



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO 34 OF 2013

BERNARD MMAITSI ANANDE.....APPELLANT

VERSUS

EASTERN PRODUCE (K) LTD (SAVANI TEA ESTATE).....RESPONDENT

(An Appeal arising out of the Judgment and decree of Hon. G. Adhiambo PM delivered on 18th March, 2013 at Kapsabet Principal Magistrate's Court Civil Case No. 127 of 2011)

JUDGMENT

The Appellant was the original Plaintiff and the Respondent the Defendant in the original trial in **Kapsabet Principal Magistrate's Court Civil Case No. 127 of 2011**. The Appellant instituted the said suit in the trial court for general and special damages on account of the Respondent's alleged breach of its statutory duty to provide him with a safe working environment. The trial court, in a judgment delivered on 18th March, 2013 held that the Appellant failed to prove to the required standard of proof on a balance of probabilities that the Respondent was liable for the injuries sustained by the Appellant, and dismissed the Appellant's suit with costs to the Respondent.

The Appellant being dissatisfied with the said judgment, filed an appeal challenging the judgment of the trial court. He raised several grounds of appeal. The Appellant faulted the trial court for dismissing the Appellant's case without any legal basis. The Appellant was aggrieved that the trial court failed to appreciate the Appellant's evidence and written submissions. The Appellant challenged the trial court's finding which was to the effect that the Appellant failed to prove his case to the required standard of proof. The Appellant was also of the view that the Respondent failed to rebut the Appellant's case.

During hearing of the appeal, counsel for the Appellant argued that the evidence on record was not properly evaluated. He stated that it was not necessary to call an eye witness since the Appellant's evidence was primary evidence by virtue of **Section 62** of the **Evidence Act**. He submitted that the Appellant proved that he was injured. His supervisor testified that the Appellant was working on the material day. Learned counsel was of the view that the Respondent ought to have availed critical documents including the master roll, checklist and a daily logbook. He asserted that the Appellant laid a strong case that he was injured while on duty. He submitted that the Appellant sustained a cut wound on the left leg and had availed medical documents to corroborate his claim. He maintained that the injuries were as a result of negligence on the part of the Respondent, since there were ditches in the field which ought to have been covered. He therefore prayed that the appeal be allowed.

Counsel for the Respondent, while opposing the appeal, stated that the Appellant failed to provide documents to show that he was treated for the alleged injuries. She stated that the Appellant failed to prove that he was injured while at work. She submitted that the Appellant worked for eight (8) hours on the material day, and the same was corroborated by his supervisor. She maintained that the Respondent produced an accident register as well as an outpatient register. The Appellant's name did not feature in any of the said registers. She added that the Appellant failed to avail eye witnesses to corroborate his claim, and therefore failed to discharge the burden of proof. She asserted that the Appellant's appeal lacks merit and should be dismissed.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. Further, the Court has jurisdiction to delve into matters of fact and law. (See **Selle V Associated Motor Boat Company Ltd [1968] EA 123.**)

In the present appeal, the issues for determination are whether the Appellant proved that he was injured while at work at the Respondent's premises and secondly, if the first issue is answered in the affirmative, the amount that ought to be awarded to the Appellant as damages for purposes of compensation.

As regards an action in negligence, it is stated in **Halsbury's Laws Of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to what is required to be proved in an action such as the Respondent's:-

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”

Therefore, the Appellant has to prove that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, he also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Respondent, and to show that he was also not negligent in the performance of his duties.

This statutory duty stems from **Section 6(1)** of the **Occupational Safety and Health Act, 2007** which requires every occupier to ensure the safety, health and welfare at work of all persons working in his/her workplace. In addition, **Section 10(2)** of the **Work Injury Benefits Acts, 2007** provides that an employer is liable to pay compensation in accordance with the provisions of the **Act** to an employee injured while at work.

In the present appeal, the evidence by the Appellant was that he was employed by the Respondent at a tea farm, and that on the day of the accident, he was carrying out duties assigned to him in the course of his employment, a fact that was not disputed or controverted by the Respondent. This Court notes in this respect that the Appellant did produce in evidence a pay slip dated September, 2010 as his **Exhibit 3** in the trial court. In addition DW1, Benson Kipkoeh Kurgat, confirmed that the Appellant reported to work on the material day and even produced an attendance register. Therefore there existed an employer-employee relationship on the material day hence the Respondent owed the Appellant a statutory duty of care.

It is however disputed whether the Appellant was injured in an accident that occurred while carrying out the said duty, which was to pluck tea leaves at the Respondent's farm. The Appellant stated that on 10th September 2010, he slipped and fell into an unmarked ditch while plucking tea leaves at the Respondent's farm. He stated that he reported the incident to his immediate supervisor Mr. Benson Kurgat who referred him to the company dispensary where he was treated. He later sought further treatment at Nandi Hills District Hospital. He also added that another tea plucker, Wesley Avisia, witnessed the incident. The Appellant claims to have been treated on the material day at Nandi Hills District Hospital at about 3.00 p.m. However, PW2, Simon Rono, a clinical officer at the said hospital, testified that he was not on duty on the material day. He can therefore not corroborate the Appellant's claim that he was treated at 3.00pm on the said date.

PW2 produced a treatment card from Nandi Hills District Hospital dated 10th September 2010 which confirmed the pleaded injuries. This however, only proves that the Appellant was injured but not that he was injured while working at the Respondent's premises. The Appellant failed to call the said eye witness, Wesley Avisia, to corroborate his claim. He did not give any reasons why he was not availed to testify in the case. The Respondent's clinical officer, Faith Chelagat (DW2), testified that the Appellant was not treated on the material day of any injuries. She produced the company's dispensary outpatient records for the month of September 2010. The Appellant's name did not feature in it. She also produced the company's injuries register which again did not feature the Appellant's name. In addition, Dr. Aluda, PW1, who examined the Appellant, gave contradictory evidence with regards to the Appellant's injuries. He stated that the Appellant was injured on his right leg while his report indicated that the Appellant sustained injuries on his left leg.

In the case of **Statpack industries v James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003** (unreported) the court held that:-

“Coming now to the more important issue of ‘causation’, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable”.

Section 107 of the **Evidence Act** is very clear that he who alleges must prove. In the present appeal, the Appellant proved that he was injured but he failed to prove that he was injured at the Respondent's tea farm. The Appellant was aware that the Respondent had denied that he was injured while at work on the material day. Strict proof was therefore called for. The only other people who could confirm that the Appellant was injured at work on the material day were the witness (Wesley Avisia), his supervisor and the clinical officer (DW2) at the dispensary. It was not enough for the Appellant to prove that he sustained the injuries. An employer is not liable for all the injuries sustained by its employees. It must be proved that the Appellant sustained the injuries while on duty working for Respondent. It must also be established that the employer breached the statutory duty of care or the common law duty of care owed to the Respondent as its employee.

In this case, this court agrees with the trial magistrate's finding that the Appellant ought to have availed the eye witness who would have corroborated his evidence. The Respondent provided the dispensary outpatient records as well as the injuries register to rebut the Appellant's case, and to show that the Appellant was not treated there on the material day. Therefore, the Appellant ought to have availed a witness to prove his claim that he was indeed injured at the Respondent's tea farm. The Appellant was also required to adduce evidence to rebut the Respondent's assertion that his failure to attend the company's dispensary showed that he was injured while he was out of work. The Appellant should have given a reasonable explanation as to why he failed to avail the eye witness. In **High Court Civil Appeal 183 of 2009 Timsales Limited v Noel Agina Okello [2014] eKLR** the court held that:

“When therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher.”

This court is not certain that the Appellant sustained the injuries in the course of performing his duties at the Respondent's tea farm as the same has not been proved. It is for this reason that this court find that the Respondent cannot be held liable for the said injuries and further do find that the Appellant cannot be said to be entitled to damages.

The upshot of the above is that this court finds that appeal herein is without any merit both on liability and on quantum. The same is hereby dismissed with costs to the Respondent. It is hereby so ordered.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF FEBRUARY 2019

HELLEN OMONDI

JUDGE