



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 112 OF 2012

COUNTY COUNCIL OF NANDI

(KIBORGOK TEA ESTATE).....APPELLANT

VERSUS

PETROL IKOA.....RESPONDENT

JUDGMENT

(Being an appeal arising from the judgment of Honourable E.W. MULEKA (PM) in Hamisi SPMCC NO. 157 of 2009 delivered on 25/9/2012).

1. The appellant **COUNTY COUNCIL OF NANDI (KIBIRGOK TEA ESTATE)** was the defendant in the lower court, where the respondent (**PETRO IKOA**) claimed special and general damages for negligence, following injuries he sustained when he was employed as a tea plucker at the Appellant's *Kiborgok Tea Estate*.
2. It was the respondent's case that on 3rd May, 2007 while working for the Appellant, he was injured when he slipped and fell down while carrying tea as a result, he sustained serious injuries on the right knee which was swollen and tender and a fracture of the right patella.
3. **The appellant denied** the claim *in toto*.
4. The trial Magistrate found that both the appellant and the respondent were to blame, and apportioned liability with the appellant shouldered 70% while the Respondent shouldered 30%. He assessed general damages at Kshs 250,000; and, special damages at Kshs 1,500. The Respondent was also granted interest and costs.
5. The appellant being aggrieved by the decision prefers this appeal on the grounds: -
 - i). That the trial Magistrate erred in entering judgement in favor of the plaintiff when there was no evidence to support the case.
 - ii). That the trial Magistrate erred in making a finding that the defendant was liable in negligence when the plaintiff did not proof the same.
 - iii). That the trial Magistrate erred in law and in fact in awarding damages that were so excessive or inordinately high in view of the injuries sustained by the plaintiff.
 - Iv). That the trial Magistrate erred in making a finding that the plaintiff was injured on the date he claimed to be on duty when there was no evidence.
 - v). That the trial failed to take into account and consider the evidence on record.
 - vi). That the trial Magistrate failed to properly consider submissions by the defence.
6. The Appellant prays that the judgment and decree be set aside and the costs of the appeal be awarded to it.
7. The appeal was canvassed by way of written submission. The Appellant submitted that during cross examination, it was demonstrated that the Respondent was negligent for the injuries he allegedly sustained as a result of the accident.

8. Further, that the learned Magistrate found that the Respondent was to blame for the accident pointing out that he ought to have been careful.
9. That the defence adduced evidence to establish the fact that the Respondent was on duty throughout 3/5/2007 until 7/5/2007. No accident was reported and the master roll produced confirmed that the Respondent was on duty throughout the whole day.
10. Further, that the Respondent alleged to have sought treatment for the alleged injuries on 8/5/2007, yet he purportedly got injured on 3/5/2007. That he also failed to demonstrate a casual link between the injuries and the alleged accident.
11. It is also contended that the Respondent failed to prove that he was not provided with protective apparels. The appellant argues that the injuries sustained by the respondent were minor hard and soft tissue which had healed with no permanent disability. Consequently, considering the minor nature of the injuries, the award of **Kshs. 250,000/-** was manifestly excessive.
12. The Respondent submitted that he produced treatment chits from **Kapsabet District Hospital** p.exbt 1, x-ray films p.exbt 2 and **Dr. Aluda's** medical report and receipt as pexbt 3a and 3b which confirmed the injuries sustained.
13. It is argued that the evidence presented confirmed that on 3/5/2007 the respondent reported on duty and was under the supervision of **Alfred Shikanga Kenyatta** who assigned him the duty of plucking tea. That while undertaking the said duties, he slipped and fell into an unmarked ditch as a result of which he sustained injuries on his right knee and a fracture of the right patella.
14. The Respondent attributed the incident to the appellant's negligence as they failed to mark the ditches covered by the tea bushes nor was, he notified of the existence of these holes in any way. Also, that he was not provided with protective apparels which would have mitigated the injuries he sustained.
15. In rebuttal, the Appellant called **Julius Kipkosgei** (a supervisor at the Appellant's estate), who testified that he was not the Respondent's immediate supervisor and that the supervisor was **Alfred Kenyatta**. No explanation was given as to why Mr. Kenyatta was not availed to court.
16. The witness further testified that that there exists an **Accident Register** but instead produced a Muster roll. He maintained that the Appellant's workers were protective apparels but failed to produce any evidence to corroborate his evidence.
17. The Respondent insists that his claim was proved on a balance of probabilities, and the Appellant had not demonstrated that the award of damages is inordinately high as to be a wholly erroneous estimate of the injuries suffered or how the learned magistrate applied wrong principles in assessing damages.

Issues for determination

18. The main issues for determination is whether the Respondent got injured while working for the Appellant and who was liable for the accident.
19. As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **SELLE&ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD &ANOTHER (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.
20. In addition, the Court will not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:
- “A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”***
21. This court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.
22. The duty of the first appellate court is to reevaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions – see **STANLEY MAORE -VS- GEOFFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002 – “the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses.”**
23. In considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court “**will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles**” - **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278.**
24. It is settled principle that “**an appellate court will not disturb an award unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge (and I add Magistrate) proceeded on wrong**

principles or that he misapprehended the evidence in some material respect”

25. The question as to whether the employer was *liable* for the injuries. The respondent proved on a balance of probabilities that he was on duty when the alleged accident occurred. The legal burden of proving *negligence* or *breach* of any statutory duty of care fell on the respondent’s shoulders.

26. The duty of the employer to ensure the safety of an employee is not absolute it is one of reasonable care against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee’s insurer round the clock.

27. The Respondent testified that while going on with his duties as a tea plucker, he sustained injuries when he fell into a trench at the Appellant’s plantation. He further stated that the Appellant had not erected any sign or red flag on the farm to alert him of any eminent danger. As much as the Respondent was in control of his own step, he was on duty bound not to expose himself to eminent danger.

I find that the trial court properly analysed the evidence and found that each party had a share of blame for the incident, I cannot fault the trial magistrate for the manner in which liability was apportioned

28. As regards to quantum of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high, or, inordinately low; or, founded on wrong principles. See ***Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR*.**

29. From the medical report of **Dr. S.I Aluda**, the respondent right knee was swollen and tender. He also sustained a fracture of the right patella which had to undergo manipulation. The report concluded that the Respondent sustained severe injuries which had healed, and the occasional pains in the knee should subside with the use of analgesics. There was no significant residual effect.

30. The Appellant complained that the sum awarded was excessive, yet not a single decision dealing with similar injurie, and in which perhaps a lower figure had been awarded as damages, was availed to this court. Consequently, the appellant has not demonstrated that the amount was excessively high or that the trial magistrate’s decision was founded on a wrong principle. The upshot therefore is that the appeal lacks merit and be dismissed with costs to the respondent.

Delivered and dated this 28th day of January 2020 at Eldoret

H. A. OMONDI

JUDGE