



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

Civil Appeal 109 of 2002

DWA ESTATE LIMITED APPELLANT

VERSUS

EUNICE TAABU MAKAU RESPONDENT

JUDGMENT

1. The advocate for the Appellant at the hearing of this Appeal abandoned the ground on quantum and argued only the issue of liability.
2. In the Respondent's Plaintiff filed on 1/11/2001, the claim was that on 9/3/2001 while in the course of her duties as an employee of the Appellant, she was injured on the left ankle and this was because of the Appellant's negligence. The particulars of negligence as set out at paragraph 7 of the Plaintiff are said to be;
 - a. "Exposing the plaintiff to damage or injury of which they knew or ought to have known.
 - b. Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged in his work.
 - c. Failing to provide a safe and proper system of work for the plaintiff to work on.
 - d. Failing to provide the plaintiff with any protection or any protective wear."
3. In her evidence before the subordinate court, the Respondent stated that on 9/3/2001 she was working at the Dwa Sisal Estate when the implement she was using, namely a hoe or a slasher hit a sucker, bounced off it and injured her left ankle. She blamed the Appellant because "the hoe was sharp and there were no boots provided to prevent such an injury." That she had worked for six (6) years in the same place and performed the same duties and did not anticipate such an injury.
4. The Appellant in its Statement of Defence dated 21/12/2001 denied the particulars of negligence and averred that the Respondent suffered the injuries because of her own negligence and at paragraph 5 thereof the particulars of negligence are set out as being;
 - a. "undertaking her duties in total disregard of her own safety;
 - b. undertaking her duties carelessly and rashly;
 - c. failing to heed known and specific instructions on safety;

d. failing to wear protective gear.”

5. In his evidence Jackson Mureithi, a Supervisor with the Appellant company recalled that indeed on 9/3/2001, the Respondent was working under his supervision and got injured but she was wholly to blame for her predicament.

6. I have taken into account submissions by Mr Mulwa for the Appellant and I also note that the Respondent failed to appear although her advocate was duly served.

7. My view on the issue of liability is very simple; whether or not the Appellant had supplied boots to the Respondent, the injury to the ankle would still have been inflicted. I say so because, with respect I do not take the view that where a party holds a working implement, has total and unhindered control of it, barring special circumstances, the employer cannot surely be blamed when the employee inflicts an injury on himself. In the present case, the swing of the hoe or slasher, the impediments to swing, the ricochet or bounce of it, are matters that the Appellant has no control over. On the other hand, all those actions are controlled entirely by the Respondent and where for example she swings badly and the implement boomerangs, then it is entirely her “shauri”. In that regard I completely agree with Waweru J Mumias Sugar Co. Ltd. vs Samson Muyinda H.C.C.A 58/2000 (UR) – Kakamega where the learned judge held that it was the duty of the Respondent “to ensure that he did not cut himself with a panga (as) that was a matter that was particularly within the power and control of the respondent.”

8. The above view was supported by Kimaru J in Wilson Nyanyu Musigisi vs Sasini Tea & Coffee Ltd H.C.C.A 15/2003 (Kericho) when he stated that where the Appellant was using the slasher while at work, “the slasher was within the power and control of the appellant. He cannot blame anybody if he injured himself.”

9. I think that the judgment on liability in this case was in error and the Appeal is allowed as prayed. The judgment of the subordinate court both on liability and quantum is set aside and instead the suit therein is dismissed with costs. The appellant shall also have the costs of the Appeal.

10. Orders accordingly.

Dated and delivered at Machakos this 16th day of October 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr A.K. Mutua holding brief for Mr Mulwa for Appellant

ISAAC LENAOLA

JUDGE