REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Civil Appeal 79 of 2006

NYAMACHE TEA FACTORY ……………………………………….. APPELLANT

VERSUS

GEORGE GEKONDE OKINDO ………………………………….. RESPONDENT

JUDGMENT.

The respondent filed a suit against the appellant claiming general and special damages as a result of injuries which he suffered at the appellant's factory where he was working. He alleged that the accident occurred on 12th January 2005. He stated that on the material day he was working in the processing section when he sustained chemical burns on his right hand fingers. He blamed the appellant for failing to provide him with a safe system of work and in particular for failing to provide him with hand gloves. He set out particulars of breach of duty as well as particulars of negligence and breach of contract on the part of the appellant.

The appellant filed a statement of defence and denied the respondent's claim in its entirety. The appellant added that if at all the alleged accident occurred, the same was caused by the respondent's own negligence.

The respondent gave a brief testimony during the hearing of the case. He said that he was a casual employee of the appellant and gave his employment number as 324. He also produced a copy of a pay slip to prove that he was a casual employee at the material time. He alleged that on the material day he sustained chemical burns to his right hand fingers while working at the processing section. He further stated that he informed his seniors and was given a sick sheet which he produced as an exhibit. The same was issued by the Factory Manager. He was treated at Nyamache Sub-District Hospital. He produced patient's record card and treatment notes from the said hospital. Later he was seen by Dr. Ojuoga who examined him on 3rd of March 2005 and prepared a medical report. The said doctor charged him Kshs. 3,500/= for the medical report. The medical report and the receipt in respect of payment of the aforesaid sum were produced as exhibits without any objection raised by the appellant.

The respondent asserted that the said accident occurred because he had not been provided with hand gloves.

In cross examination the respondent stated that he had not been trained on the use of chemicals and neither had he been told about the dangers of using the same. He alleged that on the material day he was using chemicals for the first time.

The appellant called one witness, **Samson Otwori, DW1,** who was working for the appellant as a

Supervisor. DW1 admitted that the respondent was in the appellant's employment on the material day. He had been assigned the duty of clearing trolleys. He said that the respondent was supposed to put on gloves because he was to use chemicals to clean the trolleys. The witness denied that the respondent was injured on the material day. He produced a muster roll to prove that on the material day the respondent worked for eight hours. The witness also produced an accident's record book and the respondent's name was not included therein. He added that although the respondent had produced a sick sheet which was allegedly issued by the appellant, the same did not appear genuine because it ought to have been initially signed by a Supervisor. The witness was the supervisor on duty on the material day and he had not signed the same.

In a very brief judgment, the trial court held that the appellant failed to supply the respondent with gloves and awarded a sum of Kshs. 70,000/= as general damages and Kshs. 3,500/= as special damages. The appellant was aggrieved by the said judgment and preferred an appeal to this court. The appellant faulted the learned trial magistrate for, ***inter alia,*** failing to analyse the evidence on record properly and thereby reaching a wrong conclusion.

From the evidence on record, it is not in dispute that the respondent was an employee of the appellant at the material time. That was not denied by DW1. It is also not in dispute that on the material day the respondent was directed to clean trolleys using some chemicals. What is in dispute is whether he suffered chemical burns in the process of cleaning the trolleys. The respondent asserted that he had not been supplied with gloves and as a result he suffered chemicals burns to his right hand fingers. The respondent produced a sick sheet that was issued to him on the day of the alleged accident which was signed by the Factory Manager. It indicates that he was given permission to be off duty for two days. He then proceeded to Nyamache Sub-District Hospital where he was treated. He produced the treatment notes.

On the other hand, the appellant's contention was that the respondent was not so injured because the muster roll that was produced in court showed that he had been marked present throughout the month of January 2005. However, the entries in the muster roll were made by DW1 and the person who made the entries was not called as a witness. On a balance of probabilities I find that the respondent proved that he sustained chemical burns to his right hand fingers.

That notwithstanding, the respondent's counsel in conducting the case disregarded the important provisions of **Section 48** of the **Evidence Act** which states as follows:

"**48 (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuiness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuiness of handwriting or finger or other impressions.**

(2) Such persons are called experts".

The respondent chose to produce the medical report prepared by Dr. Ajuoga instead of calling the said doctor to produce the same so that he could be cross examined by the appellant's counsel. Production of the said medical report was not by consent. From the provisions of Section 48 of the Evidence Act quoted hereinabove, the aforesaid medical report was only admissible if produced by Dr. Ajuoga. The learned trial magistrate relied on the same in assessing general damages.

The appellant's counsel had cited before the trial court the Court of Appeal decision in **MOHAMED ASHAN MUSA & ANOTHER –VS- PETER MAILANYI & ANOTHER,** Civil Appeal No. 243 of 1998 (unreported). In that appeal, the Court of Appeal considered the provisions of **Section 48** of the **Evidence Act** and faulted a trial Judge for awarding general damages on the basis of a medical report that was produced by a plaintiff and not by the maker thereof, that is, the doctor who prepared the same. The court held that "**the plaintiff in this instance had, as a matter of prudence, to offer the opinion of physicians and surgeons to show his physical conditions, the nature of injury whether temporary or permanent, the effect of physical injuries upon the body or mind and their probable future consequences".** The court concluded that the alleged injuries and the effects thereof had not been

proved. There was therefore no basis of making an award for general damages.

The report by Dr. Ajuoga had a conclusion to the effect that the respondent suffered soft tissue injury which had healed well leaving scars but no permanent disability. It was necessary for the respondent to comply with the mandatory provisions of Section 48 of the Evidence Act and failure to do so was fatal to his case. Litigants should guard against the danger of rushing the process of a trial in a bid to obtain a quick finalisation of the same at the expense of violating mandatory legal provisions or procedural steps. That kind of practice may easily lead to travesty of justice and should be discouraged. It is unfortunate that the learned trial magistrate chose to disregard the aforesaid Court of Appeal decision that was cited before him by the appellant's counsel.

In view of the foregoing, I hold that the respondent's claim before the trial court was not sufficiently proved and consequently, I allow this appeal. The judgment by the trial court is set aside and substituted therefor with an order dismissal of the respondent's case with costs to the appellant. I make no order as to costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

15/5/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Mongare for Oguttu for appellant

Mr. Nyakundi for Mr. Kaburi for respondent

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.