



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
OF KISII

Civil Appeal 76 of 2006

NYAMACHE TEA FACTORY CO. LTD. APPELLANT

VERSUS

MESHACK ONYARIKI MOSE RESPONDENT

JUDGMENT

The respondent alleged that on 13th February, 2005 while cleaning trolleys and the floor with a chemical at the appellant's premises he was burnt on his right hand and sustained a burnt wound. He said that the accident was caused by the appellant's breach of statutory duty as well as negligence.

In his brief testimony before the trial court, he said that he had not been given gloves and overalls and had also not been trained on how he was to do the cleaning. The respondent produced treatment notes allegedly given to him at Nyamache Health Centre. He also produced a medical report that was prepared by Dr. P.M. Ajuoga who charged him Kshs. 3,500/=.

The appellant called one witness, **Samson Otuori, DW1**, who was a Supervisor. He testified that on 13th February 2005 the respondent was on duty the whole day. On the following day he also worked for 8 hours. He said that the respondent was not injured as alleged because the appellant had no record of such an injury to the respondent. DW1 produced an Accident Register as an exhibit. There was also no record of any sick sheet that was ever issued to the respondent. The witness further claimed that the respondent had been provided with hand gloves for use when cleaning trolleys.

The trial court held that there was sufficient evidence that the respondent was injured in the course of his work and awarded Kshs. 50,000/= as general damages and Kshs. 3,500/= as special damages.

The appellant, being dissatisfied with that judgment, preferred an appeal to this court. The appellant's counsel argued, *inter alia*, that the evidence adduced by the respondent did not support his pleadings that he was involved in any accident on 13th February, 2005.

From the evidence on record, there is no dispute that the respondent was an employee of the appellant. He claimed that on 13th February, 2005 he sustained chemical burns on his right hand. He did not state whether he was working with any other person who might have witnessed the alleged accident. The respondent further stated that he informed the supervisor on duty about the accident. The name of the supervisor was neither disclosed nor was he called as a witness. He further stated that first aid was administered and then given a sick sheet to go to Nyamache Health Centre. Who administered the first aid, if at all?

The sick sheet that was allegedly given to the respondent is dated **16th February, 2005** and is in the name of Meshack Nyariki and not **Meshack Onyariki Mose** who was allegedly injured on 13th February, 2005.

If indeed the respondent was injured on 13th February, 2005, why was he not given a sick sheet the same day? The patient record that was

produced as **P. Exhibit 2** is also in the name of Meshack Nyariki and is dated 16th February, 2005. It does not show the name of the person who attended him. No explanation as to why treatment was not sought on 13th February, 2005 if at all the respondent had sustained any injuries.

The plaintiff did not discharge his burden of proof, there was nothing to show that he was involved in any industrial accident on 13th February, 2005. The exhibits produced did not support his contention. Moreover, there was documentary evidence that he was on duty on 13th and 14th February, 2005.

But even if the respondent had been injured on 13th February, 2005 as alleged, he produced original treatment records and a medical report by Dr. P.M. Ajuoga without calling the makers thereof. The probative value of such produced documents for purposes of assessing damages was almost nil; see **MOHAMED HASSAN MUSA & ANOTHER –VS- PETER M. MAILANYI & ANOTHER**, Civil Appeal No. 243 of 1998 (unreported).

For these reasons, this appeal must be allowed. The judgment

entered by the trial court is vacated. The appellant shall have the costs of this appeal as well as costs in the subordinate court.

DATED, SIGNED AND DELIVERED AT KISII THIS 3RD DAY OF DECEMBER, 2009.

D. MUSINGA
JUDGE.
3/12/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Appellant

Mr. Otieno HB for Mr. Nyachae for the Respondent

Court: Judgment delivered in open court on 3rd December, 2009.

D. MUSINGA
JUDGE.