



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 82 OF 2011

OGEMBO TEA FACTORY CO. LIMITED APPELLANT

VERSUS

JOSPETH ORENGE RESPONDENT

(Appeal from the Judgment/Decree in Ogembo PMCC No. 13 of 2010 (Hon. Lily Nafula - PM.)

JUDGMENT

1. The appellant, **Ogembo Tea Factory**, was the defendant in **Ogembo PMCC No. 13 of 2010**, which was filed against itself by the plaintiff/respondent, **Josphath Orange**, for damages arising from injuries allegedly suffered by the respondent while in the course of his employment at the appellant's tea processing factory.
2. In the plaint dated 7th January 2010, it was pleaded that the plaintiff was in employment of the defendant as a casual worker on a daily, weekly or monthly wage and on the material date (20th October 2005) he was lawfully discharging his duties of mopping the floor within the fermenting section when he was injured on the right arm by a sharp metal thereby causing him to suffer pain, suffering, loss and damage.
3. It was further pleaded that it was a term of employment between the plaintiff and the defendant and/or it was the duty of the defendant to take all reasonable and foreseeable precautions for the safety of the plaintiff while performing or engaging in carrying out his duties not to expose him to any risks and damage or injury which they knew or ought to have known and provide and maintain adequate plant, to take reasonable care that the place at which the plaintiff carried out his work was safe and to provide and maintain a safe and proper system of work.
4. The plaintiff contended that the accident aforementioned was solely caused by the defendant's breach of statutory duty of care or by the defendant's negligence. He consequently suffered a deep cut wound on the right arm and therefore prayed for special and general damages against the defendant together with costs of the suit and interest.
5. The defendant in its statement of defence dated 28th January 2010, denied all the allegations made against itself by the plaintiff and in particular that the plaintiff was its employee and was discharging his duties at the defendant's premises when he was injured by a sharp metal on the 20th October 2005.
6. The defendant contended that the plaintiff's claim was nothing but an ill-fated attempt to defraud it by falsely claiming compensation while aware that such compensation was not lawfully due to him. And, if the alleged accident ever occurred, then the same was caused and/or was substantially contributed to by

the plaintiff's own acts of negligence.

The defendant therefore prayed for the dismissal of the suit with costs.

7. At the trial, the plaintiff (**PW 3**) testified that he was employed at Ogembo Tea Factory as a casual labourer and was on duty on the material date mopping the floor in the fermenting section using brooms, water and rags.

In the process, he slipped and fell down. Metal plate pieces near the roller pin machine cut him on his right hand near the elbow.

8. The plaintiff testified further that the defendant was to blame for his injury for failure to provide him with protective gear such as gumboots. He was at the material time using ordinary shoes which could not properly grip the floor. He was also not provided with wiper gloves which would have protected his hand from serious injury. He did not get a rubber dust coat to minimize the injury and instead received an old dust coat.

9. The plaintiff also testified that he reported the accident to his supervisor, one Mr. Onuko, who gave him permission to go to hospital. He was treated at Ogembo district hospital and was later examined by Dr. Ajuoga, who completed and signed a medical report.

10. **Dr. P.N Ajuoga (PW 1)**, a consultant neurosurgeon running a private clinic at Awendo examined the plaintiff and prepared the necessary medical report which he produced (P.Ex 1). He said that the plaintiff suffered soft tissue injury on the right arm which left him with a scar and pains on lifting heavy objects.

11. **Benjamin Okioma (PW 2)**, a clinical officer at Gucha District hospital confirmed that the plaintiff was attended at the hospital after he was injured on the right arm on 20th October 2005.

12. After close of the plaintiff's case, the defendant's witness, **Robert Masea (DW 1)**, testified that he was a clerk at the defendant's factory and his duties included verification of entries in the allocation book for transfers to the muster-roll and the accident register. He indicated that the plaintiff was not on duty on the material date and in fact, not on duty throughout the month of October 2005. He produced an extracted copy of the muster roll (D.Ex 1) to confirm as much. He also indicated that the accident register which contains names of injured employees did not contain the name of the plaintiff.

13. The defendant did not call any other witnesses and after both parties presented their written submissions, the trial court rendered its judgment on the 7th April 2011, in favour of the plaintiff.

Thus, judgment was entered in favour of the plaintiff against the defendant for the total sum of Ksh. 66,500/= being Ksh. 60,000/= general damages and Ksh. 6,500/= special damages. Costs of the suit and interest were given to the plaintiff.

14. The defendant was dissatisfied with the trial court's decision and therefore filed the present appeal on the basis of the grounds contained in the memorandum of appeal dated 3rd May 2011, filed herein by the firm of **Mukite Musangi & Co. Advocates**.

The appeal was canvassed by way of written submissions and in that regard both parties through their respective advocates filed their submissions.

15. The duty of this court is essentially to re-consider the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (See, **Selle Vs. Associated Motor Boat Co. Ltd (1968)EA 123**).

16. In that regard, this court has hereinabove re-considered the evidence and formed the opinion that the main issue that arose for determination was whether the defendant/appellant was liable to the

plaintiff/respondent for injury suffered by the respondent and if so, whether the respondent was entitled to any damages and to what extent.

17. In denying liability, the stand taken by the appellant was that the respondent was not its employee and was not on duty at the material time of the accident. In an attempt to establish the fact, the defendant produced a copy of the relevant muster roll (D.Ex1) which did not contain the name of the respondent.

A register of accidents was alluded to but it was not produced in evidence.

18. The muster roll alone was not sufficient to disprove the fact that the plaintiff was never an employee of the defendant at the material time or any other time.

The defendant's clerk (DW 1) when he stated that he knew the plaintiff as an employee of the defendant in the year 2004 and acknowledged that the workmen's compensation form (P.Ex 4) in respect of the plaintiff may have been issued by a supervisor at the defendant's factory in effect confirmed that the plaintiff/respondent was indeed an employee of the defendant and that most likely than not he was injured while in the course of his employment on the material date.

19. Indeed, the workmen's compensation form (P.Ex 4) attested to the respondent's presence at the appellant's factory on the material date. It also confirmed that the respondent suffered injury on the material date while in the course of his employment.

The appellant's contention that the respondent was not its employee and was never on duty when he was injured was clearly contradicted by its own evidence and rendered ineffective.

20. Having established that he was injured on the material date while in the course of his employment, the plaintiff was also required to establish on a balance of probabilities that the injury was occasioned by the defendant's breach of statutory duty and/or negligence.

21. He (plaintiff) alleged that he was mopping the floor using brooms, water and rags. These were the items that were provided to him to undertake his chore. In the process, he slipped and fell down only to be cut on the right arm by a sharp metal. This meant that despite slipping and falling down the plaintiff would not have suffered injury but for the presence of a sharp metal in the defendant's premises.

22. Coupled with that, despite the presence of a sharp metal in the defendant's premises, the plaintiff would not have suffered injury if he had not slipped and fallen down. It would appear that he was cleaning a slippery floor using water and was not provided with proper protective items such as rubber shoes or gumboots while undertaking the task.

23. The plaintiff confirmed that he was not provided with gumboots or any other protective items.

In effect, the defendant/appellant breached statutory duty of care by failing to provide or maintain a safe environment for the respondent to undertake his lawful duty whether as a permanent employee or a casual labourer.

The defendant/appellant was also negligent for failing to provide the plaintiff/respondent with any or proper protective gear.

24. In sum, the respondent's case on liability was clearly established against the defendant on a balance of probabilities. This court would, as did the trial court, find the defendant/appellant liable at 100% for the injury occasioned to the plaintiff/respondent.

25. On quantum of damages, the medical report by Dr. Ajuoga (P.Ex 1) although compiled almost five years after the accident indicated that the respondent suffered minor soft tissue injuries which healed fully without any permanent disability. It is possible that by now the respondent no longer experiences pains on the right arm while lifting heavy object. The scar he complained about did not affect the quality of his

life neither was it shown to be cosmetically ugly as to lower his self esteem.

26. With regard to special damages, this court would also award a sum of Kshs. 6,500/= which was pleaded and duly established by necessary documentary evidence i.e a payment receipt (P.Ex 2).

AS for general damages, the plaintiff had proposed a sum of Ksh. 100,000/= on the basis of the decision in **Samuel Kariuki Kinyua Vs. Mackenzie & Another NBI HCCC No. 520 of 1987.**

27. The defendant had on the other hand proposed a sum of Ksh. 30,000/= on the basis of the decisions in **Grace Nduta Vs. Sokoro Ltd NKU HCCC No. 99 of 2003** and **Nakuru Timber Vs. Kephagh Siminwi Njomo NKU HCCA No. 28 of 2001.**

The trial court considered all the foregoing authorities and contended that a sum of Kshs. 60,000/= was adequate compensation regard being given to existing inflation trends.

28. This court's view on that award of general damages by the trial court essentially for pain and suffering is that it was adequate, reasonable and in keeping with the applicable principles in the assessment of damages. Therefore, a reason to interfere with the award does not arise.

29. In the end result, this appeal is without merit and is hereby dismissed with costs to the respondent.

Ordered accordingly.

[Delivered and signed this 9th day of February 2017].

J.R. KARANJAH

JUDGE

In the presence of

Mr. Ochoki holding brief for Mr. Ongosi

for Respondent

CC Njoroge/Dorothy