REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

Civil Appeal 22 of 2003

AFRICAN HIGHLANDS PRODUCE CO. LTD …….... APPELLANT

VERSUS

FRANCIS B. MOSOSI ……..…. RESPONDENT

JUDGMENT

The Respondent in this appeal filed suit against the appellant seeking to be paid damages on account of injuries that he alleges to have sustained while working for the appellant. The Respondent claimed that he was injured due to the negligence and breach of statutory duty on the part of the appellant. The Respondent pleaded that the appellant failed in its statutory duty by failing to provide him with equipment and a safe working environment. He further pleaded that due to the breach of duty of care owed to him by the appellant, he was injured while working for the appellant. The appellant filed a defence. The main thrust of its defence was that respondent was not its employee at the material time that he claims to have been injured. The appellant denied that the respondent was injured while working at its premises. In the alternative, the appellant pleaded that if the respondent was injured, then it was due to the respondent's own negligence. The appellant pleaded that it owed no duty of care to the respondent. After the close of the pleadings, the case duly proceeded to hearing before the Senior Resident Magistrate, Mr. S. K. Ombaye. After hearing the case the said trial magistrate found in favour of the respondent. He however apportioned liability at the ratio of 80:20 in favour of the respondent and as against the appellant. He assessed the general damages to be paid to the respondent to be Kshs.100,000/-, less 20% contribution. He also awarded the respondent Ksh.2000/- special damages and costs of the suit. The appellant was aggrieved by the said decision of the trial magistrate. It duly filed an appeal against the said decision, both on liability and quantum.

In its memorandum of appeal, the appellant raised six grounds of appeal faulting the decision of the trial magistrate. It was aggrieved that the trial magistrate had found that the respondent had been employed by the appellant and had been injured in the course of such employment contrary to the evidence adduced. It was aggrieved that the trial magistrate had considered irrelevant matters and further applied erroneous considerations in reaching the said decision in favour of the respondent whereas there was ample evidence that the respondent's suit disclosed no reasonable cause of action. The appellant faulted the trial magistrate for finding in favour of the respondent even after the said respondent had failed to discharge the burden of proof placed on him by the law. The appellant was finally aggrieved that the general damages awarded to the respondent was inordinately high taking into account the injuries that the respondent had allegedly sustained. The appellant urged this court to allow the appeal and make an order that would be just and expedient in the circumstances.

In the submissions made on this appeal by Mr. Kamau on behalf of the appellant, it was argued that the respondent had failed to prove to the required standard that the appellant breached any statutory duty or that the appellant owed any duty of care to the respondent. It was contended that since the appellant was allegedly injured in a quarry, such a place was not a factory within the meaning of Section 5 of the

Factories Act. It was submitted that the respondent had failed to establish that he was an employee of the appellant; no documents were produced to prove that the respondent worked for the appellant. It was further submitted that there was no evidence adduced by the respondent which established that the respondent was injured while either in the employment of the appellant or worked within the premises owned by the appellant. It was contended by the appellant that the respondent had been employed by an independent contractor who had been contracted by the appellant to crush stones. The appellant argued that it managed to adduce evidence it its defence establishing that the respondent was not its employee. The appellant was aggrieved that this evidence was not however considered by trial magistrate, hence its erroneous decision finding in favour of the respondent.

It was contended on behalf of the appellant that the respondent failed to prove his case against the appellant to the required standard of proof on a balance of probability. The appellant argued that the respondent had not proved that the appellant was liable in law. Mr. Kamau further submitted that the general damages awarded to the respondent was inordinately high putting into consideration the injuries that the respondent had sustained as shown by the medical report prepared by Dr. Ajuoga which was produced in evidence by the respondent. The appellant referred this court to several authorities in support of its submission to have the appeal allowed. The appellant submitted that the trial court therefore ought to have awarded the respondent Kshs.40,000/- as general damages subject to whatever contribution that this court would apportion on liability.

Mr. Orayo, Learned Counsel for the respondent opposed the appeal. He submitted that the respondent had proved its case on a balance of probabilities. He submitted that the respondent had proved that he had been employed by the appellant as a casual employee at its quarry. It was argued that the evidence that was adduced by the respondent was not controverted by the defence witnesses who had given contradictory evidence as regards the number of employees who at the time worked for the appellant in the particular department. It was further contended on behalf of the respondent that the fact that the respondent was treated at the dispensary of the appellant was sufficient proof that the respondent was its employee. Mr. Orayo submitted that the respondent had discharged the burden of proof placed on him to establish that he was an employee of the appellant and had been injured while working for the appellant. It was further submitted that the appellant failed in its bid to establish that the respondent at the material time had been employed by an independent contractor and not the appellant.

It was argued that the appellant had failed in its statutory duty of care to the respondent. Further the appellant had failed to provide the respondent with protective gear which could have reduced the chances of the respondent being injured while working at the quarry. The respondent submitted that he had established that the appellant was solely liable for the injuries that he had sustained and therefore the trial magistrate had erred in apportioning liability. On quantum, it was contended that the award assessed by the trial magistrate was neither inordinately high nor inordinately low as to attract the interference by this court of the said exercise of discretion by the trial magistrate in assessing the said damages. Mr. Orayo urged this court to dismiss the appeal with costs.

This is a first appeal. As the first appellate court this court is mandated to reevaluate afresh the evidence adduced before the trial magistrate so as to reach its independent determination whether or not to uphold the said decision. As was held by the Court of Appeal in ***Virani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Co. Ltd Civil appeal No. 88 f 2002 (Kisumu)(unreported)*** at page 6 of its judgment:

> ***"As this is a first appeal we are under a duty to reconsider and re-evaluate the evidence on record and draw our own conclusions, always being in mind and giving due allowance for it, that the trial Judge had the advantage of seeing and hearing the witnesses testify before him."***

Having carefully evaluated the evidence on record and further having considered the rival submissions made by the parties to this appeal the issues for determination are threefold; firstly, did the respondent establish that he was an employee of the appellant? Secondly, did he prove that he was injured while in the employment of the appellant after the said appellant had breached the duty of care owed to him?

Thirdly, and finally whether this court can interfere with the award of damages assessed by the trial magistrate. On the first issue, the respondent testified that he was employed by the appellant to work at its quarry. The respondent's duty involved crushing stones. He recalled that on the 4th of December, 2001 while he was on duty a stone hit him on his right ankle and injured him. He blames the appellant for the injury failing to provide him with a safety gear. He denied the suggestion that he was an employee of a contractor who had been hired by the appellant. PW2, Yego Kirwa, a clinical officer treated the respondent when he was referred to him for treatment. He stitched the cut wound on the respondent's right ankle. He produced the treatment notes that he had written at the material time as evidence in court. PW3 Dr Ajuoga produced a medical report which he had prepared after examining the respondent. PW4 Dickson Onyango Okwaro denied that he had employed the respondent. He told the court that he did not know the respondent.

PW5, James Lusi, a supervisor at the appellants engineering department denied that the respondent was a permanent employee of the appellant. He however admitted that a casual employee's names were not recorded in the register. The appellant's witness, David Chepkwony testified that according to the record kept by the company the respondent had not at any time been employed by the appellant. He was categorical that the appellant had not employed casual employees to crush stone at its quarry. He testified that PW4 Dickson Onyango had been contracted by the appellant to crush stones. DW1 speculated that the respondent most probably was employed by the said Dickson Onyango. The appellant's witness declaimed liability for the injuries that the respondent could have sustained.

Having re-evaluated the said evidence adduced and also carefully considered the submission made there is no doubt that the main plank of the appellant's defence was that the respondent was not its employee. From the evidence adduced by the respondent which evidence, the appellants witness corroborated to some extent, it is clear that the respondent worked in a quarry within the appellant's parcel of land. Although the appellant claimed that the respondent was an employee of a contractor known as Dickson Onyango, the said Dickson Onyango denied that he had employed the respondent. The appellant produced the record of its employees in its bid to establish that the respondent was not its employee. However the chink in the appellant's case was the evidence adduced by its supervisor called James Lusi (PW5) who testified that no records were kept for casual employees. The respondent testified that he had been a casual employee at the material time. On re-evaluation of the evidence adduced it is evident that the respondent proved that he was employed by the appellant on a casual basis to crush stones at the appellant's quarry. The appellant has tried to escape liability by adducing evidence to the effect that the respondent was an employee of a contractor. The contractor was however called to give his testimony before the trial magistrate. He denied that the respondent was his employee. In the absence of any other evidence to the contrary, it is clear that the respondent was at the quarry as an employee of the appellant.

The appellant failed to provide him with a safe working environment by providing him with protective gear to protect the respondent from harm that could be occasioned by falling stones. As this court held in a case of similar facts as the present one i.e. ***African Highlands & Produce Co. Ltd versus Collins Moseti Ontweka HC Civil Appeal No. 38 of 2002 (Kericho)(unreported***)at page 11 of the judgment;

> ***"I do hold that the appellant was solely liable for the injuries sustained by the respondent due to the fact hat under the Factories Act the failure of an employer to provide protective gear to an employee, especially when he is working in a dangerous environment means that, In the event such an employee is injured, then such an employer shall be guilty of breach of a statutory duty. Liability in such event is strict".***

The above holding is applicable in this case. The appellant did not controvert the evidence adduced by the respondent that he was not given protective gear and therefore when the stone fell on him, it was envitable that he would be injured. On re-evaluation of the evidence adduced, it is evident that the appellant was solely liable in damages to the respondent. I therefore hold that the appellant shall bear 100% liability for the injuries that the respondent sustained. The appellant failed in its statutory duty of care to the respondent.

On quantum, evidence was adduced by PW2 Yego Kirwa, a clinical officer who examined the respondent

after the accident and by PW3 Dr Ajuoga, who prepared a medical report to the effect that the respondent sustained a deep cut wound on his right leg (precisely on his right ankle). He also sustained bruises on his right leg. The prognosis of Dr Ajuoga is that the respondent had ***"suffered mostly soft tissue injuries, which by now healed well, leaving him with only a scar and no permanent disability."*** As an appellant court this court cannot interfere with the exercise of discretion by the trial magistrate in assessing general damages unless it is proved that the said trial court applied wrong principles of the law that it awarded damages that were either inordinately high or inordinately low as to amount to an entirely erroneous estimate of the amount to be awarded. (See ***Kitavi versus Coastal Bottlers Ltd [1985] KLR 516 and Hassann versus Nathan Mwangi Kamau Transporters [1986] KLR 457.***

In the present appeal, it is clear that the general damages awarded by the trial court were inordinately high considering the injuries that the respondent sustained. The respondent sustained soft tissue injuries which had completely healed by the time the respondent was examined by Dr. Ajuoga leaving no permanent disability apart from a scar. The trial magistrate applied the wrong principles of the law in assessing the said damages to be awarded. This court will therefore interfere with the said general damages awarded. The said award of Kshs.100,000/- by the trial magistrate is consequently set aside and substituted by an award of this court of Kshs.40,000/-. In this regard I have been guided by the case o***f John Otieno Ojwok versus Samwel Onyango Abunga & another Nairobi, HCCC No. 2001 of 1992 (unreported)*** where the plaintiff therein sustained similar injuries to the respondent in this appeal. The special damages of Kshs.2,000/- was proved. It is awarded as prayed. Since the appellant has been partially successful in this appeal, I shall award it half of the costs of this Appeal. The respondent shall however have the costs of the suit in the lower court. Interest on the damages awarded shall be applied from the date the initial damages was assessed by the trial magistrate.

DATED at KERICHO this 1st day of December, 2005.

L. KIMARU

JUDGE