REPUBLIC OF KENYA

THE HIGH COURT OF KENYA

Civil Appeal 63 of 2006

NYAMACHE TEA FACTORY COMPANY LIMITED …..…. APPELLANT

VERSUS

HENRY NYABUTO MONARI ……. RESPONDENT

JUDGMENT:

The respondent stated in his plaint that on 18th August, 2002 he was working for the appellant as a casual worker in the Tea Processing department. He was required to clean remains of tea using tea and a certain chemical. Some of the chemical spilled on his face and he suffered some burns. According to a medical report that was prepared by Dr. Ajuoga, the respondent sustained loss of sight in the right eye and rashes on the front side of the face above the right eye. The respondent blamed the appellant for failing to provide him with a face mask. He also claimed that the appellant had not warned him that the chemical was dangerous.

In cross examination, he said that he had worked for the appellant since February, 2002. Although he had done cleaning before, he had never used that particular chemical prior to the material date. He added that the chemical had not been used by the appellant in the past. He was not aware whether the appellant knew that the said chemical could explode.

In its defence, the appellant denied that the respondent was its casual employee and further denied that he was involved in any industrial accident as alleged.

The appellant called only one witness, **Samson Oluor, DW1.** He was a general supervisor employed by the appellant. He testified that he knew the respondent as he was living near the appellant's factory. DW1 denied that the respondent was in the appellant's employment. He produced the master roll to prove that the respondent was not the appellant's employee on the material date or at all.

DW1 added that the appellant always used blue omo for washing and the same could not cause burns. He denied that the appellant had introduced a new cleaning soap or chemical as alleged. The witness further stated that he knew the respondent well from his home background. He stated that the respondent lost his sight due to a sickness and the loss of sight had nothing to do with the appellant.

In cross examination, DW1 said he had no card or letter to prove that he was an employee of the appellant. He also stated that in cleaning the workshop a certain chemical was being used but he did not know its name.

In her judgment, the learned trial magistrate held that the respondent had sufficiently proved that he was injured while working for the appellant but apportioned liability at 80:20 in favour of the respondent. General damages were assessed at Kshs. 300,000/=.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The memorandum of appeal contained 4 grounds as follows:

"**1. The learned trial magistrate erred in law and in fact in off-handedly rejecting the credible defence evidence.**

2. The learned trial magistrate erred in law and in fact in reaching findings on liability that were not supported by the evidence on record.

3. The trial magistrate erred in fact and in her appreciation of the negligence principles and/or in her application of the same to the circumstances of the case.

4. The learned trial magistrate erred in law and in fact in her assessment of general damages by making a manifestly excessive award thereon."

From the foregoing, there are two main issues that required determination by the trial court. The first one is whether the respondent was an employee of the appellant on 18th August 2002 and the second one was whether on the material date the alleged accident did occur in the circumstances as alleged.

Turning to the said issues, the respondent stated in the plaint that he was a casual labourer at the appellant's Nyamache Tea Factory. He did not specifically state what work he was doing on the date when the alleged accident occurred.

In paragraph 5 of the plaint he pleaded:

"***5. On or about the 18th day of August, 2002 the plaintiff whilst in the course of his lawful employment at Nyamache Tea Factory was involved in an industrial accident and sustained injuries that occasioned him to suffer (sic) loss and damage."***

The respondent conceded that he had no document to prove that he had been employed by the appellant. He said that he was employed in February 2002 and left in August 2002. That was a period of close to seven months. Over that period of time he must have known some of the people he was working with, if at all. The respondent alleged that on 18th August 2002 an unknown chemical which had not been used before in cleaning spilled on his face and caused him loss of sight in the right eye.

If that indeed happened, it was such a significant occurrence in the life of the respondent that he could tell all the minute details of the incident for example, when he was with at the material time, whom he first reported to, who took him to hospital, what the name of the chemical was and so on.

Such details were vital for the respondent to sufficiently discharge the burden of proof that was upon him. When such an accident occurs, it is unusual not to report the same to one's work mates and superiors so that it is recorded in the accidents register. The employee would thereafter be issued with workmen's compensation forms to be completed and forwarded to the employer's insurer.

All the above was not done and if at all it was, no evidence to that effect was led. Apart from Dr. Ajuoga who examined the respondent almost three years from the date of the alleged accident, no other witness was called to testify in support of the respondent's evidence. I would have expected some of the people who were working with the respondent at the material time to be called as witnesses. I would also have expected the respondent to have instructed his advocate to commence proceedings against the appellant almost immediately after August 2002 when he said he left the appellant's employment.

It is appreciated that many employers do not give identification documents or letters of appointment

to casual employees. If that is the case, where a person intends to prove such casual employment, he must endeavor to adduce all manner of evidence as would be sufficient to satisfy a court that such engagement did actually exist, especially where the person knows that the alleged employer has specifically denied the alleged casual employment.

Section 107 (I) of the **Evidence Act** states as follows:

"**107 (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility, but the validity of any such objection shall be tried by the court."**

In my view, the respondent did not discharge his burden of proof.

The appellant called DW1, a general supervisor, who testified that the respondent was never employed by the appellant. DW1 produced a muster roll for August 2002 and the same did not include the respondent's name. He also denied that the alleged accident ever occurred.

In my view, the respondent did not discharge the burden of proof. He did not prove that the loss of sight in his right eye had anything to do with the appellant. The document that he produced as P. Exhibit III was totally unreliable and its authenticity was questionable. It was a photocopy and no effort was made to explain where the original was. This was a chit, allegedly issued by the appellant to the officer in charge, Kisii District Hospital and Nyamache Health Centre. It was allegedly issued on 18/8/02 although the date seems to have been altered. The name of the person who issued it was not disclosed.

The Patient's Record Book, **P. Exhibit 1,** appears to have been specifically acquired for purposes of the case that was before the trial court. Its genuiness appears suspect. The court was not told the name of the person who wrote the alleged treatment notes thereon and neither is the person's name shown in the said exhibit. But even if the said exhibit was not of a questionable nature, in the absence of sufficient proof of the respondent's employment by the appellant, the document cannot be of much to the respondent.

With respect to the learned trial magistrate, she misdirected herself in holding that the muster roll that was produced by the appellant created some doubt as to whether the respondent was the appellant's employee and then proceeded to state:

"***This benefit of doubt will go to the plaintiff holding therefore that the plaintiff worked for the defendant."***

She did not analyse any other evidence on the part of the respondent before concluding that he was an employee of the appellant.

That kind of legal deduction is wrong. A plaintiff succeeds in proving his case on the strength of his evidence in support of his pleadings but not on perceived weakness of defence evidence. Whether or not a civil suit is defended, a plaintiff has to prove his case on a balance of probabilities before judgment can be entered in his favour.

In conclusion, I allow this appeal, set aside the judgment that was entered by trial court and substitute therefor an order dismissing the respondent's case in the subordinate court with costs. The appellant shall have costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

31/3/2009

Before D. Musinga, J.

Court: Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Minda for the Respondent

N/A for the Appellant.

D. MUSINGA

JUDGE.