REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 711 of 2006

KAKUZI LIMITED. ..... APPELLANT

VERSUS

SABINA MOKEIRA NYABORO. ..... RESPONDENT

(From the judgment and decree of J O Were, Resident Magistrate in Kandara CMCC No. 628 of 2005)

J U D G M E NT

The Appellant was the employer of the Respondent, a coffee tree pruner, in the Appellants plantation in Thika. The Respondent used a sharp panga provided by the appellant, to prune the coffee trees.

On 16th January, 2004, the Respondent was in the course of his duty, pruning the coffee trees. He unfortunately injured himself with the sharp panga. Thereafter he filed this suit at the lower court through a plaint dated 9th May 2005, claiming general and special damages. He alleged breach of statutory and common law duty of care on the apart of the defendant/Appel

In its defence, the Appellant had denied the alleged liability. It had also denied the alleged employee-employer relationship between the parties although it did not pursue the latter.

During the hearing of the suit at the lower court, only the plaintiff/respondent came to testify. The Defendant/Respondent did not testify in its own defence but filed written submissions before the said court.

The Respondent's evidence was to the effect that she was a coffee trees pruner. She used a sharp panga to prune. On the material day, she was pruning when the panga cut her thumb, causing a serious injury on it. She was taken to hospital where she obtained medical treatment until she finally healed. She also testified that the occurrence of the injury on the left thumb, was caused due to the negligence of her employer for failing to provide her with protective clothing. She also asserted that providing her with a sharp panga as a working tool and failing to provide safe and conducive working environment by the Appellant amounted to a breach of the duty of statutory or/and common law duty of care.

The Defendant did not give evidence to controvert the Plaintiff's evidence at the lower court. The result is that the honourable trial magistrate concluded that the plaintiff had proved that the Defendant was negligent although the Plaintiff also contributed to it. He awarded general damages of Ksh.70,000/- and

special damages of Ksh.3,000/-. The award aggrieved the Defendant who appealed to this court raising mainly the following grounds of appeal: -

1. That the trial court erred in law and fact in finding negligence or breach of contract on the part of the Appellant.

2. That the trial court awarded general damages which are inordinately high as to make them erroneous.

I have carefully perused the record including the lower court pleadings, submissions and judgment. I have also perused the written submissions before this court on the face of the grounds of appeal all of which carefully considered all the above documents.

Clearly, the Plaintiff's evidence was not generally disputed. The evidence in my view established that she was an employee of the Appellant company as a coffee tree pruner which she had done for a while. She did not suggest that she was in experienced in the pruning work. She used a sharp panga to prune. She did not show that she needed any clothing or equipment to do her work except the panga. Apart from a supervisor being present or around the place of work, the actual pruning work was being carried out only by the pruner. Pruning incidentally was carried out by cutting away dead or overgrown branches or stems or removing superfluous or unwanted parts from the coffee trees. It was the plaintiff's case that as she and others worked on the coffee trees, they did so under their a supervisor's control and pressure to work faster in order to cover more ground or a greater number of trees.

The main issue that arose at the court below which also presents itself here to be resolved, is whether in the above circumstances, an employee such as the Plaintiff can invoke the alleged negligence or breach of duty of care, be it statutory or common law. The plaintiff asserted that the mere fact that the Appellant had employed her to prune the coffee trees with a sharp panga, was sufficient reason to invoke negligence on the employer's part, notwithstanding the fact that the Plaintiff personally held and controlled the panga in her own hand or hands as she did the pruning work.

I have carefully considered the facts of this case. They are indeed not any different from the facts of the case of **WILSON NYANYU MUSIGISI Vs SASINI TEA & COFFEE LTD** in Kericho High Court Civil Appeal No. 15 of 2003 decided by my brother Kimaru, J in 2006. In the said case the Plaintiff claimed that he got injured by being cut by a slasher which he wielded and controlled by his other hand as he cleared grass along a path in the tea plantation. The Plaintiff blamed his employer, the Defendant by pleading and asserting that the latter breached its statutory duty of care owed to him by failing to provide the plaintiff with suitable clothing or equipment that would ensure a safe working environment. The Defendant had thereupon denied any such duty of care and denied any liability. The trial court dismissed the suit and plaintiff's appeal was also similarly dismissed. In his judgment in the appeal the learned judge whose opinion I respect and agree with, stated thus at page 5: -

"***The Appellant was undertaking manual work. He was not operating a machine. He was cutting grass using a slasher. The swing of the slasher was within his control. He controlled the rate at which he swung the slasher to cut the grass. This court wonders how the respondent can be made to be liable in the performance of such manual task. The Appellant was given a duty. He performed badly....***"

Waweru, J had also made similar observations in a case of similar facts i.e **MUMIAS SUGAR CO. LTD Vs SAMSON MUVINDA,** in Kakamege High Court Civil Appeal No. 58 of 2000. In that case an employee had engaged in manual labour that did not require any exceptional skill but where he held full control of the tool of his work. The honourable judge commented at page 3 of his judgment thus: -

"The respondent's work for which he was engaged involved cutting sugar cane in an open field using a sharp panga. No machinery of any type was used in this exercise. He would hold a cane in one hand and cut its lowest point with a panga in the other hand. It was a simple operation which the respondent had full command and control. It was surely his duty to ensure that he did not cut himself with the panga. No evidence was led that in that type of work there was reasonable necessity of any type of

protective clothing or that the same were provided as a matter of course in similar work elsewhere. There was no proof of hidden inherent danger in the operation of cutting down cane of which the Appellant ought to have warned the Respondent. To ensure that he did not cut himself with the panga, was a matter that was particularly within the power and control of the respondent."

In this case before me, the Respondent had similarly worked for the Appellant as a coffee trees pruner for long enough to enable her know what the job entailed. She held the sharp panga and controlled the same as wisely and carefully as she alone knew how. Her command and control of the panga while using it to prune, was clearly exclusive to herself and no one else. Not even the employer's supervisor, who may have been in the vicinity, can be said to have interfered with the Respondent's hold on and command and control of the panga. The duty to ensure her safety and security from the use of operation of the said panga, lay in the exclusive and personal control of the Respondent.

The court accordingly, finds that if the panga which the Respondent was using proceeded to cut the Respondent's thumb, it did so only because the Respondent, one way or the other, at the relevant moment, failed to properly control the use or operation of it as she ought to have done, in order to secure her safety. Any failure arising in those circumstances would have no one else to blame except the Respondent. That is because no one else, including the employer, helped her control and operate the panga in any particular manner which led to the occurrence of the injury. Clearly such conclusion is not based on any rule or principle of law. If there is such a rule or principle then it can only be said to be a rule entirely based on common sense.

Having come to the above conclusions, I find that the honourable trial magistrate's attempt to run away from the conclusions in the above quoted cases, was as futile as it was erroneously. His conclusions are so much against logic and common sense that this court cannot allow them to stand.

In the circumstances, this appeal has merit and hereby succeeds. The lower court judgment is hereby set aside on the ground that the Respondent's claim was not proved on the balance of probabilities. Each party is to bear own costs in the circumstances of this case. Orders accordingly.

Dated and delivered at Nairobi this 10th day of April 2013.

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D A ONYANCHA
JUDGE