REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 49 of 2009

KIPTANGICH TEA ESTATES LIMITED……APPELLANT

VERSUS

JOHN KIMITEI KOROS……..…….RESPONDENT

(An Appeal from original Decree/Judgment in Molo R.M.C.C.NO.185 of 2004 by Hon S. M. Soita, Principal Magistrate, dated 24th February, 2009)

JUDGMENT

The respondent filed a claim against the appellant before the court below for general damages from an accident alleged to have occurred while the former was working for the latter. The trial court found both the appellant and the respondent liable in negligence and after apportioning liability in the ratio of 80% against the appellant and 20% against the respondent, awarded Kshs.80,000/= and Kshs.20,000/= in general and special damages respectively.

The appellant was dissatisfied and has brought the present appeal arguing, inter alia, that:

i) the respondent did not prove his claim;

ii) the trial magistrate misapprehended the law regarding negligence and breach of contract of employment;

iii) the trial magistrate erred in failing to consider decisions of superior courts cited to him;

iv) the general damages awarded were manifestly excessive.

The thrust of this appeal is that the respondent did not prove that when the alleged accident took place on 29th November, 2003, he was in the employment of the appellant; that the injury allegedly sustained was not proved as there is no evidence that he was attended at the appellant's clinic; that there are discrepancies as to which part of his body was injured and finally that the respondent did not prove negligence or breach of statutory duty on the part of the appellant. Counsel for the appellant relied on several authorities which I have taken into consideration in this ruling.

For his part, counsel for the respondent has argued that the respondent proved his claim on a balance of probability having shown that he was injured on duty and having been attended by Dr. Omuyoma who confirmed from the treatment note that the respondent had been treated at the appellant's clinic. On quantum, he submitted that the same was not excessive.

The first issue to be determined is whether the respondent was on duty on 29th November, 2003.

Both the appellant and the respondent produced the latter's payslip for November, 2003 showing that he worked for only six (6) days in the month of November. The six days are however not specified and cannot be assumed to be the 1st to the 6th November, 2003. D.W.1 David Kipkemoi Rono, on the other hand testified that the respondent worked upto the 20th November, 2003. The appellant also relied on the muster roll which suggests that the respondent was not on duty on 29th November, 2003.

Three things stand at the evidence of the muster roll. The employee has no opportunity to confirm the entries, even those shown to have been in attendance. It is unfair to expect an employee or indeed the court to confirm the authenticity of the entries. Secondly, it would appear, from the admission of D.W.1, David Kipkemoi Rono that the muster roll does not after all reflect the true state of attendance of staff. Although D.W.1, David Kipkemoi Rono confirmed that he was on duty on 29th November, 2003, his name is not in the muster roll.

Only an extract of the muster roll was produced for the 29th November, 2003. To allay any doubt the entire muster roll ought to have been produced. It is interesting to note that the name of the respondent is squeezed at the end of the page. I come to the conclusion on this point that the respondent was on duty on 29th November, 2003.

I turn to the twin questions of whether the respondent was injured and whether the appellant was negligent and/or was in breach of statutory duty. In paragraph 6 of the plaint, the respondent enumerated the particulars of negligence and in the alternative, in paragraph 7, he has listed particulars of breach of contract of employment. In terms of **Section 107** of the **Evidence Act,** the burden to prove those particulars of negligence and breach of contract of employment fell squarely on the respondent.

The mere fact that an accident has occurred and a person injured is not *per se* evidence of negligence or breach of statutory duty. Evidence of negligence must be presented. See **Timsales Limited** V. **Willy Nganga Wanjohi,** H.C. Civil Appeal No.230 of 2004.

Similarly, the extent of an employer's liability for injuries sustained by an employee under a contract of employment is well settled.

That position is explained in "***Winfield and Jolowiez on Tort*"** 13th Ed. As follows:

"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence vests with the plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonably safe system of working the plaintiff must plead, and therefore prove, what the proper system was and in what relevant respect it was not observed."

First, the respondent relied on a treatment card allegedly issued to him at the appellant's staff clinic. That card was not produced in evidence during the trial. Secondly, it was disowned by D.W.1 Zephania Bowen, a nursing officer at the clinic whose evidence to the fact that the respondent was not attended at the clinic as alleged was not controverted. For instance, D.W.1 confirmed that on the day in question, he was alone at the clinic and attended only five patients and the respondent was not one of them. It was also his evidence that the clinic does not issue cards to patients but instead issue treatment books. He disowned the handwriting on the card as well as the card number.

Turning to the respondent's evidence itself, the question as to who was to blame for the accident, if at all, became clear.

According to the plaint, the respondent suffered a deep cut wound on the left shoulder. Dr. Omuyoma who examined him about four months later, noticed a scar on the left shoulder. But in the evidence of the respondent, he consistently stated that he was injured "*at the left upper arm."* He even clarified in cross-examination thus:

"I was not injured on my shoulder but the left elbow joint."

There is, therefore, from that evidence, doubt as to whether the respondent was injured on the elbow or on the shoulder. How did the accident occur, according to the respondent?

Having maintained in examination in chief that as he slashed the grass the handle of the *panga* came off and the panga cut him, in cross-examination, he explained that:

"The handle did not come off but I cut myself as I slashed the grass. The handle had no problem but I accidently cut myself. I was the one holding it and not the company. I am the one who controlled it and not the company……. The panga had no problem but I accidentally cut myself."

With that evidence, how can the appellant be blamed? There is no evidence that it exposed the respondent to danger or for failing to provide him with safe and proper system of work.

It is equally incredible that a person slashing with his right hand would cut either the elbow or the shoulder. The learned trial magistrate erred in finding the appellant liable in light of such clear evidence. This appeal succeeds and is allowed with costs. Costs in the court below is also awarded to the appellant.

Dated, Signed and Delivered at Nakuru this 16th day of July, 2012.

W. OUKO
JUDGE