REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Appeal 271 of 2005

KIPKEBE LIMITED……..APPELLANT

VERSUS

JAMES ONDIMA NYAMBEGERA…….RESPONDENT

JUDGMENT

The respondent's claim before the trial court was that on 28th April, 1999, as an employee of the appellant and while applying fertilizer in the appellant's plantation, he was injured on his right thigh by a sharp tea stick. He alleged that the said accident was caused by the appellant's breach of statutory duty as well as negligence and he set out particulars thereof. He claimed general damages as well as special damages of Kshs. 3, 000/= on account of a medical report.

The appellant denied the respondent's claim. It added that if at all the respondent sustained any injuries or suffered any damages as alleged, it was not liable to compensate the respondent.

The respondent's evidence before the trial court was that on the material day while applying fertilizer, he was pierced on his right thigh by a tea stick. He blamed the appellant for that incident because it had not supplied him with gum boots. He did not state how the gum boots which ordinarily cover only the lower part of a human leg, would have protected him from being pricked by a stick on his thigh, which is the upper part of the leg.

The appellant called **Tobias Gari Ochuka**, a Check Roll Clerk. He testified that on that 28th April, 1999 the respondent was plucking tea leaves and he worked the whole day and managed to pluck 66 kilograms. On the following day, he was also on duty the whole day. He added that the respondent did not make any report regarding the alleged injury.

In a brief judgment, the trial court held as follows:

"**the defendant had a duty to ensure that the plaintiff's working conditions were safe and to provide him with appropriate protective wear. The defendant failed in that duty. I find the plaintiff has proved his case against the defendant on a balance of probability."**

The trial court did not state what exactly the appellant was required to do in this particular case to ensure that the working conditions were safe, if at all the alleged accident had occurred. There was no analysis of the evidence that was tendered by both parties. The judgment did not comply with the mandatory requirements of **Order XX rule 4** of the **Civil Procedure Rules.**

Notwithstanding the above finding by the learned trial Magistrate, he proceeded to state that the respondent should have been more careful to avert the accident and apportioned liability at 30:70 in favour of the respondent.

The respondent was awarded general damages of Kshs. 70,000/= less 30% which came to Kshs. 49,000/= plus special damages of Kshs. 3,000/= making a total of Kshs. 52,000/=

I have taken into consideration the brief submissions that were made by Mr. Oguttu for the appellant and Mr. Mbicha for the respondent.

The first issue I wish to consider is whether the respondent proved on a balance of probabilities that he was injured in his place of work in the circumstances as alleged and if so, whether the appellant is liable.

The respondent was emphatic that the alleged accident occurred on 28th April, 1999 at about 1.00p.m. He alleged that immediately after the accident he was attended to at the appellant's dispensary and he was issued with a treatment chit which was marked for identification but was not produced. He alleged that he proceeded to Nyamira District Hospital for treatment on the same day. He reached the said hospital at 2.00p.m. However, the out patient card allegedly issued by the Hospital, P. Exhibit 6, showed that the respondent was seen there on 28th April, 1999 at 8.00a.m. When he was cross examined about the discrepancy on the above timings, he could not give any cogent explanation. He only said that he was not in the Hospital at 8.00a.m as shown in P. Exh. 6.

The respondent did not state the name of the person who attended to him at the appellant's dispensary. He did not also produce the treatment chit, (MFI 5). There is no way he could have been attended to at Nyamira District Hospital on 28th April, 1999 at 8.00a.m if he was injured at 1.00p.m on the same day.

When this inconsistency in the respondent's evidence is weighed against the evidence of DW1, whose records showed that the respondent was on duty the whole day, that is 28th April, 1999, and no accident was reported that day, the only logical conclusion that can be drawn is that the respondent was not truthful and did not prove on a balance of probabilities that he was injured as alleged. Had the learned trial magistrate carefully analysed the evidence on record he would have come to a different conclusion. I find and hold that the respondent did not prove the allegation in his plaint that he was injured on 28th day of April, 1999 in the course of his employment by the appellant. The medical report prepared by Dr. Ajuoga on 22nd January, 2004 based on the treatment card issued at Nyamira District Hospital is of no relevance. The medical report merely showed that the respondent had a scar on the right thigh but the doctor could not tell the genesis of that scar.

In view of the above finding regarding the alleged accident, this appeal must succeed. But even if I were to believe the respondent's evidence, I would still allow the appeal because if there was any sharp stick in a huge tea plantation where the respondent was working, he ought to have seen it if he was careful and diligent. Even if he had been provided with gum boots, they would not have protected his thighs if he was not careful. At common law, an employee is under an obligation to undertake his duties diligently and must exercise due care for his own safety. The appellant was not expected to comb an entire tea estate to ensure that there is no sharp stick that may injure any of their workers. While the appellant had a duty of care to her employees, such duty is only in respect of reasonably foreseeable dangers.

For reasons aforesaid, I allow this appeal. The judgment of the trial court is set aside and substituted with an order dismissing the respondent's suit with costs. The appellant will also have costs of the appeal.

DATED, SIGNED & DELIVERED at Kisii this 2nd July, 2009.

D. MUSINGA

JUDGE.

2/7/2009

Before D. Musinga. J

Mobisa – C.c

Mr. Odhiambo for Mr. Oguttu for the appellant.

No appearance for the respondent.

Court: Judgment delivered in open court on 2nd July, 2009.

D. MUSINGA

JUDGE.