REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 30 OF 2013.

JOHN KARANJA NJUGUNA.......................................APPELLANT

VERSUS

EASTERN PRODUCE (K) LTD

(SAVANI TEA ESTATE)..RESPONDENT

(Being an appeal from the judgment and decree of the principal Magistrate's court at Kapsabet PMCC No. 179 of 2011 on the 14.3.2013 by G. Adhiambo (RM).

JUDGEMNT

1. The appellant **(JOHN KARANJA NJUGUNA)** had sued the respondent **(EASTERN PRODUCE (K) LTD (SAVANI TEA ESTATE))** seeking general and special damages, claiming that he got injured on the 3.2.2011 while working for the respondent. The appellant's case was that as a result of due to the breach of contract of employment and/or statutory duty of the respondent/ his agent, servants he was seriously injured when he slipped and fell into an unmarked ditch or hole. The respondent had failed to provide or maintain it's appliances to enable him work safely.

2. The respondent denied liability stating that if at all such an accident happened then it was wholly or substantially caused by the appellant's negligence.

3. The matter proceeded to hearing where the appellant testified and called one witness a clinical officer, the defence availed two witnesses. The matter was dismissed with costs on failure by the appellant to prove his case on a balance of probability. The appellant was aggrieved by this and appealed against. The following issues were appealed against:

i. The trial magistrate erred in dismissing the plaintiff's case in favor of the defendant without any legal basis

ii. The trial magistrate failed to appreciate the overwhelming evidence in favor of the appellant yet the plaintiff had proved his case on a balance of probability.

iii. The trial magistrate failed to consider the plaintiff's written submissions.

4. The appellant testified that he was on duty on 3rd February 2011 as a tea plucker when he slipped and fell into a ditch while carrying tea to the weighing shed. He was under the supervision of Mr. Francis Korir whom he duly informed about the incident. He blamed the respondent for failing to provide him with any safety apparel particularly gloves, overall and industrial boots which would have given him a firm grip and prevented him from falling. He also blamed the respondent as they did not put any warning signs like a hazard flag in the farm to warn the appellant of the existing ditches which had been covered by the tea bushes nor was he notified of existence of these holes in any way.

5. It was the appellant's contention that the respondent exposed him to risk resulting to his injury. The appellant stated that the holes in the tea farm were as a result of activities undertaken by the Defendant's employees, servants and/or agents.

6. The appellant also availed a clinical officer - PW2 **(Simon Rono)** from **Nandi Hills District Hospital** who produced the treatment chit and an out-patient book (Exhibit 2) confirming that the appellant was treated at the hospital by **Tom Juma Barasa** who was no longer working at the hospital.

7. Dr. Samuel Aluda (PW3) produced a medical report (Exhibit 3A) which confirmed that the appellant sustained injuries on his right leg below the knee.

8. The respondent's witness **Phanice Sagwe (DW1)** a clinical officer at **Savani Tea Estate dispensary** told their supervisor. That any worker who got injured while on duty would go to the dispensary with a treatment chit from who kept records such as out-patient register and injury register maintained that the records did not reflect that the appellant had been treated during the period in question. That infact, no injury of any worker was recorded at the time in question

9. She explained that whereas injured workers could be treated at the Nandi Hills Hospital, which is 10km away from the tea estate, but that would only happen in cases which the dispensary could not manage, such as fractures. In such instances, the worker would be given a referral note which after treatment would be surrendered to the supervisor

10. On cross examination. She insisted that it was not procedural to issue any patient with a treatment card.

11. Francis Kipkoech Korir (DW2), who supervises tea pluckers at the respondent's tea estate confirmed that the appellant was on duty on the date in question under his supervision, but denied that he sustained injuries on that date. He referred to a checklist (DEx2a and 2b) which showed that the appellant was on duty for 8 hours, having plucked 33.5kgs of tea, and even reported on duty the next day. On cross-examination, he told the trial court that the appellant used to pluck 50-100kgs, but other workers would pluck less.

12. He denied claims that the appellant reported to him that he had been injured, or that he gave out a referral note for him to seek treatment. He also denied the existence of a hole within the tea plantation.

13. The parties agreed to canvass the appeal through written submissions. (The respondent has not filed its submission).

14. The appellant's counsel submitted that the evidence regarding his injury was corroborated by the clinical officer who testified that the appellant was treated at **Nandi District Hospital**. The respondent was faulted for failing to put warning signs on the farm.

15. The evidence by the respondent's witness **Phanice Sagwe (DW1)** is faulted on grounds that she was not present on the material day and the court ought to have disregarded her evidence as she did not write any statement nor did she produce any accident register to prove the appellant was not among the injured. That this demonstrated that if the accident register was produced, it would have showed the appellant had been injured while at work. In support of this proposition, this court was referred to **Nguku v. Republic.**

16. That in any event the respondent's exhibit1 showed a record of natural ailments and not industrial accidents of employees while at work.

17. Further, that the evidence by DW2 that the appellant had plucked 33.5 kilos of tea yet in a day a person could pluck 100 kilos, was a demonstration that the low out-put on that day was low because the appellant had sustained injury, and left to seek treatment. The appellant referred to the case of **Timsales Ltd v. Moses Mburu, Nku. HCCA No. 111 of 2005** to support the argument that the respondent did not give any rebuttal evidence on the treatment book from Nandi Hills District Hospital as was held in. It is contended that the respondent had a duty to produce the referral notes they issued since they were retained at the dispensary.

18. Further, that the evidential burden had shifted to the respondent who failed to shift the same, pointing out that **Francis Korir** did not produce any document to show the employees that got injured on that day, nor could he remember what had transpired since he was supervising many people. The appellant's counsel thus urged the court to find the appellant had proved his case on a balance of probability, and be guided by the decision in ***Peter Wafula Juma & Anor v. Republic*** **[2014] eKLR** where it held as follows.

> **"[19*] Evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence. On this, see Halsbury's Laws of England para 15. Evidential burden is the basis for the practice in criminal law where the trial court makes a ruling as to whether the prosecution has adduced prima facie evidence as to warrant the accused person to be placed on his defence. See section 211 of the Criminal Procedure Rules. Even in civil cases, when prima facie evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where the evidential burden is not discharged, judgment may be entered against the defendant- in case of a civil case- or a conviction against the accused- in case of a criminal case.*VP**

19. Reference is also made to the decision in **Eastern Produce (K) Ltd v. Nicodemus Ndala [2004] eKLR**, where the court held that the appellant owed the respondent a duty of care which had been breached by failing to cover the hole. The learned magistrate had applied a very high standard of proof beyond reasonable doubt in determining the appellants case rather than the standard of proof on a balance of probability applied in civil cases.

20. As regards quantum of damages, the appellant prayed for a sum of **Ksh 300,000/-** for the soft tissue injuries and referred to **Catherine Wanjiru King'ori & 3 Ors v. Gibson Theuri Gichubi, Nyeri HCCA No. 320 of 1998.**

21. No submissions were filed by the respondent.

<u>**Analysis and determination**</u>

22. The for determination are:

> ***i. Whether the appellant was injured while in the cause of duty***

ii. Whether the appellant proved his case on a balance of probability

iii. Whether the respondent was liable for the injury sustained by the appellant

iv. ***Whether the court erred in dismissing the appellant's case*****.**

23. This being an appeal, this court has a duty to re-evaluate the case, and come up with its own conclusion as was held in ***Jabane v. Olenja, [1986] KLR 661, Selle v. Associated Motor Boat Company Limited*** **[1968] EA 123 and** ***Peters v. Sunday Post*** **[1958] E.A. 424** where Sir Kenneth O'Connor stated as follows:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in **Watt v.Thomas (1), [1947] A.C. 484.**

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

24. The issue as to whether the appellant was at work on the material day does not arise as the respondent's supervisor DW2 confirmed that position.

Was the appellant injured while on duty

25. The appellant evidence that he slipped and fell in a ditch, where pruned tea pricked him on the right leg beneath the knee. The supervisor however testified that the appellant was at work and he was not injured. That when a person is at work and gets inured he is given a chit and he goes to the dispensary. That all workers when injured are treated at the dispensary. DW1 the nurse collaborated this evidence that workers are treated at the dispensary and if the case is worse then they are referred to Nandi District Hospital. The checklist for 3.2.2011(DEx 2b) has the appellants name an indication that he worked full day. His employment number is **405189** and it shows he worked 8 hours and plucked **33.5** kilos of tea. The appellant's counsel argument that a person cannot pluck that amount of tea if he works the whole day does not have an empirical basis a look at the checklist shows some employees such as **Elphas Arega Masinza employment number 405163, who worked 8 hours but also plucked 23.500 kilos of tea**, **Emilly Imbihila Jedi employment number 405413 plucked 18.500 kilos of tea yet she had worked for 8 hours**.

26. In addition to the above the outpatient register **(DEx 1)** does not show the appellant's name, and there is nothing to suggest that it was doctored. The appellant had stated that he was given first aid and he later went to Nandi Hills District, he did not state whether he was issued with a referral note to the said hospital. The referral note to the dispensary remained at the dispensary, he did not produce it. PW2 the clinical officer produced treatment card (PEx. 2) from Nandi Hills District Hospital which indicated he was treated at the said facility, though by a different person. When shown a letter by the hospital's Superintendent, it indicated the appellant's name did not appear in the outpatient register, although to be fair to the appellant, the maker of this document did not testify.

The burden of proof

27. The burden of proof is on one who alleges those facts on negligence as provided by section 107 of the Evidence Act. The appellant's argument is that the burden shifted to the respondent urging this court to refer to ***Peter Wafula Juma*** case (supra). This was a criminal appeal whose threshold on proof is beyond reasonable doubt.

28. The burden of proof in civil cases has always been on a balance of probability and this court cannot depart from the set principle and law. There is no evidential burden that has shifted, the plaintiff availed a pay-slip, a treatment card from Nandi Hill hospital which did showed there was an injury, but the same did not establish that he was injured at the premises while on duty carrying out the assigned duties. The court in **Eunice Wayua Munyao v. Mutilu Beatrice & 3 Ors[2017] eKLR opined as follows:**

Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya clearly captures these aspects and they provide as follows: -

107. Burden of proof (1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden The of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The issue has been dealt with and settled by the Court of Appeal and was applied in one of the fairly recent authorities of **East Produce (k) limited –v. Christopher Astiado Osiro Civil Appeal no. 43 of 2001** where it was held that:-

"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku V. Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

29. The appellant had the onus to proof he was injured at work, being an industrial claim then it is him to prove since the evidence as illustrated above and as the documentary evidence shows he was at work and was not injured while at work.

30. The appellant testified he had injured his right leg below the knee. The treatment chit indicated the same. This is a soft tissue injury which if proved would have been adequately compensated by an award of Ksh. 60,000/= would have been adequate compensation.

31. The upshot is that trial court duly considered and analyzed the facts and evidence. It applied the appropriate principles of law and did not err as per the documentary evidence. The appeal lacks merit and is dismissed with costs to the respondent.

Delivered and dated this 30th day of January 2020 at Eldoret.

H. A. OMONDI

JUDGE