REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 110 OF 2012.

EASTERN PRODUCE (K) LIMITED

(KAPSUMBEIWA TEA ESTATE).....APPELLANT

VERSUS

STEPHEN INYASA MAKHAYA.....RESPONDENT

(*from the Judgment and decree of E.W. Muleka, RM in Hamisi PMC*

*Civil Suit No. 17 of 2012 dated 1/11/2012***)**

J U D G M E N T

1. The respondent herein had sued the appellant at the lower court claiming damages after the respondent was injured while working in employment of the appellant as a tea picker at the appellant's Kapsumbeiwa Estate. The respondent blamed the appellant for failing to provide him with a safe system of work and also for breaching its duty of care as a result of which the respondent was involved in an accident thereby sustaining injuries. The trial court in its judgment apportioned liability between the parties at 80% for the appellant and 20% contributory negligence by the respondent. The magistrate awarded the respondent Ksh.170,000/= in general damages with costs of the suit and interest. The appellant was dissatisfied with the judgment of the learned trial magistrate and filed this appeal against findings on both liability and quantum.

2. The grounds of appeal are that:

1. The learned trial magistrate erred in law and fact in failing to hold that the respondent's case was not proved on a balance of probability as required by law.

2. The learned trial magistrate erred in failing to judiciously evaluate the evidence tendered.

3. The trial magistrate misconceived the claim under litigation by deeming it a breach of contract and thereafter proceeded on wrong analysis.

4. The learned magistrate erred on all points of fact and law in as far as the award of damages is concerned.

5. The learned trial magistrate erred in law in fact in failing to apportion liability judiciously.

6. The learned trial magistrate's award of damages was inordinately too high and manifestly excessive for the injuries allegedly suffered.

7. The learned trial magistrate erred in law and in fact in failing to dismiss the respondent's case.

8. The learned trial magistrate erred in law and in fact in disregarding the formidable defence evidence and/or submissions tendered.

3. The appeal was opposed by the respondent through their advocates, **D.K. Korir & Associates.**

Case for Respondent

4. The case for the respondent was that on the 28/10/2008 he was picking tea as an employee of the appellant when he fell into a ditch and was injured on the right leg. He went for treatment at Nandi Hills District Hospital. Later on the 28/1/2012 he was seen by a doctor Aluda who prepared for him a medical report. He sued the appellant. During the hearing of the case in court he produced treatment notes from Nandi Hills District Hospital and the medical report of Dr. Aluda as exhibits, Pex 2 and 3 respectively.

Defence Case

5. The appellant denied the claim in toto. They pleaded in the alternative that the accident was solely or substantially contributed to by the negligence of the respondent.

6. The appellant called two witnesses - **David Cheruiyot** DW 1 and **Samuel Langat** DW2. Dw1 testified that he was working for the appellant at the said estate as a field supervisor. That on the material day he was at work. The respondent was on duty as a tea picker. He was supervising him. They worked upto 4.30 pm. He denied that the respondent was injured on that day while at work. He further added that whenever a worker is injured he gives him a note to go to the company dispensary which he di not do in the respondent's case.

7. Samuel Langat DW2 testified that he works for the appellant as a nurse. That at the time of the alleged incident he was based at another estate of the appellant. He was transferred to Kapsumbeiwa estate after the incident in issue had taken place. That at the office there was a record of the patients who were treated at the company's dispensary on 21/10/08. The name of the respondent was not among the patients who were treated at the dispensary on that day. He produced an extract of the record as exhibit, D Ex1.

Submissions

8. The advocates for the appellant, **Kibichy & company Advocates,** submitted on liability that the trial court erred in finding the appellant liable for the accident when no evidence was adduced to demonstrate negligence on the part of the appellant. Further that the respondent failed to demonstrate to the court that he was injured in the course of his employment. That the appellant's witnesses Dw1 proved that the respondent was not injured on the material day while Dw2 proved that the respondent did not attend dispensary for treatment on the alleged date of the injury. That the learned trial magistrate wrongly ignored the evidence of the defence witnesses and erroneously held against the appellant when all testimony pointed to the fact that the respondent was not injured. Further that the respondent did not call an eye witness to corroborate his testimony.

9. The advocates for the respondent on the other hand submitted that the respondent was injured while in the course of his employment. That the respondent was taken to the company dispensary but was immediately referred to Nandi Hills District Hospital where he was treated and discharged. That it should therefore be noted that the respondent was not treated at the company dispensary. That the treatment card from Nandi Hills District Hospital and Dr. Aluda's medical report proved that the respondent was injured while at work. That the appellant was negligent and was solely to blame for the accident. Therefore that the finding on liability by the trial magistrate should be upheld.

10. On quantum, the advocates for the respondent submitted that the award made by the trial court is a fair estimate of the damage. There was no evidence that the trial court either took into account an irrelevant factor or left out a relevant one or that the amount is inordinately high.

10. The advocates for the appellant had in the lower court not made any submissions on quantum. In this appeal they submitted that the amount awarded by the trial court was inordinately high and an erroneous estimate of the damages.

Analysis and Determination

11. This is a first appeal. It is the duty of a first appellate court to re -evaluate afresh and analyse the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify- see **Selle & Another Vs Associated Motor Boat Company Limited & Another 1968 EA 123** and **Abok James odera t/a A.J. Odera & Co. Advocates Vs John Patrick Machira t/a Machira & Co. Advocates (2012) eKLR.** The appeal is on both liability and on quantum.

Question of liability

12.The learned trial magistrate decided on the issue of liability in a few sentences as evidenced below:

> ***" I have carefully considered the evidence on record and the circumstance surrounding the plaintiff's injury. I do find that the plaintiff has proved his case on a balance of probability. However, the plaintiff ought to have been careful in discharging his duties. Had he been careful, probably he would not have been injured. The defendant on its part ought to have provided the plaintiff with protective gear that is gumboots that would probably have prevented the accident. I therefore apportion liability at 80:20. The defendant shall bear 80% liability while the plaintiff shall bear 20% liability.***

It is apparent from judgment that the learned magistrate did not give reasons as to why he held that the respondent had been injured while at work which was part of the dispute between the parties.

13. The respondent stated in his evidence that he was picking tea when he fell into a hole and was pricked by a stick. That he went to Nandi Hills District Hospital but he was not treated there as they were asking for money that he did not have. That he was treated by Dr. Aluda at Eldoret Town who gave him drugs and an injection.

14. The appellant's witness DW1 insisted that the respondent worked upto 4.30 PM. That they usually weighed the tea that each worker had plucked. However the witness did not produce the tea plucking record to prove that the respondent worked upto the end without any mishap. The respondent was not questioned during cross – examination as to whether he was a t work to the very end. I doubt that Dw1 was telling

the truth.

15. In his pleadings, the respondent has stated in his written statement that after the injury he was taken to the company's dispensary where he was immediately referred to Nandi hills District Hospital where he was treated and discharged. The respondent did not state in the statement that he was treated at the appellant's dispensary. When he gave his evidence in court he did not say that he was treated at the said place. The advocates for the appellant did not ask him whether he was treated there or whether his details were taken down before he was referred to Nandi Hills District Hospital. He was not asked why his name was missing from the out- patient register.

16. The record produced by Dw2 is an out -patient register for the workers who attended the company's dispensary. What is the procedure where an injured person has to be referred to another hospital? Is there a separate referral register? As the respondent had stated that he was not attended to at the company's dispensary, the burden of proof had shifted to the appellant to prove that even in case of a referral and the injured person had to be entered in the out- patient register. There was no such evidence. Dw2 was not there at the time of the incident. He cannot know whether the nurse who was there at the time just referred the respondent to Nandi Hills District Hospital without entering his name in the ou-tpatient register. The fact the respondent's name is not in the out- patient register did not by itself prove that the respondent was not injured on the material day while working for the appellant. The respondent had proved on a balance of probability that he was injured while working for the respondent.

18. The appellant owed the respondent a duty of care not to expose him to danger that was foreseeable. In **Boniface Muthama Kavita vs Carton Manufactures Limited Civil Appeal No. 670 of 2003(2015) eKLR** it was 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.***

19. The respondents evidence was that he fell into a ditch whereby he sustained injuries. It was the duty of the appellant to ensure that there were no ditches along the tea picking paths that could endanger the lives of tea pickers. The appellant breached this duty of care. The appellant was thereby liable for the injuries occasioned to the appellant.

20. The trial court found the respondent to have contributed to the occurrence of the accident in that he was not careful in the course of his duties. That had he been careful he might not have been injured. The respondent had the duty to check his pathways well to avoid any fall. In failing to do so he is partly to blame and thereby contributed to the occurrence of the accident. It is my considered view that the apportionment on liability at 80:20 in favour of the respondent against the appellant was proper.

Quantum

21. According to the medical report prepared by Dr. Aluda the respondent had sustained swellings, tenderness and a deep cut wound on the right leg and dislocation of the right knee joint.

22. The advocates for the respondent had at the lower court relied on two authorities where the injuries involved were fractures whose awards were above Kshs. 400,000/=. In the instant case there were no fractures. The respondent had sustained soft tissue injuries. The authorities cited by the advocates for the respondent had in that case little relevance with the injuries sustained by the respondent. In this appeal the advocates did not cite any authorities on quantum.

23. The advocates for the appellant in this appeal referred to the following authorities:

- **Robert Ngari Gateri Vs Maningo Transporters (2005) eKLR** where the High court awarded Kshs. 60,000/= for soft tissue injuries of the lower chest, left elbow and right buttock.

- **Sokoro Saw Mills Limited vs Grace Nduta (2006) eKLR** where the amount awarded by the lower court was reduced by the High Court from kshs. 80,000/= to Kshs. 30,000/= for soft tissue injuries to the right hip joint and back.

- **Peter Kahungu & Another Vs Sarah Norah Ongaro(2004**)eKLR where the High court reduced the award from Ksh. 150,000/= to Kshs. 80,000/= where the respondent had sustained cracked left upper molar tooth, bruises on both knees and blunt trauma to the back.

24. The trial magistrate in this case did not give reasons why he awarded a sum of Ksh. 170,000/= when the authorities placed before him were for fractures which were not comparable with the injuries that were before him. He did not cite comparative authorities to support the award that he made. This is a necessary requirement when assessing damages as was stated by the Court of Appeal in **Shabani Vs City Council of Nairobi (1985) KLR 516** that**:**

- ***" There is no doubt that some degree of uniformity must be sought in the award of damages and the best guide in respect is to have regard to recent awards in comparable cases in local courts".***

25. This court can disturb an award of damages made by a lower court where it is demonstrated that the award is inordinately high or low or was based on some wrong principles or on a misapprehension of the evidence- **Shabani Vs City Council of Nairobi (**supra). In failing to consider comparative authorities to support the award that he made the trial magistrate acted on wrong principles with the result that the award he arrived at was inordinately high. This court has reason to interfere with the award.

26. The respondent had sustained soft tissue injuries together with dislocation of the right knee joint. The authorities cited by the advocates

for the appellant did not involve any bone dislocation which in my view is a more serious injury than mere bruises. I have on my own looked at some more relevant authorities. In **Charles Ochieng Ogola Vs Bhole Kondele Limited (2017) eKLR**, the appellant had sustained injuries to the neck, back, chest, left shoulder, right knee joint and dislocation of the right knee joint. The High Court on appeal enhanced the award to Kshs. 100,000/= from Ksh. 70,000/=. In **Nyayo Tea Zones Development corporation Vs Catherine Mboga (2017) eKLR** and in **Nyayo Tea Zones Development corporation Vs Sarah Muhonja Makwaka (2017) eKLR,** the Employment and Labour Relations Court upheld awards of Kshs. 80,000/= to the respective respondents who had sustained dislocation of the right leg and dislocation of the right ankle joint respectively.

27. Upon considering the awards referred to above where the injuries involved bone dislocation as was the respondent herein and also considering that the respondent had sustained a deep cut wound on the right leg, I am of the considered view that an award of Kshs. 110,000/= is sufficient compensation.

28. The upshot is that the appeal on liability is dismissed while the appeal on quantum is partly successful. The award is reduced to Kshs. 110,000/= less the respondent's contributory negligence of 20%. The respondent to have the costs of the appeal.

Delivered and dated in open court at Kakamega this 21st day of February,2019.

J.NJAGI

JUDGE

In the presence of :

N/A.....for appellant

N/A.....for respondent

Appellant .....Absent

Respondent .....Absent

Court assistant.....George

30 day Right of Right.