REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 103 OF 2010

NYAYO TEA ZONES DEVELOPMENT CORPORATION ……..…… APPELLANT

VERSUS

MARGARET WANJIRU MBURU …….…….. RESPONDENT

(Being an Appeal from the Decree and Judgment of Honourable B. N. MOSIRIA (Senior Resident Magistrate) in Iten SRMCC. No. 45 of 2009 delivered on 16th May 2010)

JUDGMENT

This appeal arises from the decision and judgment of the Senior Resident magistrate delivered on the 26th May 2010 in Iten SRMCC No. 45 of 2009 in which the Plaintiff (herein, respondent) was awarded damages in the sum of Kshs. 91,500/- less 60% contribution thereby summing up to Kshs. 36,600/=.

The case for the plaintiff was founded on the pleadings contained in the plaint dated 27th August 2009 while the defendant's (herein, appellant) case was founded on the pleadings in the statement of defence dated 29th September 2009. The plaintiff, **MARGARET WANJIRU MBURU (PW 1)**, testified that she was employed by the defendant and was on duty on 10th October 2007 at the defendant's Kapcherop Nyayo Tea Zone farm plucking and putting tea leaves into a basket when she fell on tipped or cut tea plants while pulling out weed growth. As a result, she suffered injury on the chest and head caused by the pricking plants. She proceeded to Kapcherop District Hospital where she was treated. Later, she was examined by a doctor who prepared the necessary medical report.

DR. SAMUEL ALUDA (PW 2), examined the plaintiff and thereafter compiled the medical report dated 27th August 2009 (P.Ex 2(a)) in which he formed the opinion that the plaintiff suffered severe injuries which healed with occasional pains.

MAURICE CHESERECK (PW 3), a clinical officer at Kapcherop Health Centre treated the plaintiff at the centre. He produced the necessary treatment notes (P. Ex.1).

In support of its defence, the defendant's Supervisor, **DANIEL ODONDI ONGISO (DW 1)**, testified of first not knowing the plaintiff and never having worked with her. Ultimately, he acknowledged that the plaintiff was indeed employed by the defendant. He produced a task sheet (D.Ex 1 (a)) to show that the plaintiff was not at work on 16th October 2007 and that her failure to sign the week's pay sheet (D.Ex 3) implied that she did not work and was therefore no paid.

The witness (DW 1) also produced a master roll for September 2007 (D. Ex 4 (a)) showing that it was signed by the plaintiff. Another master roll for October 2007 (D.Ex. 4(b)) did not show the name of the plaintiff. He (PW 1) said that another supervisor called George Abel was responsible for preparing the October master roll. The said George Abel was however not called to testify.

The learned trial Magistrate considered all the foregoing evidence and arrived at the conclusion that the defendant was liable at 40% for the injuries suffered by the plaintiff. The learned trial Magistrate also concluded that the plaintiff was also to blame for her injuries to the extent of 60%.

In so concluding, the learned trial Magistrate remarked:-

"For the reason that the person who supervised the plaintiff while working for the defendant was not called to testify and the Court having found out that the defendant witness who testified could only produce what was related to his supervisor and could not know about plaintiff whom he never supervised and further the defendant having not denied that protective gear was not supplied to the plaintiff which is duty of defendant as an employer, I find that the defendant is responsible for injuries which befell plaintiff. However, the plaintiff having undertaken duties which were within her control and which she could decide what to do in the work she did significantly contribute to injuries which befell her.
I thus would find plaintiff contributed 60% to the injuries while defendant shoulder 40%."

Being dissatisfied with the decision of the learned trial Magistrate, the defendant preferred six (6) grounds of appeal contained in the memorandum of appeal dated 8th June 2010 and filed herein on 10th June 2010.

Learned Counsel, **MR. SONGOK**, argued the appeal on behalf of the appellant while the learned Counsel, **MR. WAFULA**, opposed the same on behalf of the respondent.

At this point, the duty of this Court is to reconsider the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses. In that regard, the evidence adduced at the trial has already been re-visited hereinabove and upon due consideration of the same in the light of the grounds of appeal and the submissions made by both sides, it is the view of this Court that liability was established as found by the learned trial Magistrate. There was no dispute or substantial dispute that the plaintiff was injured while in the course of her employment with the defendant Corporation. Her role was to pluck tea and while doing so, she fell on pricking tea plants and was injured. It was not in dispute that she was not provided with protective gear which may have prevented the injury. The appellant was therefore liable for failure to provide protective gear.

However, liability did not attach to the defendant alone, the plaintiff was also liable for her failure to have sufficient regard for her own safety. She ought to have exercised extra caution while attempting to remove the weed growth underneath the tea plants. Her liability was in fact greater than that of the defendant. This was correctly set at 60% by the learned trial Magistrate. This Court has therefore no good reason to interfere with the findings on liability made by the learned trial Magistrate.

Learned Counsel for the appellant submitted that with regard to the material date of the accident, the Plaintiff's testimony was at variance with her pleadings in that whereas the plaintiff alleged that the accident occurred on 10th October 2007 which was a public holiday, the pleadings refer to 16th October 2007. In response, learned Counsel for the respondent submitted that regard being given to the pleadings, the testimonies of the plaintiff and her witnesses as well as the Judgment of the Court, it is apparent that the mention of the date 10th October 2007 was typographical error.

In this Court's view, a variance of date could not water down the plaintiff's case and more so, considering that there was no substantial dispute with regard to the occurrence of the accident on 16th October 2007 and with regard to the plaintiff being on duty on that date. Also, the 10th October 2007

having been a public holiday, it was never expected that the plaintiff or indeed any other worker would be on duty.

The mention of the date 10th October 2007 may therefore have been an error whether typographical or not. This appeal lacks merit with regard to liability as well as quantum of damages.

In any event, learned Counsel for the appellant stated that the appeal was against liability only. This meant that ground three (3) of the appeal was abandoned.

In sum, the appeal is dismissed with costs to the respondent.

J.R. KARANJA
JUDGE

[Delivered and signed this 10th day of November, 2011]
[In the absence of both parties)