REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 718 of 2005

SOCFINAF COMPANY LIMITED……..APPELLANT

VERSUS

GRACE WANJIKU CHURU…….……..RESPONDENT

J U D G M E N T

1. This is an appeal which was lodged in this Court by Socfinaf Company Limited, hereinafter referred to as the appellant. The appeal arises from a suit which was instituted by a former employee of the appellant, Grace Wanjiku Churu hereinafter referred to as the respondent. She had sued the appellant in the Chief Magistrates Court at Thika for general and special damages, arising from personal injuries allegedly suffered by the respondent as a result of the appellant's negligence, breach of contract, and/or breach of statutory duties.

2. The appellant filed a defence in which it admitted having employed the respondent, but denied having been negligent or in breach of any statutory duty or contract. The appellant further claimed that any claim of negligence was time-barred.

3. During the hearing of the suit, the respondent testified that at the material time, she was employed at the company's coffee farm. On the 10th February, 2002 she was on duty, using a panga to weed in the farm, when three fingers on her left hand were injured. She was treated by the company clinical officer a Mr. Nderitu. She produced the treatment note from the clinic as an exhibit. She blamed the appellant for her injuries as she claimed she was not provided with any protective gear.

4. Doctor Jacinta Wanjiru Maina, also testified on behalf of the respondent. She explained that she examined the respondent and noted that she had healed scars on the third, fourth and fifth fingers of the left hand. The respondent had limitation of movement of the same fingers. The doctor concluded that the respondent's injuries were moderate soft tissue injuries.

5. Two witnesses testified for the appellant. These were Evelyn Kandia Kathanga, a field clerk who maintained that on the 10th of February, 2002 when the respondent claimed she was injured there were no employees on duty. She testified that according to the records, the respondent worked on 7th February, 2002 and was thereafter away until 12th February, 2002. She maintained that the respondent may have been injured at home. Teresa Wanjiru, a community nurse with the appellant, also testified that according to the company records no patient was attended to on the 10th February, 2002. She produced a register in evidence.

6. Counsel for each party filed submissions urging the Court to find in favour of his client. Counsel for the respondent urged the Court to award the respondent a sum of Kshs.150,000/- as general damages. Counsel for the appellant, on the other hand, submitted that the respondent's claim was not proved as she did not establish the particulars of negligence alleged in the plaint.

7. Counsel for the appellant maintained that the respondent suit should be dismissed as the respondent was responsible for her own injuries. The Court was urged if inclined not to dismiss the respondent's suit, to apportion liability on an equal basis and award the respondent no more than Kshs.30,000/= as general damages for pain and suffering.

8. In his judgment, the trial Magistrate found that the respondent was not provided with protective gear relevant to the duties that she was performing. The trial Magistrate apportioned liability as between the respondent and the appellant at 20% to 80%. He assessed general damages for the respondent's injury at Kshs.100,000/= and special damages at Kshs.1,500/=. Having taken into account the element of contribution, the trial Magistrate awarded the respondent damages of Kshs.79,200/= together with costs and interests.

9. Being aggrieved by that judgment, the appellant has raised eight grounds in its memorandum of appeal as follows:

(i) The learned magistrate erred in law and in fact in finding that the respondent had proved her case against the appellant.

(ii) The learned magistrate erred in law and in fact in failing to find that the respondent was not injured while in the course of her employment with the appellant.

(iii) The learned magistrate erred in law and in fact in failing to find that the respondent was injured on a Sunday, when no employees reported on duty and no work went on at the appellant's farm.

(iv) The learned magistrate erred in law and in fact in failing to consider that the respondent was away from her place of work on two days preceding the date of the alleged injury and could not therefore have been injured at work.

(iv) The learned magistrate erred in law and in fact in failing to find that the appellant was not liable for the alleged injuries to the respondent.

(v) The learned magistrate erred in law in awarding the plaintiff a sum of Kshs.100,000/= which sum was manifestly excessive in the circumstances of the case.

(vi) The learned magistrate erred in law and in fact in entering judgment for the respondent when there was no basis for the said judgment.

(viii) The learned magistrate should have found on the evidence:-

(a) That the respondent was not injured at her place of employment.

(b) That the appellant has proved that the respondent was not at work on the alleged date of injury, the 10th of February, 2002 being a Sunday when no work was carried out at the appellant's farm.

(c) That the respondent has not proved any negligence or breach of duty of care or statute against the appellant.

(d) That the appellant could not be held liable for the matters complained of by the respondent.

(e) The respondent's suit ought to be dismissed.

10. In her submissions, counsel for the appellant argued that the evidence adduced before the trial Magistrate created a doubt as to whether the respondent sustained the alleged injuries during the cause of her employment. Counsel submitted that the respondent did not establish particulars of negligence alleged against the appellant, nor did she demonstrate any breach that the appellant committed, nor did she establish what was in her view a safe environment with respect to the use of a panga to carry out her duties of weeding.

11. Counsel for the appellant cited *Timsales Ltd. vs. Stephen Gachie HCCA No. 79 (Nakuru) of 2000* in which the Court held that it is upon a plaintiff to prove that his or her injuries arose out of the negligence and/or breach of duty of the defendant. Counsel argued that there must be a causal connexion between the breach and the injury. Counsel also relied on *Kiema Muthuku vs. Kenya Cargo Handling Services Ltd 1991 2KLR 258.*

12. Counsel further submitted that the respondent having worked for 16 years there was no evidence to show any form of training which she needed that was not availed to her. *Eastern Produce (K) Limited vs. Joseph Wafula Mwanje, HCCA No. 86 of 1999 (Eldoret),* was cited for the submissions that the respondent's system of work was not demonstrated as being unsafe. It was therefore submitted that the trial Magistrate erred in finding the appellant liable to the respondent.

13. With regard to the assessment of general damages, it was submitted that the respondent having suffered soft tissue injuries the sum of Kshs.100,000/= was excessive. Relying on *HCCA 152 of 2003, Statpack Industries vs. John Mbithi Munyao* the Court was urged to adjust the award downwards. The Court was urged to allow the appeal and dismiss the respondent's suit with costs to the appellant.

14. For the respondent it was submitted that it was not a requirement in law that a successful plaintiff must prove each and every particular of negligence listed in a plaint. Counsel maintained that it was sufficient if any one of the particulars was proved. Counsel further submitted that the contract of employment between the appellant and the respondent imposed a duty on the appellant not to expose the respondent to a risk to which the appellant ought to know of.

15. Counsel argued that the respondent's duty required her to use a panga and her hands in the weeding exercise and this exposed the respondent to a risk of injury. It was therefore necessary for the appellant to provide protective clothing. The appellant did not however provide the respondent with any protective clothing, although it was fully aware of the danger and had provided other workers with protective clothing.

16. It was submitted that the appellant, not having pleaded any contributory negligence in its defence, it could not depart from its pleadings and alleged contributory negligence on the part of the respondent. It was maintained that the trial Magistrate rightly analysed the evidence before her and came to the right conclusion as the evidence produced on behalf of the appellant was contradictory, and the evidence of the witnesses called on behalf of the appellant not very useful in establishing the appellant's defence.

17. The Court was urged to find the case of *Timsales Ltd vs. Stephen Gachie* (supra) inapplicable to the present situation. Counsel for the respondent urged the Court to be guided by the case of *Gatundu Coffee Growers Co-operative Society vs. Njoki Njoroge, HCCA No. 32 of 1989* in which it was held that an employer has a duty to provide protective clothing to an employee even where the purported danger is foreseeable.

18. Counsel for the respondent further referred the Court to *Ndurya Rai vs. Warehousing Farming Enterprises, HCCC 923 of 1987 (Mombasa), Mohamed Juma vs. Kenya Glasswork Ltd C.A 1 of 1980, Robert Musyoki Kitavi vs. Coastal Bottlers Limited, CA No. 69 of 1984* and *Kemfro Africa Ltd t/a Meru Express Services (1976) & Another vs. A.N. Lubia & Another (2), 1988 KLR 30.* He therefore urged the Court to dismiss the appeal.

19. In response to the submissions made by counsel for the respondent, counsel for the appellant maintained that the authorities cited on behalf of the appellant were relevant, as the respondent had

alleged breach of statutory duty in its plaint. Counsel argued that the appellant having denied in its plaint, the entire occurrence of the accident, pleading contributory negligence would have been inconsistent. Counsel submitted that in the present case, no negligence could be attributed to the appellant, nor could it be said that the appellant had failed to provide a safe environment. Counsel urged the Court to find that the trial Magistrate was wrong in finding the appellant liable.

20. I have carefully reconsidered and evaluated the evidence which was adduced in the lower Court. I have also considered the grounds of appeal and the submissions made before me. I find that it was not denied that the respondent was employed by the appellant. However the appellant denied that the alleged accident occurred. The appellant also denied that it was in breach of any statutory duty or contractual duty or negligence.

21. The respondent testified that she was injured whilst on duty. She produced some treatment notes which she alleged were prepared by the company clinical officer. The appellant did not call the company clinical officer to controvert the respondent's evidence in that regard. The two appellant's witnesses, who testified, gave the impression that the respondent was not on duty at the time of the alleged accident. However, at the material time, neither of the two witnesses was working at the appellant's coffee farm where the accident is alleged to have occurred.

22. The appellant's witnesses relied on documents which were not prepared by them. Moreover, no evidence was called by the appellant to explain why the makers of the documents were not called to testify nor was there any explanation as to why no officer of the appellant in authority over the staff was called to testify. The appellant's evidence was therefore hearsay evidence. In the circumstances this Court has no reason to fault the trial Magistrate for believing and accepting the respondent's evidence that she was actually injured at her place of work.

23. With regard to the issue as to whether the respondent's injuries were caused by the appellant's negligence and/or breach of statutory duty or contractual duty, the law is that the appellant as an employer of the respondent owed the respondent a duty of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution. This was so stated in the case of *Mwanyule vs Said t/a Jomvu Total Service Station [2004] 1KLR 47.*

24. Thus, in order for the respondent in this case to succeed in her claim, she had to establish that the appellant failed to exercise reasonable care for her safety against risks which were reasonably foreseeable. It must be borne in mind that the appellant is not under strict liability but is under a duty only to exercise reasonable care.

25. In this case the respondent's responsibilities included weeding using a panga. The respondent maintained that the appellant was in breach of its statutory duty to her, the particulars of which were pleaded in paragraph 5 (a) to (d) as follows:

(a) Failing to make or keep safe the plaintiff's place of work

(b) Failing to provide or maintain safe means of access at the defendant's place of work

(c) Employing the plaintiff without instructing her of the dangers likely to arise in connection with her work, or without providing her with sufficient training in work or without providing any and/or adequate supervision.

(d) In the premises failing to provide a safe system of work and/or suitable working equipments.

26. In her evidence the appellant did not adduce any evidence to show in what way the appellant failed to make her place of work safe or failed to provide or maintain a safe means of access. Nor did the respondent adduce any evidence to show that the duties which she was performing required any supervision or specific training which was not provided. Indeed the respondent's evidence was that she had worked for the appellant for a period of about 17 years. She must therefore be taken to have been

sufficiently familiar with the work which she was assigned to do. Moreover the work that the respondent was doing was simply weeding using a panga. The respondent did not tender any evidence before the Court to demonstrate that weeding using a panga was not a safe system of work, or required supervision.

27. With regard to the allegations of negligence and/or breach of contractual duty, the particulars alleged against the appellant as pleaded in paragraph 5 of the plaint were as follows:

(a) Failing to make any or adequate precautions for safety of the plaintiff while she was engaged upon the said work.

(b) Failing to provide or maintain adequate or suitable appliances and in particular with any gloves and/or protective gears to carry out the said work in safety or to protect the plaintiff's hands while she was carrying out the said work.

(c) Directing and requiring the plaintiff to carry out the said work without providing her with suitable protective clothing, gloves and/or otherwise to protect her hands.

(d) Employing untrained staff or employees.

(e) Exposing the plaintiff to danger, which the defendant knew and/or ought to have known.

(f) Assigning the plaintiff duties in unsafe place.

28. In this regard, the respondent capitalized on her allegation that the appellant did not provide her with any gloves while some of the employees were so provided. The appellant did not challenge the respondent's evidence that she was not provided with any gloves nor did the appellant challenge the appellant's evidence that hand gloves were necessary for her safety. Nevertheless it was upon the respondent to prove a causal link between her injuries and the appellant's alleged breach. She therefore had to prove that the injuries to her fingers resulted from the appellant's negligence or breach of duty.

29. The respondent was weeding using a panga and her hands. The question is whether it can be concluded that the absence of the hand gloves is what caused the respondent's injuries. Perhaps the use of hand gloves would have been useful in protecting the respondent from injury arising from pebble stones, thorns from weeds or any other harmful foreign body that may have been in the earth. The gloves were however unlikely to protect the respondent from a cut arising from the panga which the respondent was using, as the panga could cut through the gloves.

30. In this case, the respondent obviously suffered her injuries as a result of being cut on the fingers on her left hand by the panga that she was holding with her right hand. In this regard this case is distinguishable from the case of *Gatundu Coffee Growers Coffee Society vs. Njoki Njoroge* (supra) in which the respondent who was cutting grass using a slasher, was injured in the eye by soil contaminated by chemicals earlier sprayed by the appellant's servants, and the Court found the appellant liable because of the appellant's failure to provide the respondent with eye goggles which would have prevented the contaminated soil from entering her eyes.

31. Moreover the possibility of the respondent being injured whilst weeding with the panga using her bare hands was remote as the respondent had worked for over 17 years without any incident. Further, it cannot be said that the provision of hand gloves would have made any difference as the injuries were caused by the panga cutting the respondent. The respondent did not explain why on this particular day the panga cut her when she had been performing the same duties for about 17 years without any mishap.

32. The respondent was the one in control of the panga. The mere fact that the accident occurred did not connote any negligence or breach of statutory duty on the part of the appellant as the accident may well have been due to the respondent's own negligence. It was therefore upon the respondent to go further and explain in what way the appellant was negligent or in breach of contract/statutory duty, and how that negligence or breach caused the accident. The respondent's evidence was insufficient in this

regard. Therefore the respondent failed to prove her case on a balance of probabilities. While it is true that the respondent was injured during the course of her employment it is evident that she could only be compensated for her injuries under the Workman's Compensation Act. The trial Magistrate was therefore wrong in finding the appellant liable to the respondent and this appeal must succeed in that regard.

33. Finally as regard to the awards of Kshs.100,000/= which was made to the respondent, the report of Dr. Jacinta Maina revealed that the respondent suffered cut wounds on her third, fourth and fifth fingers on her left hand, which left her with healed scars, limitation of movement of the fingers, and deformity of mid index finger. The scars were said to be of cosmetic significance.

34. As was held by the Court of Appeal in *Kemfro Africa Ltd. vs. A.M. Lubia & Olive Lubia,* an appellate court can only interfere with the quantum of damages awarded by a trial Judge, where it is satisfied that the Judge in assessing the damage took into account an irrelevant factor or left out of account a relevant factor, or that the amount awarded is inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. In this case although the damages awarded were on the high side, I do not find that the damages were based on wrong principles or that the same were so inordinately high as to justify interference. I would therefore have dismissed the appeal against quantum had the appellant not succeeded in regard to liability.

35. The upshot of the above is that I allow the appeal, set aside the judgment of the lower court, and substitute thereof an order dismissing the respondent's suit. In view of the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear its own costs both in the lower court and in this Court.

Orders accordingly.

Dated and delivered this 24th day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Lubano for the appellant

Advocate for the respondent, absent