REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

Civil Appeal 78 of 2006

OGEMBO TEA FACTORY COMPANY LIMITED …..…..…. APPELLANT

VERSUS

GLADYS KWAMBOKA ITIRA ……. RESPONDENT

JUDGMENT.

The respondent filed a suit against the appellant and stated that on 10th November, 2003 at Ogembo Tea Factory where she was working she was involved in an industrial accident as a result of which she sustained burns on the right hand three finger nails and burns on the left hand finger nails. She alleged that the accident was occasioned by the appellant's breach of statutory duty and negligence. She set out the particulars thereof which included failing to keep safe its place of work and exposing her to risk of injury which the appellant knew or ought to have known. She claimed general and special damages.

The appellant filed a statement of defence and denied the respondent's claim in total. The appellant added that if the alleged accident occurred the same was due to an act of God and was not foreseeable. Alternatively the accident was due to the respondent's own negligence in that she failed to take reasonable care of her own safety and exposed herself to injury.

The respondent testified that on the material day she was in her place of work at the fermenting section. She was washing a trolley using acid when she was burnt by the same. She said that she notified the management about the said incident. She was treated at Gucha District hospital and she produced the treatment notes as an exhibit. A workmen's compensation form was also filled and signed by the appellant's production manager. On the workmen's compensation claim form it was stated as follows:

"**She was washing but safety gloves had a slight leakage and the strong detergent scotched her right hand 3-finger tips and her left 1-finger tip."**

Later she was examined by Dr. Ajuoga who prepared a medical report at a cost of Kshs. 3,000/=. The respondent blamed her employer for not providing her with protective gloves. She also said that she had not been trained for the kind of work she was doing.

In cross examination, the respondent admitted that she had been given gloves but the same were torn. She added that she had complained to the managers about the torn gloves.

The appellant called **Nahashon Ouko, DW1,** as a witness. He testified that the respondent had been given gloves but they were torn. He further testified that he had instructed her on how to work and had in particular told her to always wear gloves while performing her cleaning duties. In cross examination the

witness admitted that the respondent had been injured as claimed.

In his judgment the learned trial magistrate held that the respondent had not been supplied with gloves and therefore found the appellant fully liable for the said industrial accident. He proceeded to award general damages in the sum of Kshs. 80,000/= and Kshs. 3,500/= as special damages on account of a medical report.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The grounds of appeal were to the effect that the trial court erred in its findings on liability and that it awarded general damages which were excessive.

Mr. Ochwangi for the appellant and Mr. Minda for the respondent made brief submissions which I have taken into account.

I carefully perused the record of appeal. It is not in doubt that the respondent was in the appellant's employment. It is also not in dispute that on the material day she was washing a machine using acid while wearing gloves that were said to have a slight leakage. The appellant clearly stated so in the workmen's compensation claim form. The appellant's witness said that the respondent had been supplied with gloves but they were torn. The respondent claimed that she had complained about the gloves but the appellant had not replaced them.

In the circumstances I do not agree with the submissions by the appellant's counsel that the doctrine of ***Volenti Non Fit Injuria*** was applicable.

The respondent proved her case on a balance of probabilities. The respondent cannot be said to have contributed to the occurrence of the accident in any way, particularly if she had complained to her employer about the torn gloves and the same had not been replaced.

As regards quantum of damages, the principles observed by an appellate court in deciding whether it is justified in disturbing an award by a trial court are that; it must be satisfied that the trial court in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that the amount is so inordinately low or so inordinately high that it is wholly an erroneous estimate of the damage. That was not demonstrated by the appellant. I find no basis of disturbing the award given by the trial court.

In conclusion this appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

30/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the appellant

Mr. Minda for Mr. Nyachae for the respondent

Court: Judgment delivered on 30th April, 2009 in open court.

D. MUSINGA

JUDGE.