REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 125 OF 2009

KEBIRIGO TEA FACTORY CO. ……..……..…….. APPELLANT
-VERSUS-
RICHARD OCHIENGI OBARE ……...……... RESPONDENT

JUDGMENT
(Being an appeal from the Judgment and decree delivered by Hon. Komingoi (Senior Resident Magistrate) in Nyamira SRMCC No. 29 of 2007 dated 10th June 2009.

The respondent, **Richard Ochiengi Obare** then as plaintiff filed this suit against the appellant then as defendant in the Senior Resident Magistrate Court at Nyamira seeking damages both general and special on account of injuries he allegedly sustained in the appellant's tea factory at Kebirigo. He averred that on 27th of June 2003, whilst on duty at the appellant's factory aforesaid, he was injured on his left hand near the wrist joint. He claimed that as he was putting tea bags into the chain, the hook caught his hand and as a result he was seriously injured. The respondent blamed the said accident on the negligence of the appellant both statutory and under common law. According to the respondent the appellant had failed to provide him with a safe working environment, exposed him to risk or damage or injury, failed to make or to keep safe the respondent's place of work, failed to provide or maintain safe means of access to his place of work, employed him without instructing him as to the dangers likely to arise in connection with his work or without providing any or any sufficient training or supervision.
With regard to common law negligence the respondent accused the appellant for failing to take any adequate precautions for his safety, exposing him to risk of damage or injury of which it knew or ought to have known, failing to provide suitable appliances such as gloves, apron protective clothing to enable him carry out his work in safety, and directing the respondent to carry out his work without the protective gear aforesaid when it knew or ought to have known that it was unsafe and dangerous for him to carry out the said work without such protective gear.
The appellant filed a defence to the claim and denied the averments of the respondent and in particular, that the respondent was its employee and that it was responsible for the injuries that he sustained. The appellant averred that if the respondent was indeed injured while on duty, it was wholly or substantially caused by the respondent's own negligence and want of care in his conduct at the material time. The appellant enumerated the particulars of negligence it attributed to the respondent. As a parting shot the appellant pleaded ***volenti non fit injuria.*** Thereafter the appellant put the respondent to strict proof thereof on the injuries that he allegedly sustained following the alleged accident.
The suit was initially heard by **S.K Gacheru RM** and later by **L. Komingoi SRM**. After hearing both sides, the trial magistrate entered judgment on liability in favour of the respondent. She however held that the respondent was equally to blame to the extent of 30%. She thereafter assessed general damages payable to the respondent by the appellant at Kshs. 90,000/= less of course 30% contribution. The respondent was also awarded special damages of Kshs. 6,500/=.
The appellant was aggrieved by the judgment and decree aforesaid and immediately lodged this appeal setting out 5 grounds of attack to wit:-
"1) The learned trial magistrate erred in law and in fact by holding that the plaintiff had proved his case on liability against the appellant on a balance of probabilities.
2) The learned trial magistrate erred in law and misdirected herself in holding that occurrence of the accident was proved and that the appellant was 70% liable for the same.

3) The learned trial magistrate erred in law and in fact by failing to dismiss the plaintiff/respondent's suit in the lower court (sic) view of the evidence tendered before her.

4) The learned trial magistrate erred in law and infact by awarding general damages that are so manifestly excessive as to be erroneous in light of the nature of injuries allegedly sustained.

5) The learned trial magistrate erred both in law and in fact by not properly considering the evidence on record, the appellant's defendant's submissions and authorities and hence did not write a considered judgment.."

When the appeal came up for directions it was agreed amongst other directions that the appeal be heard by way of written submissions. Those submissions were subsequently filed and exchanged. I have since had the benefit of reading and considering them as well as cited authorities.

The appellate court, has a duty to reconsider the evidence adduced before the trial magistrate's court, evaluate it itself and draw its own conclusions. Such court however is expected to always bear in mind the fact that it neither saw nor heard the witnesses and therefore cannot be expected to make any findings as to the demeanour of witnesses. As was stated by the Court of Appeal in:

Selle VS Associated Motor Boat Co. Ltd 1968 E.A 123 at page 126;

"In particular this court is not bound necessarily to follow the trial's court findings if it appears either that it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

The issues before the trial court and in this appeal were whether the respondent was injured in the course of his employment with the appellant, whether the appellant was thereby liable and finally if so, the quantum .

During the trial, there was credible evidence that the respondent was on duty on the material day and worked at the intake section from 12 noon onwards. He had been instructed to put tea bags in the chain and as he did so the hook caught his hand and he was injured. However from the documents tendered in evidence it appears no such accident occurred nor was the respondent injured. It is possible therefore and as claimed by the appellant that the respondent's claim could as well have been fraudulent. The respondent did not seriously challenge the appellant's evidence in that regard. He was contend with submitting that the appellant's witnesses were not competent to tender evidence with regard to the muster roll and the accident register that showed no accident involving the respondent having occurred on material day since they were not the authors of the said documents. However such submissions cannot not sufficiently answer or counter the appellant's contention. In any event the respondent did not object to the said witnesses producing the documents.

The appellant relied on the testimony **Akuma George Sagwe.** He was at the time a data clerk at the appellant's factory. He confirmed knowing the respondent and that he was on duty on 27th June 2003. He produced a muster roll as well as the accident register as defence exhibits. The muster roll showed that the respondent was on duty on the material day and worked for a full eight hours and was paid for the days worked that month. However, he signed off at the end of the working day with no indication that he had been injured.

The Respondent was shown the muster roll and though he claimed ignorance, he nonetheless confirmed that his check roll number was 490 as indicated therein. Much as the documents aforesaid were generated and or prepared by the appellant and the possibility that they could have been tampered with so as to advance its case, I am however satisfied and persuaded having perused them that they are indeed genuine. I doubt that the appellant would go out of its way to falsify documents merely to avoid paying a genuine claim. I am certain that the appellant may have had a workmen compensation scheme in place which would have taken care of the respondent's claim if it had been genuine and reported. Furthermore if indeed he was involved in such an accident some of the co-workers could have witnessed the same going by the muster roll. Why couldn't he call any one of them to come and testify on his behalf and confirm such an accident.

The evidence of **Dr. P.M. Ajuoga** who testified on behalf of the respondent is also telling. He stated that he examined the respondent on the 10th April, 2007, four years or so after the alleged accident. However, during cross examination he admitted that he did not see any sick sheet from Kebirigo and that he merely relied on the treatment notes from Nyamira District Hospital. One wonders why it took the respondent 4 plus years to see the doctor for purposes of a medical report. Further it appears to me that the respondent's claim may have been time barred. It was in the nature of a tortious claim much as the respondent claims breach of contract. The accident is alleged to have occurred on 27th June, 2003. Yet

the suit was not filed on 20th April, 2007 a whole 4 years later. Any way I will leave the matter at that as it was not pleaded nor canvassed at the hearing of the suit in the trial court and or in this appeal.

Dominic Ombati Onsongo was also called as a witness by the respondent. He was the clinical officer at Nyamira District Hospital where the respondent was allegedly treated following the accident. He produced treatment notes. However, during cross examination he conceded that the treatment notes did not have the O.P number for the said hospital. He conceded further that all out patients were given such outpatient numbers. He could not tell whether there was an error or not. Finally he conceded that he could not confirm whether the respondent's name was in the register. This evidence seem to cast doubt as to the authenticity of the respondent's claim.

The upshot of all the foregoing is that as much the respondent was an employee of the appellant, there is no cogent evidence that he was involved in the accident on that day contrary to the finding of the learned magistrate. The appellant is thus not liable to the respondent on any account.

Even if I had come to the conclusion that indeed the respondent was injured in the course of his duties, I would still have held that the appellant was not liable. The respondent was engaged in manual work which did not require any special skill and expertise. He did not need special training or expertise to put tea bags in the chain. I do not therefore see how the provision of the gloves and overalls as testified to by the respondent would have prevented the accident if at all. The respondent himself testified that as he putting the tea bags into the chain, the hook caught his hand. What special instructions did one require to put tea bags into the chain? To my mind the respondent was the author of his own misfortune if at all.

Had I dismissed the appeal, I would not have interfered with the general damages awarded to the respondent. The injuries suffered by the respondent as per the medical report were soft tissue injuries and the award made was within the acceptable range for those sort of injuries.

In the result however, I allow the appeal, set aside the judgment and decree of the subordinate court. In substitution I order the respondents suit dismissed with costs. The appellant too shall have the costs of this appeal

Judgment dated, signed and **delivered** at Kisii this 30th June 2010.

ASIKE-MAKHANDIA
JUDGE