REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 115 of 2006

KENYA TEA DEVELOPMENT AGENCY……APPELLANT

-VERSUS-

SOFIA NYABOKE KENANDA……RESPONDENT

JUDGMENT

(***Appeal from the judgment and Decree of Hon. L.Komingoi(SRM) Dated and delivered on 14th day of October,2004, in the original Kisii CMCC.No. 748 of 2003).***

In the suit filed in the Chief magistrate's court at Kisii being CMCC.No.748 of 2003, the respondent herein was the plaintiff whereas the appellant was the defendant. In the said suit, the respondent sought compensation for alleged injuries she sustained on 7th April, 1999 as she was working for the appellant at Kebirigo Tea Factory. Apparently, the appellant was a general worker in the sorting section of Kebirigo Tea Factory. As she carried out her work on the material day, tea dust was blown into her eyes bilaterally and as a result she sustained injuries, suffered pain, loss and damage. To the respondent, the said accident was occasioned by a breach of statutory duty towards her by the appellant in that it failed to make or keep safe the respondent's work place, failed to maintain safe means of access to the work place, employed her without instructing her as to the dangers likely to arise in connection with her work or without providing her with any or any sufficient training and adequate supervision. In the premises, the appellant failed to provide a safe system of work. In the alternative, the respondent pleaded common law negligence on the part of the appellant whose particulars were that the appellant failed to take any or any adequate precaution for the safety of the respondent, exposed her to a risk of damage or

injury which it knew or ought to have known, failed to provide or maintain adequate or suitable plant, tackle or appliances' to enable her carry out her said work safely in and failing to provide the respondent with suitable goggles or other adequate equipment to enable her carry out her work in safety.

As a result of the foregoing, the respondent sustained injuries to her eyes when foreign bodies lodged therein and turned them red. She was subsequently treated and a report as to the nature and extent of injuries aforesaid prepared. For that exercise she paid Kshs. 3,500/-. She was therefore claiming from the appellant special as well as General damages, costs and interest incidental to suit.

In its defence, the appellant denied that the respondent was involved in any accident on that date and or that it breached statutory duty nor was it negligent towards her. The particulars of negligence attributed to it were denied and respondent put to strict proof thereof. In the alternative, the appellant pleaded that any accident that the respondent may have been involved in was caused or substantially contributed to by reason of her gross negligence for she worked in such careless, haphazard and negligent manner thereby causing or contributing greatly to the accident, she exposed herself either intentionally or due to her own carelessness, to danger which she knew or ought to have known whilst working, failed to take any prudent and elementary precautions for her own safety thereby causing the said accident, either intentionally and or deliberately being where she was not authorized to be thus risking injury or damage, failed to obey and follow clear and specific instructions regarding her work thereby contributing to the accident and finally she basically caused the accident to herself.

The case was heard by **L. Komingoi**, the Senior Resident Magistrate at Nyamira commencing on 6th April, 2004. In her testimony, the respondent stated that she was working at Kebirigo Tea factory managed by the appellant as a casual. On 7th April, 1999 whilst on duty, tea leaves dust entered her eyes and they started swelling. She went for treatment at Nyamira District hospital and was admitted for four days. She blamed the appellant for the accident as she was not issued with protective equipment like goggles to protect her eyes. She was examined by **Dr. Ezekiel Ogando Zoga** who prepared a medical report. She paid him Kshs. 3,500/=. She denied that she was careless whilst working and or that she was not at her rightful place of work at the time of the accident.

The respondent then called **Dr. Ezekiel ogando Zoga** as a witness. He had examined the respondent on 2nd July, 2003 when she complained of itchness sensation to both eyes. His findings were that both eyes were red, there was reduced vision 6/12 in both eyes and itchness. He then prepared the medical report for which he was paid Kshs. 3,500/=

For the defence, the appellant called **Charles Mwebi**. His duties at Kebirigo Tea Factory included collecting the data from allocation brokes, transfer to the master roll and computer payments for all workers. He knew the respondent as she used to work at the factory. Going through his records, he did not see the name of the respondent in the allocation and or permission book for the day of the alleged accident. It was his testimony that if a worker was injured in the factory, the incident is recorded in the permission book as well as the accident register.

The learned magistrate having carefully considered and evaluated the evidence tendered by both the respondent, appellant as well as the written submission filed by respective parties found in favour of the respondent holding :

> ***…… " She blames the defendant for this accident. She said she was not issued with protective equipment like goggles to protect her eyes. There is no doubt that the plaintiff was injured while on duty. I have considered the submissions of both counsels on liability. The plaintiff's counsel submits that the defendant be found 100% liable while the defendants submits that they should not be found liable at all. I have done consideration to the testimony on DW1. She told the court that the plaintiff was not involved in any accident. He however admitted that he was not the plaintiff's immediate supervisor. He also admitted that the plaintiff had not been issued with protective equipment .***
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> ***He told the court that the plaintiff's claim does not appear in the permission book. He however produced no accident register to show that the plaintiff's name was not there.***
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> ***Furthermore the details in Exhibit D1 are entered by the defendant clerks the plaintiff does not participate in the making of those documents. I find that the plaintiff was***

injured while on duty. I also find the defendant liable for this accident. The plaintiff should however take some of the blame. I apportion liability in the rate of 80% to 20% in

Form(sic) of the plaintiff……."

Arising from the above judgment and decree, the appellant filed the instant appeal. It faulted the learned magistrate's judgment and decree on four grounds to wit:

"1. The trial magistrate erred in law when contrary to the

provisions of Order XX Rule 4 of the Civil Procedure Rules and to the appellant's detriment she failed to set out the points for determination, the decision thereon and reasons for such decision.

2. The learned magistrate erred in law and fact in her failure to recognize that contested as the issue was, the respondent (Plaintiff) did not prove that she was the appellant's (defendants) employee.

3. The Senior Resident magistrate erred in law and fact in her failure to find that since the respondent pleaded failure to provide suitable goggles as item(s) under particulars of negligence, her claim was barred by limitation under the Limitations of Actions Act (Cap. 22 Laws of Kenya)-as she pleaded the date of cause of action as 7/4/99 whereas she filed suit over four years after, that is to say,17/1/2003.

4. The trial magistrate misdirected herself in finding that the respondent was injured in the cause of her duty on 7/4/99 as pleaded when the respondent herself had conceded in re-examination that 7/4/99 was the date she sought treatment having been injured on 6/4/99-which would be a totally different cause of action altogether."

When the appeal came up for directions, **Mr. Ochwangi** learned counsel for appellant and **Mr. Ogweno** learned counsel for the respondent agreed to canvass the same by way of written submissions. Subsequently the same were filed and exchanged, I have carefully read and considered them as well as the cited authorities.

The first appellate court has the duty to subject the evidence tendered in the trial court to a fresh and exhaustive scrutiny but it does not have to write judgment in a form appropriate to the trial court as it is sufficient, on questions of fact, if the appellate court having itself considered and evaluated the evidence, and having tested the conclusion of the trial court, drawn from the demeanor of the witnesses against the whole of their evidence, it is satisfied that there was evidence upon which the trial court could properly and reasonably find as it did. See **Geoffrey Kihungu Wanjura .v.Gichini Kiguta** and **another, civil appeal no. 67 of 1997(UR)**

The respondent's claim was predicated upon her employment by the appellant and thereafter being injured in the cause of such employment. The accident complained of was as a result of the appellant's alleged breach of statutory duty as well as common law negligence towards the respondent. For the respondent to succeed against the appellant in her claim she was required to satisfy the court that, one, she was an employee of the appellant, two, she was injured as she worked for the appellant and three, the accident could very well have been avoided but for the breach of statutory duty and or negligence of the appellant towards her. Did the respondent overcome any of these hurdles? In my view she did so

admirably.

With regard to the first issue, the respondent categorically stated that she was employed by the appellant as a casual worker at its Kebirigo tea factory. Infact she had been employed as such since 1994. This fact was not seriously disputed, challenged discounted by appellant's own witness, **Charles Mwebi**. If anything he confirmed that fact. He stated thus ***"…… I know the Sophia Nyaboke Getanda. She used to work at the factory. She doesn't work there any more...***

However, the witness was unable to say when the respondent ceased working for the appellant. It is therefore possible to say that at the time of the alleged accident, she was still an employee of the appellant. This conclusion is buttressed by the fact that following the accident, the appellant issued her with a letter referring her to Nyamira District hospital for treatment. This aspect of the case came out during cross-examination of the respondent by the appellant. She stated thus ***"….I was given a letter referring me for treatment at Nyamira. Shown a copy. The letter is dated 6/4/99. I was given….."*** Again this aspect of the matter was not seriously challenged by the appellant in its subsequent testimony. In view of the foregoing I have no doubt at all in my mind that the respondent was an employee of the appellant at the time of the accident.

Was the respondent injured as she worked for the appellant? In view of what I have already stated, the answer is pretty obvious. The appellant's denial of the accident is based on the fact that the respondent's name did not appear in the permission book. The permission book is a record of workers who go out of the factory on permission. That is, if someone is injured in the factory, he /she is given a statement sheet which is then transferred to the permission book showing that the person is sick. Furthermore, the incident is entered in the accident register. However, the appellant's witness confirmed that as at 1999 the factory manager had not introduced the book. I do not know whether this witness was referring to the permission or accident register book. Whichever book he was referring to, if it had not been introduced at the time of the accident, the respondent's name would not be expected to be therein. In any event the witness could not confirm or deny whether the respondent was injured on the material day. Under cross-examination he testified thus ***"….can't tell for sure if the person was not injured…."*** That leaves the possibility that indeed the respondent could have been injured in the factory. Further the

witness was unable to reconcile the fact of the respondent being issued with a reference letter to Nyamira hospital for treatment and the non occurrence of the accident. She was infact taken to hospital in a van belonging to the appellant. Finally, it is highly unlikely that the appellant's witness would have known about the accident when he was not the respondent's immediate supervisor. The letter originated from the appellant and its authenticity or lack of it was not seriously challenged. I am therefore in agreement with the learned magistrate that the appellant was injured whilst on duty.

Was the accident occasioned by breach of statutory duty towards the respondents by the appellant? I think so. According to the respondent the accident occurred when fine tea leaves dust entered her eyes as they were filtering. Infact the tea dust blew into her eyes. She blamed the appellant for not providing her with protective gear like goggles to protect her eyes. The appellant had no response to this claim. Indeed the appellant's witness both in examination in chief as well as in cross-examination did not at all answer or respond to this assertion. It must therefore be taken to be true. Ordinarily, if a person is working in situations where he/she is likely to be exposed to risk of injury to the eyes, at least safety gear like goggles should be provided. No eye goggles or other safety gear was provided to the respondent to protect her from likely injury to the eye arising from fine tea leaves dust. The appellant only denied the occurrence of the accident without denying the fact of no-provision of the aforesaid safety gear to the respondent. This perse, was breach of statutory duty towards the respondent by the appellant. It was also negligence on the part of the appellant.

In his submissions in support of the appeal, the appellant abandoned grounds 1 and 2 of the appeal. This means that the judgment was crafted in accordance with the law and also that the respondent was an employee of the appellant.

In support of grounds 3, the appellant submitted that the cause of action having arisen on 7th April, 1999 and the suit having been filed on 17th July,2003 and being a claim based on tort, it was time barred. The respondent was duty bound to file and or mount the proceedings in the subordinate court within 3 years. My simple answer to this submission is that it is trite law that an appellate court can only deal and decide on issues which were canvassed before the trial court. It cannot deal with the issue which is raised in the appeal for the first time. In the present case, the issue of Limitation was never pleaded in

the plaint nor was it canvassed before the trial court. I have perused the written submissions filed in the trial court. The issue of Limitation was never raised therein. It is being raised for the 1st time in this appeal. In my opinion, the appellant is not entitled to do so.

The same reasoning applies to the appellant's ground 4 of the appeal. The issue of discrepancy in the dates of the accident was not made the subject of pleadings in the trial court. Nor was it canvassed before the trial magistrate so that she could make a ruling on it. It cannot now be a ground of an appeal.

The upshot of the foregoing is that I find the appeal unmerited and is liable to dismissal. Having reached this conclusion, I think it will be an exercise in futility to deal with the submissions of the respondent with regard to whether or not the appeal was competent having been filed by a firm of advocates who were not on record during the trial and that they only came on record after judgment and decree had been obtained for purposes of amounting the appeal without first seeking and obtaining leave of court to come on record.

The appeal is dismissed with coasts to the respondents

Judgment dated, signed and delivered at Kisii this 31st May, 2010.

ASIKE-MAKHANDIA

JUDGE