REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 39 of 2005

LONGONOT HORTICULTURE LTD……..APPELLANT

VERSUS

ISAAC OLUOCH KICHAMA……RESPONDENT

JUDGMENT

This is an appeal against the judgment of the Acting Senior Principal Magistrate delivered on 3rd February 2005 in Nakuru CMCC No. 169 of 2003.

The respondent had in that case claimed that on
24th December 2002 while employed by the defendant as a carpenter and assigned to remove some vegetation on a roof of one of the appellant's structures, he slipped and fell down as a result of which he suffered injures.

He attributed his fall to the negligence and/or breach of the contract of employment between them in failing to provide him with a safe system of work. He therefore claimed both general and special damages.

The appellant on the other hand, although it had in its defence made a general denial of the respondent's claim, in the evidence of its Human Resource Assistant, it admitted that the respondent indeed fell and suffered injuries but attributed that to the respondent's negligence. That witness claimed that the respondent compromised his own safety by working on the edge of the roof.

After hearing the case the learned trial magistrate held the appellant 100% liable and awarded the respondent Kshs.180,000/- general damages.

In its 8 grounds of appeal, the appellant raised two main points: that the respondent had failed to establish the appellant's negligence and that considering the injuries the respondent suffered the sum awarded was inordinately high.

On the first point the appellant contended in both its memorandum of appeal and its counsel's submissions that injury perse is not actionable. The respondent was bound to but had failed to prove that it was negligent and/or that it was in breach of the contract of employment with the respondent.

If anything, counsel for the appellant argued, it was the respondent who was negligent. That it had rained was immaterial. Everything was under the respondent's control. Though the ladder he used was short he is the one who chose it. Finally he faulted the learned trial magistrate for failing to find that at the very least the respondent substantially contributed to the accident.

Responding to these submissions, counsel for the respondent argued that there is no evidence to proof that the respondent chose the short ladder and that the appellant had failed to assign somebody else to assist the respondent and hold the ladder for him.

I have considered these rival submissions in the light of the evidence on record. At common law, an employer, especially the one carrying out dangerous tasks, is not only required to provide a safe system of work but to also establish a supervisory system that ensures that the safe system of work he has put in place works and is followed. The words of Lord Denning L J in **Clifford Vs Charles & Sons Ltd [1951] All ER 72** set out this duty clearly:-

> **"When an employer asks his men to work dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of they own safety and may become careless about taking precautions. He must therefore, by his foremen, do his best to keep them up to the mark and not to tolerate any slackness. He cannot throw all the blame to them if he has not shown a good example himself."**

Counsel for the Appellant contended that there was no causal nexus between the respondent's injury and the Appellant's negligence if any. I agree with him that injury per se is not actionable. Save for claims solely based on the Workmen Compensation Act, the plaintiff in each case has not only to prove that he suffered injury but has also to show a causal link or nexus between his injury and the negligence or breach the statutory duty of care or contract on the part of the defendant-**Wilson Nyanyu Musigisi Vs Sasini Tea & Coffee Ltd, Kericho HCCA No. 15 of 2003**. In the said case of **Statpack Industries Vs James Mbithi Munyao,**
Nairobi HCCA No. 152 of 2003, Justice Visram expressed this point thus:-

> **"Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."**

In this case the respondent proved the causal link between his injury and the Appellant's negligence. He testified that on the material date he was assigned for remove vegetation which had grown on the roof of one of the appellant's buildings and replace one of the rotten iron sheets. He took a ladder and a hammer. While removing one of the rotten sheets, his hammer fell down. As he had no assistant to throw it back to him, and because of the shortness of the ladder and wet surface he slipped and feel as he claimed down to retrieve it.

The work of repairing a roof like in this case is dangerous. It was therefore the duty of an employer in such case to provide its employee not only with an appropriate ladder but also with an assistant to at least hold the ladder to avoid it slipping and causing the employee to fall. The respondent's testimony that he was provided with a short ladder and had nobody to assist him was uncontroverted. Having failed to provide the respondent with a suitable ladder and an assistant, I find that the Appellant failed in its common law duty of care.

This finding notwithstanding, however, and despite the fact that the witness the appellant called did not witness the accident I agree with counsel for the appellant that the trial court erred in not realizing that the respondent to the accident. As he had no assistant, the respondent was in the circumstances supposed to firmly secure the ladder to ensure that it does not slip. From the circumstances of this case it appears that the respondent also failed to necessary precautions for his own safety and for that failure I find that the contributed to the cause of the accident. I assess that contributory negligence at 25%.

As I have pointed out the second point raised in this appeal is on the quantum of damages. It is contended for the appellant that he learned trial magistrate ignored the defence submissions and failed to adequately consider the defence case and in the result she awarded the respondent excessive general damages. As I have said the respondent was awarded.

For me to interfere with that award I must be satisfied that it is so inordinately high or low as to represent an erroneous estimate. This is a well established principle that has been stated and reiterated in several decisions of this court and those of the Court of Appeal including **Butt Vs Khan [1982-88] KAR 1** and **Kemfro Africa Ltd & Another Vs Lubia & Another (No.2) [1987] KLR 30.**

Having considered the medical reports the evidence on record and bearing in mind the above guiding principle, I find that the complaint on the quantum of damages has a basis. The respondent, according to Dr. Omuyoma who testified on his behalf, sustained soft tissue injuries to

the hip and chest, a sprain of the wrist joint and a cut wound on the right leg. He classified those injuries as harm.

Dr. Malik who examined the respondent the instance of the appellant stated in his report hat the respondent's hip was normal. He only elicited some pain on stretching the right wrist joint to the extreme.

The respondent was injured on
24th December 2002 but he went to hospital on 1st January 2003. Both in his plaint and his evidence, he did not say he suffered any fracture. He never made mention of a plaster being applied to his injured wrist. I am satisfied from Dr. Malik's report that the respondent tried to manufacture evidence of a fracture to his right wrist.

It is clear to me from this evidence that the respondent suffered soft tissue injuries to the hip and chest, sprain of the right wrist joint and cut a wound on the right leg. The soft tissue injuries the plaintiff in the case of **Micah Lekeuwan Julius Amakoye Yosi, Msa HCCCA No. 127 of 2002** suffered had a possibility of a long term effect and he was awarded Kshs.150,000/= in May 2005. No such prognosis is given in this case. In the circumstances I find that a sum of Kshs.150,000/= on 100% basis would be a reasonable award in this case.

For these reasons, I allow this appeal and reduce the award to Kshs.150,000/= less 25% contributory negligence. That works to a net award of Kshs.112,500/=. In the lower court the respondent shall have the costs and interest on that sum while the Appellant shall entitled to half the costs of this appeal.

DATED and DELIVERED this 31st day of March, 2010.

D. K. MARAGA
JUDGE.