REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 91 of 2007

CHEMELIS SUGAR COMPANY LTD……PLAINTIFF

VERSUS

JOHN OUMA……..….DEFENDANT

J U D G M E N T

This appeal arises from the decision of the Senior Resident Magistrate Nyando made on the 15th November 2006 in Nyando SRMCC No. 234 of 2003 in which the respondent/plaintiff, **John Ouma,** was awarded general damages in the sum of Kshs. 56,000/= together with costs and interest against the appellant/defendant, **Chemelil Sugar Co. Ltd.** This was a personal injury claim arising from an industrial accident which occurred on the 7th April 2003 while the respondent was in the course of his employment with the appellant company.

It was contended that on that material date, the respondent was lawfully and diligently performing his duties when he stepped on a drainage slab and hot water spilled on his left leg thereby causing him to suffer serious burns.

It was further contended that the accident was as a result of the appellant's negligence and breach of contract and/or duty thereby causing the respondent to sustain severe multiple scald and soft tissue injuries on the left foot.

The respondent therefore prayed for general damages, special damages and costs of the suit.

A statement of defence filed by the appellant was in denial of the respondent's allegations and claim. It was contended that the respondent was not an employee of the appellant neither did he suffer injury as claim and if he was indeed an employee of the appellant and suffered injury then the accident occurred due to his sole negligence.

The appellant therefore prayed for the dismissal of the respondent's suit.
In support of its defence, the appellant availed two witnesses i.e. its personnel records clerk **Kennedy Ingini (DW1)** and its security supervisor **Nelson Aremo (DW2).**
And in support of his claim against the appellant the respondent **John Ouma Adiyo (PW1)** gave his evidence and called **Dr. Obed Omuyoma (PW2)** as his witness.

After considering the pleadings and the evidence presented to her, the learned Senior Resident Magistrate found the appellant liable for the accident to the extent of 70% and the respondent to the extent of 30%.

The learned trial magistrate assessed damages in favour of the respondent at Kshs. 80,000/= less 30% contributory negligence i.e. Kshs. 56,000/=.

Ultimately, judgment was entered for the respondent against the appellant for the sum of Kshs. 56,000 plus costs and interest. Being disappointed with the decision, the appellant preferred the present appeal.

The appeal is anchored on five grounds ***viz:***-

(1) The learned trial magistrate erred in law and in fact in finding that there was an employee (sic) of the defendant/applicant (sic) in the absence of evidence of such employment.

(2) The learned trial magistrate erred in law and in fact in finding that there was a contractual duty on the part of the defendant/appellant.

(3) The trial magistrate erred in law and in fact in finding that the plaintiff had proved his case whereas there was no valid evidence to sustain that finding.

(4) The trial magistrate erred in law and in fact in giving judgment on liability against the defendant/applicant in the absence of negligence against the defendant or any contractual duly owned by the defendant.

(5) The trial magistrate erred in law and in fact in disregarding the defendant's evidence on record with no rebuttal of the same from the plaintiff.

At the hearing of the appeal, it was apparent that great emphasize was placed on grounds (1) and (2) which invariably impact on the rest of the grounds.

Mr. Ragot, learned counsel, submitted on behalf of the appellant that from the word go, the appellant denied that the respondent was their employee at any given time yet the denial was not disproved.

Learned counsel contended that the treatment chit supplied by the respondent to prove employment was insufficient as it contained no stamp nor letter head of the appellant.

It was also submitted by the appellant that although the respondent alleged that he had worked for only twelve (12) days, his name did not appear in the relevant records. There was nothing to link his treatment chit with the appellant or to link the appellant with the clinic which issued the treatment chit.

The appellant went on to submit that the medical report by the doctor (PW2) was a private arrangement with the respondent.

The appellant contended that the records produced by its clerk did not show the respondent's name and the record kept by its security officer did not indicate the occurrence of the accident and the person responsible for reporting it.

The appellant further contended that the learned trial magistrate shifted the burden of proof to the appellant yet the burden to prove the case lay with the respondent.

In response to the foregoing, the respondent through learned counsel, **Mr. Mboga,** contended that he had been employed by the appellant as a casual worker for a period of 12 days. He implied that the records produced by the appellant were mere paper leafs which were not serialized and could therefore not be relied upon.

The respondent submitted that the clerk (DW1) indicated that he could not tell whether or not an employee was absent from duty and that the records produced did not include treatment notes which were normally left with the appellant.

The respondent also submitted that there was oral and documentary (treatment chit) evidence to prove his employment with the appellant and that although claim forms were referred to, none was produced by the appellant.

With regard to the security officer (DW2), the respondent submitted that he (DW2) produced the occurrence book (O.B) normally kept at the gate but conceded that the entries thereon were not solely made by himself. Further, he (DW2) was not a supervisor for the accident to be reported to him.

In concluding his submissions, the respondent's learned counsel contended that the appeal is incomplete and fit for dismissal in as much as it was filed out of time without the leave of the court and in as much as the firm of Otieno Ragot & Co. Advocates came into the record without the pre-requisite leave of the court.

This concluding submission was effectively and correctly answered by the appellant's rejoinder through its counsel. The need to consider it does not arise.

Be that as it may, the grounds for the appeal and the rival arguments in relation thereto have been taken into consideration by this court whose duty at this juncture is to re-visit the evidence and arrive at its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

The respondent (PW1) testified that at the material time he was employed by the appellant and was on the material date at about 8.00 a.m. sweeping grass near the store when he stepped on a slab which unknown to him had a crack. The slab broke sending him into some hot water from the factory. This resulted to his injury on the left leg. He was treated at the appellant's clinic. He produced a copy of the treatment chit to establish the fact. He said that the original remained with the appellant. He was later examined by Dr. Omuyoma (PW20 who compiled a medical report confirming the injuries and the magnitude thereof.

The report showed that the plaintiff suffered burns on the dorsal aspect left foot.

On behalf of the appellant, the records clerk (DW2) stated that he was responsible for keeping the records of all casual and permanent employees but did not know the plaintiff whose name does not even appear in the records.

The said records were produced and did not show that the plaintiff was an employee of the defendant.

The appellant's security officer (DW2) said that he was responsible for making entries in the occurrence book and on the material date (7th April 2003) no accident report was made to him. He produced the book showing that no accident involving the plaintiff was reported.

The learned trial magistrate considered the evidence in its totality and found that most likely than not, the respondent was working for the appellant when he was injured on the material date.

The learned trial magistrate considered the treatment chit presented by the respondent on the basis of the evidence adduced by the appellant through DW1 and DW2 and arrived at that finding.

The learned trial magistrate also found that the appellant was liable since the circumstances leading to the accident as stated by the plaintiff were not rebutted. However, the learned trial magistrate also found that the plaintiff partly contributed to the accident by stepping onto a slab knowing that it was cracked hence exposing himself to the risk of injury.

Having also considered the evidence, this court shares not the view that on a balance of probabilities, the respondent was able to establish that he was injured while in the course of his employment as a casual worker.

The treatment chit and the oral evidence by the respondent were insufficient to prove that the appellant

had indeed employed the respondent at the material time.

The records and the occurrence book produced by the appellant to disprove the allegation that the respondent was an employee of the appellant were not conclusive but nonetheless showed that the respondent's name was not however reflected in the company records.

The validity of the treatment chit produced by the respondent was shattered by the fact that it was not formally tendered in evidence. It was merely marked for identification so that it may formally be treated as evidence for consideration by the court and to discharge the burden of proof placed upon the respondent.

In the absence of the treatment chit which was the only evidence to show the occurrence of the accident and the link between the respondent and the appellant, the respondent failed to discharge his burden of proof.

Consequently, this appeal is merited on all grounds and is allowed to the extent that the judgment of the learned trial magistrate be and is hereby set aside and replaced with one dismissing the respondent's suit with costs.

The appellant will also be entitled to the costs of this appeal.

Had this court sustained the judgment by the learned trial magistrate, the award of general damages in the sum of Kshs. 80,000/= less 30% contributory negligence would have been left intact as it was reasonably adequate in view of the injuries suffered which were of a minor nature

Delivered, dated and Signed at Kisumu this 30th day of September 2010.

J.R. KARANJA
J U D G E

JRK/va