



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**CIVIL APPEAL 37 OF 2006**

**KANYENYAINI TEA FACTORY CO. LTD. .... APPELLANT**

**VERSUS**

**STANLEY MUHIA GICHURE ..... RESPONDENT**

*(Appeal from original Judgment and Orders of the Resident Magistrate's Court at Kangema in Civil Case No. 94 of 2005 dated 9<sup>th</sup> May 2006 by G. P. Ngare – R.M.)*

**J U D G M E N T**

The appellant, **Kanyenyaini Tea Factory Company Limited**, is a limited liability company involved in processing tea. The respondent, **Stanley Muhia Gichure**, was at the relevant time an employee of the appellant and was working as a groundsman whose duties involved collecting garbage and down loading it in to the smouldering garbage bit for burning. He had joined the appellant as aforesaid in 1991. On 31<sup>st</sup> May 1991, he reported on duty as usual and went about his business. He collected the garbage and wheeled it to the dumpsite in a wheelbarrow and as he was emptying the garbage into the pit, he slipped and fell into the fire. In the process his lower part of the right leg was severely burnt. The burns were circumferential and they were deep involving the ankle joint. He was rushed to Murang'a District Hospital where he was treated between 31<sup>st</sup> May 1991 and 20<sup>th</sup> March 1992. According to **Dr. Kanyi Gitau** (PW3) he was of the opinion that the respondent suffered a lot of pain and due to the contracture he was not able to extend the foot fully. Following his recovery, the plaintiff resumed duties with the appellant but in a different section. However in 1994 he was laid off due to his inability to perform due to the injuries aforesaid.

In the meantime, the respondent sought compensation from the appellant for the injuries sustained. Negotiations with a view to resolving the matter outside court were entered into. Eventually by a letter dated 27<sup>th</sup> August 2004 from Majani Insurance brokers Ltd addressed to the District Labour Office, Murang'a, the respondent was advised that though his injury claim was reported as required by the appellant, unfortunately, the appellant had been insured through **Kenya National Insurance Company Limited**, which company was under statutory management. The respondent was thus advised to wait for the statutory manager to start honouring liabilities if at all.

Having waited for so long and seeing no possibility of the appellant compensating him for the injuries sustained and time for filing suit based on a tort of negligence having passed due to the protracted negotiations, the respondent through an originating summons filed in the Resident Magistrate's Court,

Kangema, sought and was granted leave to file his claim out of time on 30<sup>th</sup> August 2005. In a plaint dated 1<sup>st</sup> September 2005, the respondent sued the appellant in the same court seeking judgment to be entered against the appellant for:-

**“a) General Damages**

**b) Special damages aforesaid**

**c) costs of this suit**

**d) Interest on (a) and (b) at court rates**

**e) Any other relief that this Honourable court**

**may deem fit and just to grant.”**

The appellant in a defence dated 14<sup>th</sup> September 2005 denied the respondent’s claims and pleaded further and in the alternative that the injuries complained of, if any, were solely caused by the respondent’s own negligence and cited four particulars of the respondent’s negligence, each of which the respondent in his reply to the defence denied. The appellant also pleaded that the respondent’s claim was time barred. After pleadings closed, the suit was set down for hearing. The respondent gave evidence and called two other witnesses, whereas the appellant did not call any evidence, but its counsel cross-examined the respondent and his witnesses and put in written submissions at the close of the hearing of the case. The learned magistrate in a considered judgment apportioned liability at 80% for the appellant and 20% contributory negligence on the part of the respondent. In short, the trial magistrate found that the respondent’s negligence portion was 20%. Having done so, the court then considered appropriate damages awardable and came to the conclusion that Kshs.100,000/= as general damages was adequate. For special damages, an award of Kshs.1500/= was made. The trial magistrate awarded interest on the same awards and costs of the suit and interest thereon. Thus, the total awarded sum was Kshs.101,500/= less 20% contribution. The total payable to the respondent was thus 81,200/=.

The appellant felt aggrieved by that judgment and hence this appeal premised on four grounds as follows:-

**1. The learned trial magistrate erred in law in entertaining and finding in favour of the Respondent in a claim that was time barred under the Limitation of Actions Act.**

**2. The learned trial magistrate erred in law and in fact in arriving at the conclusion that the appellant was liable to the respondent, in a case where the respondent failed to proof negligence or breach of duty to him.**

**3. The learned magistrate further erred in law and in fact in awarding a huge quantum in view of the superficial burns suffered by the Plaintiff and the contradictory medical evidence adduced.**

**4. The learned trial magistrate erred in law and in fact in making a decision that is not supported by the evidence on record.**

During the hearing of the appeal, **Ms Mwai** and **Mr. Bosire**, both learned counsels for the appellant and respondent respectively agreed to have the appeal heard and determined by way of written submissions. I have carefully read and considered the respective submissions and the authorities cited.

I have considered the record before me, the submissions by both counsel on the rival points both of fact and law as this is a first appeal as well as judgment of the subordinate court and the law as I am bound to do in law. See the case of **Selle v/s Associated Motor Boat Co. Ltd. (1968) E.A. 123.**

First on liability, the evidence on record was adduced by the respondent. As I have already stated, the

appellant did not offer any evidence. The respondent in his evidence stated concerning the incident “..... **I recall on 31.5.1991 as it had rained in the night and in the morning. I went to work as usual. I picked some waste material on a wheelbarrow and was to dump it on fertilizers. And as I was moving I stepped on manure, and my leg entered into a hole which had fire. I was wearing ordinary shoes at the time. I slide (sic) because of the rain and the soil was wet. My shoes did not have grip and we were not issued with gumboots ..... I would not have slid at the time had I gumboots.....**” And in cross-examination, he said “..... **I am doing farm work since then. If I had been given boots I would not have been injured.....**”

The evidence given by the respondent as I have reproduced above, makes it abundantly clear that for the kind of work he was engaged in, he required gumboots. He was not provided with any. There is no counter evidence from the appellant to the effect that the gumboots were not an absolute necessity. Accordingly, the appellant breached its statutory duty under common law towards the respondent express or implied to take all reasonable precautions for the safety of the respondent while he was engaged upon his work, not to expose him to the risk of damage or injury which it knew or ought to have known, to provide and maintain adequate and suitable measures to enable the plaintiff to carry out his work in safety and provide a safe and proper system of working. However, the respondent was not without blemish either. He had a duty to exercise diligence in the performance of his duties as well. He knew the dangers that the smouldering garbage pit exposed to him. After all he had worked thereat for sometime. He knew the state of the ground. It was wet and slippery since it had rained at night and that morning. Extra care and caution was required of him. In the circumstances, a liability percentage of 20% against him was warranted. I cannot therefore say that the trial court came to a wrong decision on that aspect of the matter. I will thus, not interfere with the apportionment of liability. It will stand. Thus the appeal on liability has no merit.

The next aspect I need to discuss is the award for damages. As I have already stated, the learned magistrate awarded Kshs.100,000/= as general damages. It is the contention of the appellant that this was a huge award in view of the superficial burns suffered by the appellant. An award of Kshs.50,000/= would have sufficed. On his part, the respondent submits that the amount of quantum awarded is not inordinately high considering the nature of injuries the respondent sustained.

The jurisdiction of this court to disturb awards by the trial court is well settled. An appellate court is not entitled to review such awards merely because it is possible that had it been sitting in the first instance it would have awarded a lesser or higher sum. If it has to review, it must first be satisfied that the trial court acted on wrong principle of law or that the amount awarded is so high or so low as to make it an entirely erroneous estimate of damage to which the respondent is entitled. Moreover, where an award damages differs significantly from awards given in comparable cases it might be right for an appellate court to interfere. See **Biashara Master Sawmills Ltd v/s Ernest Khaye Shipira, C.A. Civil appeal number NKR 251 of 1997** (unreported). I note that in his written submissions in support of quantum the respondent relied on several relevant authorities to lay the basis of his entitlement to Kshs.200,000/=. The appellant responded by offering Kshs.50,000/= but cited no authorities. In a way and so to speak, the appellant merely plucked that figure from the air. Based on the authorities cited by the respondent. I am unable to hold that the eventual award by the learned magistrate was such as to constitute an erroneous estimate of damages to which the respondent was entitled to. Indeed it was tandem with awards made in comparable cases. The award made in my view met the justice of the case. I will not interfere with it.

Finally I would wish to turn on the complaint by the appellant that the learned magistrate erred in law in entertaining and finding in favour of the respondent in a claim that was time barred under The Limitation of Actions Act. It is the contention of the appellant that though the respondent obtained leave to file the suit out of time, it was wrongly granted as the time for filing suit by the respondent had long expired by the time he made the application, whether his claim was based on tort or contract. He was not under any disability and no facts of a decisive nature were outside his knowledge. The appellant maintains that whether negotiations with a view to settling the dispute out of court were ongoing, that is not an instance envisaged by section 27 of Limitation of Actions Act as there were not facts of decisive character which were outside the knowledge of the Respondent. The appellant relied on the cases of **Crispin Ned Ngari & Another v/s Churchill Odero, C.A. Civil appeal number KSM 223 of 1998** (unreported) and **Mary**

**Wambui Kabugu v/s Kenya Bus Service Ltd C.A. Civil appeal No. 195 of 1995** (unreported) to buttress its contentions. In the first case, the court of appeal stated **“..... It can be seen straight away that the requirements of the two sections (meaning section 27(2) and 28(2) of the Limitations of Actions Act of the Act are stringent. If the court is satisfied on evidence before it that the said requirements are met it has no option but to grant the application. If those requirements are not met the court must reject the application .....**” In the second case, again the court of appeal delivered itself on the issue as follows:-

**“..... The requirements of section 27 of the Act are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law e.t.c.....”**

The respondent's take on this is that before filing the suit he sought and properly obtained leave to file the suit out of time. He further contends that the issue of limitation should have been raised during the trial and not on appeal. The issue was never raised during the trial and as such it should not be an issue in this appeal. Counsel for the appellant relied on the case **Divecon Limited v/s Samani, C.A. Civil appeal number 142 of 1997** (unreported).

As I understand it, the appellant's objection to the grant of leave to file a suit notwithstanding that three years had expired since the date of the accident was based on the requirements of section 27 and 28 of the Limitation of Actions Act. It was an objection which the appellant could have taken at the trial. In the case of **Hary Wambui Kabugu** (supra) **Justice Shah J.A.** opined **“..... In my humble view the only time when such a defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts.....”**

Before then in the case of **Yunes K. Oruta & Another v/s Samuel Mose Nyamata Civil appeal No. 96 of 1984** (unreported) **Nyarangi, Platt & Gachuhi JJ.A;** held that the issue of challenge to the granting of leave to file suit out of time can only arise at the trial. **Gachuhi JA** in the leading judgment in the case stated **“..... It will be upto the judge presiding at the trial to decide the issue of limitation as one of the issues but**

**not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the limitation of Actions Act particularly where leave to file an action against the defendant has been granted ex-parte .....**”

It is thus patently clear that the appellant ought to have challenged the granting of leave to the respondent during the trial of the suit. It did not, much as it had indicated in paragraph 6 of its defence that it would move the court to have the suit dismissed on the ground that the respondent's claim was time barred. As already stated the appellant called no evidence to counter the respondent's claim. No evidence was led to challenge the granting of leave. The appellant did however raise the issue in its written submissions. However I do not think that this was

the right way to go. By those written submissions, the appellant must have proceeded on the basis that all the pertinent facts relating to the case were agreed. I do not think that this was the case here. In any event the learned magistrate succinctly addressed the issue in her judgment and I have no cause to disagree with her. In my view therefore the leave to file suit out of time was properly granted to the respondent and cannot be challenged. The respondent was under the impression that the appellant would make good on its promises to compensate him for the injuries suffered. It was not until he got wind of the letter from Majani Insurance brokers, that such payment may after all not be forthcoming that he thought of commencing court action. By which time, time limited for filing such suits had long expired. Leave can only be granted where a cause of action has been established and the requirements of section

27(2), 28 and 29 of the Limitation of Actions Act met. In the circumstances of this case, the respondent was under the

expectation, mistakenly though as it has turned out to be that the appellant would pay him his dues. There

was nothing to suggest that the appellant was not serious with the offer to settle the matter out of court. Indeed the respondent made countless visits to the appellant's offices in pursuit of the claim. As the negotiations were encouraging and were being carried out in good faith, there was no reason for the respondent to think otherwise and file suit. This was a material fact that related to the cause of action.

Leave to file claim out of time having been sought by the respondent and the same having been granted and was not seriously challenged and or raised as an issue in the trial, I am of the considered view that the appellant's complaint on the issue is unmerited. The sum total of all the above is that I see no merit in the entire appeal which must be and is hereby dismissed. The respondent will have the costs of this appeal.

*Dated and delivered at Nyeri this 23<sup>rd</sup> day of October 2008*

**M. S. A. MAKHANDIA**

**JUDGE**