REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

APPEAL NO. 3 OF 2016

(Before D. K. N. Marete)

JAMES FINLAY (K) LTD....…….....APPELLANT

VERSUS

JACOB WABUKE WANYONYI.....RESPONDENT

JUDGMENT

This matter is brought out by way of a Memorandum of Appeal dated 27th February, 2009 and cites the following as grounds of appeal;

1. The learned trial Magistrate erred by arriving at a finding on liability, which was not supported by evidence.

3. The learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.

4. The respondent's case was not proved on balance of probability as is required by law.

5. The trial magistrate should have found that there was no contract of employment and that the Plaintiff was hired by an independent contractor.

6. The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the very minor soft tissue injuries allegedly suffered by the plaintiff.

7. The learned trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

She prays as follows;

1. That the decision of the Chief Magistrate on both liability and quantum in Kericho PMCC No.794 of 2004 be set aside and a proper finding be made by this Honourable Court.

2. That this Honourable Court do make such further orders as may be just and expedient.

3. This appeal be allowed with costs.

The appellant in her written submissions dispels liability on her part in that she was not in control of the

factor leading to injury and further that this evidence was not corroborated by an eye witness. It is her further submission that a party seeking to rely on negligence would need to itemize and prove the particulars of negligence at trial.

The appellant again seeks to rely on the authority of **Mumias Sugar Co. Ltd Vs. Samson Munyinda Kakamega**, **HCCA No.58 of 2000** where it was observed as follows;

> *"….. in a nutshell that when a person is in total control of the implement he cannot blame anyone if he did the work badly and injured himself."*

She went on to draw a similarity between this case and the authority above as follows;

> *"This annuity serve to illustrate the similar of this case to highlight the fact that the respondent had the power and control of how he walked on the tea plantation since it was not the first time he had worked there. It was upon him to take necessary precautions to ensure that he does not cause harm to himself. He would therefore carry his own cross."*

She therefore justifies her submission on the erroneous finding of the trial court in the circumstances.

The appellant in pursuance of her case on quantum seeks to rely on paragraph 6 and 7 of the Memorandum of Appeal. It is her case that the respondent pleaded a deep cut on his back. The medical report confirms that the wounds have healed and there only remain scars. All evidence tendered led to a confirmation that all injuries encountered were soft injuries and had healed. This would call for lesser award of quantum as is illustrated in the authorities of **Sokoro Sawmills Ltd vs Grace Nduta Ndungu (2006) eKLR** and **Peter Kahungu & Another vs Sarah Norah Ongaro (2004) eKLR** where awards for damages were reduced from Kshs. 80,000.00 to Kshs. 30,000.00 and Kshs. 150,000.00 to Kshs. 80,000.00 respectively in cases of soft tissue injuries.

The respondent in his written submissions submits a case of injury at the work place. It is his further submission that this was clearly demonstrated in evidence on trial as follows;

> *"I reported at 7am and was injured at noon. I slipped into a hole as I plucked tea and carrying tea leaves on my back. I did not see the hole as it was covered by tea bushes. When I fell, I was picked by a tea stump on the back (scar seen) I was treated at Chemasingi dispensary and then, told to report the following day. On 19th an ambulance was summoned and took me to Chemogondai Hospital where I was operated on and stick removed I was then stitched and went on with treatment. Later I saw Dr. Ajuoga who prepared a medical report exhibit P1 and I paid Kshs. 5,500/=. I have pain when I work I blame the defendant for failing to refill the hole. There was no sign to show the presence of the hole. I was careful in my work. I pray for damages and costs."*

It is the respondent's case that his employment with the appellant is not in dispute and that he was injured in the course of duty. These injuries were occasioned by the negligence of the appellant in that he was not warned of the existing or even that no precautionary measures like coverage of the hole were done by the appellant.

The respondent on the other hand, submits that for the appellate court to interfere with a judgment of the trial court, it must be satisfied that;

> *1. Either the trial magistrate, in assessing damages, took into account an irrelevant factor or left out on account a relevant factor. Or*
>
> *2. The amount is inordinately so high or so low that it must be a wholly erroneous estimate of damages.*

She seeks to rely on the authority of **SOKORO SAWMILLS LTD VS GRACE NDUTA** (also cited by the appellant.)

"My Lord, we rely on the authority of Sosphinats Co. Ltd -vs- Daniel Ng'an'ga – Nakuru Civil Appeal No. 315 of 2001 (Appeal from the judgement of the High Court of Kenya at Nakuru (Rimita J) dated 23rd day of March, 2001.)

At pages 2-3 it states:-

"The assessment of damages for personal injuries is a difficult task. The court is required to give a reasonable award which is neither extravagant nor oppressive. And while the judge is guided by such factors as the previous award for similar injuries and the principles developed by the courts, ultimately, what is a reasonable award is an exercise of discretion by trial judge and will invariably depend on the peculiar facts of each case.

In this case, the trial Judge considered the evidence of the respondent, the three medical reports which he quoted extensively, the submissions of respective counsel and the authorities cited to him in arriving at what he referred to as adequate compensation". It is evident from the medical reports that the respondent sustained a severe head injury resulting in the deformity of the brain injury.

It has not been shown that in assessing the damages the learned Judge failed to apply the relevant principles nor can it be justifiably said that the award is in the circumstances of the case so high that it amounts to an erroneous estimate. There are no valid grounds, in our view, for interfering with the award."

This matter tilts in favour of the respondent. The appellant has not come out of his way to prove her grounds of appeal. It is notable from the proceedings and judgment of the trial court that the respondent proved his case on a balance of probabilities and preponderance of evidence. Again, there is no demonstration that the learned Magistrate failed to take into consideration the relevant principles on award of damages or even made an award so high as to be senseless and inexplicable.

I am therefore inclined to dismiss the appeal with costs to the respondent.

Delivered, dated and signed this **31st day of January 2017.**

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Sitienei instructed by Kibichiy & Company Advocates for the Appellant.

2. Mr. Meroka instructed by Meroka & Company Advocates for the Respondent.