



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Civil Appeal 59 of 2006

NYAMACHE TEA FACTORY CO. LTD.....APPELLANT

VERSUS

CONVAS ONTOMWA BUGERESPONDENT

JUDGMENT

The respondent stated in his plaint that he was an employee of the appellant and on 29th July, 2002 while in the course of his employment, was involved in an industrial accident as a result of which he sustained a cut wound on the right leg. He alleged that the accident was caused by the appellant's breach of statutory duty as well as negligence. He stated, *inter alia*, that the appellant failed to provide him with adequate or suitable tackle or appliances in particular, gloves, gum boots, apron, protective clothing and helmet. He claimed general and special damages.

The appellant filed a statement of defence and denied that the respondent was its employee. They also denied any knowledge of the alleged accident but added that if it did occur, it was caused by the respondent's negligence.

During the hearing the respondent testified that he had been employed by the appellant as a casual worker, roll number 390. On 29th July, 2002 he was working at the weathering section when he slipped and fell from the bed he was standing on. He duly informed his supervisor and the unit manager, he claimed. He was issued with a sick sheet and proceeded to Nyamache Health Centre. He produced the treatment record as an exhibit. Later on he consulted Dr. Ajuoga who examined him and prepared a medical report for which he paid Kshs. 3500/=. He blamed his employer for having failed to supply him with boots and helmets.

In cross examination he said that his work involved removing tea leaves from a chain belt and pouring it on a bed. That job required him to wear gum boots, he stated. On the bed he was standing on there was a barrier to prevent people from falling off. He had worked there for 2 years. The chain was fast moving. At the time of the accident he was alone. The respondent did not call any witness.

The appellant called **Samson Otwor, DW1**, a General Supervisor. He testified that the respondent had been employed by the appellant as a casual worker from time to time but on the day of the alleged accident he was not in the appellant's employment. He had been sacked on 24th July, 2002 because of chronic absence. The witness produced a muster roll to prove that the respondent was indeed not in the appellant's employment on the said date. He also produced the Accident Register. It showed that there was no accident recorded on the material day. The witness further testified that according to their system of work, if an employee is injured in the course of duty, the supervisor on duty reports to the management. The injured employee is taken for treatment after the supervisor fills and signs a sick sheet. The manager rubber stamps and signs the sick sheet. The witness said that he was the supervisor on duty on the day of the alleged accident yet he had not signed any sick sheet. He disowned the unsigned sick sheet that was produced by the respondent.

The learned trial magistrate found the appellant fully liable for the accident and awarded Kshs. 60,000/= as general damages plus special damages of Kshs. 3,500/=. Being aggrieved by the said judgment, the appellant preferred an appeal to this court. I need not set out the grounds of appeal. Suffice to say that the appellant contended that the trial court's findings were not supported by the evidence on record.

It was agreed by consent that this appeal be canvassed by way of written submissions. Both parties filed their respective submissions and I have carefully perused the same.

In the case that was before the trial court, the respondent, being the plaintiff, was under a legal duty to prove on a balance of probabilities that:

- (a) On 29th July 2002 he was in the appellant's employment,**
- (b) That on the material day an accident did occur at his place of work.**
- (c) That the accident was caused by the appellant's negligence and/or breach of statutory duty.**
- (d) That he sustained injuries as a result of the accident.**

The respondent did not call any witness to support his evidence. Surely there must have been some people who witnessed the accident, if at all it occurred. The sick sheet that he produced did not bear the name of any supervisor or Factory Manager, who issued it to the respondent. He alleged that the supervisor on duty was one Ogeto while the Unit Manager was one Gitau. None of them were called as witnesses. The respondent was aware that the appellant had denied that he was in its employment on the material day and further that no such accident ever occurred. Strict proof was therefore called for.

On the other hand, DW1 produced a muster roll to demonstrate that the respondent was not in its employment at the material time. He also produced the Accidents Register to prove that no accident was recorded that day. These were records kept in ordinary course of business by the appellant and it was not shown that they had been falsified or were tailor made for purposes of the case. In my view, they were appropriate documents to counter the respondent's assertions and the trial court had no proper basis of rejecting the same. I am satisfied that the respondent was unable to prove that he was in the appellant's employment on 29th July, 2002 and that an accident occurred on that day.

But even assuming the respondent was in the appellant's employment and the alleged accident occurred, he did not prove that it was caused by the appellant's negligence and/or breach of statutory duty. The respondent was standing alone on a fenced bed. He did not show that his fall was occasioned by lack of gumboots. He alleged that he fell because he was running. He alleged the supervisor told him to run. He did not explain why he had to run. If indeed it was necessary for him to run for whatever reason, he ought to have called the supervisor to explain the reason. Besides, he was still under an obligation to conduct himself carefully.

Occurrence of an accident *per se* does not connote negligence on the part of an employer, causation must be proved.

The respondent, having failed to prove the aforesaid issues, the trial court had no basis of finding the appellant liable at all. It follows therefore that no damages were awardable.

This appeal must be allowed which I hereby do. The respondent's case before the trial court is dismissed with costs. The respondent shall also bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF JULY, 2010.

D. MUSINGA
JUDGE.
12/7/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Appellant.

Mr. Bosire HB for Mr. Nyachae for the Respondent

Court: Judgment delivered in open court on 12th July 2010.

D. MUSINGA
JUDGE.