REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCA NO. 145/2006

PAN AFRICAN PAPER MILLS (E.A.) LTD.....APPELLANT

=VERSUS=

VINCENT SIMIYU FESTO.....RESPONDENT

JUDGMENT

The Appellant, **PAN AFRICAN PAPER MILLS** (E.A.) **Limited** was the defendant before the trial court, whilst the the respondent , **Vincent Simiyu Festo,** was the plaintiff.

The learned trial Magistrate held the Appellant liable for the injuries which the Respondent sustained when the tree he had been cutting fell onto another branch, causing the branch to inflict injury on the Respondent.

The trial court held the Appellant 90% to blame, for the incident, whilst the Respondent was held to be 10% negligent.

The trial Court assessed the General Damages at Kshs 140,000/=. Therefore, the court carried out calculations, which resulted in the award of Kshs 126,000/=, after taking into account the 10% contributory negligence which had been attributed to the Respondent.

The costs of the suit were agreed upon by the 2 parties, as being Kshs 25,000/=.

The Appellant was dissatisfied with the Judgment on liability and also on the quantum. The grounds upon which the appeal are founded can be summarized as follows:-

(a) There was no or no sufficient evidence to support the finding on liability;

(b) The case ought to have been dismissed for want of proof;

(c) The suit was time-barred;

(d) If the Respondent was injured, it was due to his own negligence.

(e) The damages awarded were excessive.

When canvassing the appeal, Mr. Makuto, the learned advocate for the Appellant, submitted thy there was no evidence that it was obliged to provide protective clothing or that the accident was caused by the

failure to provide protective clothing.

The Appellant further submitted that it did not breach any duty under the Common law. If anything, the Respondent is said to have been in personal control of the task he was undertaking. Therefore, if he was injured, the Appellant says that the said injuries were attributable to the Respondent's negligence.

As the incident took place within the forest where the Respondent was cutting down a tree, the Appellant insisted that the provisions of the Factories Act do not cover matters which happened in forests.

In any event, even if the Respondent was injured, the Appellant insisted that an employer did not necessarily become liable in negligence, simply because the injury was sustained during the time the employee was at work.

Another issue that was canvassed by the Appellant was that the whole suit was time-barred, because it was filed after the lapse of more than three (3) years after the incident which gave rise to the cause of action.

The Appellant also faulted the trial court for awarding compensation under the heading of "*loss of Amenities*", when the Respondent's plaint did not have any claim under that head of claim.

Finally, the Appellant submitted that the award of Kshs 530,000/= was inordinately high. It was the opinion of the Appellant that an award of between kshs 150,000/= and Kshs 200,000/= would have been sufficient.

But the Respondent thinks that the Judgment of the trial court was wholly justified. As far as he was concerned, the Appellant owed to the Respondent a common law duty of care.

The Respondent submitted that under Common Law, a master was under a duty to see to it that reasonable care be taken to ensure that his servants are not exposed to unnecessary risks.

In this case, the Respondent submitted that the Appellant had breached either the Common Law duty or the Statutory duty or both. Therefore, the Respondent argued that the trial Court had rendered itself properly and within the confines of the law, when it held the Appellant 90% liable.

The Respondent also submitted that the issue regarding jurisdiction should have been raised as a Preliminary point of law. As that was not done, the Respondent submitted that the Appellant cannot be permitted to raise that issue at this stage of appeal.

Being the first appellate court, I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. Each of the two parties called only one witness.

The Plaintiff testified as P.W.1. He testified that he was on duty in the forest, where he was cutting trees, at a place named Turbon.

P.W. 1 was using a power-saw to cut the trees. One of the trees he cut fell onto another tree. One branch of the tree fell and crushed P.W.1 on his lips.

According to P.W.1, the incident resulted in the loss of two teeth, and a cut on his lip.

Following the incident, P.W.1 was off-duty for one (1) week. The incident took place on 11th January, 1998. By that date, P.W.1 had, by his own assessment gained;

> ***"Sufficient experience to cut trees in the forest. That is why I was employed. I had no injuries before. The injuries are not common. I was with my officer-in-charge called Habel Nakoti. He was an eye witness. I had no helmet then. That branch came from a side view. The Defendant did not know about the branch falling."***

He then went on to say:

> ***" I know that when trees are being felled, you should stand far. I did not expose myself to danger."***

From, the evidence tendered by the Respondent, it is clear that he attributed his injuries to the fact that the Appellant failed to provide him with a helmet.

Meanwhile, the Appellant's witness, Habel Nakoti, confirmed that at the material time, he was supervising the Respondent, as he carried out his work.

According to D.W. 1, the Respondent, had been given appropriate instructions on how to go about the task of cutting down the trees.

D.W.1 testified as follows:-

> ***" The job was risky. The branches occasionally fall. The branches fell from above. The Complainant does not take any precautions to prevent the accident. The branches were not too long."***

It was his testimony that the Respondent did not move back, and that if the Respondent had moved back, he could not have been injured.

In effect, both parties confirmed that the task of cutting down trees entailed some measure of risk. However, both parties agreed that injuries were not a common occurrence.

Secondly, both parties confirmed that the Appellant did not know that the branch would fall. Therefore, the Defendant testified that there was nothing it could have done to avoid the incident.

As P.W.1 also stated that the Defendant did not know about the branch falling, that would appear to corroborate the Defendant's testimony. In the event, if the Defendant did not know about the falling of the particular branch, it could not have been expected to do something about that said branch.

But as the felling of trees was known to be a risky business, should not the parties have been expected to take precautions?

The Appellant said that the Respondent had been appropriately trained and instructed. And the Respondent confirmed that he was very experienced in the felling of trees.

The Learned trial Magistrate addressed herself as follows, on the issue of liability.

> ***" In my view, the Defendant should not have allowed the Plaintiff to work without protective gear. The Defendant owed the Plaintiff a duty of care. The Plaintiff, on the other hand, knew that the job was risky and proceeded to work. He should have some contributions. This is to make him, next time, to be mindful of his own safety. I hence apportion liability at 90:10, in favour of the Plaintiff "***

Whilst, I appreciate the reasoning of the trial Court, I have failed to trace any evidence that demonstrates that if the Respondent had put on a helmet, he would not have been injured.

It has to be appreciated that the injuries were to the lips of the Respondent, culminating in the loss of 2 teeth and a cut on his lip.

When it is borne in mind that a helmet is worn on the head, and that, ordinarily, the helmet does not cover the area around the mouth, I am unable to appreciate how the helmet could either have stopped the branch of the tree from hitting the Respondent, or if it did hit him, how it would have protected his

lips and teeth.

In the case of **ABDALLA BAYA MWANYULE =VRS= SWALAHADIN SAID T/A JOMVU TOTAL SERVICE STATION, CIVIL APPEAL NO. 211 OF 2002**, the Court of Appeal reiterated that the employer's duty to take reasonable care of an employee cannot impose upon the employer, a responsibility to compensate the employee for any injury which he may sustain in the course of his employment, simply because he was an employee. The Court of Appeal said:-

> ***" We think, what we have stated above is enough to show that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution."***

In my considered opinion, the Respondent did not prove that his injury was caused by an event which was reasonably foreseeable or which could have been prevented by taking reasonable precaution.

In **MUMIAS SUGAR CO. LTD =VRS= GEORGE MULUNDA MAENDE (KAKAMEGA) CIVIL APPEAL NO. 20 OF 2001,** the High Court expressed itself in the manner following:-

> **"The Respondent was cutting cane with a panga. He had the skill to do so and had cut cane for four years without gloves and without any accident. It is patent that the absence of gloves did not cause the accident. The absence of gloves may have exacerbated the injury as the panga hit the hand directly."**

I am in full agreement with the said finding, and I hold that that similar reasoning can apply to this case. I reiterate that the Respondent did not prove that the branch of the tree only hit him in the face because he was not wearing a helmet. He also did not prove that if he had been wearing a helmet, he would not have suffered the loss of 2 teeth and a cut on his lip.

In **STATPACK INDUSTRIES =VRS= JAMES MBITHI MUNYAO (NRB)** Civil Appeal No. 152 of 2003, Visram J. (as he then was) held as follows:-

"Coming now to the more important issue of 'causation', it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a casual link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

I completely agree. And because the Respondent failed to prove the nexus between his injuries and any negligence attributable to the Appellant, I find that the learned trial Magistrate erred by finding the Appellant liable.

One other issue needs to be addressed; that is the issue about the claim being time-barred. The Respondent submitted that that matter cannot be raised, for the first time, at the stage of appeal.

In this case, it is noted that the incident in question took place on 14th January, 1998. The plaint was later filed in Court on 19th May, 2003. In effect, the suit was filed more than five (5) years after the cause of action accrued.

The claim was founded upon the Appellant's alleged negligence. In its defence, the Appellant asserted (at paragraph 9) that the claim was statute barred by the Limitation of Acts Act.

In the circumstances, the first time the Appellant put forward the defence, that the suit was instituted too late, was in the Defence.

Thereafter, the Appellant's written submissions also reiterated the contention that the suit was time-

barred. Therefore, the Appellant has all along held the position that the suit was filed too late in the day. Accordingly, the Respondent cannot now be heard to contend that the Appellant has only just raised that line of defence at this stage of appeal.

By dint of the provisions of Section 4(2) of the Limitation of Actions Act (Cap 22);

> **" An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Provided that an action for libel or slander may not be brought after the end of twelve months from such date.**"

As the case herein was filed more than five (5) years from the date when the cause of action accrued, the suit was definitely time-barred.

It was thus remiss of the learned trial Magistrate to avoid making any finding on that line of defence.

Finally, on the issue of quantum, I find no reasons, in law or in fact, for interfering with the award of Kshs 140,000/=.

If I had upheld the finding on liability, I would have upheld the damages awarded. But because I have found that Appellant ought not to have been held liable, I now allow the appeal, and set aside the Judgment of the learned trial Magistrate. I order that the Respondent's claim be dismissed.

The Appellant will have the costs of this appeal, together with the costs of the suit.

DATED, SIGNED AND DELIVERED AT ELDORET, THIS 6TH DAY OF MARCH, 2014.

FRED A. OCHIENG

JUDGE.