



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Appeal 307 of 2004**

**KENYA TEA DEVELOPMENT AGENCY LIMITED ..... APPELLANT**

**AND**

**JOSPHINE KWAMBOKA OMBOTO ..... RESPONDENT**

***(Being an appeal from the decree of Hon. Loice Komingoi, SRM, dated and***

***delivered on the 10<sup>th</sup> November 2004 in Kisii CMCC No.483 of 2003)***

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> May 2011 the Respondent herein JOSEPHINE KWAMBOKA OMBOTO sued KENYA TEA DEVELOPMENT AGENCY LIMITED, the appellant herein claiming the following reliefs:-
  - (a) *special damages.*
  - (b) *General damages.*
  - (c) *Costs.*
  - (d) *Interest on (a), (b) and (c) above at court rates.*
  - (e) *Any other relief that the honourable court may deem fit and just to grant.*
2. The appellant entered appearance on the 13<sup>th</sup> June 2003 and filed a defence on the 19<sup>th</sup> June 2003.
3. In the defence, the appellant denied the Respondent's allegations that she was an employee of the appellant; that there was in existence a contract of employment between them. The appellant put the respondent to strict proof of her claims.
4. The appellant further denied that there was an accident on the 26<sup>th</sup> November 2001 or that the plaintiff was trying to push a trolley at their factory or that the plaintiff suffered pain, loss and damage as alleged and again the respondent was put to strict proof thereof.
5. Further in the defence, the appellant denied that the accident was occasioned by a breach of statutory duty on its part and the particulars of negligence were also denied. Lastly the appellant avers that if at all the accident occurred as alleged a fact that was denied, then the same was solely caused by and/or

substantially contributed to by the respondent's own negligence and particularly that she deliberately hurt herself so as to seek compensation and further that she failed to take care of her own safety. The respondent did not file Reply to Defence.

6. The respondent in her plaint claims she was employed by the appellant as a general worker at Nyankoba Tea Factory. She states that at all material times it was the statutory duty of the appellant to keep and maintain a safe and proper system of work for all its employees and not to expose any employee to any risk or damage or injury which they knew or ought to have known. Further, that the appellant was under a duty to provide and maintain adequate and suitable measures to enable the respondent to carry out her work safely.

7. She claims that on the 26<sup>th</sup> November 2001 she was carrying out her duties at Nyankoba Tea Factory, and while pushing a trolley thereat, the trolley hurt her and as a result she sustained injuries as a consequence of which she suffered pain, loss and damage.

8. She blames the accident solely on the appellant who she says breached his statutory duty of care by:-

- (a) *failing to make or keep safe the respondent's place of work;*
- (b) *employing her without instructing her as to the dangers likely to arise in connection with her work, giving her no sufficient training in work and not providing adequate supervision;*
- (c) *failing to provide or maintain safe means of access to the plaintiff's place of work; and*
- (d) *failing to provide a safe system of work.*

9. Further and in the alternative the respondent alleges negligence on the part of the appellant the particulars of which are:-

- (i) *failing to take any adequate precautions for the safety of the plaintiff while she was engaged in her work;*
- (ii) *exposing the plaintiff to a risk of damage or injury of which they knew or ought to have known;*
- (iii) *failing to provide or maintain adequate or suitable plant tackle or appliances to enable the said work to be carried out safely;*
- (iv) *failing to take any adequate measures to see that the plaintiff was not hurt; and*
- (v) *failing to provide the plaintiff with any appropriate protective apparatus e.g. gumboots.*

10. Because of the above the respondent in her plaint has claimed that she suffered injuries which she has enumerated as follows:-

- *Deep cut on the palm of the left hand.*
- *Bruises on the finger of the left hand. She claims that as a result of the aforesaid injuries, she continues to suffer mild pain on and off.*

11. The respondent called two witnesses. Doctor Ezekiel Ogando was the first to testify and he told the court that on the 18<sup>th</sup> April 2003 he examined JOSEPHINE KWAMBOKA who explained to him how she was injured while pushing a trolley at the factory. She explained to him that she was injured on the left hand and treated at Keroka sub district hospital. Dr. Ogando testified of seeing a scar on the left palm and it was his opinion that the same had healed well leaving a permanent scar. He also said he saw treatment notes from Keroka sub district hospital. He prepared the medical report and produced the same as **P. Exhibit 1**. He said that he charged Kshs.3,500/= and he produced the payment receipt as **P. Exhibit**

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12. On cross examination, Dr. Ogando confirmed that he examined the respondent 2 years after the injury and that he saw the treatment notes from Keroka and from the Ministry. It is from this that he formed the opinion that the respondent had healed well with a scar which could not stop her from performing her duties.

13. The respondent who was the second to testify narrated that on the 26<sup>th</sup> January 2001 she was at Nyankoba Tea Factory which belongs to the appellant. She was pushing a trolley which had tea from the fermenting section to the dryer. The trolley fell and hit her hand and she was cut by a metal sheet which had gotten out of the trolley.

14. She blamed the appellant because the trolley was defective. She also blamed the appellant for failing to issue her with gloves to protect her hands. She produced the work identity card to show that she was in employment at Nyankoba Tea Factory and she was a member of the SACCO. The work ID was marked as **P. Exhibit 3**. She explained that when she got injured she was examined at Keroka sub District Hospital. She has produced treatment notes as **P. Exhibit 4**. Subsequently, she was examined by Dr. Ogando who prepared a Medical Report and charged her Kshs.3,500/= (P. Exhibits 1 and 2 respectively).

15. The respondent denies that she was careless in her work and says that she did nothing wrong to contribute to the accident. She testified that she was not paid any money by the appellant and that she now seeks to be compensated. She showed the court a stitched scar on the left palm. She also prayed for costs of the suit.

16. On cross examination the respondent stated that she was employed in 1989 as a general worker and that she worked until 2002 April. She has reiterated what happened on the 26<sup>th</sup> January 2001. Her case was that if the trolley had been in good condition it would not have fallen and injured her. She has further stated that she got injured twice at the Nyankoba Tea Factory; in 1989 and 2001 and that she had not been compensated in the civil case No.5 of 2001 at Kisii.

17. The appellant did not call any witness to challenge the evidence by the plaintiff/respondent and her witness. Judgment was thereafter entered in favour of the respondent. Liability was apportioned in the ratio of 90% to 10% in favour of the respondent and she was awarded Kshs.100,000/= in general damages together with special damages.

18. Being aggrieved by the judgment of the trial court the appellant has moved this court by way of an appeal.

19. The appellant has raised the following five (5) grounds of appeal:-

1. *That the learned trial magistrate erred in law and in fact in failing to hold that the respondent was not an employee of the appellant.*

2. *The learned trial magistrate erred in both law and in fact in failing to appreciate the evidence, which the respondent gave in, cross examination to the effect that three (3) of her fingers on the left hand are amputated and or completely paralyzed, while all the fingers on the right hand are completely amputated, which injuries were clearly open and visible to the naked eye and were in no way connected or related to the alleged soft tissue injuries to wit cut wound to the left palm, bruises on left finger and linear scar to the left hand which had healed well, which the respondent alleged to have suffered at the alleged accident.*

3. *The learned trial magistrate erred in both law and in fact in failing to hold that the respondent's claim was fake and fraudulent and that the injuries alleged were nonexistent and had been suffered elsewhere in 1989 as the respondent herself had testified during cross examination.*

4. *The learned trial magistrate erred in law and in fact in awarding to the respondent Kshs.100,000/=*

*as General Damages which amount was manifestly high and excessive in the circumstances.*

5. *The learned trial magistrate erred in law and in fact in deciding the case against the weight of evidence and in apportioning 90% liability against the appellant.*

20. The appellant prays that the appeal be allowed with costs to the appellant and that the respondent's suit in the court below be dismissed with costs.

21. With the agreement of the parties to this appeal, the appeal was canvassed by way of written submissions. I have carefully read the two sets of submissions filed by M/s Okongo and Company Advocates for the appellant and M/s Khan & Associates for the respondent. I have also carefully read the pleadings filed by the parties to this appeal as well as the proceedings and judgment of the lower court. This is a requirement cast upon the first appellate court, which is expected to rehear the suit. The duty of a first appellate court was restated by the Court of Appeal for Eastern Africa in the case of **Peters -vs- Sunday Post Ltd [1958] EA 424** at pages 429 and 430.

**“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt -v.- Thomas (1) [1947] A.C.484.**

Viscount Simon, L.C., said at p. 485:

**“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”**

Lord Thankerton said at p.487:

**“I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence; III.**

**The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.”**

Lord Macmillan said at p.491:

**“So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”**

22. It is not disputed that the respondent herein was employed by the appellant as a general worker at the Nyankoba Tea Factory between 1989 and 2002. It is also not disputed that the respondent was on duty on or about 26<sup>th</sup> November 2001 where she was engaged in pushing trolleys from one point of the factory to the drier. It is also not in dispute that a trolley she was pushing fell and she got injured. What is in dispute from the pleadings is whether the appellant was in breach of a statutory duty of care to the respondent and whether as a result of such breach, the respondent got injured. While the respondent contended that the appellant owed her a statutory duty which he breached, the appellant said there was no such duty and that if the alleged accident ever occurred, the respondent was either wholly or substantially responsible for the same.

23. The appellant submits that the respondent did not establish negligence against the appellant on a balance of preponderance. Counsel for the appellant has also raised issue with the fact that parties are bound by their pleadings and that any material departure from the same is fatal in any claim as per **Order 2 Rule 6** of the **CPR**. Counsel for the appellant contends that the Kenya Tea Development Limited and Nyankoba Tea Factory are separate entities and that the particulars of breach of statutory duty and negligence pleaded in the plaint were thus against Nyankoba Tea Factory and not the appellant and for this reason alone the claim herein ought to have been dismissed.

24. On the issue of statutory negligence the appellant also states that the same has not been established and he has cited **South Nyanza Sugar Company Ltd. –vs- Wilson Ongumo Nyakweba – Kisii HCCA No.77 of 2004** where Hon. Judge Mr. D. Musinga on 22<sup>nd</sup> April 2008 at page 7 of the judgment observed that:-

**“..... In Statpack Industries Ltd. –vs- James Mbithi Munyao – Nairobi**

**HCCA No.152 of 2003(unreported) it was held as follows:-**

**“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal 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 as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable.”**

25. Further, counsel has quoted from WINFIELD & JOLOWICZ IN TORT, 13<sup>th</sup> Edition page 203:-

**“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 been said that if he alleges a failure to provide a reasonable safe system of working, the plaintiff must plead and therefore prove**

**what the proper system was and in what relevant aspects it was not observed. It is true that the severity of this particular burden has somewhat been reduced but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient.”**

26. On the issue of failure to file a reply to defence, counsel has relied on **Kenya Tea Development Agency Ltd. –vs- James Nyambega – Kisii HCCC No.7 of 2006** Pg.14 where it was found that the particulars of negligence pleaded against the respondent in the statement of defence were deemed to have been admitted for failure to file a reply to defence and the appeal was allowed and the lower court judgment set aside. Counsel also relied on the above mentioned authority at page 9 where the respondent had sued the Kenya Tea Development Agency Limited instead of Tombe Tea Factory who was pleaded as the employer.

27. It is to be noted that in this case the Respondent did not produce any documentation to show that she was employed either as casual or a general employee.

28. Counsel has further relied on **Kenya Tea Development Agency Ltd. –vs- Andrew Mokaya – Kisii HCCA No.174 of 2006** to fortify appellant’s contention that failure to file a Reply to Defence is deemed to be admission of the facts alleged in the defence. Further, counsel has also reiterated the provisions of **Order 2 rule 6** and **Order 6 (2)** which further provide that the mode of traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication. On the same counsel has relied on the following cases:-

- *Jivanji –vs- Sanyo Electrical Co. Ltd. [2003]1 EA 98.*
- *Unga Maize Millers Ltd. –vs- James Munene Kamau – HCCA No.16 of 2001 at Eldoret and*
- *Mount Elgon Hardware –vs- United Millers Limited – Kisumu Court of Appeal Civil Appeal No.19 of 1996.*

29. Counsel for the respondent also filed their submissions in which they submitted that Grounds 2 and 3 of the appeal are misplaced; that ground 2 was a fishing expedition since the court never considered the said injuries while delivering the judgments. It (the court) awarded Kshs.100,000/= for a deep cut on the left finger which is what is pleaded in the plaint and that the amount was supported by the evidence that was tendered.

30. Regarding ground 3, counsel submitted that the same was baseless since the injuries the respondent sustained in 1989 were on the right arm while in 2001 the injuries are on the left and the respondent was not claiming for amputation of her fingers in the claim.

31. Counsel for the respondent maintains that the respondent was employed as a general worker at Nyankoba Tea factory by the Defendant and she produced a membership card of Chai Sacco Society Limited which showed her station as Nyankoba Tea Factory owned by Kenya Tea Development Agencies. This evidence was neither controverted nor did the defence tender any evidence in opposition.

32. In further submissions, counsel for the respondent has asked the court to take judicial notice of the fact that casual workers are not normally supplied with contracts of employment nor pay slips, but to however find that the membership card of Chai Sacco Society fortifies the respondent’s assertions that she even had a roll number. On this counsel for the respondent has relied on **Kisii HCCA No.55 of 2005 – Sony –vs- Thomas Omwando** where the court found that the delivery note though not the best proof of employment was acceptable since there was no other proof led to the contrary.

33. On the issue of liability of 90-10 in favour of the respondent, counsel for the respondent has relied on **Kisii HCCCA No.243 of 2006 – Prinsal Enterprises Ltd. –vs- Benedict Okoth Onyango** where it was held that the apportionment of 90%:10% in that particular matter was proper in that going by the tendered evidence, the respondent was in control of the knife that cut him thus he was also somehow to blame for the injuries. Counsel has also relied on **Kisii HCCA No.36 of 2010 – Kipkebe Ltd. –vs- Dismas**

**Nyangau** where it was held “**that pleadings are no more than allegations which must eventually be proved at the plenary hearing by cogent evidence. If no evidence is led in proof of them they forever remain just that, mere allegations. There was therefore no basis upon which the learned magistrate ought to have apportioned liability. It was either the appellant was 100% liable or not.**

34. Counsel for the respondent further submitted that the appellant chose to close the defence case without calling a witness which left the respondent’s cogent evidence unchallenged and uncontroverted and that the said evidence ought to be believed.

35. On the issue of damages, counsel for the respondent relied on **Kemfro Africa Ltd. T/A Meru Express Service Gathogo Kanini –vs- A.M. Lubia & another** which was quoted in the case of **Stanley Maore –vs- Geoffrey Mwenda – Civil Appeal No.147 of 2002 (Nyeri)**, the Court of Appeal held:

**“The principles to be observed by an appellate court in deciding the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that the judge, in assessing the damages took into account irrelevant factors or left out of account relevant ones or that: short of this, the amount was so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”**

In the said appeal the judges in 2004 held that an award of Kshs.100,000/= for what it termed as soft tissue injuries was adequate compensation.

36. Counsel concludes his submission by urging this court to dismiss the appeal on all grounds and order the appellant to bear the costs of the appeal since they were never in the first place interested in pursuing the suit at the lower court.

37. Having gone through the contending submissions and the authorities cited, the following issues come to mind:-

- a) *Was the respondent an employee of the appellant and if so was she wrong to sue the appellant?*
- b) *Whether the respondent got injured at her place of work and what injuries did she suffer? Did the court consider those injuries when coming up with its judgment?*
- c) *Whether the appellant had a statutory duty towards the respondent and whether that duty was breached.*
- d) *Whether the award of Kshs.100,000/= as general damages was high and excessive plus apportioning liability at 90% to 10% in favour of the respondent with the evidence adduced.*
- e) *Was failure to file a reply to defence fatal to the respondent’s case?*

38. The respondent told the lower court that she was working as a general worker for Nyankoba Tea Factory and she produced the work identity card and also indicated that she was a member of the Chai Sacco as per **P. Exhibit 3**. Her evidence from the proceeding was not challenged even at the cross examination. This actually means that the appellant agreed that the respondent was actually her employee. I therefore agree with the respondent’s counsel’s submissions to the effect that the respondent was employed by the appellant as a general worker at Nyankoba Tea Factory. Nyankoba Tea Factory according to the said submissions was owned by KTDA, the appellant herein. Again, this evidence was neither controverted nor challenged. The position remains that the respondent was an employee of the appellant which is made up of a member of Tea Factories among them Nyankoba Tea Factory.

39. The respondent called Dr. Ezekiel Ogando Zoga who produced the medical report on her behalf as he had testified that he examined her. This was marked as **P. Exhibit 1**. This piece of evidence was not challenged. Dr. Ogando confirmed the healed injuries suffered by the respondent as a result of the accident, namely **“a deep cut on the palm of the left hand and bruises on the finger of the same left**

**hand.”** It is instructive to note that the appellant did not find it necessary to seek a second medical opinion with a view to challenging the findings of Dr. Ogando.

40. As to liability, the respondent in her testimony testified clearly that she blamed the appellant because she was given a defective trolley and no gloves for protection. I find and hold that the appellant had a duty to provide the respondent with a proper functioning trolley which is a statutory duty and having failed to provide a properly functioning trolley without gloves then the said duty had been breached causing the respondent injury.

41. On the appellant’s contention that the award of Khs.100,000/= being high and excessive, this court does not agree with the contention. In **Butt –vs- Khan, Court of Appeal at Nairobi Civil Appeal No.40 of 1997**, the Court of Appeal reiterated the principle that generally speaking, the figure reached by the trial court is not disturbed on appeal unless it is based on some incorrect reasoning. In other words, an award of general damages should not be interfered with unless:-

**“It is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”**

42. In the instant case, it has not been shown that the learned trial magistrate proceeded on wrong principles in making the award.

43. Lastly there is the issue of the respondent’s failure to file a reply to defence which the appellant contends is fatal to the respondent’s case. As already stated, see **Kisii HCCA No.36 of 2010 – Kipkebe Ltd. –vs- Dismas Nyangau** (supra), the appellant’s allegations that the respondent was either wholly or substantially to blame for the accident remained just that allegations. No evidence was led by the appellant to prove such allegations.

44. From all the above, I find the appeal herein to be unmerited and the same is therefore dismissed with costs to the respondent.

**Dated and delivered at Kisii this 1<sup>st</sup> day of November, 2012.**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Odhiambo Kanyangi (absent) for Appellant

Mr. G.J.M. Masese for Z. Ogweno (present) for Respondent

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**