REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 159 OF 2003

EASTERN PRODUCE (K) LIMITED

(SAVANI TEA ESTATE).....APPELLANT

-VERSUS-

WYCLIFFE IGARA JIDAI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court in Kapsabet PMCC No. 90 of 2001 dated 28 November 2003 by Hon. Francis A. Mabele, PM)

JUDGMENT

[1] This is an appeal that was filed on **24 December 2003** by the Appellant, **Eastern Produce (K) Limited (Savani Tea Estate)** from the Judgment and Decree of the Principal Magistrate at Kapsabet Law Courts, **Hon. Francis A. Mabele**, in **Kapsabet PMCC No. 90 of 2001: Wycliffe Igara Jidai vs. Eastern Produce (K) Limited (Savani Tea Estate).** The Respondent had filed that suit claiming Special and General Damages, costs of the suit, interest and any other relief deemed fit by the lower court. His cause of action was that, on or about the **17th October 2000,** while he was engaged upon his work as a tea picker in the employ of the Appellant, he was pricked by a piece of stick in his right hand; and as a result sustained serious injuries. It was his contention that it was a term of the contract of employment between him and the Defendant that the Defendant was to take all reasonable measures to ensure his safety while he was engaged upon his work as a tea plucker, and not expose him to a risks or injury which the Defendant knew or ought to have known. He further asserted that it was a term of their contract that the Appellant would at all times supply him with protective apparel and ensure adequate training on how to use the same; and that it was due to breach of the Appellant's duty to him that the accident occurred; thereby causing him loss and damage.

[2] The Defendant/Appellant denied the Plaintiff's claim. It basically denied that the Respondent was its employee; that there was a contract of employment between it and the Respondent; or that the Respondent was engaged upon his work when he was pricked by a piece of stick as alleged or at all. The Appellant further denied the averments in paragraph 6 of the Plaint to the effect that the alleged accident was due to the negligence and/or breach of contract of employment on its part. Indeed, it was the contention of the Appellant, in the alternative, that if any accident ever occurred, then the same was wholly or substantially occasioned by the negligence of the Respondent as per the particulars set out in Paragraph 8 of the Appellant's Defence dated **5 April 2001**.

[3] Having heard the evidence that was presented before it, the lower court found the Appellant liable, but apportioned liability at 80:20 in favour of the Respondent with the result that the Respondent was awarded **Kshs. 56,000/=** as General Damages and **Kshs. 1,200/=** as Special Damages together with costs and interest at court rates. Being aggrieved by that decision, the Appellant lodged this appeal on **24 December 2003** on the following grounds:

[a] That the Learned Magistrate erred in law and fact in awarding damages to the Respondent against the weight of evidence;

[b] That the Learned Magistrate erred in law and fact in failing to find that the Respondent had not proved his case on a balance of probability;

[c] That the Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions;

[d] That the Learned Magistrate erred in law and fact by failing to apply the provisions of the **Evidence Act** in relation to the evidence tendered and the exhibits.

[e] That the Learned Magistrate erred in law and fact in failing to dismiss the suit for want of proof;

[f] That the Learned Magistrate erred in fact and law by failing to take cognizance of the evidence tendered on behalf of the Appellant during the hearing of the defence case;

[g] That the Learned Trial Magistrate erred both in law and fact by finding that the Respondent had established his case on a balance of probabilities when in fact:

[i] The Plaintiff's evidence was that he had attended Nandi Hills Hospital on **18 October 2000** yet the treatment chit produced as **PEX1** was issued on **17 October 2000** and the Respondent was unable to explain the discrepancy.

[ii] The Respondent was unable to defend the contents of the **Plaintiff's exhibit 1 and 3B** and conceded that the same were not accurate and misrepresented the facts of the case.

Consequently, the Appellant prayed that the Judgment of the lower court be set aside and in lieu thereof be substituted with an order dismissing the Respondent's suit with costs.

[4] The appeal was urged by way of written submissions. Hence, the Appellant's written submissions were filed herein on **31 July 2012** while the Respondent's written submissions were filed on **20 June 2013.** Counsel for the Appellant took issue with the discrepancy in the Respondent's evidence as to the date he sought treatment. He pointed out that whereas in his testimony the Respondent stated that he went to Nandi Hills District Hospital the following day, which was **18 October 2000**, the treatment document (the **Plaintiff's Exhibit No. 1)** indicated the date of his treatment as **17 October 2000**. According to Counsel, the Respondent was unable to explain the discrepancy or defend the contents of the document which he admitted had misrepresentations of fact, such as about his age.

[5] Counsel for the Appellant further submitted that, from the evidence of the Respondent, no evidence was adduced to demonstrate that the Appellant owed him any contractual duty to provide gloves or any other protective clothing. He posited therefore that, even assuming that the Respondent had been injured while working for the Appellant as alleged, he did not prove any negligence whatsoever on the part of the Appellant and hence there was no basis for the trial court's finding on liability. Counsel cited **Muthuku vs. Kenya Cargo Services Ltd [1991] eKLR** and **Kaboswa Tea Estate vs. Alfred Juma Bilauni Eldoret Civil Appeal No. 302 of 2000** for the proposition that for liability to attach there has to be some fault on the part of the Defendant.

[6] It was further the submission of Counsel for the Appellant that the Respondent did not prove how lack of gloves and/or other protective clothing contributed to his injuries. Reliance was placed on **Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47** to buttress the argument that the only duty owed by an employer is that of reasonable care against risk of injury from reasonably foreseeable events; which was not the case herein. He urged for the appeal to be allowed and for the decision of the lower court to be set aside and replaced with an order dismissing the Respondent's suit with costs for lack of proof.

[7] Counsel for the Respondent opposed the appeal. He reiterated the Respondent's evidence before the lower court that, on the date in question, the Respondent was on duty plucking tea when he was instructed by his supervisor to remove tree stumps from a field in preparation for ploughing; and that while so doing, he got pricked on the right thumb. According to Counsel, had the Respondent been provided with protective apparel such as gloves, the injury would have been avoided. He urged the Court to note that the Defence witness, **David Maiyo (DW1)** who was the Respondent's supervisor on the date in question, admitted that the Respondent was indeed an employee of the Appellant; that he was on duty on **17 October 2000**; that he had been assigned the duty of clearing a new field in readiness for planting; and that the Respondent had not been supplied with protective apparel. According to Counsel, the Respondent proved to the requisite standard that he got injured while on duty as a result of the breach of the Appellant's duty of care in respect of events that were reasonably foreseeable, and therefore preventable. He urged the Court to dismiss the appeal with costs.

[8] 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 satisfying itself as to the soundness of the lower court's decision. 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..."**

[9] What then, was the evidence presented before the lower court? A careful scrutiny of the lower court record shows that the Respondent testified as **PW1.** His evidence was that, on **17 October 2000**, he was on duty plucking tea at **Savani Tea Estate** where he was working then as an employee of the Appellant; and that he was reassigned duties by his supervisor, one **Ben Aura**, to move to a new field and help in uprooting stems and stumps with a view of clearing it for ploughing. According to him, while so working, a stick pricked his right thumb thereby causing him severe pain. He brought the matter to the attention of his supervisor and was referred to the Appellant's dispensary for treatment. The following day he went to **Nandi Hills District Hospital** for further treatment before being examined by **Dr. Aluda.** He produced the treatment booklet as an exhibit; while **Dr. Aluda's** report was produced by consent of the parties and marked the **Prosecution's Exhibit 3(a).**

[10] It was the Respondent's evidence that he blamed the Appellant for his injuries because he was not given gloves, while other older employers had been provided with the same. He also testified that the work he was assigned to do could have been accomplished by deploying tractors and other implements on that particular field. Lastly, the Respondent took issue with the fact that he was not given any instructions before being re-assigned to the work of clearing stems and trunks.

[11] The Appellant, on its part, called **David Maiyo (DW1)** who told the lower court that he was then working as a supervisor at the

Appellant's **Savani Tea Estate**. He confirmed that the Respondent was also working at the Estate as a general worker; and that he was on duty on **17 October 2000** under his supervision. He similarly confirmed that there was a new field being prepared for tea-planting; and that workers, including the Respondent, were consequently deployed to clear the field of stones, grass and sticks in readiness for tea-planting. He added that, as far as he knew, no one was injured on that day and no report was made to him of any injury; adding that the work was fully and successfully accomplished by 1.00 p.m.

[12] 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 employed by the Appellant as a general casual laborer. The Respondent's pay slip for the month of **October 2000** was produced before the lower court as an exhibit and it does confirm that he performed his duties during that month and was duly paid a salary therefor. There is further no dispute that the Respondent was on duty on **17 October 2000**. His supervisor, testified as **DW1** and conceded as much. **DW1** further conceded that the Respondent was, on that particular day, deployed to undertake field clearing duties. What is in contestation therefore is whether the Respondent was injured as alleged by him; and if so, whether the Appellant is liable for the same. Consideration will also be given to the lower court's award and whether it is tenable.

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

[13] According to the Respondent, he reported to his work place as a tea plucker as usual on the **17 October 2000** when his supervisor instructed him to clear a certain one of the Appellant's fields for planting; and that while working on the said field, removing tree stumps and twigs, a stick pricked his right thumb, thereby occasioning him a painful injury which he reported to his supervisor. He said he was given a referral note by the supervisor to take to the dispensary but that the same was retained at the dispensary. He nevertheless produced the treatment booklet issued to him at Nandi District Hospital **(Plaintiff's Exhibit No. 1)** as well as a Medical Report prepared by **Dr. Aluda** to prove that he was indeed injured on the right thumb. **Dr. Aluda's** report shows that, though the injury had healed, it left a scar and had slight tenderness.

[14] Though the Appellant took issue with the date expressed on the treatment booklet as being contradictory of the Respondent's own evidence that he visited Nandi Hills Hospital on **18 October 2000**, it is noteworthy that the Appellant failed to avail its own treatment records to refute the evidence that the Respondent was referred to the dispensary for treatment immediately after his injury. Accordingly, the Trial Magistrate cannot be faulted for coming to the conclusion that the Respondent was indeed injured at his workplace. I would not consider the alleged contradictions in connection with the Respondent's age and the date on the treatment booklet sufficient rebuttal of this assertion.

[b] <u>On whether the Appellant is liable for the Respondent's injury:</u>

[15] In **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR</u>** it was held 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..."**

[16] There is no denying that the kind of work the Respondent was deployed to carry out on **17 October 2000** was the kind that required the provision of gloves; and it was the evidence of the Respondent that other employees had been provided with the same. It is also instructive that, in this regard, **DW1** conceded in cross-examination that:

> **"...It is true Wycliffe was an employee of Savani Tea Estate and was on duty that day 17 October 2000. It is true they were removing rubbish or dirt from a new field. Since it was not heavy duty we did not give them anything to wear on the hand. It is true one can get pricked on the hand. It is true one can get pricked while doing that. We assigned [assumed] that no such injury will result. We gave them nothing that is true..."**

[17] In the premises, I would agree with the Learned Trial Magistrate that the Appellant failed in its duty of care towards the Respondent; noting that though allegations of negligence were raised by the Appellant in the Defence, none of them was proved before the lower court. The Appellant had alleged that the Respondent had been negligent in:

> **[a]** Failing to exercise due care and attention;
>
> **[b]** Failing to put on protective gears and apparel provided by the Appellant;
>
> **[c]** Failing to take any or any adequate precaution for his own safety;
>
> **[d]** Exposing himself to an obvious risk whose incidence he ought to have known or reasonably anticipated;
>
> **[e]** Failing to concentrate on his work;
>
> **[f]** Working rashly and recklessly.

[18] Having made the assertions, the burden of proof was on the Appellant to satisfy the lower court, on a balance of probabilities that the Respondent failed to exercise due care and attention; or that he was provided with protective gears and apparel but failed to put them to use

at the time of the accident; or that he failed to take any or any adequate precaution for his own safety. In the same vein, the Appellant failed to adduce evidence to demonstrate that the Respondent deliberately exposed himself to an obvious risk whose incidence he ought to have known or reasonably anticipated; or that he failed to concentrate on his work; or even that he otherwise went about his duties in a rash and reckless manner.

[19] Section 107(1) of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit 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.***

[20] Likewise, **Sections 109** and **112** of the **Evidence *Act*** provide that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[21] 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 injury he suffered while performing his duties at the Appellant's farm on **17 October 2000**. Although no reason was given to justify the apportionment of liability at 80:20, it is trite that some measure of care is expected of a worker in the performance of his duties. The expressions by the Court of Appeal in **Mwanyale Said T/A Jomvu Total Service Station vs. as apt,** that:

> **"It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer merely upon the ground of relation of employer employee..."**

[22] And in **Statpack Industries vs. James Mbithi Munyao [2005] eKLR**, it was emphasized 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."**

In the premises, the trial court cannot be faulted for attributing some degree of fault to the Respondent. In any case, the Respondent did not complain about that apportionment of liability by way of cross-appeal.

[c] On Quantum of Damages

[23] The trial court, having considered the evidence adduced before it, the submissions made by Learned Counsel for the parties and the authorities cited settled on an award of **Kshs. 70,000/=** as General Damages, to which he applied 20% contribution. He also accepted the special damage component of **Kshs. 1,500/=** as having been proved by the receipt marked the **Plaintiff's Exhibit No. 3b** less contribution. Other than stating that the award was against the weight of evidence, the Appellant failed to show in what sense the award was erroneous.

[24] Thus, since assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere without justifiable cause, I would be disinclined to disturb the lower court's award. 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..."**

[25] 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."**

[26] 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."**

[27] In the light of the foregoing, I would find no reason to disturb the award made by the Learned Trial Magistrate. Moreover, it was not shown by the Appellant that there was an error in principle committed by the Learned Trial Magistrate to warrant interference by this Court.

[28] In the result, I would uphold the lower court's Judgment on liability and quantum and dismiss this appeal with costs.

It is so ordered.

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

OLGA SEWE

JUDGE