REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 678 OF 2006

KARIRANA TEA ESTATE LTD...APPELLANT

VERSUS

GRACE AKETCH KASERA..RESPONDENT

(Appeal from the original judgment and decree of Hon. Aminga A. O. delivered in Limuru SRMCC No. 369 of 2005 on 26th September, 2006)

JUDGMENT

1. This appeal was premised on grounds which can be summarised as follows:-

a. ***Whether or not the Respondent was injured in the cause of his duty;***
b. ***Whether or not the Appellant was liable for the Respondent's injury; and***
c. ***If (b) is answered in the affirmative, whether or not the award of KShs 60,000/- was excessive in the circumstances.***

2. The Respondent's claim before the trial court was for recovery of damages arising from an alleged industrial accident. He pleaded that while picking and carrying a load of tea on 7th August, 2005 within the scope of his employment, he was involved in an accident. He pleaded that as a result of the said accident he suffered a blunt trauma to his left leg, dislocation of the left leg joint and other soft tissue injuries. He claimed that in breach of statutory duty, the Appellant had failed to provide him with protective devices which would protect him from injury and allowing him to load and off load and head carry load in spite of the obvious risk involved. The Appellant on the other hand denied the Respondent's claim and attributed the injury to the Respondent. It was particularised that the Respondent failed to keep proper look out, take measures that was expected of him to avoid being injured, failed to observe laid down procedure in carrying his duties, exposing himself to the risk of injury which he ought to have known and failing to take care of himself.
3. The trial magistrate found the Appellant 80% liable for the accident and entered judgment in favour of the Respondent and awarded him KShs. 60,000/= as general damages and KShs. 1,500/= as special damages plus costs and interest. The said award was subject to liability.
4. This being a first appeal, I have warned myself that I am called upon to re-evaluate the facts afresh, re-assess this case and make my own independent conclusions. See ***Selle v. Associated Motor Boat Co. Ltd 1968 E.A 123.***
5. It was the Respondent's testimony that she was an employee of the Appellant between the year 2001 and June, 2002 when her employment was terminated. That she resumed work with the Appellant as a casual worker. It was submitted that the Respondent pleaded that she was injured 'on or about' 7th August, 2005. That she confirmed that no work goes on on Sundays and that the court considered her age and that she was illiterate and may not be able to give an exact date. It

was argued that the trial magistrate dealt with the issue substantially and is therefore no ground of appeal. On the other hand Mr. Evanson Mwangi Waweru who was the Administrative Manager of the Appellant at Karirana Estate Ltd stated that the Respondent resigned from employment on health grounds by a letter dated 22nd June, 2002 (D. Exhibit 1). That he was not aware that the Respondent was re-hired as she alleged. He further contended that the date of the alleged accident was a Sunday on which day employees do not work. Referring to a register for the year 2005 (D. Exhibit 4), he stated that the Respondent's name did not appear there. It was submitted that the document produced in defence thus (D. Exhibit 1) confirmed that the Respondent was not the Appellant's employee at the time and furthermore the said date was a Sunday. Further to this it was argued that the trial magistrate having in her analysis found that the date of the alleged accident was disputed, her finding on liability is inconsistent with the foundation of the case.

6. I have given due consideration to the evidence on record and submissions with regard to the first issue. While the Appellant produced a letter of acknowledgment of the alleged resignation (D. Exhibit 1), the Appellant failed to avail its author to clear the air on whether or not she/he truly wrote the letter and to confirm that she/he was the author of the said letter. Further, the whereabouts of the said author, whether or not he/she was still in the Appellant's employment was not disclosed. It is also noteworthy that DW1 who testified in court was during the alleged time an accountant and was not better placed with the necessary information required to establish whether or not the Respondent was in employment. One Stephen who was said to be the supervisor was better placed to give such evidence. It was however not explained while he was not availed in court to give evidence yet his evidence would have been of much substance. Further, the Respondent in her testimony stated that she was illiterate. This fact was not contended by the Appellant. I therefore take it to be true and that she could not have written a letter more so in English. In view of the aforegoing disposition, I find that the Appellant did not sufficiently prove that the Respondent resigned from work. I am fortified by the presumption in law that withheld evidence is taken to be detrimental to the party withholding it.
7. While the Appellant disputed that the Respondent was not at work in the year 2005, its own document, D. Exhibit 4 which is a payroll report for August, 2005 has the name of the Respondent reflected as No. 20290 Grace Aketch Kasera. The argument that the Respondent was not at work in the year 2005 therefore fails.
8. The other facet on the first issue was that the Respondent could not have been at work on the pleaded date since it was a Sunday. A plain reading of paragraph 5 of the plaint shows that the Respondent gave an approximate date of the accident as being on or about 7th August, 2005. The use of the phrase ***'on or about'*** has been explained in the **<u>Black's Law Dictionary 7th Ed. at page 1117</u>** as follows:-

    "This language is used in pleading to prevent a variance between the pleading and the proof, usually when there is any uncertainty about the exact date of a pivotal event."

9. This phrase is ordinarily used when there is uncertainty on the exact date a cause of action occurred. Such uncertainty was possible considering that the Respondent is an illiterate person and does not prejudice the Appellant. All the medical documents produced by consent leave no doubt as to the date of the accident. Her uncontroverted evidence was that she was first treated at Tigoni Sub-District Hospital the same day the accident occurred. P. Exhibit 1 which is a treatment document from the said document is dated 8th August, 2005. I find that the trial magistrate did not err in finding that the accident occurred as pleaded.
10. Having so found, the next issue is whether or not the Appellant could be found liable for the said accident. It was the Respondent's evidence that while taking the tea she had picked for weighing, a tea stick trapped her and she fell. She said she was carrying the tea sack on her neck. **At paragraph 560 of Halsbury's Law of England, 4th Edition, Vol. 16, it is states that:-**

    "At common law an employer is under the duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk."

11. **The Respondent stated that she was not supplied with protective gears that could have protected her from the injuries she sustained. The Appellant who is under duty to supply**

such protective garments under Section 34 of the Factories Act, Cap 514 Laws of Kenya did not dispute the Respondent's allegation of failure to supply protective gears. The Court in <u>Makala Makumumende v. Nyali Golf & Country Club C.A. NO. 16 OF 1989</u> had this to say:-

> "***Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection. The necessity is the greater for an employer to protect his employee from danger after a warning following a potentially dangerous incident during which no injuries are sustained.***"

12. **In view of the aforegoing, I find that the Appellant was negligent for failing to supply the Respondent with protective gears and for not ensuring that the tea plants were pruned to avoid such accident. On the other hand, the Respondent too having worked in that environment and knowing the risks therein should have taken reasonable precaution. In the circumstances I find that liability as apportioned by the trial magistrate was reasonable.**
13. On quantum, I have considered the medical report and treatment documents on record. It was the doctor's opinion that the injuries sustained were moderate blunt soft tissue injuries and caused temporary incapacitation. By the time of examination, the Respondent had recovered from the injuries. However, considering that nine (9) years have lapsed since the trial court's judgment was delivered, the same amount would not at the moment adequately compensate the Respondent now bearing in mind the rate of inflation on the Kenyan Shilling. If this court had been asked to revise the award, I would have enhanced the said award to KShs. 150,000/=. The examination was done in the year 2005 and an award of KShs. 60,000/= in the year 2006 was reasonable at the time. The trial magistrate did not err either in principle or in law. In the end I find no merit in this appeal. It is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 17th day of July, 2015.

J. K. SERGON

<u>JUDGE</u>

In the presence of:

............................for the Appellant.

.... for the Respondent.