REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 96 OF 2014

EASTERN PRODUCE (K) LIMITED (KABOSWA TEA ESTATE).....APPELLANT

VERSUS

GABRIEL IKARI DOGARI.....RESPONDENT

(from the judgment and decree of J.K. Ng'arng'ar, SPM

in Hamisi SRM Civil Suit No.29 of 2012

delivered on 5/8/2014)

JUDGMENT

1. The respondent herein sued the appellant at Hamisi court claiming general and special damages after he was injured while working as a tea picker for the appellant. The respondent blamed the appellant for failing to provide him with a safe system of work as a result of which he sustained the injuries. After a full trial, the trial court entered liability for the respondent against the appellant in the ration of 90:10 and awarded damages as follows:

General damages	Ksh. 80,000
Special damages	Ksh. 1,500
	Ksh. 81,500
Less 10%	Ksh. 8,150
	Ksh. 72,350

2. The appellant was aggrieved by the decision of the learned magistrate and filed the instant appeal. The grounds of appeal are that:-

(a) The learned trial magistrate erred by arriving at a finding on liability which was not supported by evidence.

(b) The learned trial magistrate erred in law and fact in basing findings on irrelevant matters.

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

(d) The trial magistrate should have found that there was no basis on which the appellant could be blamed for the incident alleged and injuries sustained.

(e) The learned trial magistrate's assessment of compensation was inappropriate and irregular vis-à-vis the circumstances of the case.

(f) The learned trial magistrate erred on all points of fact and law in as far as both liability and assessment of quantum is concerned.

3. The appeal was opposed by the respondent vide the written submissions of his advocates, **Alwanga & Co. Advocates**.

4. The respondent testified and called one witness in the case. Dr. Aluda PW2. It was the evidence of the respondent that in the year 2009 he was working for the respondent as a tea picker. That on 7.4.2009 at 10a.m. he was taking tea leaves to the weighing centre. It had rained on the previous night and the area around the weighing centre was muddy. That on reaching the place he slipped on a muddy sack that had recklessly been dropped at the place. He fell down and was injured. He had not seen the sack before he stepped on it. His supervisor wrote him a referral note to Kaboswa Dispensary. He went to the dispensary and was treated. He was later attended to at Nandi Hills District Hospital. He was later seen by Dr. Aluda PW2 who prepared a medical report for him. He sued. He blamed the appellant for recklessly leaving the sack at the said place. He had not been supplied with gumboots which would have prevented the fall. During the hearing, he produced a payslip, P.Exh.1, for the month of April 2010 to show that he was working for the appellant. He produced the reference chit for treatment as exhibit P. Exh.2. Dr Aluda produced the medical report as exhibit, P. Exh.4(a).

5. The appellant called 2 witnesses in the case – a field supervisor, DW1 and a nurse in Charge of Kaboswa Dispensary, DW2. It was the evidence of the field supervisor DW1 that he knew the respondent. That in the year 2009 they did not have casual workers as they did not have much tea. That the respondent was employed in the month of April 2010. He denied that the respondent was injured at their premises on 7/4/2009. He produced the attendance register for 1/4/2009 to 16/4/2009 as exhibits, D.Exhibit 1.

6. The nurse DW2 testified that she joined the appellant in 2011. That the company maintains an outpatient register. That the record of 7/4/2009 did not have the name of the respondent. That it was the company rule that anybody injured on duty ought to be seen at the health facility. She produced the outpatient register as exhibit – D.Exhibit 2.

7. In finding for the respondent the trial magistrate referred to paragraph 5 of the appellant's written defense in which the appellant referred to incident that had occurred in the year 2008. The magistrate accordingly held that the appellant's written defence was at variance with their evidence. That the averments in the plaint were not rebutted. That the court believed that the respondent was on duty on 9/4/2009.

8. The advocates for the appellant, **Kibichiy & Co. Advocates** submitted that there was no evidence to prove that the appellant was liable for the injuries arising from the accident or any prevention or precautionary measures that the employer would have done to prevent the accident. That the sack was likely negligently dropped by employees while performing their duty. That no level of employer intervention would have prevented the accident. That the respondent should have observed care and diligence in preventing the accident.

9. Further that the respondent did not prove how failure to provide gumboots was consequential to the accident. That the respondent acknowledged that there were other employees who did not have gum-boots and did not slip. That the respondent did not call the people who witnessed the accident to corroborate his claim.

10. That the respondent's name did not appear in the attendance register D.Exhibit 1. That this proved that he was employed in the year 2010 and not 2009. That DW2 proved that the respondent was not treated at the company dispensary on the material date.

11. Counsel submitted that it was wrong for the trial magistrate to dismiss he appellant's case based on a technicality of an error in the defence without regard to the merit of the case.

12. On quantum it was submitted that the trial magistrate failed to take into consideration the legal principles for award of general damages.

13. The advocates for the respondent on the other hand submitted that the respondent produced a payslip to show that he was working for the appellant. That the documents for the appellant were filed at the defence case stage thereby raising suspicion on the authenticity of the documents. That the documents were prepared with the view of defeating the respondent's case. That the attendance list were said to have been computer generated after a field record had been filed. That the maker of the documents was not called. That there was no evidence led to show that the appellant did not have casual labourers in 2009 or that the respondent was employed in the year 2010.

14. That the respondent produced a note from his supervisor Mr. Omollo to show that he was injured while on duty. That the note has the stamp of the dispensary. That the note was therefore issued by the appellant through the supervisor.

15. That the nurse who produced the outpatient register said that he was not working with the appellant in 2009. Therefore that she is not the one who prepared the register. That the person who prepared the register was not called. That DW2 could not testify on the authenticity of a document that she did not make herself. That it was proved that the respondent was injured while on duty.

16. Counsel submitted that Section 6(1) of the Occupational Safety and Health Act places duty on an employer to ensure safety and welfare of his employees while in the course of duty in the place of work. That the employer is required to provide the necessary safety appliances to ensure that they are not injured. That the respondent proved that he was not supplied with gumboots. That he would not have been hurt if he had gumboots as he would not have slipped on the muddy sack. That there was no evidence that the appellant provided a safe working environment to the respondent.

17. It was submitted that the defence filed by the appellant did not traverse the issues raised by the plaintiff as paragraph 5 of the defense introduced issues not pleaded by the respondent.

18. On quantum counsel submitted that it is clear that the trial magistrate considered the cited cases by both sides, the nature of the injuries suffered, the age of the authorities cited and inflation rate. Counsel urged the court not to interfere with the award.

Analysis and Determination -

19. The duty of the first appellant court was explained in the case of **Abok James Odera T/A A.J. Odera & Advocates -Vs- John Patrick Machira T/A Machira & Co., Advocates (2013) eKLR** as follows:-

> **"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

20. The issues for determination in this appeal are:

1. Whether the trial magistrate erred in her finding on liability.

2. Whether the trial magistrate erred in arriving at her decision on quantum for damages.

Liability -

21. It was the evidence of the respondent that he was injured while performing his duties while in employment of the appellant. An employer has a duty to ensure safety of his employees. The respondent blamed the respondent for breach of duty of care that was owed to him as an employee.

22. The essentials of an action based on a statutory duty are stated in **Clerk & Lindsell on Torts, Eighteenth Edition** at paragraph 11-04 page 600 as follows:-

> **"1. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.**
>
> **2. It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.**
>
> **3. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused his loss, which he will fail to do if the damage would have occurred in any event.**
>
> **4. Finally, there is the question whether there are any defences available to the action."**

23. In **Bonface Muthama Kavita –V- Carton Manufacturers Limited Civil Appeal No. 670 of 2003 (2015) eKLR** Onyancha J. observed that:-

> **"The relationship between the appellant and the respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not expose the employee to an unreasonable risk."**

24. It was the duty of the respondent to prove that he was an employee for the appellant at the time of the accident and that there was breach of duty of care on the part of the appellant.

25. The standard of proof in civil cases is on a balance of probabilities. Section 107 of the Evidence Act places the burden of proof on a person who asserts the existence of facts to prove that those facts exist. Section 108 of the same provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence was called on either side.

26. The respondent herein stated that he was working for the appellant in the year 2009. The appellant on the other hand stated that the respondent was employed in the year 2010 and that he was not working for the appellant in April 2009.

27. The respondent in paragraph 3 of the plaint pleaded that at the material time he was employed by the defendant as a casual labourer at Kaboswa Estate where he was engaged as a tea plucker. In the written defence the appellant pleaded as follows:-

> **"The defendant denies in toto the contents of paragraph 3 of the plaint and particularly that the plaintiff was the defendant's employee at Sitoi Tea Estate working as a tea picker or all. Strict proof therefore is invited."**

28. The respondent further pleaded in paragraph 5 of the plaint that on or about 7th April 2009 the plaintiff while on duty, due to breach of contract of employment and breach of duty of care by the defendant and/or its servants, agents or other employees, the plaintiff was seriously injured while taking tea to the weighing place. In response to that the appellant stated as follows in paragraph 5 of the defence:-

> **"The defendant denies the contents of paragraph 5 of the plaint particularly that on or about 13th August 2008, the plaintiff while engaging in his lawful assigned duties, due to breach of contract of employment and/or breach of statutory duty and/or breach of common law duty of care by the defendant and/or its servants, agents and other employees, the**

plaintiff was seriously injured when he was felling trees using a power saw at the defendant's forest for drying of tea leaves."

29. Rule 11 of order 2 of the Civil Procedure Rules provides as follows:

"(1) Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it.
(2) A traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication.
(3) Subject to subrule (4), every allegation of fact made in a plaint or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by him in his defence or defence to counterclaim; and a general denial of such allegations, or a general statement of non-admission of them, shall not be a sufficient traverse of them.
(4) Any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been traversed unless specifically admitted."

30. The respondent pleaded that he was the appellant's employee at Kaboswa Estate. The appellant never denied that the respondent was their employee at Kaboswa Estate. They instead denied that he was their employee at Sitoi Tea Estate. The appellant thereafter in their evidence in court denied that the respondent was their employee at Kaboswa Estate in the year 2009. They adduced evidence that he was employed there in April 2010. The appellant did not traverse the pleadings of the respondent that he was their employee at Kaboswa Estate. To adduce contrary evidence during the hearing amounted to nothing. This was evidence based on a matter that was not pleaded. There was then no basis for them denying that the respondent was their employee in the month of April 2009. As the respondent's employment status was not traversed it amounted to an admission that he was their employee at Kaboswa Tea Estate. I am in agreement with the trial magistrate that there was no denial of the respondent's employment status in the appellant's statement of defence.

31. The respondent did not produce any document to show that he was working for the appellant in April 2009. He produced a payslip for the month of April 2010. The respondent however produced an injury reference chit – Pexhibit 2 signed by the supervisor Mr. Omollo showing that he was working for the appellant on 7/4/2009 and that he was injured while on duty. There was no denial that Mr. Omollo was an employee for the appellant. This coupled with the fact that the employment status of the respondent was not traversed proved that the respondent was an employee for appellant in the month of April 2009.

32. Similarly, the pleadings of the respondent in paragraph 5 of the plaint were not traversed. Instead the appellant denied that the respondent was injured on 13/8/2009 when felling trees which was not the issue pleaded by the respondent. The fact of injury of the respondent while taking tea leaves to the weighing area was not traversed. To adduce contrary evidence to what was not pleaded amounted to hot air. The attendance register produced by the appellant's witness DW1 was for permanent employees. DW's name did not appear in the register which meant that that was the comprehensive register for all the employees. There cannot have been any truth that the respondent was not working for the appellant in April 2009.

33. The referral injury chit that the respondent produced showed that he was injured while working for the appellant. It bore the stamp of the appellant and signed by a supervisor by the name of Omollo whom the appellant never called to respond to the evidence. The respondent further produced treatment notes showing that he was thereafter treated of the injuries at Nandi Hills District Hospital. The nurse called by the appellant DW2 was not working at the dispensary in the year 2009. She cannot thereby know the treatment procedure employed by the appellant in the year 2009. Besides both the attendance register, D.Exhibit 1 and the dispensary register, D.Exhibit 2 had not been filed in court before both witnesses DW1 and DW2 testified in court. Rule 5 of Order 7 of the Civil Procedure Rules requires a party when filing a defence to file copies of documents to be relied on at the trial. The said documents were filed in court after DW1 and DW2 had testified in the case. They were not available in court when the respondent ad his witnesses testified in court. The documents are therefore suspect. I am in agreement with the trial magistrate that the respondent had proved that he was injured while on duty at the appellant's premises.

34. The appellant testified that he stepped on a muddy sack at the weighing in area that caused him to fall. He stated that it had rained and the area had been muddied up by many workers who were taking tea leaves to the weighing-in area.

35. It was the duty of the appellant to ensure that the paths to and from the weighing-in area were free from mud during the rainy season. If this was not so there was a possibility of a worker slipping and falling down due to the mud. It was also the duty of the employer to ensure that the area was free from any droppings that could cause a worker to slip during the rainy season. The respondent herein slipped on a muddy sack that had been dropped in the weigh-in area. The appellant was in breach of duty of ensuring the safety of its workers by failing to do so.

36. It is also the duty of an employer to provide an employee with safety appliances. The respondent stated that he was not supplied with gumboots. The appellant did not show otherwise. The respondent therefore failed in its duty in failing to supply the respondent with gumboots. It is possible that gumboots could have prevented a fall in a muddy place.

37. On the other hand it is also the duty of a worker to keep a proper look out when at work to avoid being injured. In the case of **Purity Wambui Muriithi -V- Highland Mineral Water Co. Limited (2015) eKLR** the court of Appeal held that:-

"Section 6(1) of the Occupational Safety & Accident Act provides:-

"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."

It, therefore, follows that as 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 that safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employee's own negligence it would be unfair to hold the employer liable. Further Section 13(1)

(a) of the Occupational Safety and Health Act provides:

"13(1) Every employee shall, while at work place –

> **(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at workplace."**

38. In **Statpack Industries –V- James Mbithi Munya (2005) eKLR** Visram, J. (as he then was) held that an employer's duty at common law is to take all reasonable steps to ensure the employee's safety but that he cannot bay-sit an employee nor is he expected to watch over the employee constantly.

39. An employee therefore has a corresponding duty to ensure his own safety while at work. The respondent herein contributed to his own fall by failing to keep a proper look out. I find that the apportionment of liability between the appellant and the respondent at the ratio of 90:10 was not shown to be unreasonable or unwarranted. The trial magistrate did not err on her finding liability.

Quantum -

40. The respondent stated that he was injured on the back. The medical report of Dr. Aluda was that the respondent had sustained a blunt trauma to the spinal column which was tender. That he had severe pain incurred during and after the injury. At the time of examination over a year after the injury, he complained of occasional pains in the spinal column.

41. The trial magistrate awarded Ksh.80,000/= in general damages and Ksh.1500/= in special damages. An appellate court can only interfere on an award of general damages on grounds set out in **Butt -V– Khan (1977) 1 KAR 1** where it was held that:

> **"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely 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."**

42. The respondent's advocate had in the lower court proposed Ksh.200,000/= in general damages. They had relied on the case of **Agriculture Finance Corporation & Another -V- David Kariuki Kithinji,** Meru HCCA No. 53 of 2016 where Kasango J. upheld an award of Ksh.100,000/= in general damages for bruises on the right scapula, bruises on the lower back and bruises on the left ankle. Counsel also cited the case of **Catherine Wanjiru Kingpri & 3 Others -V- Gibson Theuri Gichubi (2005) eKLR** where general damages ranging from Ksh.100,000/= to Ksh.350,000/= were awarded. The 2nd plaintiff in that case was awarded Ksh.100,000/= for injuries on the back.

43. The advocate for the appellant had made submissions in support of Ksh.20,000/=. They cited the cases of **David Okoka Odera -V- Kilindini Tea Warehouses Limited (2008) eKLR** where Ksh.40,000/= was awarded where the appellant had sustained minor soft tissue injuries of the lumber sacral spine, **Sokoro Saw Mills Limited -V- Grace Nduta Ndungu** (2008) eKLR where an award of Ksh.80,000/= was reduced on appeal to Ksh.30,000/= for soft issue injuries and **Elizaphan Ndito Kareti -V- Charles Maina Kimani (2009) eKLR** where Ksh.40,000/= was awarded for minor soft tissue injuries.

44. I have considered damages awarded in other cases. In **Hassan Farid & Another –V- Sataiya Ene Mepukori & 6 Others (2018) eKLR** the appellant sustained cut wounds on the forehead, the occipital region and blunt injuries to the chest and back. The court made an award of Ksh. 80,000/=. In **Nyambati Nyaswabu Erick –Vs- Toyota Kenya Limited & 2 Others (2019) eKLR** the appellant sustained a cut wound on the scalp and blunt injury to the chest. The court made an award of Ksh. 90,000/=.

45. Dr. Aluda described the respondent's injuries as severe but noted that they had healed but for occasional pains. It has not been shown that the award of Ksh.80,000/= was inordinate or that it represented an erroneous estimate of the damages. The award of Ksh. 80,000/= in general damages and Ksh.1500/= in special damages is upheld.

46. The upshot is that there is no merit in the appeal. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. N. NJAGI

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court Assistant - Polycap

30 days right of appeal.