



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL NO. 44 OF 2018**

**(Previously Kisii High Court Civil Appeal No. 75 of 2012)**

**OGEMBO TEA FACTORY CO. LTD.....APPELLANT**

**v**

**RONALD NYABUTO ONDARA.....RESPONDENT**

**(Being an Appeal from the Judgment and decree of R. K. Koech, Senior Resident Magistrate in Ogembo Civil Suit No. 78 of 2010 delivered on the 4<sup>th</sup> May 2012)**

**JUDGMENT**

1. Ronald Nyabuto Ondara (Appellant) sued Ogembo Tea Factory Co. Ltd (Respondent) before the Senior Resident Magistrates Court in Ogembo alleging breach of statutory duty/negligence leading to injuries in the workplace. The Appellant sought general and special damages.
2. In a Judgment delivered on 4 May 2012, the Magistrate found that the Appellant contributed to the accident and apportioned liability at 70:30. The Appellant was awarded Kshs 55,000/- being both general and special damages.
3. The Appellant was dissatisfied and he filed a Memorandum of Appeal before the High Court contending that
  1. The Learned trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him very superficially and consequently came to a wrong conclusion on the same.
  2. The Learned trial Magistrate did not consider the demand of contributory negligence on the part of the Respondent.
  3. The Learned trial Magistrate erred in not sufficiently taking into account all the evidence presented to him and in particular the evidence presented on behalf of the Appellant.
  4. The Learned trial Magistrate grossly erred by proceeding on wrong principles of law whilst assessing liability while no negligence had been established on the part of the Appellant.
  5. The Learned trial Magistrate failed to apply his mind judicially and thereby arrived at a decision on liability that is unsustainable in law.
  6. The Learned trial Magistrate wholly misdirected himself by apportioning liability on the Appellant while there was no evidence disclosed to sustain such a finding.
  7. The Learned trial Magistrate acted arbitrarily by arriving at a decision which was wholly unjustified and in contrast to the evidence on record.
  8. The Learned trial Magistrate misdirected himself by ignoring the Appellant's written submissions on record and specifically the points of law therein enshrined.
  9. The Learned trial Magistrate failed to disclose the grounds upon which he had found the Appellant 100% liable in negligence.
4. Pursuant to directions by the High Court, the Appellant filed his submissions on 27 September 2018 while the Respondent filed its submissions on 17 December 2018.

5. On 19 December 2019, the High Court, citing lack of jurisdiction directed that the Appeal be transferred to this Court.

6. The Court has considered the record and submissions.

### **Role of Court on the first appeal**

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a 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.

8. This Court will abide by the interdict on its role as a first appellate Court.

### **Proof on a balance of probability**

9. The Appellant contended that the Respondent had not proved his case on a balance of probability.

10. In challenging the trial Court's decision, the Appellant asserted that the evidence before the Court was that it was the Respondent who poured detergent on the floor and which detergent made the floor slippery eventually leading to him sliding and sustaining injuries.

11. According to the Appellant, the only inference which could be drawn was that the Respondent was wholly negligent.

12. The Appellant also challenged the fact that the Respondent did not present any other witness or records to substantiate his version of the facts.

13. To the contrary, the Appellant maintained that the records it had for the material day confirm that the Respondent was not on duty.

14. The Court has re-looked at the evidence tendered before the trial Court. The Respondent testified that the Appellant issued to him Form LD104.

15. Under the law in place then, the Workmen's Compensation Act, it was mandatory for an employer to notify the Director of Occupational Health and Safety of an accident in the workplace.

16. The Appellant allowed the production of the Form LD104 by consent.

17. The Form had the Appellant's stamp and a signature.

18. It, therefore, beats logic to hear the Appellant deny that the Respondent was not at work on the day of the accident and injuries when it prepared and stamped the notification to the Director of Safety about the accident.

19. The Appellant also made much of the assertion that the muster roll for the particular day did not have the Respondent's details. Ordinarily, it is the employer who keeps records.

20. In dealing with the omission of entries in the muster roll, the trial Court found that since primary attendance records were entered into an allocation book, it is the allocation book which could serve as primary evidence.

21. The Appellant did not explain why the allocation book was not produced if indeed the Respondent was not at work.

### **Liability**

22. The Appellant made the further contention that the trial Court misdirected itself because it was the Respondent who was negligent as he admitted pouring the detergent which made the place he was cleaning slippery.

23. In addressing the question of liability, the trial Court noted that the Respondent had not been issued with gumboots and that the Appellant had failed to remove certain scrap metals from the area the Respondent was cleaning.

24. It is widely accepted that an employer has a duty of care to maintain a safe work environment for the employees.

25. The duty calls upon the employer to take all reasonable care and precautions to ensure the safety of the employees and to provide an appropriate and safe system and work environment.

26. Having failed to issue gumboots to the Respondent while carrying out cleaning duties involving water and detergent and also having failed to remove the scrap metals, the Court is of the view and finds that the trial Court did not fall into error in apportioning negligence/liability at the ratio of 70%:30%.

### **Disregarding submissions**

27. The Appellant did not disclose which parts of its submissions the trial Court ignored and/or failed to consider and the Court, therefore, cannot second guess the trial Court.

28. The Appeal is found without merit and is dismissed with costs to the Respondent. The decretal sum to attract interest from 4 May 2012.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 27<sup>th</sup> day of November 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant L.G. Menezes & Co. Advocates

For Respondent T.O. Nyangosi & Co. Advocates

Court Assistant Chrispo Aura