REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 31 OF 2003

KILIFI PLANTATIONS LIMITED …..… APPELLANT/DEFENDANT

Versus

JETH AWOUR ODAWA ……. RESPONDENT/PLAINTIFF

J U D G M E N T

This is an appeal on both liability and quantum from the judgment of P.M. Mutani Esq., Senior Resident Magistrate at Kilifi in SRMCC No. 115 of 2003. The Appellant was in that case held 100% liable and the plaintiff was awarded Sh. 160,000/= general damages for the injuries suffered. The Appellant has listed several grounds of appeal which can be summarized into two main ones namely:-

1. That the learned trial magistrate erred in holding the appellant 100% liable.

2. That the award of Ksh. 160,000/= was excessive in the circumstances.

I will deal with the issue of liability first.

Mr. Khagram for the appellant argued that the Respondent on the evidence adduced should not have been held 100% liable. If the Respondent was given a panga without a handle, as he alleged, he should have rejected it. Having accepted it he assumed some risk and should have therefore been held at least 50% liable. The correct position, he submitted, was that the Respondent as D.W.1, Mr. Paterless Mwenda, testified, was given a panga with a handle. He urged me to hold the Respondent at least 50% liable.

Opposing the appeal Mrs. Abwodha for the Respondent submitted that as the trial magistrate found the Respondent was given a panga without a handle. Such a panga, as was admitted by the defence witness, was dangerous. The authorities cited, she further submitted, related to road accidents and are not applicable to this appeal.

It is not in dispute that the Respondent suffered an accident at the Appellant's shamba while cutting hay. The Appellant admitted that it did not provide the Respondent with gloves or gum boots. If gloves had been provided the Respondent could, perhaps, not have been injured or his injury could not have been as serious as it turned out to be. On the question of the panga having no handle, it was the Respondents word against that of D.W.1 Peterless Mwenda. The trial magistrate observed the demeanor of both and chose to believe the Respondent although he does not say why he preferred the evidence of the Respondent to that of D.W.1. I have no reason to disbelieve the Respondent's evidence. Besides the handle, as I have already said, the Appellant did not provide the Respondent with gloves. If it had, the injury could have been prevented or minimized. With respect the authorities cited by Mr. Khagram on liability are not relevant they relate to road accidents. In the case of **Lakhamshi -Vs- Attorney General [1971] E.A. 118** for instance Spry V P stated that where two vehicles collide in the middle of the road and

there is no explanation both the drivers should be held equally liable. If one is negligent in driving over the center of the road, the other is also negligent for not taking any evasive action.

In this appeal it was not a road traffic accident. It is whether or not the appellant provided the implement required for work which as I have found it did not do. In the circumstances the appeal on liability fails.

On quantum Mr. Khagram submitted that the sum of Sh. 160,000/= awarded was excessive. He said that award for fairly similar injuries a few years ago attracted awards in the range of Sh. 50,000/= to Sh. 60,000/=. Even with 10% inflation the award of Sh. 160,000/= is too high. Mrs. Abwodha countered that argument by submitting that the Respondent suffered a serious injury affecting the grip of his left hand.

An appellate court should not substitute its award for that of the trial court even if it thinks that the trial court's award is high or low. T

he principles upon which an appellate court should proceed when dealing awards of damages were succinctly stated by the Court of Appeal in **Bhutt Vs Khan (1982 – 88) 1 KAR 1** that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely wrong estimate. It must also be shown that the judge proceeded on wrong principles, or that he misapprehended some evidence in some material respect and so arrived at a figure which was inordinately high or low.

The Appellant has not shown that the trial magistrate misapprehended any evidence. What counsel submitted is that the award was excessive. I understood him to say that it is so inordinately high as to represent an entirely erroneous estimate. Let us look at the facts of the case. According to the medical report the Respondent suffered cuts of the first and second metacarpophalangeal joints of the first and second fingers of the left hand. In the words of the doctor **"He now has reduced movement of the 2nd finger of the left hand, resulting in reduced grip of the left hand. Although he is right handed, he has difficulty performing tasks that require the use of both hands".** Those are not mere soft tissue injuries as submitted by Mr. Khagram. The Respondent is a casual worker who needs to perform whatever task that comes his way and invariably requires to use both his hands. As a result of the injury he suffered the grip of his left hand has been affected. I do not think that the sum of Sh. 160,000/= he was awarded was so inordinately high as to represent an erroneous estimate. In the circumstances the appeal on quantum also fails. In the result this appeal, on both liability and quantum, is hereby dismissed with costs to Respondent here and in the lower court.

DATED this 5th day of March 2004

D.K. Maraga

Ag. **JUDGE**