REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 86 OF 2007

KAKUZI LIMITED ..... APPELLANT

VERSUS

JOHN MACHARIA MWANGI ..... RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate's Court at Kigumo in Civil Case No. 41 of 2007 dated 23rd day of August 2007 by S. M. Mokua – S.R.M.)

J U D G M E N T

Between July and August 2006, the appellant had engaged the Respondent as a casual labourer. His job description entailed splitting firewood using a panga. On the 16th August 2006, the respondent in the course of duty as aforesaid was involved in an industrial accident; the panga slipped from his hands and cut him on the right leg. The panga slipped after he had hit a branch, presumably of a tree with it. As a result he sustained the following injuries according to the medical report by **Dr. Karanja** tendered in evidence; a scar on the lower third of the lower anterior aspect measuring 8 x 2 cm; a swelling at the ankle joint region and tendon weakness of 4th and 5th toes especially on extending them. The Doctor opined that in order to restore the activeness of the said toes there was need for surgical intervention. As a result of the said injuries, the respondent was treated in the company health facility and thereafter a workman's compensation form LD 104 filled. Thereafter the respondent left the appellant's employment.

The respondent blamed the appellant for the said accident. Accordingly on 19th March 2007 he lodged a civil suit in the Resident Magistrate's Court at Kigumo which is the subject of this appeal. In the civil suit, the respondent sought general and special damages, costs of the suit together with interest. He pleaded that the appellant had breached the statutory duty of care owed to him by failing in essence to provide him with equipment which would have ensured that he worked in a safe environment. In particular, the respondent pleaded that the appellant had failed to provide him with gumboots which in his view would have gone a long way in lessening the gravity of the injuries.

The appellant filed its defence and denied the allegations in the plaint. In the alternative it pleaded that the respondent was solely and or substantially to blame for the accident if at all. It also particularised the negligence on the part of the respondent to include his failure to take adequate precaution for his safety, failing to use protective apparel provided by the appellant and ignoring and or disregarding the appellant's rules and regulations at work which had been imparted to him by the supervisor.

During the hearing of the case only the plaintiff testified. His evidence was brief which I proceed to set out in extenso.

"**I am Simon Kamwangi and come from Kambiti. I am not working. Previously I used to work at Kakuzi. I joined Kakuzi in July 2006. I worked up to 15th August 2006. I was splitting firewood. I was a casual employee. The firewood was for selling. On 16th August 2006 I was working for Kakuzi and was assigned the duty of splitting firewood. In the process the panga slipped and cut me on the right leg. Those that I was with tied my hand. I was taken to the company clinic. I informed the supervision regarding the accident herein. I did not continue working after the accident. I was treated by a nurse lady. I have not recovered as one of the tendons was cut. A form was filled on my behalf. I produce the LD 104 form as PExh.1. I hit a branch and the panga slipped. The company ought to have given me gumboots. The company did not give it to me though I requested the supervisor to give me – he indicated that the same is normally given to the permanent employees. I was seen by a doctor for purposes of preparing a medical report on my behalf. I paid Kshs.1500/= for the report. I wish to produce the medical report dated 20th April 2004 and receipt as PExh.2 and PExh.3. I pray for damages and costs herein. I confirm that I was working for the defendant. At the moment I have documents to indicate that I was working for the defendant. I did not willingly cause injuries to myself.**

S.M. MOKUA – SRM

2/8/207

xxd by Ms Mulwa: There was need for gumboots to be given to me. The panga belonged to me. Casuals were to avail pangas. I may have been given if I was permanent. The panga I had was sharp and could cut the gumboots. The gumboots could have somehow lessened the gravity of injury. I cut myself.

S.M. MOKUA – SRM

2/8/2007

Re-Exam by Bosire: The company did not provide me with any gadgets. I was performing duties herein for the company. The manager claimed that casuals were not entitled to any gadget. I was meant to cut firewood and not gumboots. I have no expertise to deny that gumboot would not have been of any help.

Mr. Bosire: That is the close of the plaintiff's case."

The appellant did not call any evidence in support of its defence. The learned magistrate having considered the evidence led by the respondent, the written submissions filed, the authorities cited and the law found for the respondent, holding "**..... I concur with the judges of appeal's holding – the plaintiff in the present suit was working for the defendant. He was assigned the work he was performing by the defendant. What the defendant did, at most was assigning him a supervisor. Whatever the circumstances, it was upon the defendant to ensure that it did all it could to provide the plaintiff with safety gadgets and a safe environment. The employer, defendant was under duty to take reasonable care for safety of its employees so as not to expose them to unnecessary risk. Splitting of firewood was not devoid of any risks.**

Therefore the defendant herein did not take reasonable care in so far as safety of the plaintiff herein was concerned. The plaintiff therefore proved his case on a balance of probability; the defendant – did not tender evidence in support of its defence. The evidence by the plaintiff stand unchallenged. In sum I find the defendant 100%."

Having found for the respondent, the learned magistrate proceeded to award the respondent a sum of Kshs.120,000/= as general damages for pain, suffering and loss of amenities. As for special damages he

awarded him Kshs.1,500/= making a grand total of Kshs.121,500/=.

The appellant was aggrieved by the said decision of the trial magistrate. It thus preferred the instant appeal through **Messrs Kairu & McCourt Advocates**. In total it raised 11 grounds of appeal to wit:

"**1. The learned magistrate erred in law and in**

fact in failing to find that the cause of the plaintiff's injuries was the plaintiff's own negligence and or lack of attentiveness in view of the following evidence:

(a)The plaintiff was involved in a manual

task and was in full control of the activities he was engaged in.

(b) The Plaintiff was working with a panga

– a hand tool, not an automated machine and was therefore in command and control of the activities he was engaged in.

2. The learned magistrate erred in law and in fact in finding that the defendant was negligent in failing to warn the plaintiff of the inherent dangers in using a panga in view of the evidence on record that the plaintiff was fully aware of the dangers involved in using a panga.

3. Further and without prejudice to the foregoing, the learned magistrate erred in law and in fact in failing to take Judicial Notice of the fact that handling of a panga was such a basic task that did not require any training or warning of the danger that may be involved in cutting firewood with a panga.

4. The learned magistrate erred in law and in fact in finding the defendant liable for failing to provide protective apparel to the plaintiff in view of the evidence on record to the effect that the terms of the contract of employment between the defendant and the plaintiff provided that the plaintiff being a temporary causal employee was to provide his own implements of work including any protective apparel and the defendant only provided protective apparel and working implements to its permanent employees.

5. The learned magistrate erred in fact and in law in ignoring the terms of the contract of employment between the defendant and the plaintiff and the plaintiff's own testimony in court that he was solely responsible for providing his own implements and in fact the panga he was using was his own brought from home.

6. The learned magistrate erred in law and in fact in ignoring the law and the wisdom of the learned judges in:

- **HCCA NO. 15 OF 2003 – Kericho**

Wilson Nyanyu Musigisi v/s Sasini Tea &

Coffee Limited

- H**CCA NO. 30 of 2000 – Eldoret**

Eastern Produce (K) Limited v/s Patrick Chege

Mwangi

- **HCCA No. 58 of 2000 – Kakamega**

Mumias Sugar Company Limited v/s Samson Muyinda

7. The learned magistrate erred in law and in fact in failing to distinguish the facts and the law in CA No. 32 of 1989 – Nairobi Gatundu Coffee Growers Co-operative Society Limited v/s Njoki Njoroge on the following points:

- **The plaintiff in the Gatundu case was in fact working in a hazardous environment namely that the grass she was cutting had in fact been sprayed with chemicals.**

- **The cause of the plaintiff's injuries in the Gatundu case was caused by the presence of chemicals in the grass a fact which the plaintiff had no control over whereas the cause of the respondent's injuries in the present case was as a result of his own act of cutting himself with a panga a factor which was within his control.**

- **There was no evidence of negligence on the part of the plaintiff in the Gatundu case whereas in the present case the respondent admitted in cross –examination that in the circumstances of the accident no one but himself could be blamed for the accident.**

- **In the Gatundu case the dangerous environment had actually been created by the defendant and the defendant was fully aware of the dangerous presence of the chemicals in the grass the plaintiff was cutting and ought to have warned and protected the plaintiff from the same. In the present case there was nothing to warn the plaintiff about.**

- **In the Gatundu case it was reasonable for the employer to provide an employee with goggles whilst cutting grass laced with dangerous chemicals but in the present case the respondent was only danger to himself and no one may blame another for his own carelessness.**

8. The learned magistrate erred in fact and in law in failing to consider the plaintiff's own admissions in court that indeed the plaintiff was to blame for the misfortune that befell him.

9. The learned magistrate erred in law and in fact in failing to appreciate that the plaintiff had not proved any of his allegations and the whole case in its entirety on a balance of probabilities.

10The leaned magistrate erred in fact and in law in failing to appreciate that in view of the evidence before him the defendant had no case to answer and in fact did not need to call any evidence.

11. The learned magistrate erred in law and in fact in awarding the plaintiff excessive damages in view of the defendant's submissions before the court and the awards given for injuries of a similar nature."

When directions as to the hearing of the appeal were given on 16th March 2009, parties agreed that the appeal be heard by way of written submissions. Subsequent thereto, the parties filed their respective submissions which I have carefully read and considered together with the relevant authorities cited. I need not reproduce them here as they are already on the record.

This being a first appeal, I am mandated in law to subject the evidence tendered at the trial to fresh and exhaustive evaluation. I am required further to reconsider the facts and the law so as to reach my own independent decision as to whether the trial court's decision ought to be upheld or upset. In doing so however I am required to bear in mind the fact that I neither saw nor heard the witnesses who testified before the trial magistrate's court and make due allowance (See **Selle v/s Associated Motor boat Co. Ltd (9165) E.A. 123**.

In the circumstances of this appeal, it would appear that the learned magistrate relied heavily on the unrebutted evidence of the respondent to find favour with the respondent's claim. Yes, the appellant opted not to call any evidence pursuant to its defence. However did the respondent establish the appellant's culpability and or causation as to make the appellant liable? Having carefully re-evaluated the

evidence adduced by the respondent and considered the written submissions by the appellant and the respondent, I am not satisfied that the appellant's culpability was proved to the required standard much as the appellant did not tender any evidence. It was the respondent's case that having been assigned duties of splitting firewood by the appellant, the panga slipped and hit him on the right leg having first hit a branch of a tree. To him the appellant ought to have provided him with gumboots which would have minimised or lessened the gravity of the injury. That he had requested for the same from his supervisor but was told that they were normally given to the permanent staff only. It is not in dispute therefore that the respondent injured himself. He was at the time fully in control of the panga. Indeed according to his evidence, the panga did not even belong to the appellant. It was his own personal panga which he came along with from home. One would therefore assume that he was familiar with it and how sharp it was. The story could have perhaps been different had the panga been supplied by the appellant. In those circumstances, one would be justified to assume that perhaps the respondent would not have been familiar with it hence a call for instructions from the appellant and or its members of staff as to the safe use of the same. The respondent testified that the panga slipped from his hands after he had hit a tree branch and cut him on the leg. I do not see how the foregoing can disclose the culpability of the appellant. It was not the appellant who instructed the respondent to swing the panga in the manner that he did resulting into it slipping from his hands. As stated by **Justice Kimaru** in the case of **Wilson Nyanyu Musigisi v/s Sasini Tea & Coffee Ltd (2006)e KLR** "**.....The appellant was undertaking manual work. He was not operating a machine. He was cutting grass within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be made to be liable in the performance of such a manual task. The appellant was given a duty. He performed it badly. He injured himself. He now blames the respondent. In law the only compensation that can be paid to the appellant (if indeed he was lawfully employed by the respondent) is under the workmen compensation Act....."** I totally agree with the sentiments by the learned judge. They equally apply to the circumstances of this case. The respondent was undertaking a manual job. A panga is not a machine that may require training as to how to operate it. In fact as a manual employee he was required to come with his own panga. The appellant was not providing any. If the respondent came with his own panga, one can rightly assume that he had the necessary experience as to how to use it. Indeed he knew how sharp it was. Clearly having been given a manual job which he performed badly at his own peril, he cannot now turn around and blame the appellant for the injuries he sustained out of his own negligence. The respondent takes the view that had he been given gumboots they would have helped to minimize or lessen the injuries sustained. Essentially what the respondent is saying is that the gumboots perse were not the panacea of his safety. He was acutely aware that with or without gumboots he could suffer injuries if he was not careful whilst swinging the panga. From his evidence it is not clear as to how the panga hit a tree branch and then slipped from his hands. Was it because he had not held the panga firmly? If where he was working there were tree branches it must have been apparent to him that if he swung the panga carelessly, he was likely to hit another tree or a branch thereof, hence the need to exercise diligence. I cannot discern such exercise of diligence on the part of the respondent in the circumstances of this case.

It is trite law that an employee who gets injured in the course of employment and seeks compensation under common law is strictly required to prove the employer's liability and or culpability. In the circumstances of this case and contrary to the finding of the learned magistrate, no such proof was forthcoming from the respondent. The learned magistrate heavily relied on the decision of the court of appeal in the case of **Gatundu Coffee Growers Co-operative Society Limited v/s Njoki Njoroge, Civil appeal number 32 of 1989** (UR). According to he learned magistrate, the judges of appeal had held that there was nothing outrageous in expecting an employer to provide a grass cutter with articles to cover his eyes if that is necessary for employee's safety. The employer is under duty to take reasonable care for the safety of his employees so as not to expose them to unnecessary risk. He took the view that at least the appellant should have assigned the respondent a supervisor. According to the learned magistrate, failure to do so amounted to the appellant's failure to provide the respondent with safety gadgets and a safe environment. It also failed to take reasonable care for the safety of its employees so as not to expose them to unnecessary risk. I am unable to understand how the provision of a supervisor would have ensured that the respondent does not swing the panga in such a manner as to hit a tree branch resulting in it slipping from his hand and cutting him. The learned magistrate in relying on the aforesaid Gatundu case heavily, failed to appreciate that it was distinguishable with the circumstances obtaining in the

instant appeal. The plaintiff in the Gatundu case was working in a hazardous environment; the grass she was cutting had been sprayed with harmful chemicals by the employer yet she had not been provided with a mask so that she could not inhale the same. In the present case there was no inherent danger to which the respondent had been exposed for his was only cutting firewood with his own panga. Secondly, the plaintiff's injuries in Gatundu case were caused by the presence of chemicals in the grass whereas the cause of the respondent's injuries in the present case was as a result of his own act of cutting himself with a panga a factor which was within his control. Thirdly, in the Gatundu case, it was reasonable for the employer to provide an employee with goggles whilst cutting grass laced with dangerous chemicals as there was risk that such grass could fly into the plaintiff's eyes through no fault of her own. In the present case even if the gumboots were provided a negligent respondent would still have cut himself elsewhere. As correctly submitted by the Advocate for the appellant "**It is not absence of gumboots that caused the injury; it is the absence of attentiveness on the part of the respondent. The accident occurred when the panga slipped not because of the absence of gumboots. So the issue really is what caused the panga to slip? Whose fault was it that the panga slipped? Is it the appellant's or respondent's or nobody at all ......"** In my view the respondent was solely to blame. Had the learned magistrate approached the issue of liability with what I have set out above, I am certain that he would have come to a different conclusion.

The conclusion I have come to is that the respondent failed in this case to establish the appellant's culpability. He was unable to prove that the appellant failed him either in its statutory or common law duty of care. In reaching this conclusion I am reminded of what **Waweru J.** said in the case of **Mumias Sugar Co. Ltd v/s Samson Muvinda, Kakamega HCCA No. 58 of 2000** (UR) that where an employee is engaged in manual labour that does not require any exceptional skill and injures himself, then such an employee cannot hold his employer liable under statute or common law. This is the situation obtaining in this case. The respondent's work for which he was engaged involved splitting firewood using a panga. No machinery of any kind was involved. It was a simple exercise which the respondent had full command and control of. When hired the respondent was required to come with his own panga. He must have had his own experience with the panga. It was surely his duty to ensure that he did not cut himself with his own panga. I cannot see how the provision of a supervisor or gumboots would have avoided the accident.

There is therefore merit in this appeal and I allow it with costs to the appellant. Accordingly I set aside the judgment and decree of the learned magistrate dated 23rd August 2007 and substitute therefor with an order dismissing the suit with costs to the appellant as well. I must however point out that had I come to a different conclusion and dismissed the appeal, I would not have interfered with the damages awarded as they appear reasonable and not excessive in the circumstances.

Dated and delivered at Nyeri this 21st day of May 2009

M. S. A. MAKHANDIA

JUDGE