



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**APPEAL NO. 8 OF 2015**

(Being an appeal arising from Hamisi SRMCC. NO. 20 of 2010)

*(Before Hon. Lady Justice Maureen Onyango)*

**NYAYO TEA ZONES DEVELOPMENT CORPORATION .....APPELLANT**

**-Versus-**

**SARAH MUHONJA MAKWAKA .....RESPONDENT**

**J U D G E M E N T**

This is an appeal from the Judgement and decree in Hamisi SRMCC No.20 of 2010. The Appellant was the Defendant in the case in the lower court while the Respondent herein was the Plaintiff. The Respondent filed suit against the Appellant seeking general damages, special damages, costs and interest following injuries alleged to have been sustained in the course of employment when the Respondent fell into a ditch in the plantation where she was plucking tea. The Respondent attributed the injuries to the Appellant's negligence and breach of duty of care. The particulars of injuries were stated at paragraph 9 of the plaint as dislocation of right ankle joint.

In the judgement delivered on 28th October 2010 the learned Magistrate found the Appellant liable and awarded the Respondent Kshs.80,000 as general damages, Kshs.1,000 as special damages, costs and interest. The learned Magistrate apportioned liability at 80:20 in favour of the Respondent.

Being dissatisfied with the Judgment and decree, the Appellant appealed citing the following grounds of appeal -

1. That the learned trial Magistrate erred in law and in fact in entering judgment for the plaintiff as against the defendant when the plaintiff has failed to prove her case on a balance of probabilities or at all.
2. That the learned trial magistrate erred in law and in fact in finding the defendant substantially 80% liable for the accident or at all.
3. That the learned trial magistrate erred in law and in fact in failing to take into account the weighty submissions and authorities by the defendant on the issue of liability.
4. That the learned trial magistrate erred in law and in fact in failing to consider the evidence on record.

5. That the learned trial magistrate erred in law and in fact in taking undue consideration of own personal opinion instead of evidence on record.

6. That the learned magistrate erred in law and in fact in holding that the plaintiff was injured at the defendant's place of work in the absence of direct evidence linking her injuries to the defendant's place of work.

7. That the learned trial magistrate erred in law and in fact in awarding the plaintiff general damages and special damages at all.

The Appellant prays that the judgement and decree in HAMISI SRMCC NO.20 of 2010 be set aside, that this court dismisses the Respondent's suit with costs to the Appellant and that this court proceeds to make its own independent determination on liability and quantum. The Appellant further prays for costs of the appeal.

The appeal was filed as Kakamega High Court Civil Appeal No. 151 of 2010 and was transferred to this court after directions had been taken and parties had filed written submissions. The parties agreed that this court proceeds to prepare judgment based on the submissions on record.

### **Appellant's submissions**

The Appellant divided its submissions into two heads: liability and quantum.

On liability the Appellant submitted that there was no proof that there was a hole in the Appellant's plantation in which the Respondent fell and sustained the alleged injuries. It is the Appellants submission that PW1 Julius Murray who treated the Respondent on 30th April, 2009 at Kapsabet District hospital admitted in cross examination that he did not treat the Respondent. It was submitted that it was possible for the Respondent to have sustained the injury away from her place of work.

It was further submitted that the Honourable Magistrate failed to consider the weighty submissions and authorities by the Appellant on liability.

On quantum the Appellant submitted that Shs.40,000 could adequate compensation for the Respondent for the injuries she sustained relying on **Nairobi HCCC No.4150 of 1999, Loice Nyambeki v Omar Haji Hassan, Nairobi HCCA No.742 of 2003, Socfinaf Company Limited v Joshua Ngugi Mwaura and Nairobi HCCC No.27 of 1991, Peter Kariuki Njuguna v Alex Kiguru Nganga**. The Appellant argued that the Respondent suffered soft tissue injury which had healed completely.

### **Respondent's Submissions**

The Respondent submitted that the learned trial Magistrate was right in entering judgement against the Appellant as the Respondent proved her case on a balance of liabilities, that there was no dispute that the Respondent was an employee of the Appellant, that she was on duty on the date of the injury, that the Appellant did not provide the Respondent with gumboots and overall and failed to seal off the ditch in which the Respondent fell or that the Appellant allowed grass to grow on the ditch making it impossible to detect the presence of thereof in the plantation where the Respondent was plucking tea.

It was further the Respondent's submission that the trial magistrate considered all the evidence on record and did not rely on personal opinion and that general damages were awarded by the trial magistrate after analysing all the evidence on record. The Respondent distinguished all the authorities relied upon by the Appellant which she dismissed as irrelevant.

### **Evaluation of Evidence**

In a first appeal, the duty of the court is to evaluate the evidence and arrive at its own determination.

The evidence adduced by the Respondent at the trial was through PW1 Julius Murray, a clinical officer at Kapsabet District Hospital who testified that the Respondent was treated at the hospital on 30th April, 2009 with a history of falling. On examination she was found to have a swollen right ankle joint which was diagnosed as a dislocation of right ankle joint and a firm bandage was applied.

On cross examination PW1 stated that the patient was treated by Erick Langat who had been transferred to Bomet, that x-ray was not taken and that a dislocation can be diagnosed by physical examination.

RW2 Sarah Muhonja Nakwaka, the Respondent, testified that she was employed by the Appellant as a tea plucker, and that she was plucking tea when she fell into a ditch and her leg was dislocated. She testified that she did not know there was a ditch in the plantation as it was covered with grass. she was treated at Kapsabet hospital. A medical report was prepared at Shs.1,000 which she paid as evidenced by exhibits 2(a) and 2(b) (the medical report and receipt).

Under cross examination she stated that she started working in 2001, that she did not know the ditch was on the spot where she fell as it was covered with grass and no one else could have known that there was a trench. She testified that she had not fully healed but agreed with the medical report.

For the Appellant, DW1, James Singa testified that he was a field supervisor with the Appellant and allocated the Respondent her duties. He testified that he was at work on 30th April 2009. He testified that the Respondent worked as a tea plucker but left employment in 2009. He testified that on the material day the Respondent was at work and left at around 3 pm.

On cross examination DW1 stated that the Respondent's supervisor was Helen Magut who did not sign the daily task record (Defence Exhibit 1). He stated that he did not have the daily occurrence book, that the Appellant issued only an overal and basket to tea pluckers and not gumboots. He stated that the Respondent was allocated 16 kg but only plucked 13 kg on the material day.

## **Determination**

Although there are 5 grounds of appeal the Appellant filed written submissions on the first two grounds only, that is, on liability and quantum.

On liability the Appellant submitted that there was no evidence that the Respondent was injured while plucking tea or that there was a ditch in the tea plantation where she was working. According to the evidence on record PW2 (Plaintiff) testified that she fell into a ditch and that the ditch was covered in grass to the extent that it was not visible. This evidence was not controverted either in cross examination or through the evidence of DW1, the Defendant's only witness. No evidence was led by the Appellant (Defendant) to prove that the ditch did not exist or that the Respondent was aware of its existence. There is no mention of the ditch at all in the testimony of DW1. This left the evidence of PW2 intact to the effect that there was a ditch covered in grass that she fell into and sustained the injuries that are the subject of this suit.

The Appellant further argued that it is curious that the plaintiff (Respondent) did not report to anyone in the Appellant's company about the accident and neither did she attend the Appellant's health centre for first aid and record purposes. No questions were put to the Respondent in cross examination or evidence led by the Appellant to prove that there was a reporting system for accidents and a health centre for first aid within the Appellant's premises that the Respondent or employees generally were expected to attend.

It was further submitted by the Appellant that it is possible that the Respondent sustained the injuries away from work. At the trial the Appellant did not produce any evidence pointing to the possibility of the Respondent sustaining the injury away from work.

On the issue of quantum, the Appellant did not state why it did not agree with the shs.80,000 assessment of general damages or the 20% contribution. All the Appellant did was to suggest a figure of Shs.40,000 as adequate compensation without stating why in its opinion this should be considered adequate. The

Appellant relied on the decision in ZIPPORAH WAMBUI WAMBURA case (supra) where the trial court awarded Shs.50,000 for soft tissue injuries sustained in 1992. The Respondent herein was injured in 2009, about 17 years later and was awarded Shs.80,000 which was in any event reduced by 20% as her contribution to the negligence. Appellate Courts are only to interfere with awards by trial courts when the award is either excessively high or excessively low. The Appellant did not justify that the award was too high as to warrant interference by this court. The opinion of the Appellant is not sufficient ground to warrant an appeal court interfering with the award of a trial court. I do not find the award too high. I find that the award in the decision relied upon by the Appellant made 17 years before the injury in this case compares well taking into account inflation over the period.

For the foregoing reasons, I find no merit in the appeal and dismiss it with costs.

**DATED SIGNED AND DELIVERED THIS 26TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**