



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 2 OF 2014

EASTERN PRODUCE (K) LIMITED.....APPELLANT

-VERSUS-

JOSEPH ATUNGULU NDERE.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court

in Kapsabet PMCC No. 135 of 2011 dated 10 December 2013 by Hon. G. Adhiambo, RM)

JUDGMENT

[1] This appeal arises from the Judgment and Decree of the Principal Magistrate's Court at **Kapsabet in Civil Case No. 135 of 2011: Joseph Atungulu Ndere vs. Eastern Produce (K) Limited**. The Respondent herein was the Plaintiff in the suit, which was filed on **12 April 2011**. His cause of action was that, on or about **13 December 2010**, while on duty as an employee of the Appellant, he fell into an unmarked ditch/hole within the Appellant's tea plantation and thereby sustained injuries. He consequently filed the lower court suit seeking compensation in general and special damages for his pain, suffering and loss of amenities.

[2] The Respondent blamed the Appellant for his injuries contending that it was a term of his employment contract that the Appellant would take all reasonable precautions to ensure his safety while he was engaged in his work; and not expose him to a risk of damage or injury which the Appellant knew or ought to have known. It was further the contention of the Respondent that it was the duty of the Appellant to provide and maintain measures that would enable him carry out his work in a safe environment. Thus, in paragraph 6 of the Plaint dated **7 April 2011**, the Respondent supplied particulars of negligence and breach of duty or care and/or contract on the part of the Appellant, its servants, agents and/or employees.

[3] The Appellant denied the Plaintiff's claim. It basically denied that the Respondent was its employee or that there was a contract of employment between it and the Respondent. The Appellant further denied that an accident occurred as was alleged by the Respondent or that the said accident was due to its negligence or breach of statutory duty on its part. It was further the contention of the Appellant that, if any such accident occurred, then it was due to the sole negligence of the Respondent or was contributed to by him; particulars of which were pleaded in paragraph 6 of the Defence. The Appellant further averred that, in line with the doctrine of *volenti non fit injuria*, the Respondent freely accepted to run the risk of all purely accidental harm foreseeable, connected with and/or incidental to his employment. Thus, the Appellant had prayed before the lower court for the dismissal of the Respondent's suit with costs.

[4] The learned trial magistrate heard the parties and their witnesses and, in her Judgment delivered on her behalf by **Hon. Mosiria, RM**, on **10 December 2013**, she found in favour of the Respondent on liability and awarded her **Kshs. 100,000/=** in general damages and **Kshs. 1,500/=** as special damages. Being aggrieved by that decision, the Appellant lodged this appeal on **9 January 2014** on the following grounds:

[a] That the learned trial Magistrate erred in law and fact in holding the Appellant 100% liable in negligence without considering the evidence and the legal concept of negligence.

[b] That the learned Magistrate erred in law and in fact in failing to take into account the fact that the Respondent was not on duty and/or in the Appellant's employ on the **13 December 2010** as it was an extension of a public holiday.

[c] That the learned trial Magistrate erred in law and in fact in failing to hold that no accident occurred in and/or within the Appellant's premises.

[d] That the learned trial Magistrate erred in law and fact in failing to deal with, and consider all issues raised in the pleadings and

the evidence on record hence, hence an erroneous judgment.

[e] That the learned trial Magistrate erred in law and in fact in contravening the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules**.

[f] That the learned trial Magistrate erred in law and in fact in failing to hold that if at all an accident occurred, the same was not foreseeable; hence it was an inevitable accident.

[g] That the learned trial Magistrate erred in law and fact in failing to dismiss the Respondent's case with costs to the Appellant for want of proof.

[h] That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent had not proved his case on a balance of probabilities as expected by law.

[i] That the learned trial Magistrate erred in law and in fact in failing to consider and apply the provisions of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, and particularly **Sections 107, 108 and 109** thereof.

[j] That in the alternative and without prejudice to the foregoing, the learned trial Magistrate erred in law and fact in failing to hold that the alleged accident, if at all it occurred, was wholly and/or substantially caused by the Respondent's own carelessness and/or negligence while carrying out his duties.

[k] That the learned trial Magistrate erred in awarding damages to the Respondent, which in any event were manifestly excessive as to amount to an erroneous estimate of the loss allegedly suffered by the Respondent.

[5] It was on account of the foregoing grounds that the Appellant prayed that the Judgment of the lower court be set aside and that in lieu thereof there be an order dismissing the Respondent's claim with costs. The appeal was urged by way of written submissions, pursuant to the directions given herein on **28 June 2016**. Thus, in the Appellant's written submissions, filed herein on **29 September 2016**, it was submitted that the lower court's finding on liability was erroneous, unsupported by the evidence adduced and therefore ought to be overturned. According to Counsel, the Appellant adduced overwhelming evidence to prove that the Respondent was not on duty on the date of the alleged accident; and that the trial court failed to consider this crucial evidence, and instead opted to believe the Respondent's version, notwithstanding that he did not avail any witness to corroborate his evidence.

[6] Counsel for the Appellant further urged the Court to find that the particulars of negligence or breach of duty were also not proved by the Respondent; and that, in particular the Respondent failed to demonstrate the connection between the failure by the Appellant to supply him with protective apparel and the accident. The Court was urged to take into consideration that the Respondent had worked for the Appellant for two years; and that he was therefore familiar with the working environment. Hence, it was posited that he ought to have complained to the Appellant about the alleged ditches for preventive action to be taken. It is on this account that Counsel urged the Court to invoke the doctrine of *volenti non fit injuria* and find that the Respondent was the author of his own misfortune.

[7] On quantum, Counsel relied on **Nakuru HCCA No. 99 of 2000: Sokoro Saw Mills Ltd vs. Grace Nduta Ndungu** and **Nairobi HCCA No. 298 of 2012: Vincent Okoso Nyende vs. Shengle Engineering Construction Limited** to support the proposed award of **Kshs. 50,000/=** should the Court find that liability was established. She submitted that, since the injuries alleged are minor soft tissue injuries, the sum awarded by the lower court was manifestly excessive. Counsel otherwise prayed that the appeal be allowed and that the Judgment of the lower court be set aside and substituted with an order of this Court dismissing the Respondent's suit with costs.

[8] **Mr. Yego**, learned Counsel for the Respondent opposed the appeal, contending that the lower court committed no error. He reiterated the Respondent's assertion that the Appellant breached their duty of care to the Respondent by failing to alert him of existing ditches which the Appellant had dug out on the farm, and by failing to supply the Respondent with protective gear which would have mitigated the injury suffered by the Appellant. He urged the Court to find that the Appellant had completely failed to rebut the Respondent's evidence. He pointed out that, not only did the Appellant fail to avail a crucial witness, in the person of the Respondent's supervisor, but that it also failed to produce the Muster Roll, a crucial piece of evidence that would have aided the lower court in coming to its determination.

[9] Counsel for the Respondent relied on **Eldoret HCCA No. 96 of 2010: Eastern Produce (K) Ltd vs. Nicodemus Ndala**, in which the Court (**Hon. Gacheche, J.**) found that the Appellant owed the Respondent a duty of care which was breached when the Appellant failed to cover a hole within the tea plantation, thereby exposing the Respondent to danger. He also relied on **Bungoma HCCRA No. 144 of 2011: Peter Wafula Juma & 2 Others vs. Republic** for the proposition that, when *prima facie* evidence has been presented by the plaintiff, the evidential burden shifts to the defendant who must prove to the contrary by way of rebuttal evidence; and that where the evidential burden is not discharged, judgment may be entered against the defendant. In his submission, the lower court's award was on point and therefore ought to be upheld. He cited **Nairobi HCCA No. 701 of 2001: Joseph Henry Ruhui vs. Attorney General** in which **Kshs. 101,500/=** was awarded for a prick wound on the right leg.

[10] This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court with a view of coming to its own conclusion on the pertinent issues raised before the lower court, while bearing in mind that it neither saw nor heard the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was elucidated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[11] In the light of the foregoing principle, I have carefully considered the evidence that was presented before the lower court. The record of the lower court shows that the Respondent testified as **PW1** on **24 April 2012** and told the court that he was employed by the Appellant as a tea plucker in its **Sitoi Tea Estate**; and that he was on duty on **13 December 2010** when he fell into a ditch as he was carrying tea leaves to the weighing area. It was the Respondent's evidence that he sustained injuries on the chest, left shoulder, back and left leg. He added that his supervisor, one **Murunga**, was accordingly notified and that he gave him a referral note with which to go to the dispensary for treatment.

[12] It was further the testimony of the Respondent that, at the dispensary, he was attended to and given an ointment to apply on his injuries; but that as he was feeling pain, he sought further treatment at **Nandi Hills District Hospital**. In support of his case, the Respondent produced his Pay Slip for **December 2010** as his **Exhibit 1** and identified the treatment card he was given as **Nandi Hills District Hospital (the Plaintiff's Exhibit 2)**. He added that he thereafter visited the clinic of **Dr. Aluda** for examination for which he paid **Kshs. 1,500/=**. The Respondent blamed the Appellant for the accident, for failing to provide him with gum boots and overall; and for failing to place a hazard mark to alert the workers of the holes.

[13] The Respondent called **Simon Kiplagat Rono**, a Clinical Officer at Nandi Hills District Hospital, as **PW2**; and **Dr. Aluda**, a medical practitioner in Eldoret Town as **PW3**. In his evidence, **PW2** stated that he was on duty on **13 December 2010** when the Respondent visited their facility, with a complaint of having fallen down and sustained a cut wound on the left ankle joint. He added that the patient also complained of chest pain and pain on the left shoulder joint. He was treated and given drugs for use. **PW2** produced the treatment card as an exhibit before the lower court.

[14] On his part, **Dr. Aluda (PW3)** confirmed that the Respondent visited his clinic on **23 March 2011** for examination; and that he examined him and prepared a Medical Report to that effect which he produced before the lower court as **the Plaintiff's Exhibit 3a**. He also confirmed that he charged the Respondent **Kshs. 1,500/=** for his services. He produced the receipt he issued as the **Plaintiff's Exhibit 3b**. He testified that the Respondent's injuries were soft tissue in nature and that they had healed at the time of examination.

[15] In resisting the Respondent's claim, the Appellant called two witnesses, namely, **Moses Chesaina (DW1)** and **Carolyne Cheptum Rotich (DW2)**. **DW1** was a supervisor at **Sitoi Tea Estate** at the material time, and he confirmed that the Respondent was indeed employed by the Appellant at the estate as a tea plucker. He however denied that the Respondent was on duty on **13 December 2010** as alleged by him. His evidence was that since **12 December 2010**, a gazetted public holiday, fell on a Sunday, the celebrations were extended to Monday **13 December 2010**; and as such, none of the workers reported for work. It was therefore the evidence of **DW1** that the Respondent was not on duty on the date in question; and to buttress his evidence, **DW1** produced the Attendance Register, referred to as Attendance Checklist, as **Defence's Exhibit 1**. In cross-examination, **DW1** conceded that the Respondent's supervisor at the time was **Joseph Boen**; and that he was not the maker of the Attendance Checklist. He also conceded that he did not avail the Muster Roll for the month of **December 2010** which would have indicated whether the Respondent was present on the date in question.

[16] **Carolyne Cheptum Rotich (DW2)** a Clinical Officer at its **Sitoi Dispensary**, also confirmed that the Respondent was an employee of the Appellant at its **Sitoi Tea Estate**. It was, likewise, her evidence that **13 December 2010** was a Monday and therefore the public holiday of **12 December 2010** was extended. Nevertheless, she reported for duty as usual to deal with any emergencies; and that she attended to only 2 patients; and that the Respondent was neither of them. **DW2** produced the Outpatient Register as the **Defendant's Exhibit 2** before the lower court.

[17] From the foregoing summary of the evidence adduced before the lower court, there appears to be no dispute that the Respondent was, at all times material to the suit, an employee of the Appellant; or that he was one of the Appellant's tea pluckers. The Respondent produced, as **the Plaintiff's Exhibit 1**, his pay slip for the month of **December 2010**, and it does confirm that he performed his duties during that month and was duly paid a salary therefor. Therefore, the key issues that presented themselves before the lower court are:

[a] Whether the Respondent was on duty at the Appellant's **Sitoi Tea Estate** on **13 December 2010**; and if so, whether he was involved in an accident in which he sustained injuries as alleged; and if so,

[b] Whether the Appellant is liable for the injuries sustained by the Respondent.

[c] Whether the lower court's award it is tenable.

[a] On Whether the Respondent was on duty on the 13 December 2010 and whether he was injured as alleged:

[18] There seems to be no dispute that **13 December 2010** was a Monday, and that the Jamhuri Day celebrations of Sunday **12 December 2010**, were extended to **13 December 2010**. It is a common practice in this jurisdiction, of which this Court takes judicial notice. Nevertheless, it has never been obligatory to observe such days as a public holiday. Hence, **DW2** testified that she was on duty on **13 December 2010**, that extension notwithstanding. Granted the contention of the Respondent that he was indeed on duty, the evidential burden was on the Appellant to prove otherwise. In this regard, the Appellant relied on the evidence of **DW1** to prove its assertions; and apart from his assertion that none of the employees of the Appellant worked on **13 December 2010**, **DW1** produced the Attendance Checklist for **1 December 2010 to 31 December 2010**.

[19] It is noteworthy however that, in cross-examination, **DW1** conceded that all that the document shows is that the Respondent was absent on **12 December 2010**; and that there is no indication thereon that **13 December 2010** was an extension of the holiday of **12 December 2010**. He also admitted that, unlike on other dates, such as Sunday **12 December 2010** when workers would ordinarily not report for work, the column for that date would be included in the register, with an indication that the employees were absent, signified by the letters "AB"; yet no column was created for **13 December 2010**. **DW1** had no explanation for this omission and so he conceded that:

"...Yes in the absence of the master roll and in the absence of the column for 13.12.2010 we cannot say with certainty that people were not on duty..."

[20] Further to the foregoing, **DW1** conceded before the lower court that he was not the maker of the Attendance Checklist and therefore could not vouch for its authenticity. More importantly, he conceded that he was not the Respondent's supervisor. This is significant because it left unrebutted the contention by the Respondent that the accident was brought to the attention of his supervisor; who issued him with a referral note to take to the dispensary. In the circumstances, the Appellant not only failed to call the Respondent's supervisor to clarify matters, but also failed to avail the Muster Roll, the one document that would have proved whether or not none of the Appellant's tea pickers, and in particular the Respondent, worked on **13 December 2010**.

[21] The evidence of **DW2** was not of much help either. She conceded in cross-examination that, the diagnosis of the first of the two patients she attended to did not indicate that the injury was sustained at home. She also conceded that the entries for **13 December 2010** in the register that she produced were not made by her; but were made by one **Silas Oriedo**, yet she insisted that she was all alone on duty that day. It is no wonder therefore that the trial court commented on her lack of candour and concluded that her evidence could not furnish the requisite rebuttal to the Respondent's case.

[22] In the premises, the lower court cannot be faulted for coming to the conclusion that the Appellant had failed to rebut the Respondent's assertion that he was on duty at the Appellant's **Sitoi Tea Estate** on **13 December 2010** and that he was injured when he accidentally fell into a ditch in the course of his work.

[b] On whether the Appellant is liable for the Respondent's injury:

[23] In **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** the Court of Appeal restated that:

"...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety..."

[24] The Respondent adduced uncontroverted evidence to show that he was never provided with protective gear, such as gum boots or an overall garment; and that had this been done, his injuries would have avoided or minimized. In the same vein, there was no rebuttal of the assertion by the Respondent that the ditch into which he fell had been dug by and was known to the Appellant and yet no warning at all was given to the plantation workers of its existence.

[25] Apart from the Respondent's evidence that he sustained injuries on the chest, left shoulder, back and left leg, **PW2** produced a treatment card issued to the Respondent at **Nandi Hills District Hospital**. It is dated **13 December 2010** and it gives the history that the patient had fallen down and sustained a cut wound on the left leg with pain on chest, back and left shoulder. Further corroboration was furnished by **Dr. Aluda's** Medical Report dated **23 March 2011**. It shows that, upon examination the Respondent still had slight tenderness on the chest, the left shoulder and the left ankle, which had a scar. In the premises, I would agree with the Learned Trial Magistrate that the Appellant failed in its duty of care towards the Respondent while engaged in the discharge of his duties.

[26] While the Appellant urged the lower court to find that the Respondent was either entirely to blame for the accident or that he substantially contributed thereto, it is noteworthy that neither **DW1** nor **DW2** made any reference to the particulars of negligence enumerated by the Appellant in its Defence dated **11 May 2011**. Accordingly, the Appellant did nothing to demonstrate that the Respondent:

[a] failed to adhere to the set safety rules and precautions;

[b] negligently exposed himself to risk of injury or damage of which he knew or ought to have known;

[c] was supplied with protective gear but failed to carry them with him to work, or that he failed to make proper or any use of the same;

[d] carried out his duties recklessly or negligently;

[e] inflicted the injuries he sustained upon himself.

[27] Having made the allegations of negligence in its Defence, the burden of proof was on the Appellant to supply evidence in proof thereof, for this is the essence of **Section 107(1)** of the *Evidence Act, Chapter 80 of the Laws of Kenya*. It provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[28] In the premises, I would be of the same view as the trial court that there was sufficient material for holding the Appellant liable to the Respondent for the injuries he suffered while performing his duties at the Appellant's farm on **13 December 2010**. I note that Counsel for the Appellant referred the Court to **Statpack Industries vs. James Mbithi Munyao [2005] eKLR**, for the holding that:

"An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly."

[29] There was however no indication from the facts of the case that the Respondent was in any way to blame for his misfortune; or event that the accident was inevitable. The lower court was therefore in order in attributing 100% liability on the Appellant.

[c] On Quantum of Damages

[30] Needless to say that assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere without justifiable cause. Thus, in **Peters vs. Sunday Post Limited [1958] EA 424** it was held that:

"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..."

[31] Likewise, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[32] The trial court, having considered the evidence adduced before it, along with the submissions made by Learned Counsel for the parties and the authorities cited settled on an award of **Kshs. 100,000/=** as General Damages. The lower court also accepted the special damage component of **Kshs. 1,500/=** as having been proved by the receipt marked the **Plaintiff's Exhibit No. 3b**. Thus, other than stating that the award was against the weight of evidence, Counsel for the Appellant failed to show in what sense the award was erroneous. He, however, relied on two authorities to support the submission that an award of **Kshs. 50,000/=** would suffice in the circumstances. I however note that **the Sokoro Saw Mills case** was decided on **24 March 2006** and; while in the case of **Vincent Okoso Nyende vs. Shengle Engineering Construction** involved blunt head injury with nose bleeding, slightly minor injuries in nature. The case was decided on **13 March 2015**, upholding the lower court award of **Kshs. 40,000/=**.

[33] What then, is the correct approach to employ? In this respect, I find instructive the approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, that:

"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."

[34] And in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR**, the Court of Appeal suggested thus:

"...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

[35] As is evident from the summary of the Respondent's evidence herein above, there is no dispute that the injuries suffered by him were soft tissue injuries from which he was expected to fully heal, with no residual disability. The Medical Report prepared by **Dr. Aluda** shows that the Respondent was aged 46 years at the time of the accident. In the light of the foregoing, I have looked at recent awards and note as follows:

[a] In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another [2018] eKLR**, an appeal from an award that was made on **10 December 2015**, the Respondent had been awarded **Kshs. 300,000/=** by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to **Kshs. 100,000/=** in a Judgment delivered on **1 February 2018**.

[b] In **Godwin Ireri vs. Franklin Gitonga [2018] eKLR**, the Respondent had been awarded **Kshs. 300,000/=** as general damages for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced to **Kshs. 90,000/=**.

[c] In **Maimuna Kilungya vs. Motrex Transporters Ltd [2019] eKLR** the Appellant sustained a blunt neck injury, blunt injury to the left shoulder and bruises on the left ear and was expected to recover fully. The lower court awarded **Kshs. 100,000/=** which was enhanced on appeal to **Kshs. 125,000/=**.

[36] In the light of the foregoing, it cannot be said that the lower court's award was excessive. Moreover, in **H. West & Son Ltd vs. Shephard [1964] AC 326**, it was acknowledged that:

"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and

reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

[37] In the premises, I find no reason to disturb the award made by the lower court. The result, therefore is that the lower court's Judgment on both liability and quantum is upheld and the appeal is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL 2020

OLGA SEWE

JUDGE