REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

Civil Appeal 15 of 2003

WILSON NYANYU MUSIGISI ….....…… APPELLANT

VERSUS

SASINI TEA & COFFEE LTD …….....…….. RESPONDENT

JUDGMENT

The appellant, Wilson Nyanyu Mosigisi filed suit against the respondent, Sasini Tea and Coffee Co. Ltd. He sought to be paid damages on account of injuries that he alleges to have sustained while working at the respondent's Tea Estate. The appellant claimed that as he was working at Kiptenden Tea Estate Field no. 7 slashing paths in the tea plantation, he was cut by a slasher on his right leg below the knee. The appellant blamed the respondent for the said injury. He pleaded that the respondent had breached the statutory duty of care owed to him by failing to provide him with equipment which would have ensured that he worked in a safe environment. In particular, the appellant pleaded that the respondent had failed to provide him with gumboots which, in his view, would have prevented the injury that he sustained.

In its defence, the respondent denied that the appellant was injured while in its employment. Further, the respondent denied that it owed a duty of care to the plaintiff and described the injuries that the appellant sustained to have been self inflicted. The respondent urged the court, to dismiss the appellant's suit. The subordinate court heard the case. It agreed with the respondent. The appellant's suit was dismissed with costs. The trial magistrate in his considered judgment stated that the appellant had failed to prove that the respondent was liable to him in damages in the circumstances of the case.

The appellant was aggrieved by the said decision of the trial magistrate in dismissing his suit. He appealed to this court. In his memorandum of appeal, he raised seven grounds of appeal challenging the said decision of the trial magistrate. He stated that the trial magistrate fell in error when he found the respondent not liable for the injury that the appellant sustained. He was aggrieved that the trial magistrate had not considered the documentary evidence that the appellant had adduced in support of his case. He stated that the said documents were not challenged by the respondent. He was further aggrieved that the trial magistrate had not considered the fact that the respondent had offered no defence to the appellant's suit and therefore, in his view, the dismissal was unjustified in the circumstances.

At the hearing of the appeal, I heard the submissions made by Mr. Motanya on behalf of the appellant and Mr. Onyari on behalf of the respondent. Mr. Motanya submitted that the trial magistrate had erred in failing to consider the fact that the appellant had been injured while working at the premises of the respondent. He further submitted that the documentary evidence which was produced in evidence by the appellant was not challenged by the respondent. Learned counsel for the appellant urged the court to re-evaluate the evidence and consider the grounds of appeal put forward by the appellant and reach a decision favourable to the appellant. He urged the court to allow his appeal.

Mr. Onyari, learned counsel for the respondent in opposing the appeal submitted that the decision reached by the trial magistrate was proper. He submitted that the incident complained of by the appellant was remote and unforeseeable. He stated that the fact that the documents were admitted in evidence without any objection by the respondent did not mean that the respondent had admitted the plaintiff's claim. He submitted that in fact the documentary evidence produced established that the appellant had been injured and treated at Kapkatet District Hospital and not at one of the medical clinics operated by the respondent. He submitted that it was incumbent upon the appellant to prove his case. In the instance case, the appellant failed to prove his case on a balance of probabilities therefore there was no need for the

respondent to adduce any evidence in its defence. He further submitted that the evidence of the appellant established that the appellant was in full control of the slasher which cut him. He could not therefore blame anyone other than himself. He submitted that the appellant had not established that the respondent was negligent in any way. He urged the court to dismiss the appeal as no evidence was tendered to support the plaintiff's claim.

This being a first appeal, this court is mandated in law to hear the appeal herein by way of rehearing the case. This court is required to consider the facts and the law as regard the appeal before it. This court is further required to reconsider and reevaluate the evidence adduced before the trial magistrates court so as to reach its own independent decision. In reaching its decision this court is required to put in mind the fact that it neither saw nor heard the witnesses who testified before the trial magistrate's court ***(see Selle vs Associated Motor Boat Co. Ltd [1968] EA 123)***. In the instant appeal, the issue for determination by this court is whether the appellant established by his evidence that the respondent was liable in law for the injuries that he alleged to have sustained while working at the respondent's Tea Estate.

In the present case, the appellant testified that while he was slashing grass to clear the path between the tea bushes using a slasher the said slasher cut him on his right leg below the knee. The appellant testified that he could not have sustained the injury if he had not been assigned a task which he had not been trained to do. He testified that he was a trained tea picker and not a grass cutter. He further testified that he could not have been injured if the respondent supplied him with gumboots. It was his testimony that he was injured when the slasher hit a tree thereby causing it to deflect to his right leg and thereby injuring him.

I have re-evaluated the evidence adduced by the appellant and considered the submissions made before me by the appellant and the respondent. It is not disputed that the appellant injured himself with a slasher while he was clearing the path between the tea bushes. The appellant testified that he was cut on his right leg below the knee when a tree deflected the slasher causing it to cut him. The appellant admitted that at all times he was in full control of the slasher. This court does not see how such clear facts can by any stretch of imagination be described as disclosing culpability on the part of the respondent.

The appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be made to be liable in the performance of such a manual task. The appellant was given a duty. He performed it badly. He injured himself. He now blames the respondent. In law the only compensation that can be paid to the appellant (if indeed he was lawfully employed by the respondent) is under the ***Workmen Compensation Act***. This Act mandates an employer to pay his employee in case he is injured while at his place of work. Such a compensation is paid on "*no fault*" basis. The employee is not supposed to prove any negligence or breach of statutory duty on the part of the employer.

In the event that such an employee such as the appellant embarks on litigation to be paid compensation under common law negligence, then he would be required to prove culpability on the part of the employer. In this case the appellant has established no such culpability on the part of the respondent. He has failed to prove that the respondent failed either in its statutory or common law duty of care. I agree with Waweru J, when he stated in the case of ***Mumias Sugar Co. Ltd vs Samson Muyinda Kakamega HCCA No. 58 of 2000 (unreported)*** that where an employee is engaged in manual labour that does not require any exceptional skill and injures himself, then such an employee cannot hold his employer liable under statute or common law. At page 3 of his judgment he stated as follows:

"***The respondent's work for which he was engaged involved cutting sugar cane in an open field using a sharp panga. No machinery of any type was used in this exercise. He would hold a cane in one hand and cut its lowest point with a panga in the other hand. It was a simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of protective clothing or that the same were provided as a matter of course in similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of***

which the appellant ought to have warned the respondent. To ensure that he did not cut himself with a panga was a matter that was particularly within the power and control of the respondent."

In this case the operation of the slasher was within the power and control of the appellant. He cannot blame anybody if he injured himself. This court wonders how the provision of gumboots by the respondent to the appellant would have changed the projection of the slasher which he had himself directed to his right leg albeit accidentally.

In the circumstances of this case I find no merit whatsoever in the appeal filed by the respondent. I dismiss the appeal with costs to the respondents.

DATED AT KERICHO THIS 10th **DAY OF** FEBRUARY, **2006**

L. KIMARU

JUDGE