



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO.18 'B' OF 2000

EASTERN PRODUCE (K) LTD.....APPELLANT

V

EZEKIEL INGATI SHIGOLIGO.....RESPONDENT

(An appeal from judgment and decree in Kapsabet PMCC 148 of 2000 by F.M. Kinyanjui delivered on 20/01/2000)

JUDGMENT

1. The appellant (**EASTERN PRODUCE (K) LTD**) had been sued by the respondent (**EZEKIEL INGATI SHIGOLIGO**) in the lower court for damages where he sustained injury to his right leg on the 13th December 1995, having been assigned to pick leaves at **Savani Tea Estate** when he was pierced by a sharp dry branch from a plant. The respondent alleged that the appellant had failed to take all reasonable precautions for his safety while he was engaged at work, not to expose him to risk of injury or damage.

The respondent attributed the injury to the negligence on the appellant.

2. The appellant denied negligence and attributed the injury if at all it occurred to the respondent himself, and that in any event the respondent did not report the accident.

3. The matter proceeded to hearing and according to the respondent, the accident occurred, he was picking tea from the tea bushes when he was pricked by a dry branch which could not be seen as it was below the tea table. He explained that the tea bushes had not been pruned in a long time, and blamed the appellant for not providing a safe working environment or protective gears, which could have cushioned him from harm.

4. The appellant's witness (DW1) a supervisor testified that he was on duty on 13/12/2005 and never received any report that the respondent had been injured. Further that the procedure at work was that whenever an accident occurred a supervisor would write a chit to enable the injured worker to go to the dispensary. It was his evidence that the respondent had not been injured while on duty as the respondent nor had he reported on duty. That in any event the respondent had not produced any clinical notes from Savani dispensary and a chit from the supervisor.

5. The trial court upon considering the evidence held that the appellant was negligent and thus liable, but found that the respondent had contributed to his misfortunes. Judgment was delivered in favor of the respondent as against the appellant on liability in the ratio of 80:20 and quantum awarded at **Ksh 70,000/= less 20% to give a net sum of Ksh 56,000/=**. The appellant was aggrieved by this judgment and filed an appeal.

6. The grounds of appeal that:

i. The trial magistrate erred in law and in fact in failing to hold that the plaintiff's suit disclosed no reasonable cause of action the evidence having contradicted the pleadings.

ii. The trial magistrate erred in law and in fact in entering judgment in favor of the plaintiff notwithstanding lack of evidence to support such judgment

iii. The trial magistrate erred in law and fact in failing to hold that there was no evidence to show that the plaintiff was injured on duty on 13.12.98 or at all

iv. The learned trial magistrate erred in law and fact in failing to uphold the defence evidence which clearly showed that the alleged accident herein was questionable

v. The learned trial magistrate erred in law and fact in failing to find that failure by the plaintiff to reply to the defence in time or at all constituted an admission by the plaintiff of the defence

vi. The learned trial magistrate erred in law and fact in awarding damages to the plaintiff notwithstanding lack of evidence on which to base the award.

vii. The learned trial magistrate erred in law and fact in awarding an amount which was so high as to amount to a gross overstatement of the injuries allegedly suffered.

7. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's submitted that the respondent did not establish his claim as he did not demonstrate that gumboots were necessary in the performance of his duties. The duty of care of an employer to ensure safety of an employee was not absolute and it was one of reasonable care against a foreseeable risk. That the trial court had erred to find them 80% liable yet they had taken precaution by trimming the tea bushes. The appellant insists that the accident was not foreseeable but the court held them liable, drawing from the decision in **Maji Mazuri Flowers Ltd v. Samuel Momanyi Kioko [2016] eKLR**, the court opined that the duty of the employer to ensure the safety of an employee was not absolute.

8. Further the respondent knew the risk involved in the job and he had accepted to take the risk. His allegation that the appellant had failed to provide him with gumboots was not supported by his evidence as he had failed to show how the gumboots would have helped him in his work. That in any case, the respondent was also required to take precaution while at work as provided under **section 13(1) (a) of the Occupational Safety and Health Act, 2007** finding a footing in the holding by the Court of Appeal in **Purity Wambui Muriithi v. Highlands Mineral Water Co. Ltd [2015] eKLR** and also **South Nyanza Co. Ltd v. Enock Mauti Nyandoro [2011] eKLR**.

9. In addition, the court had failed to give reasons for finding them 80% liable as required by **Order 21 rule 4 of the Civil Procedure Rules 2010** and without taking into account all the evidence adduced in totality.

10. The appellant also argues that the respondent was awarded damages that he did not prove, as the treatment document from **Nandi District Hospital** showed he was treated two weeks after the occurrence of the accident, and he failed to show that he was treated or referred to Savani dispensary. It is pointed out that the said treatment chit did not show the injuries he was being treated for and they failed to call a doctor to clarify on the same. Further, that the injuries in the pleadings were from a medical report prepared 4 months after the injury, and indicated that the respondent had sustained multiple scars and wounds on the leg. Also, that the doctor who prepared the report was not the treating doctor and the trial court could not base its award on it yet the injuries had not been proved.

11. Counsel for the respondent pointed out that this appeal had taken really long to be heard and they had put all efforts to have it heard, the file had gotten lost and they were unable to trace it. That the decretal sum of Ksh 56000/= and costs of Ksh 27,155/= was deposited in a fixed deposit account opened in the joint names of the parties' counsel.

12. It is their submission that this court has the inherent power under **section 3A of the Civil Procedure Act** to compensate the respondent for the suffering of having the appeal be heard and referred the court to **Machakos Ranching Ltd v. Joseph Wambua, Machakos HCCA no. 41/2008**.

Basically the respondent addressed the court on merits of striking out the appeal, and not the appeal itself.

Analysis and determination

13. The issues that arise for determination are:

- i. Whether the respondent was injured while at work**
- ii. If so whether the appellant is liable and to what extent**
- iii. What compensation is adequate for the injuries sustained.**
- iv. Costs and interest payable.**

14. This being a court of first appeal has a duty to reassess, analyze and make its own independent conclusion, keeping in mind that it did not have the opportunity to hear and see the parties as they gave evidence as was held in **Selle & anor v. Associated Motor Boat Co. Ltd & anor (1968) EA 123**.

15. The respondent cited negligence on the part of the appellant by breaching the terms of the contract. The respondent averred that he was pricked by a dry tea branch, he showed his supervisor who told him to wash with hot water. He went to the dispensary the following day and after 7 days he was told to go to Nandi hospital. He produced this treatment chit but there was no treatment chit from the dispensary.

16. This is denied by the supervisor **Charles Ndung'u** who claimed that he did not receive any injury complaint. On cross-examination he confirmed that the respondent had been injured but he did not know how he had been injured.

17. The onus of proof in civil cases is on the plaintiff (respondent). The respondent has alleged he had been injured and the supervisor being

the appellant's employee confirmed to the court. Thus the plaintiff had been injured on 13.12 1995 was correct.

18. The question to be answered is whether the appellant was liable for this injury. The respondent had given evidence that the appellant had not pruned the tea bushes - this on the part of the appellant was duty of care. The Labour Officer at Nandi District (**PW3**), testified that he received an injury report in respect of the respondent, on the material date, and produced the **Workman's Compensation form (EX5)** which indicated that the respondent was injured on 13th December 1995) I find that the respondent on a balance of probabilities, proved that he was injured on the material date.

19. The respondent was however required to be careful while carrying out his duty as assigned by the appellant. The court is in agreement with the decision in **Maji Mazuri Flowers Ltd v. Samuel Momanyi Kioko** (supra) that the duty of the employer is to ensure safety at the workplace and the same was not absolute. The accident had occurred while on duty and the appellant had played his role by pruning the tea bushes it was then the respondent to be extra cautious not to hurt or injure himself since the employer could not stand there and watch over him. In **Amalgamated Saw Mills vs. David K. Kariuki [2016] eKLR** where Mulwa J. in dismissing the appeal held:

“An employer cannot babysit an employee especially in manual tasks that need no special training or supervision. He must work and at the same time take precautions on his own security and safety”.

20. The above sentiments were also echoed by Koome, J (as she then was) in **Samson Emuru vs. Ol Suswa Farm Ltd, Nakuru HCCA No. 6 of 2003** that:

“The duty of the employers to provide the servant with a safe place of work not merely to warn against unusual dangers known to them, ... but also to make the place of employment...as safe as the exercise of reasonable skill and care would permit...The duty thus described is a higher... the master is under a duty to make his servants to take reasonable steps to avoid harm arise.”

21. The respondent on the other hand owed a duty to himself now that the employer had taken precaution to trim the tea bushes. He could have avoided the accident, by taking reasonable measures, as this was in fact a foreseeable risk, since he was aware that the unpruned bushes were below.

22. It is my finding that the trial court did not err in finding the appellant liable for the accident and apportioning liability on the respondent since he had to be extra careful knowing that the tea had been pruned just recently.

23. Indeed, the appellant could not have compensated the respondent if at all he had not been injured. The amount of Ksh. 5697.10 had been paid to the respondent and the same had been deducted.

24. The respondent had pleaded the following injuries:

- i. Pierced leg
- ii. Swollen leg with multiple scars
- iii. Complicated polymyositis
- iv. Disability of 80%

25. The chit from Nandi District hospital showed a septic wound, contrary to the appellant's submission that this chit had not shown any injury. The examining doctor had found that the leg was still swollen and it had formed wounds. It is clear that the injury sustained was a wound on his right leg.

26. The trial court had awarded ksh70,000/= as general damages less contributory negligence and the compensation already paid to the respondent. In **Butt v. Khan (1982-1988) KAR 1** the Court of Appeal opined as follows in disturbing an award by the court

“an appellate court will not disturb an award of damages unless it is so 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.”

I detect no error in principles or misapprehension of the evidence regarding material ingredients to be considered, on the part of the trial court. The sum awarded bearing in mind the nature of the injuries, was in my view neither inordinately high or low as to represent an entirely erroneous estimate and the trial court did not err in making the award.

The appeal lacks merit and is dismissed with costs to the respondent.

E-Delivered and dated this 28th day of October 2020 at Eldoret

H. A. OMONDI

JUDGE

Miss Odwa for Respondent

N/A of Appellant at 8.50am