REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Appeal 203 of 2004

KIPTAGICH TEA ESTATES LIMITED ……...…….. APPELLANT

VERSUS

CHRISTOPHER KIBET KOSKEY ……. RESPONDENT

JUDGMENT:

The respondent stated in a plaint that he was employed by the appellant as a Machine Attendant at the appellant's factory at Olenguruone. On or about the 11th day of December, 2001 he was sweeping under a machine referred to as C.T.C. machine when his hand was held by the conveyor belt as a result of which he sustained injuries to his right hand. In his plaint, the respondent averred that the said accident was occasioned by breach of statutory duty on the part of the appellant. Alternatively, the respondent pleaded, the accident was caused by the appellant's negligence and/or breach of duty or breach of the employment contract. He set out particulars of breach of statutory duty and particulars of negligence. He claimed general damages and special damages in the sum of Kshs. 3,500/= on account of a medical report.

The appellant filed a statement of defence and denied having ever employed the respondent as a Machine Attendant or at all. The appellant further denied the respondent's claim in its entirety. However, the appellant added, if the respondent got injured as alleged, the accident was solely caused and/or substantially contributed to by his own negligence. The appellant set out particulars of negligence against the respondent. The appellant admitted that the trial court had jurisdiction to hear and determine the respondent's case.

The respondent filed a reply to defence and joined issue with the appellant except where admissions had been made. The respondent denied that he caused the accident or contributed to its occurrence in any way. He reiterated that the same was solely due to negligence on the part of the appellant.

Before the trial court, the respondent testified that on the material day he was sweeping the floor at the appellant's factory. He was trying to retrieve tea leaves from under a conveyor belt when he was injured on his right hand. He explained that it was his duty to wash a machine known as CTC machine after work. He was also supposed to sweep spilt tea leaves. He had been instructed not to switch off the machine before cleaning it. The machine had no guard and that was well known to him.

He was wearing an apron and the same was caught by the machine and as a result suffered injuries to his right hand.

Following the said accident he was taken to Tenwek Mission Hospital where he was treated. Later he

saw Dr. Ogando who examined him and prepared a medical report at a cost of Kshs. 3,500/=. As a result of the said injury he could no longer work as a Machine Attendant. Shortly after the accident he was relieved of his duties.

The respondent blamed the appellant for the said accident because he had not been trained on how to safely work with the machine. He also blamed the appellant for its failure to place guard rails round the machine.

Dr. Ezekiel Ogando Zoga, PW2, testified and produced the respondent's medical report. He said the respondent sustained degloving injury of the right hand and fracture of the ulna styloid of the right hand and skin grafting was done. The respondent complained of reduction of muscle power and loss of sensation. The doctor assessed the injuries as amounting to 20% permanent disability.

The appellant called one witness, **Nathan Machine, DW1.** He was working at the appellant's CTC machine section and he used to work with the respondent.

He testified that on 11th December, 2001 at about 1.00 p.m. he was working with the respondent. The respondent was sweeping tea leaves on the ground and placing them on the conveyor belt. They were dressed in overalls and gloves. At the time when the accident occurred, the respondent was sweeping tea leaves which were under the machine. The respondent was between the machine and the floor. The witness said that the respondent should have switched off the machine before he proceeded to work under it. He added that they used to switch the machine on and off. In his view, the respondent was negligent in failing to switch off the CTC machine before he proceeded to sweep under it.

DW1 further testified that they had been given all the necessary precautions and the machine had guard rails. The respondent had been provided with a short broom, $1^1/_2$ feet long, whereas a standard broom should have been 3 feet long like the one he (the witness) had, DW1 stated.

The trial court held that the appellant breached its statutory duty by failing to provide a safe system of work in particular by providing the respondent with a short broom which forced him to go under the machine. In the circumstances, whether the machine was guarded or not was irrelevant, the court held. Liability was assessed at 100% against the appellant. General damages were assessed at Kshs. 400,000/= and special damages at Kshs. 3500/= for a medical report.

On the issue of the court's jurisdiction, the trial court said that it was raised during submissions, parties having called their witnesses and thereby submitted to its jurisdiction. That notwithstanding, the trial court held that it had territorial and pecuniary jurisdiction to hear the matter.

The appellant was aggrieved by the said judgment and in its appeal to this court raised the following grounds:-

"***1. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's preliminary objection that the court had no territorial jurisdiction to hear and determine the suit and by failing to put the appellant's objection on record and dismissing it off record as being of "no consequence."***

2. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions that the court lacked geographical jurisdiction to hear and determine the suit herein.

3. That the learned trial magistrate erred in law and in fact in holding the appellant 100% liable against the evidence adduced in court.

4. That the learned trial magistrate erred in law in awarding the respondent general damages which are manifestly excessive in the circumstances.

5. That the award of general damages made does not accord with the injuries sustained and the

decided authorities and is generally unreasonable."

Mr. Murimi for the appellant submitted that the trial court did not have territorial jurisdiction to hear the case. He said that the appellant's factory was situate at Olenguruone within Nakuru District and therefore the case should not have been filed at Kisii. He lamented that the learned trial magistrate declined to record his objection on the issue but the same was raised in his submissions. He cited several authorities to support his argument.

Counsel took issue with the trial court's finding that the respondent was injured because he had been supplied with a short broom, an issue that had not been pleaded. He further submitted that from the circumstances in which the accident occurred, the court should have inferred some contributory negligence on the part of the respondent.

Lastly, the appellant's counsel submitted that the award of Kshs. 400,000/= for general damages was excessive. In his view, an award of Kshs. 150,000/= was reasonable.

Mr. Ogweno for the respondent started his submissions by stating that jurisdiction of the trial court had been admitted at paragraph 9 of the appellant's statement of defence. The trial court was therefore right in rejecting that argument, counsel added.

Regarding liability, Mr. Ogweno submitted that there was no basis of apportioning the same and on the issue of quantum of damages, it was submitted that the injuries sustained by the respondent were very serious. The award of Kshs. 400,000/= should not therefore be disturbed.

Finally, Mr. Ogweno submitted that the decree that was in the record of appeal was not certified. He urged the court to dismiss the appeal with costs.

I have considered the record of appeal and the submissions by counsel. I will first deal with the issue of jurisdiction of the trial court. The respondent stated in paragraph 2 of his plaint that the appellant is a limited liability company incorporated in Kenya and that its postal address was C/o P.O. Box 1, Olenguruone. The accident that gave rise to the suit before the trial court was said to have arisen at Kiptangich Tea Factory. The actual location of that Tea Factory was not disclosed in the plaint. However, in paragraph 9 of the appellant's statement of defence, the jurisdiction of the court was admitted. The appellant's witness, **Nathan Mwadime, DW1,** stated that the appellant's Tea Factory was at Olenguruone within Nakuru District. The appellant further stated in its written submissions that the respondent's suit offended the provisions of **Section 15** of the **Civil Procedure Act** which requires that every suit be instituted in a court within the local limits of whose jurisdiction the defendant resides or carries on business or where the cause of action occurred. It was submitted that the suit ought to have been filed either in Molo or Nakuru.

In his judgment, the learned trial magistrate stated that the issue of jurisdiction was raised in the appellant's submissions. The court went on to hold:

"**I wish to state that this court has pecuniary jurisdiction herein. It also has jurisdiction to hear any matter without territorial limitation unless a preliminary objection is taken and upheld. In this case no such objection was raised. My duty having heard the case is to determine it on substantive issues rather than technical matters. More so where both parties at the hearing submitted to the jurisdiction of the court."**

The question of jurisdiction of a court is very important and ought to be raised at the earliest opportunity possible. In **WILSON KENYENGA –VS- JOEL OMBWORI [2001] 2 E.A. 416** it was held by the Court of Appeal that a question of jurisdiction is a matter which the court can and should take cognizance of whether or not it is raised in argument.

That notwithstanding, parties are bound by their pleadings. A fact or an issue that has expressly been admitted in pleadings cannot be detracted from by submissions. If after filing the statement of defence

the appellant was of the view that the court had no jurisdiction he ought to have filed an amended statement of defence. Having expressly admitted in its defence that the trial court had jurisdiction, it was improper for the appellant to adduce evidence and make submissions that contradicted the pleadings on record.

In **DOSHI ENTERPRISES LIMITED –VS- ORIENTAL STEEL FABRICATORS AND BUILDERS,** Milimani Commercial courts, Misc. Appeal No. 627 of 2001 Mwera, J. held that the filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of **Section 15** of the **Civil Procedure Act** does not make it a nullity because **Section 15 (b)** thereof adds that a court may give leave to the filing of a case away from the local limits of its jurisdiction or the defendant may acquiesce to such institution.

A Resident Magistrate's court has jurisdiction throughout Kenya, see **Section 3 (2)** of the **Magistrates' Courts Act Cap 10** Laws of Kenya but the provisions of **Sections 11** to **15** of the **Civil procedure Act** stipulate specific places where certain suits ought to be filed; see **MOHAMED SHABAN –VS- GEORGE MWANGI KAROKE** Civil Application No. 13 of 2002.

That notwithstanding, **Section 16** of the **Civil Procedure Act** states as follows:

"**16. No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice."**

While I agree that ordinarily the respondent's suit ought to have been filed before a Magistrate's Court within Nakuru District, it was not demonstrated that failure to do so occasioned a failure of justice and moreso, when the trial court's jurisdiction had been admitted in the statement of defence. For the aforesaid reasons, I reject the first two grounds of appeal.

I now turn to the issue of liability. From the evidence that was adduced by the respondent and the appellant's witness, the respondent had worked for the appellant for nearly a year. He was therefore quite familiar with the place of work and particularly the C.T.C. Machine. He had on many occasions swept the said machine. The respondent knew the type of broom that would have been appropriate to use. It is not clear whether the machine had guard rails or not. This is because the evidence of the respondent was contradicted by the evidence of the appellant's witness.

There is no evidence that the respondent took all the possible precautionary measures for his own safety, knowing that he had a short broom. There is no evidence that he requested for a longer broom and the same was denied. In my view, the circumstances of the accident called for apportionment of liability. I proceed to apportion liability at 70:30 in favour of the respondent.

As regards quantum of damages, it is trite law that for an appellate court to interfere with an award of damages by a trial court, it must be demonstrated that the trial court took into consideration an irrelevant factor or failed to take into consideration a relevant factor or that the trial court did not appreciate the importance of some material evidence or that the award is so inordinately low or high that it must be a wholly erroneous estimate of the damage, see **KEMFRO AFRICA LIMITED-VS- A.M. LUBIA & ANOTHER (1982-88) 1 KAR 727.**

None of the above factors were demonstrated in this appeal. I will not therefore interfere with the award of general damages in the sum of Kshs. 400,000/= and special damages of Kshs. 3,500/=.

In view of the apportionment of liability as stated herein above, I allow ground 3 of the appeal and set aside the trial court's finding on liability and now apportion general and special damages in the said percentages. I enter judgment for the respondent in the sum of Kshs. 280,000/= as general damages and Kshs. 2,450/= as special damages.

As the appellant has partially succeeded in the appeal, he will be entitled to one quarter of the costs of the appeal but the respondent will have three quarters of the costs of the suit before the trial court plus

interest at court rates.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

21/5/3009

Before D. Musinga, J.

Mobisa – cc

Mr. Nyamurongi for Mr. Ndumia for the Appellant

N/A for the Respondent

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.