REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 112 OF 2005

KIPKEBE LIMITED……...APPELLANT

-VERSUS-

MARGARET NYABOKE OMARIBA …….. RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree of Hon. N. Shiundu the acting Resident Magistrate, Keroka made on the 27th day of May, 2005 in Keroka Senior Resident Magistrate's Civil case No. 71 of 2003)

The respondent, **Margaret Nyaboke Omariba** filed suit against the appellant, **Kipkebe Limited** in the Resident Magistrate's court at Keroka seeking to be paid damages both special and general, costs and interest on account of injuries she allegedly suffered on 10th December, 2002 as she worked for the appellant. She claimed that at all material times, she had been employed by the appellant as a tea picker in the appellant's tea estates. On the material day as she was weeding Napier grass at field No. 22, the jembe she was using slipped and landed on her big toe and cut her in the processes. As a result she sustained injuries and suffered pain, loss and damage. She blamed the appellant for the said injuries as it had breached its statutory duty of care towards her, by failing to keep and maintain a safe and proper system of work for all its employees, not to expose any employee to any risk of damage or injury which it knew or ought to have known, failed to provide and maintain adequate and suitable measures to enable her carry out her work in safety. Further and in the alternative, she pleaded that the said accident was caused by reason of common law negligence on the part of the appellant in that it failed to take any or any adequate precautions for her safety, exposed her to a risk of damage or injury which it knew and or ought to have known, failing to take any or any adequate measures to ensure that she was not hurt and finally, failing to provide her with any appropriate protective gear such as gumboots and gloves.

In its defence, the appellant admitted having employed the respondent and the occurrence of the accident. However it denied that the accident was caused by its common negligence or breach of statutory duty towards the respondent. As far as it was concerned, the accident was caused by the carelessness of the respondent herself as she sharpened the panga she was using and infact she was also in breach of her contractual and common law duty particulars whereof were with her knowledge. Alternatively it pleaded that the cause of the accident was contributed to substantially by the breach of contract and negligence of the respondent and gave the particulars thereof. Otherwise the appellant urged the court to dismiss the respondent's suit.

The trial court having heard the case and evaluated the evidence found for the respondent on liability to the extent 10% whereas the remaining 90% was to be borne by the appellant. On damages the learned magistrate awarded the respondent Kshs. 60,000/= as general damages less 10% contribution giving way to Kshs. 54,000/=, special damages of Kshs. 3,500/= costs and interest.

The appellant was aggrieved by the said decision. Accordingly it preferred this appeal and raised 5 grounds thereof to wit:-

"1. The learned Trial Magistrate erred in not finding that the suit was incompetent.

2. The Learned Trial Magistrate erred in not finding that plaintiff's case was not proved to the required standards.

3. The learned trial magistrate erred in relying on documents which were not produced as evidence.

4. The learned trial magistrate erred in failing to consider or sufficiently consider the defendant's evidence which was cogent.

5. The learned trial magistrate erred in law by making an award which was manifestly excessive as to amount to an error in principle."

When the appeal came up for hearing before me on 2nd June, 2010, **Mr. Odhiambo** and **Mr. Ogweno,** learned counsels appeared for the appellant and respondent respectively. They agreed to urge the appeal by way of written submissions. They subsequently filed and exchanged the same which I have carefully read and considered together with the authorities cited.

As a first appellate court, I am required to re-evaluate and reconsider the evidence tendered in the subordinate court with a view to reaching my own independent decision as to whether the judgment of the learned magistrate can stand. In doing so however, I must bear in mind that I neither saw nor heard the witnesses as they testified and therefore not in a position to gauge their demeanour. Due allowance must therefore be given for such. See **Selle V Associated Motor boat Co. Ltd (1968) E.A 123.**

The issue for determination before the trial court and indeed in this appeal is whether the respondent was injured whilst in the employment of the appellant, whether the appellant or respondent were negligent and finally quantum of damages if at all.

With regard to issue number one aforesaid, paragraph 4 of the defence filed by the appellant is clear. It admitted that the accident occurred at its premises presumably involving the respondent. However, its contention was that the accident was as a result of the respondent's own negligence and carelessness. It was therefore not liable. During the hearing of the case though, the appellant's witnesses, **James Oyaro** and **James Njiru Mbati** seemed to suggest that the respondent was not at all involved in an accident on that day. A party is ordinarily bound by his/her pleadings. In the light of the appellant's categorical admission in its statement of defence that an accident involving the respondent occurred, I do find just like the learned magistrate did that indeed the respondent was injured in the course of her employment with the appellant.

With regard to the 2nd issue, the very brief evidence of the respondent was that ***"…On 10/2/02 I was on duty. I was uprooting grass. I did not finish the job well. I was using the jembe. The jembe hit a stick and cut me. I blame the factory. I had not been given gumboots. If I had boots the jembe would not have cut me. I went to Kipkebe. I was given treatment card MF 12 a doctor prepared a medical report. The report was prepared at KisiiHospital. I paid Kshs. 3,500/=. I was given receipt. Dr. Nyando's medical report MF 12. I was injured on left leg toe. I was not paid any money by the company. I want general damages and costs…."***. Therefore as far as the respondent was concerned, had she been given gumboots, the accident could have been avoided. This is the only negligence under common law and breach of statutory towards her that she attributed to the appellant. However, the respondent did show that the appellant was obligated to supply her with the gumboots and or that other workers save for her, had been given such gumboots. She did not also say that she had asked for or demanded the same from the appellant and she was denied.

Be that as it may, the respondent was engaged in manual work that required no special skill supervision and or protection. As **Kimaru J.** said in the case of **Wilson Nyanyu Mitisisi Vs Sasini Tea & coffee Ltd, Kericho HCCA No. 15 of 2003 (UR)**, where it is admitted by the plaintiff that he injured himself with a slasher while he was clearing the path between the tea bushes and that at all times he was in full control of the slasher, he could not see how such clear facts can by any stretch of imagination be described as disclosing culpability on the part of the respondent since the appellant was undertaking a manual work and not operating a machine. Yet again in the case of **Eastern Produce (K) Limited V Joseph Wafula Mwanje, Eldoret HCCA No. 86 of 1999**, **Ibrahim J.** was emphatic that cutting grass with a slasher does not require any supervision. After all that person is in full control of the slasher and its own movements. He could not therefore see how the defendant could be negligent in the circumstances. Such claim, if true, should have been covered by **Workmen's Compensation Act**. It would be stretching the realms of law too far to expect that an employer has a duty to supervise or provide protection for every simple manual duty its/his/her employees are engaged in such as even cutting grass with a slasher or as in this case uprooting grass with a jembe. Much as the aforesaid decisions are not binding on me as they are from courts of coordinate jurisdiction, I nonetheless agree and endorse the sentiments expressed therein. The respondent in this case was engaged in a manual job of uprooting grass using a jembe. There was no allegation that the jembe was defective and or that it been provided by the appellant. She was the one directing the use of the jembe. She directed it at a stick and cut herself in the process. How was the appellant to know that she will awkwardly direct a jembe at a stick. It was within her power not to direct the jembe at the stick. I think we would be expecting too much of employees if we were to hold them liable for minor injuries sustained by employees on duty in the kind of unskilled work they are in full control of and which does not require any supervision, input or training by the employer. Lifting the jembe and directing it towards the ground was an action in the exclusive control of the

respondent. She would have avoided hitting the stick with the attendant consequences if she was careful and on the lookout. I do not see what is it that the appellant should have done in the circumstances as would have prevented the respondent from misdirecting the jembe towards the stick. Even if she had been provided with the gumboots, they would not have prevented her from swinging the Jembe the way she did. She was given a job to do. She did it badly and she can only blame herself and not the appellant for the consequences. Neither do I see how the provision of gumboots would have influenced the direction that the jembe took. She would still have directed the jembe towards the stick with the consequences aforesaid.

In the circumstances, I find and hold that the learned magistrate erred in holding the appellant liable for the accident. I therefore allow the appeal and set aside the judgment and decree of the trial court. In substitution I order the dismissal with costs of the respondent's suit in the subordinate court. The appellant shall have the costs of this appeal as well. In view of the above finding on liability, it is unnecessary to consider the final issue of quantum.

Judgment dated, signed and **delivered** at Kisii this 16th September, 2010.

ASIKE-MAKHANDIA

JUDGE