REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 39 OF 2014

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

-VERSUS-

VINCENT SHITIAVAI AMALEMBA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court in Kapsabet PMCC No. 107 of 2011 dated 27 February 2014 by Hon. B.N. Mosiria, PM)

JUDGMENT

[1] This appeal arises from the decision of the Principal Magistrate at Kapsabet Law Courts, **Hon. B.N Mosiria**, in **Kapsabet PMCC No. 107 of 2011: Vincent Shitiavai Amalemba vs. Eastern Produce (K) Limited.** It was a claim for Special and General Damages, costs and any other relief deemed fit by the lower court, premised upon an alleged an accident that was alleged to have occurred on **27 June 2010** involving **Vincent Shitiavai Amalemba**, the Respondent herein. It was the contention of the Respondent in his Plaint dated **21 March 2011,** that on or about **27 June 2010**, while engaged in his lawfully assigned duties as an employee of the Appellant, he was seriously injured when he slipped and fell into an unmarked ditch/hole, and was pricked by a tea stump within the tea farm.

[2] According to the Respondent, it was a term of the contract of employment between it and the Defendant that the Defendant was to take all reasonable measures for his safety while he was engaged upon his work as a tea plucker, and not expose him to risks or damage or injury of which the Defendant knew or ought to have known; to provide and/or maintain adequate and suitable appliances to enable him carry out his work safely; to take all reasonable steps to ensure that his work place was safe. He further averred that the Appellant did not honour its obligations to him and that the accident in question was caused solely by reason of breach of common law and/or statutory duty of care and/or breach of contract of employment and/or terms thereof on the part of the Appellant, its servants, agents and/or employees.

[3] Although the Appellant denied the Plaintiff's allegations and attributed fraud to him in connection with his claim, the lower court found in favour of the Respondent on liability and quantum. Thus, in the result, the lower court entered Judgment for the Plaintiff in the sum of **Kshs. 101,500/=,** comprised of General Damages of **Kshs. 100,000/=** and Special Damages of **Kshs. 1,500/=;** plus costs and interest. Being aggrieved by that decision, the Appellant lodged this appeal on **28 March 2014** on the following grounds:

[a] That the Learned Magistrate erred both in law and fact in pronouncing Judgment in favour of the Respondent on liability when there was no legal basis for doing so;

[b] That the Learned Magistrate erred both in fact and law by pronouncing Judgment in favour of the Respondent despite the fact that the Respondent had not proved the Appellant's liability on a balance of probabilities;

[c] That the Learned Magistrate erred both in fact and law by disregarding the documentary evidence produced by the Appellant without any proper basis, and as a result thereof she reached a wrong decision on liability;

[d] That the Learned Magistrate erred both in law by holding that the Respondent had proved liability as against the Appellant on a balance of probabilities despite the fact that the legal basis for liability was not established or proved;

[e] That the Learned Magistrate erred both in law and fact by failing to take into account relevant factors and as a result, her decision is wrong;

[f] That the Learned Magistrate erred both in law and fact by taking into account irrelevant and extraneous factors, hence reaching an erroneous verdict;

[g] That the Learned Trial Magistrate misapprehended the evidence on record, and that she consequently reached a wrong decision;

[h] That the Learned Trial Magistrate misdirected herself by arriving at conclusions which are unsupported by evidence and/or based on no evidence;

[i] That the Learned Trial Magistrate erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record; hence she arrived at wrong inferences and conclusions;

[j] That the Learned Trial Magistrate failed to appreciate the weight of the evidence tendered and as a result she arrived at an erroneous decision;

[k] That the Learned Trial Magistrate erred in law and fact by unjustifiably rejecting the Appellant's evidence;

[l] That the Learned Trial Magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case and as a result, she arrived at an erroneous decision;

[m] That the Learned Magistrate erred both in fact by shifting the burden of proof to the Appellant;

[n] The Learned Magistrate erred both in fact and law by making an award of general damages which is so inordinately high as to amount to a wholly erroneous estimate.

[o] The Learned Magistrate erred both in fact and law by failing to apply or applying the wrong principles in assessment of damages thus awarding damages that were so excessive in the circumstances;

[p] The Learned Magistrate erred both in fact and law by proceeding to pronounce judgment in favour of the Respondent in total disregard of the Appellant's submissions;

[q] The Judgment of the Learned Magistrate is in the circumstances unfair and unjust.

[4] On account of the foregoing, the Appellant prayed that the Judgment and Decree of the subordinate court be set aside and substituted with an order dismissing the Respondent's suit; and that the costs of the appeal be awarded to it. The appeal was canvassed by way of written submissions which were filed herein on **18 September 2018** and **19 November 2018**, respectively. In his written submissions, Counsel for the Appellant reduced the Grounds of Appeal to two and argued them on the broad heads of liability and quantum. On liability, it was the submission of the Appellant that the Respondent was under duty to prove some fault or wrongdoing on its part. Counsel relied on **Kiema Mutuku vs. Kenya Cargo Hauling Services Limited** and **Statpack Industries vs. James Mbithi Munyao Nairobi HCCA No. 152 of 2003** for the proposition that the Respondent needed to prove that it was negligent and that there was a causal link between the negligence alleged and his injury.

[5] It was further submitted by Counsel for the Appellant that whereas it was not disputed that the Appellant was injured, there was no evidence adduced before the lower court to prove that the Respondent's injury was attributable to the negligence of the Appellant. Reliance was placed on **Kisii HCCA No. 300 of 2006: Tombe Tea Factory Co. Ltd vs. Samuel Momanyi; Nyamache Tea Factory Co. Limited vs. Convas Otomwa, Civil Appeal No. 59 of 2006** and **Nandi Tea Estate Limited vs. Eunice Jackson Were [2006] eKLR** in support of the submission that the Respondent, as an employee, was expected to exercise reasonable care while undertaking his duties; and therefore that the Appellant was not expected to watch over him constantly or to baby-sit him.

[6] On quantum, the Appellant urged the Court to re-evaluate the evidence placed before the lower court to determine whether, in its Judgment, the lower court took into account the applicable principles in its assessment of damages. Counsel pointed out that, the Respondent having not suffered any permanent disability and given the fact that his injuries had healed, the award by the Learned Trial Magistrate was in the circumstances high. Counsel cited comparable authorities involving similar injuries, such as **David Okola Odero vs. Kilindini Tea Warehouses Ltd [2008] eKLR** in which the High Court awarded **Kshs. 40,000/=** as general damages in a case where the Appellant had sustained severe personal injuries when a fellow employee crushed a sack load on him; and **Robert Ngari Gateri vs. Maingo Transporters [2015] eKLR** wherein an award of **Kshs. 60,000/=** was made for soft tissue injuries. Hence, in the Appellant's postulation, an award of **Kshs. 40,000/=** would have sufficed had the Appellant been entitled to damages. The Appellant accordingly prayed that the award of **Kshs. 100,000/=** by the lower court be set aside along with the finding on liability.

[7] Counsel for the Respondent opposed the appeal. He presented a summary of the evidence adduced before the lower court and reiterated their contention that the Appellant breached its duty of care to the Respondent by failing to alert him of the existing ditches which the Appellant had dug; and that Respondent was not provided with any protective gear that could have mitigated the extent of injury suffered by the Respondent. It was further the submission of the Respondent that whereas he provided evidence to prove his case on a balance of probabilities, the Appellant did not offer any rebuttal thereof, granted that the Appellant did not call its supervisor to testify or to produce as exhibits before the court crucial documents such as the Muster Roll or Accident Register; which documents would have aided the court in determining whether or not the Respondent was on duty on the material date.

[8] In support of his submissions, the Respondent relied on **Eldoret High Court Civil Appeal No. 96 of 2010: Eastern Produce (K) Limited vs. Nicodemus Ndala,** wherein the Respondent, a tea picker, fell into an unmarked ditch within the Appellant's tea plantation while on duty plucking tea. The Court held the Appellant liable and affirmed the decision of the lower court by dismissing the appeal with costs to the Respondent. The Respondent also cited **Bungoma Criminal Appeal No. 144 of 2011:Peter Wafula Juma & 2 Others vs. Republic** and **Nairobi High Court Civil Appeal No. 701 of 2001: Henry Ruhui vs. Attorney General** in urging the Court not to upset the decision

of the lower court either on liability or quantum.

[9] It is now trite that, in a first appeal such as this, it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the lower court reached the correct decision. This principle was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** 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..."**

[10] The Respondent gave evidence before the lower court as **PW1** and called two witnesses, namely, **Dr. Samuel Aluda (PW2)** and **Simon Kiplagat (PW3),** a Clinical Officer based at Nandi Hills Hospital. According to **PW1,** he was on duty on **27 June 2010** as an employee of the Appellant. He was working under the supervision of one **Thomas Nyamari** and was assigned to Field 4. It was his evidence that while thus working, a tea stick pricked him on the right leg at the ankle joint. That the incident was reported to **Mr. Nyamari** who issued him with a referral letter to take to the dispensary for treatment. The Respondent further stated that since he did not receive satisfactory treatment at the dispensary, he went to Nandi Hills Hospital for further attention; after which he saw **Dr. Aluda** for medical examination. It was thus the evidence of the Respondent that had he been provided with protective gear, such as gumboots and overall, he would not have been exposed to the injury that he suffered.

[11] Dr. Aluda (PW2) confirmed that he examined the Respondent on **14 March 2011** and that he had sustained a prick wound on the left leg near the knee joint while on duty on the **27 June 2010**. According to **PW2**, the injury had fully healed at the time of examination and was basically a soft tissue injury. He prepared and signed a Medical Report which he produced before the lower court as the **Plaintiff's Exhibit No. 3a** along with a receipt for **Kshs. 1,500/=. (Plaintiff's Exhibit 3b). PW3** on his part told the lower court that the Respondent was seen at their facility, Nandi Hills Hospital, on **27 June 2010**; and that he was complaining of having been pricked on the left leg above the knee for which he was treated and given 2 days off duty. **PW3** produced the Respondent's Treatment Booklet on behalf of his colleague, **Mr. Mutai** who saw the patient; and who had since left public service.

[12] On behalf of the Appellant, its nurse, **Irene Jepkorir (DW1),** testified before the lower court and produced the Patient's Register for **27 September 2010**. Her evidence was that the Respondent was not treated at the Appellant's dispensary on that date. The Register was marked as the **Defendant's Exhibit No. 1. Wilson Mahero (DW2)** was a supervisor at the Appellant's Kapkaben Division. According to him, the Respondent was not on duty on **27 June 2010**. He produced the Attendance List **(Defendant's Exhibit No. 2)** to augment his evidence.

[13] The Appellant's last witness before the lower court was **Ezekiel K. Kosorio (DW3)**, a Records and Communication Officer at **Nandi Hills Hospital**. His evidence was that the Respondent's name did not appear in the hospital's Patients' Register for **27 June 2010**. He produced an extract of that Register as the Defendant's Exhibit No.3 and stated that the register was yet to reach **Patient Number 6981** by the time the Respondent is alleged to have attended their facility for treatment.

[14] 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. His evidence that he was employed by the Appellant as a tea plucker was bolstered by the Pay Slip for **June 2010** which he produced before the lower court as his **Exhibit 1**. Accordingly, the issues for re-evaluation by this Court are:

[a] Whether indeed the Respondent was injured on the **27 June 2010** as alleged;

[b] Whether the Appellant is liable for the injury;

[c] Whether the award in damages by the trial court is defensible.

[a] <u>On Whether the Respondent was injured:</u>

[15] It was his evidence that while thus working, a tea stick pricked him on the right leg at the ankle joint. That the incident was reported to **Mr. Nyamari** who issued him with a referral letter to take to the dispensary for treatment. The Respondent further stated that since he did not receive sufficient treatment at the dispensary, he went to Nandi Hills Hospital for further attention; after which he saw **Dr. Aluda** for medical examination.

[16] It is however notable that whereas the Respondent had occasion to testify on **24 July 2012** after the amendment of the Plaint whereby the injury suffered was specified to be near the left knee joint as opposed to the left ankle joint, he was still content to state that:

> "**The stick pricked me on right leg at ankle joint..."**

In cross examination, he insisted that:

> **"...I was injured on the left leg at ankle joint ... I did not go back to work. The pains persisted but usually they tell people to go back to work. The book is given in hospital MFI 2. I was injured on left leg at ankle...I have another case before court. I was injured on right leg as seen. Many people were there. They saw me and took me to the supervisor..."**

[17] Dr. Aluda was however emphatic that the injury was on the Respondent's left leg near the knee, notwithstanding that his Medical Report was specific that the injury was on the ankle joint. This, in my respectful view was a fundamental variance that cast grave doubts as to the credibility of the Plaintiff and the doctor, who attempted to explain it away by saying that it was a typographical error. It cannot therefore be said that the Respondent discharged the burden of proving this aspect of his case on a balance of probabilities.

[18] Secondly, evidence was adduced by **DW3**, an employee of Nandi District Hospital to the effect that, according to their records, the Respondent was not seen at their hospital on 2. He added that in **June 2010,** the Hospital had a manual Out Patient Register and that on **4 June 2010** when the use of said Register was discontinued in favour of an electronic version, the number of patients registered had reached **No. 6732**. According to him the number touted by the Respondent, namely **OP No. 6981** is non-existent, and hence the assertion that the Respondent's **Exhibit No. 1** is a forgery. That evidence was not rebutted; and whereas Counsel for the Respondent attempted to discredit the evidence of **DW3,** the fact remains that the manual Register did not go beyond **6732;** and that the manual system was discontinued on **4 June 2010.** In the premises, it cannot be said that the Respondent proved on a balance of probabilities that he was injured on **27 June 2010** as alleged.

[b] <u>On Whether the Appellant is liable for the injury;</u>

[19] The Respondent's contention that he was injured at his place of work, and in the ordinary course of his duties as a tea plucker, the Appellant took an opposing stance, contending through **DW2** that **27 June 2010** was a Sunday and that ordinarily, employees of the company would not work on Sunday. It was further the contention of the Appellant that had the Respondent been injured at his work place, there would have been evidence of his treatment at the Appellant's dispensary as per the Outpatient Register exhibited before the lower court; which was not the case. To this end, the Appellant relied on **<u>Kisii High Court Civil Case No. 300 of 2006: Tombe Tea Factory Co. Ltd vs. Samuel Momanyi</u>** and **<u>Civil Appeal No. 59 of 2006: Nyamache Tea Factory Co. Ltd vs. Convas Otomwa</u>**. In both cases, the fact that the Plaintiff's name was missing from the documentary evidence exhibited by the Defendant was considered proof that the Plaintiff was not in the Defendant's employment.

[20] More importantly, the Particulars of negligence, Breach of Duty of Care and/or Contract by the Appellant, its servants, agents and/or employees were set out in Paragraph 6 of the Amended Plaint. They had to do with the alleged failure on the part of the Appellant to provide or avail the Respondent with gloves, apparel, gumboots, masks, goggles or any other protective gear; or a proper system of work. Accordingly, in his evidence before the lower court, the Respondent testified that:

> **"I do blame company for injuries herein. They didn't give me gumboot or overall to protect me..."**

It was however not demonstrated, for instance, how the gum boots would have protected the prick which is said to have injured the Respondent above his knee joint, if the Respondent's Exhibit No. 2 is anything to go by.

[21] In the light of the foregoing, and since there are grave doubts as to whether or not the Respondent was injured on **27 June 2010** as alleged, I would be of the view that the liability of the Appellant was not established to the requisite standard.

[c] <u>On Quantum of Damages</u>:

[22] It is trite that assessment of damages is a matter that falls within the purview of the trial court and an appellate court would be hard pressed to interfere with such an assessment. Hence, in **<u>Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR,</u>** the Court of Appeal reiterated this principle in the following words:

> **"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."**

[23] At page 130 of the Record of Appeal, the lower court analyzed the evidence and submissions presented before it and pointed out that the Respondent's Counsel had proposed an award of **Kshs. 350,000/=** and relied on **<u>Nyeri High Court Civil Case No. 320 of 1998: Catherine Wanjiru Kingori and 3 Others vs. Gibson Theuri Gichubi</u>**, wherein an award of sums ranging between **Kshs. 100,000/=** and **Kshs. 350,000/=** were made for soft tissue injuries to the four Plaintiffs therein whose soft tissue injuries were clearly more serious than the Respondent's. The Learned Trial Magistrate then reasoned thus:

> **"Considering that injuries sustained in this case are soft tissue injuries which had healed even at the time the doctor was examining the plaintiff, I do find that an award of Kshs. 100,000/= will suffice as general damages. Special damages of Kshs. 1,500/= were pleaded and proved. I accordingly do award the same. I enter judgment for the plaintiff against the defendant in the sum of Kshs. l01,500/= plus costs and interest.**

[24] The evidence of **Dr. Aluda** was that the Respondent's injury, a prick wound, had healed by the time he examined him on **14 March 2011** and whereas the trial court took into account the written submissions of the Plaintiff, I note that in **<u>David Okola Odero vs. Kilindini Tea Warehouses Ltd [2008] eKLR,</u>** an award of **Kshs. 40,000/=** was made for soft tissue injuries; and in **<u>Robert Ngari Gateri vs. Maingo Transporters [2015] eKLR</u>** the Plaintiff was awarded **Kshs. 60,000/=** for soft tissue injuries on chest, left elbow and right buttock. I would have thus agreed with the Appellant's Counsel that an award of **Kshs. 40,000/=** would have sufficed in this matter.

[25] In the result, having found that the Respondent did not prove either liability or quantum, I would allow this appeal, set aside the

Judgment of the lower court dated **27 February 2014** and the Decree flowing therefrom and substitute the same with an order dismissing the Respondent's suit before the lower court. The record being manifest that the Respondent left the employ of the Appellant, I would order that each party shall bear their own costs of the appeal and of the lower court proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF FEBRUARY, 2019

OLGA SEWE

JUDGE