REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 174 of 2006

KENYA TEA DEVELOPMENT AGENCY LTD …APPELLANT

-VERSUS-

ANDREW MOKAYA……..RESPONDENT

JUDGMENT

(an appeal arising from the judgment and Decree of Mr. A.A. Ingutya Esq-Senior Resident magistrate-Kisii dated and delivered on the 17th February, 2006 in Kisii CMCC No. 376 of 2003)

By a plaint dated 7th March, 2003 and filed in court on 24th April, 2003 the Respondent herein **Andrew Mokaya** then as the plaintiff filed suit against the appellant **Kenya Tea Development Agency Limited** then as defendant alleging inter alia that he was employed as a casual worker at Tombe Tea Factory. On or about the 27th February, 2002 in the course of his said employment and while trying to sort out the tea at the withering section his hand was caught by the conveyor and crushed as a result of which he sustained injuries. To the respondent the accident occurred due to breach of statutory duty and negligence towards him by the appellant. He went on to give the particulars of breach of statutory duty and negligence towards him by the appellant. He thus prayed for compensation by way of special and general damages, costs and interest.

Through a statement of Defence dated 5th June, 2003 and filed in court on 6th June, 2003 the appellant denied having ever employed the respondent as pleaded in the plaint or at all. The appellant also denied breach of the alleged statutory duty and negligence attributed to it by the respondent and the particulars thereof. It also denied injuries, the special as well as general damages set out in the plaint. The appellant in the alternative pleaded contributory negligence against the respondent and gave the particulars thereof. Finally it pleaded that the respondent's claim was fake and fraudulent. Apparently there was no reply to defence aforesaid by the respondent.

Thereafter the hearing of the suit commenced before **A. Ingutya, SRM**.

The plaintiff as PW1 testified that he was employed at Tombe Tea Factory at the time the accident occurred. It was his testimony that on 27th February, 2002 he was working as a casual labourer taking tea from the ground and loading it onto the conveyor when a wire on the conveyor pricked him at the wrist . He thereafter sought treatment at Kisii General hospital. He blamed the appellant for the accident because the wire should not have been protruding from the conveyor and secondly, the plaintiff was not given safety gear such as gloves.

Following the accident **LD 104 forms** from the ministry of Labour were filled. These were workers compensation forms. Later he was examined by **Dr. Ezekiel Ogando Zoga** (PW2).

According to PW2 he examined the respondent on 25th January, 2003, a year or so after the accident. He had sustained deep cut on the right hand. He concluded that the respondent suffered soft tissue injuries. For this service, he charged the respondent Kshs. 3000/=.

On his part the appellant testified through **Peter Mainga** who was then a supervisor at Tombe Tea factory in charge of allocation and record keeping . He knew the respondent as a casual worker. On the material day he had provided the respondent with protective gear viz gloves, shovels, uniform, dust coat and a cap and instructed him on what to do. It was not the respondents first time at the section and there was no danger as the conveyor was moving smoothly and he was abit far from the conveyor belt. The conveyor's moving belt was made of leather and there were no wires on the belt. The conveyor belt moved on spinal rollers. As far as this witness was concerned the respondent was injured due to his own negligence.

The learned magistrate having evaluated the evidence tendered by both the appellant and respondent reached the decision that both the appellant and respondent were liable for the accident. For the appellant the magistrate's apportioned its liability to the extent of 90% whereas the respondent was to blame to the extent of 10%. He thereafter proceeded to award the respondent general damages to the tune of Kshs. 100,000/= and special damages of Kshs. 3,500/= less contributory negligence aforesaid, costs and interest.

Aggrieved by the judgment and decree aforesaid, the appellant lodged the instant appeal through **Messrs Okong'o & Co. Advocates**. It sought to impugn the learned magistrate's judgment and decree on four grounds that:

> ***"1 The learned trial magistrate having held that the respondent was negligent, in failing to keep a proper look out erred in both law and in fact in again holding, that the appellant was 90% liable for the occurrence of the accident and in failing to dismiss the respondents suit in the court below with costs.***
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> ***2. The learned trial magistrate erred in both law and in fact in finding that the appellant had failed to provide safety gear and in particular gloves and without holding that such failure to provide gloves caused the said accident.***
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> ***3. The learned trial magistrate erred in both law and in fact in finding that there was a failure on the part of the appellant to ensure that the conveyor belt was guided and or in any other way made safe when infact there was***

no evidence led in that regard at the trial and in basing such findings on material which was not placed before the court.

4. ***The learned trial magistrate erred in both law and in fact in awarding to the respondent as against the appellant general damages in the sum of Kshs. 100,000/= which amount was manifestly high and excessive and constituted an erroneous estimate of the damages suffered and in misapprehending the nature and extent of the respondents injuries".***

When the appeal came up before me for directions on 22nd March, 2010, parties agreed to canvass the said appeal by way of written submissions. Subsequently, however only the appellant was able to file its written submissions. This appeal was thereafter mentioned on 7th and 14th May, 2010 respectively to enable the respondent to file his submissions to no avail. Since there was no possibility or indication that the respondent would ever file his submissions I decided to act on the submissions on record, that of the appellant only. Accordingly this judgment has been crafted without the benefit of the input of the respondent. As it were, the appeal therefore proceeded as though it was unopposed. Be that as it may, it is still my duty as a first appellate court to reconsider the evidence tendered during the trial so as to reach my own decision as to whether the judgment can withstand scrutiny.

The respondents claim in the trial court was premised on two grounds; that he was an employee of the appellant and secondly, he was injured whilst so employed as a result of the appellant's breach of statutory duty and negligence towards him. The respondent was therefore expected to prove by credible evidence the aforesaid circumstances. However, I do not think that he discharged that burden.

In the case of **South Nyanza Sugar Company Limited –Vs- Wilson Ongumo Nyakweba Kisii Hcc Appeal No. 77 OF 2004(UR) Musinga J** observed that:

In Statpack Industries Limited –V- James Mbithi Munyao Nairobi Hcca.No. 152 in 2003(unreported) it was held as follows:

> ***"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 as a result of someone's negligence. An injury per se is not sufficient to hold someone liable"***

It was further propounded at page 5 thereof that:-

"In Winfield And Jolowicz In Tort, 13th Edition page 203 the learned Author stated as follows:-

> ***"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence vests with the plaintiff work man throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working, the plaintiff must plead and therefore prove what the proper system was and in what relevant aspects it was not observed. It is true that the severity of this particular burden has somewhat been reduced but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient".***

Applying the foregoing to the circumstances of this case I am satisfied that the respondent did not prove breach of statutory duty or establish negligence against him by the appellant on a balance of preponderance. None of the particulars of negligence attributed to the appellant were similarly proved. Parties are ordinarily bound by their pleadings and a material departure therefrom is fatal. In this case the appellant sued Kenya Tea Development Agency Limited yet in his testimony he stated that he was employed by Tombe tea factory . Yet again in paragraph 3 of the plaint he stated that he was a casual worker at Tombe Tea factory. He did not seek to establish the nexus between the appellant and Tombe Tea factory. It does however appear like the two are separate entities. The particulars of breach of statutory duty and negligence pleaded in the plaint were thus against Tombe Tea Factory and not the appellant herein. This conclusion is supported by the workmen's compensation forms tendered in evidence. They clearly show the employer as Tombe Tea factory Ltd. Further the respondent in the plaint, had pleaded that his hand was caught by the conveyor belt and crushed. Yet in testimony he stated that he was merely pricked by a wire on the conveyor.

Order V1 rule 9(1) of the **Civil Procedure rules** provide that an allegation of fact in pleadings shall be deemed to be admitted by the opposite party unless it is traversed by the other party in his pleadings. Order VI Rule 9(2) further provides that the mode of traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.

In the case of **Sanyo Electrical company Limited .v. Jivanji (2003) E.A 98** the court held that "***the pleadings showed the respondent as manufacturer and distributors of the goods the subject matter of the suit, whereas Sanyo-Armco was its sub-sidiary and agent for purposes of marketing the goods.***

There was no denial of the pleadings and was therefore deemed to have been admitted (Order VI Rule 9 (1) of the Civil Procedure rules." The same situation obtained in ***Unga Maize Millers Limited –v- James Munene Kamau HCCA no. 16 of 2001 (UR)*** where Gacheche J observed that:-

> ***"…….there was no reply to appellant's claim that the respondent acted negligently and he was thus to blame. It is trite law that he who does not file a reply to such a defence is deemed to have admitted the said allegations.***
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> The court of appeal also found in ***Mount Elgon Hardware-vs- United Millers Limited KSM CA no. 19 of 1996 (UR)*** that a plaintiff who does not traverse, the particulars of negligence as alleged by a defendant admits the negligence as alleged in the Defence. It delivered itself thus:
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> ***"Furthermore the respondent denied any further form of negligence on its part and in turn, alleged negligence against the appellant. The respondent properly pleaded the particulars of negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances the learned judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence in terms of Order VI Rule 9(i) of the Civil Procedure rules…"***

The same situation obtains here again. The appellant filed a defence denying the respondent's claim. In the alternative, it pleaded negligence on the part of the respondent. It even went further and pleaded specifically that the respondent's claim was absolutely fake and fraudulent, the injuries non-existent and that it had only been made to extort money in form of compensation from the appellant. The respondent did not file a reply to defence as such he is deemed to have admitted the contents in the statement of defence particularly with regard to negligence pleaded against him and the fact that the claim was fraudulent. By his judgment and decree, the trial magistrate would appear to have given her seal of approval to a fraudulent claim which is unfortunate for courts of law do not engage in those games.

In view of the conclusions I have reached as above, I will allow the appeal set aside the judgment and decree of the subordinate court and substitute therefor with an order dismissing the suit with costs to the appellant. The appellant shall also have the costs of this appeal.

Judgment dated, signed and delivered at Kisii this 17th June, 2010.

ASIKE MAKHANDIA

JUDGE