not challenged on that aspect of his testimony.

Given DW1's testimony it is difficult to appreciate the Learned Senior Resident Magistrate's uncertainly expressed as follows:-

"It is not clear whether the 1pm (sic) he was there includes, the time that he had harvested tea having weighed or it only upto time he left the farm. Since it is common knowledge, that harvesting is first done and hereafter it is weighed, from records before court, court cannot tell if 1pm includes upto time of weighing or 1pm is upto time worker has left for home so as to say one could not be found within plantation to be injured while there."

With all due respect to the Learned Senior Resident Magistrate, there was no necessity for uncertainty. The record due accepted as evidence left no room for doubt. The testimony of DW1 also excluded the uncertainty the Learned Magistrate seemed to entertain.

Then there was the testimony of PW3. He testified as follows:-

"I did see patient at 8:30am he was injured on 9/10/2007 at 3pm and he came in the morning. He did indicate to me he was injured the previous day while on duty. It was a thorn prick in the right leg, he never complained of anywhere else but when he was injured he fell down."

That testimony was clearly not in consonance with the respondent's testimony. Yet it came from the first medical facility the respondent attended after this alleged accident. Where was he treated for injuries allegedly sustained on 10th October, 2007. When did he sustain the injury on the right hand which he talked about.

In all those premises, I have to the conclusion that the Learned Senior Resident Magistrate's findings of facts on liability were based on a misapprehension of the evidence adduced before her. There conclusion deals with grounds 1, 2, 4, 5 and 6 of the appellant's appeal which grounds challenged the Magistrate's findings of liability.

If I had dismissed the appellant's appeal on liability, I would not have interfered with the award of damages awarded to the respondent as in my view the same is not so in ordinately high as to suggest an erroneous estimate of the damages. I also detect no error of principle. So I would not have intervened even if I had not found for the appellant on liability.

In the end this appeal is allowed. The judgment of the Senior Resident Magistrate as against the appellant is hereby set aside and is substituted with an order dismissing the respondent's claim with costs as against the respondent.

Costs of this appeal are awarded to the appellant.

Order accordingly.
DATED AND DELIVERED AT ELDORET
THIS 22ND DAY OF NOVEMBER, 2011.

F. AZANGALALA
JUDGE
Read in the absence of the parties and their advocates.
The date having been taken in Court.

F. AZANGALALA
JUDGE
22ND NOVEMBER, 2011