



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 22 OF 2018**

**(Originally Kisii High Court Civil Appeal No. 121 of 2008)**

**SANGANYI TEA FACTORY LTD.....APPELLANT**

**v**

**EVANS ONDIEKI NYOKWOYO.....RESPONDENT**

**An Appeal from the judgment and decree of the Honourable S.R. Wewa (Resident Magistrate)**

**in Kisii CMCC No. 125 of 2007 dated 10<sup>th</sup> July 2008**

**JUDGMENT**

1. Sanganyi Tea Factory Ltd (the Appellant lodged a Memorandum of Appeal with the High Court Kisii on 30 July 2008 contending that:
  - (1) The learned trial Magistrate erred in law and fact by holding that the Plaintiff had proved his case on liability against the Appellant on a balance of probabilities.
  - (2) The learned magistrate erred in law and misdirected herself in holding that occurrence of the accident was proved and that the appellant was 80% liable for the same.
  - (3) The learned trial magistrate erred in law and in fact by awarding general damages that are so manifestly excessive as to be erroneous in light of the nature of injuries allegedly sustained.
  - (4) The learned trial Magistrate erred both in law and in fact by not properly considering the evidence on record, the Defendant's submissions and authorities and hence did not write a considered judgment.
2. The Appellant filed its submissions before the High Court on 30 January 2018, while the Respondent filed his submissions on 8 May 2018.
3. On 19 June 2018, the High Court citing lack of jurisdiction transferred the Appeal to this Court and because the parties took no steps to advance the Appeal, the Court issued a Notice to Show Cause on 7 June 2021.
4. On the return date of 28 June 2021, the Court was informed that submissions had been filed and exchanged.
5. The Court indicated that it would deliver judgment on notice.

**Role of first appellate Court**

6. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
7. The Court will keep the interdict in mind.

## **Liability and standard of proof**

8. The Respondent testified before the trial Court and in regard to breach of duty of care stated (typed proceedings do not make full sense due to incoherence):

24.2 04 I did report on duty at 8.00 am work in order to cut grass behind the factory. At 10.00 am I got injured on the left hand, the fingers were cut the thumb and the index finger. There been sword I did fall down injured on the chest I did inform the same supervisor namely Mr Thomas Rioba. He gave me a sick sheet which I did use to go the hospital..... I do blame the company because was allocated place where I was not to work. I was leaf collector Clerk. I had no overall and gloves was not shown how to operate in the area. I was careful. I did not contribute to the accident.... It is the factory which caused the accident by allocating me duty where I was not to work. It's me who was using the panga but they took me there to cut grass. I was alone it was upon me to ensure I worked well.

9. While evaluating the evidence on liability and standard of proof, the trial Court stated:

There is evidence that the plaintiff was injured. The issue is whether the plaintiff sustained injuries when at place of work.

From the entire evidence and the evidence adduced it's clear that injuries were suffered. There is no indication that protective gears had been produced.

The defendant, therefore, was negligent. I do find that the plaintiff's case is proved on a balance of probability.

10. The Trial Court, therefore, found the Appellant liable because it had not issued protective gear to the Respondent.

11. The Respondent was assigned the duty of cutting grass with a panga on the material day. He testified that he was not given overalls and gloves.

12. This Court is unable to fathom how overalls and gloves would have prevented or mitigated the accident considering the work which was being done by the Respondent.

13. The Respondent did not disclose what made him to fall. Apart from the overalls and gloves, the Respondent did not lead any evidence as to what the Appellant should have done or had omitted to do that was in breach of statutory duty.

14. In the Court's view, and the Court so finds, the Respondent did not discharge the burden of proving on a standard of probability that the Appellant was negligent or was in breach of the statutory duty of care.

15. The Respondent's case was casually prosecuted.

16. The injuries sustained by the Respondent should have been compensated under the Workmen's Compensation Act where fault or negligence is a consideration rather than under the common law action for breach of duty of care.

17. The Court finds that the trial Court fell into error of both law and fact in finding in favour of the Respondent.

## **Conclusion and Orders**

18. From the foregoing, the Appeal is allowed and the judgment of the trial Court is vacated and substituted with an order dismissing the suit with no order on costs, both before the trial Court and this Court.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF DECEMBER 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Appellant                      Wangai Nyuthe & Co Advocates

For Respondent                    S.N. Nyachae & Co. Advocates

Court Assistant                    Chrispo Aura