



## **Editorial Summary**

1. *Civil Appeal*
2. *Subject of Main Subordinate Court Case*

### **WORK PLACE ACCIDENT**

- 2.1 *Employer/employee*
- 2.2 *Female adult aged 41 years old in 2004*
- 2.3 *General field work*
- 2.4 *Sustained injury whilst picking avocados*
- 2.5 *Wound on injuries to small finger left hand.*
- 2.6 *Medical report G.K Karaiya MBCH Thika*

*Cut wound on 5<sup>th</sup> finger left hand measuring 3x1 cm.  
Complete healing no disability.*

- 2.7 *Trial magistrate on 27<sup>th</sup> July 2007.*

*Judgment for plaintiff/respondent*

#### **Liability**

*70% against employer appellant  
30% against employee respondent*

*Quantum*

*General Damages*

*Pain and Suffering*

*Less 30%*

*Ksh.70,000/=*

*Contribution  
Special damages  
Medical report*

*Ksh.49,000/=*

*Ksh.1,000/=*

*Total*

*Ks.50,000/=*

2.8 *Gatundu court burnt*

2.9 *Re constituted file*

3. *Appeal*

a) *Filed 21<sup>st</sup> March 2007*

b) *Dated 19<sup>th</sup> March 2007*

c) *Decision 27<sup>th</sup> February 2007*

d) *Appeal on grounds*

i) *No negligence on part of defendant proved.*

ii) *Documents Ex. 2 put in. Possible forgery – not taken into account*

iii)  
*Award excessive*

iv) *Prayed to set aside judgement and dismiss suit with costs.*

4. *In reply :*

i) *Respondent had proved she worked for appellatant.*

ii) *She was injured in course of employment and a breach of contract*

iii) *Forgery not significant*

5. *Case Law (subordinate court)*

a) *Wilson Nyanyu Musinisi*

*– Vs –*

*Sasini Tea & Cofee Ltd*

*Kericho CA 15/2003*

Kimaru J

- b) Eastern Produce (K) Ltd  
Vs  
James Kipketer Ngetich  
Eldoret CA 85/02  
Gacheche J
- c) Nicholas Kobia Thro' Agata Kanampiu  
Vs  
Overseas Trading Company  
Nairobi CA 5832/90  
Mwera J
- d) Raphael Mwaniki Kiboi  
Vs  
Joseph Njogu Kinyua  
Nairobi CA 3974  
Ringera J
- e) Employment Law by Malcom Sargent  
Pearson Education Ltd 2001

6. Advocates:

- i) J.A. Okore instructed by kairu & McCourt & Co advocates for the appellant/original defendant
- ii) P. Kangethe instructed by Ndungu Mwaura & Co Advocates for the respondent/original plaintiff

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 195 OF 2007**

**KAKUZI LIMITED.....APPELLANT/ORIGINAL DEFENDANT**

**VERSUS**

**LUCY WANJIRU KIGORO.....RESPONDENT/ORIGINAL PLAINTIFF**

*(Being an appeal from the Judgment of Hon. A. Lorot Esq Resident Magistrate in Civil Case No. 23 of 2005*

*dated 27<sup>th</sup> day of February at Gatundu)*

**J U D G M E N T**

## I. INTRODUCTION

1. The original subordinate court case herein concerns a workplace accident on a horticultural farm. The relationship between the parties is one of employer /employee.

2. On the 6<sup>th</sup> April 2004, the employee, Lucy Wanjiru Kigoro a female adult aged 41 years old engaged as a general field worker alleged that she picked avocados from a tree. As she came down the tree, she sustained injury to her hand:

*“I was cut on the hand when I was climbing down. I sustained a cut. It was about 11.00 am. I was cut on the right hand.”*

3. She then filed suit at the Law Courts Gatundu on 17<sup>th</sup> January 2005. The case was heard and concluded on the 27<sup>th</sup> July 2007. (Two years later). The Law Courts at Gatungu burnt down including all the records being destroyed.

4. By an application of Notice of Motion 18<sup>th</sup> March 2010 before the Magistrates Court, the employer applied for the reconstruction of the file. This was done and an appeal duly filed earlier on 21<sup>st</sup> March 2007 against the order of 27<sup>th</sup> July 2007, could now be dealt with.

5. This may explain the delay of disposing of this appeal.

## II BACKGROUND

6. The employer denied in the subordinate court that they were negligent in any way to occasion injury to the employee. They denied that the workplace was not safe and that they required to provide gloves for the employee to work

7. In evidence they claimed to establish that the documents produced by the employee may have been a forgery.

8. The employee claimed she was cut on her right hand and was duly treated for injuries sustained.

9. The employer was of the view that the employee would have immediately gone to the dispensary for treatment. The dispensary was run by DW1, a clinical officer who produced his records and confirmed that the employee never reported to him for treatment. That the document to produce to court being the treatment form No. 516/5 was never part of the company's records. The serial number of the receipts produced were No. 13480 – 13479. At no time was the employee's name on the register.

10. The trial magistrate gave the employee the benefit of doubt and stated that the employee contributed to the injury and was not cautious enough as she went down the tree. He assessed her contribution at 30% and that of the employer at 70% as being liable for the said accident.

11. The trial magistrate was aware that the plaintiff pleaded injuries to the left hand, small finger. This was described as a cut wound on the fifth finger left hand measuring 3 x1cm according to the doctor.

12. There was no disability. The healing was complete.

13. For the said cut, the trial magistrate awarded Kshs.70,000 as general damages.

Pain and Suffering	Kshs. 70,000/=	
Less 30%	Kshs. 21,000/=	
Total	Kshs.	49,000/=
<u>Special damages</u>		
Medical Report	<u>Ksh. 1,000/=</u>	
Grand total	Kshs. 50,000/=	
	=====	

14. Being aggrieved at this award and judgment, the employer filed appeal.

### III APPEAL

15. In the memorandum of appeal the employer prayed for the judgment to be put aside and the suit dismissed in their favor together with costs. The reasons being:

- i) *That from the evidence before court no negligence had been proved against them.*
- ii) *That the document Exhibit.2 produced by the employee was in fact a forgery and a fake. This document was to prove that the employee attended the employer's clinic but was not the company's document.*
- iii) *That the award given by the trial magistrate was excessive.*

16. In reply the employee through her advocate stated that the respondents had proved she worked for the appellant. That she sustained injuries in the course of her employment which injuries amounted to a lack of contract.

17. The employee informed this court that the issue of forgery of a document was insignificant to the case. The employee asked the decision of the final court to be upheld.

### III OPINION

18. It is an implied duty for any employer in a contract of employment to take ***“all reasonable steps to provide and maintain a safe report work so as not to expose an employee to unnecessary risk of injury.”*** Employment Law by Malcom Sargent Page 90 and 91 2001 edition.

19. The duty of care has been listed in the case law of

**Wilson and Clyde Coal Co Ltd**

V

**English**

(1938)AC 57

Where Lord Thankerton stated:

***“If the master retains control, he has a duty to see that his servants do not suffer through his personal negligence, such as***

***1) Failure to provide proper and suitable plant, if he knows or ought to have known of such failure.***

***2) Failure to select fit and competent servants***

***3) Failure to prove a proper and safe system of working aid***

***4) Failure to observe statutory regulations.”***

20. If on the other hand an employee is negligent or careless the employer is not held liable.

21. The employee is under an obligation to inform the employer or any other person of any work situation which might present a serious and imminent danger to health and safety. (Employment Law [supra])

22. In this case the employee stated she climbed a tree and received a cut on her right hand. The pleadings and doctors report speak of the left hand little finger. If per chance the employee did receive a cut in the course of employment, she required to show that coming down the tree she either slipped, fell or some form of negligence that would have caused her injury. She just stated she climbed down the tree and got a cut on her right hand. She informed the doctor that she was pricked or cut by a dry twig.

23. The issue here was she ever injured? In the case law of

**Eastern Produce (K) Ltd**

Vs

**James Kipnetich**

Eldoret CA 85/02

Gacheche J

The Hon. Judge was of the opinion where a worker is injured and they fail to immediately report to their superiors and produce treatment notes, initially from the clinic, they should not be given any award nor should the employer be held liable.

24. The trial magistrate in this case acknowledged the document produced by the employer was suspect.

***“[the document] has been disowned and seriously of Ogutu [DW1]. I find that the same is likely a forgery of a false document. However, a careful look at PEXH 1 and DEXH show that it is a lower section of the treatment note. On a balance of probabilities, I find that the plaintiff’s case is strange and can withstand the serious challenge of the defense.”***

25. It was on the above reasoning that the trial magistrate found the employee had proved their case. The

trial magistrate further based this on the grounds that the plaintiff employee “said she slipped and was pierced by a stem”

26. Unfortunately there was no evidence to this effect given by the employee on record.

27. I am of the opinion that the Hon. Trial Magistrate erred in his findings to come to the conclusion that he did. That this appeal must succeed. The judgment of the Hon. Magistrate is set aside. The judgment is to read that the suit in the subordinate court against the employer is dismissed.

28. There will be costs to the employer appellant in the subordinate court case and costs to the employer appellant in this appeal to be paid by the respondent employee.

DATED THIS 1<sup>ST</sup> DAY OF NOVEMBER 2011 AT NAIROBI

**M.A. ANG’AWA**  
**JUDGE**

*Advocates:*

i) *J.A. Okore instructed by kairu & McCourt & Co advocates for the appellant/original defendant*

ii) *P. Kangethe instructed by Ndungu Mwaura & Co Advocates for the respondent/original plaintiff*