



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**Civil Appeal 243 of 2002**

**SOTIK TEA CO. LTD ..... APPELLANT**

**VERSUS**

**PHILIP CHERUIYOT MAREL ..... RESPONDENT**

**JUDGMENT**

The Respondent, Philip Cheruiyot Malel is an employee of the appellant Sotik Tea Co. in their Momere Tea Estate where he picks tea. He sued the appellant before Kisii Senior Resident Magistrate Court for damages due to a cut he sustained while on duty. He told the court that on 30th August 1994 he was told to go and cut a tree with a panga. While doing so he cut himself on the right foot sustaining a deep cut. He said the handle of the panga was loose.

Appellant did not call any evidence though it had filed a written defence. The learned magistrate in her defence found that the defendant was negligent and awarded the respondent shs.70000/= as general damages.

Mr. Bosire submitted that the court erred in finding that the appellant was negligent. He further submitted that the court erred in not apportioning contribution which was pleaded in the defence and no reply to the defence filed.

Appeal was opposed and court told that the magistrate reached a proper findings.

Indeed in par. 7 of the plaint the Respondent had pleaded negligence. However from his evidence there was no proof of negligence by the appellant. The respondent cut himself. It was not the appellant or his agent who inflicted injuries on him.

The magistrate therefore erred to find that the appellant was negligent. The magistrate in concluding that the appellant was negligent found that the Respondent was assigned duties he was unfamiliar with and given a defective implement. In his evidence he said the handle of the panga he was given was defective. This was breach of Statutory duty and not negligence.

He should have been given a panga which was proper. Appellant did not offer any evidence to contravert that of the Respondent. Thus the appellant breached his duty and that led to the Respondent sustaining injuries.

The magistrate did not touch on the issue of contribution though this was pleaded in the defence. The Respondent had not filed any defence to that issue as required by order 8

rule 16 CPR. It is clear the respondent contributed to the tragedy. He was the one who was using the panga and he was aware the handle was loose. He had a duty to be careful and it seems he did not do this. I will put his contribution to 50%.

In the circumstances I allow the appeal to the extent that I find that the Respondent contributed to the accident and apportion contribution as 50% - 50%.

The amount of damages is therefore reduced to shs.35,000/=.

Each party will bear his own costs of this appeal

Dated this 11th day of April 2005

**KABURU BAUNI**

**JUDGE**

**Mr. Bosire for Appellant**

**N/A for Respondent**