REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 4 OF 2013

EASTERN PRODUCE (K) LTD (CHEMOMI TEA ESTATE).....APPELLANT

VERSUS

WYCLIFFE SHITENDE KEYA.....RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate Honourable B. Mosiria in Kapsabet PMCC No. 38 of 2011, dated 20th December, 2012)

JUDGMENT

The plaint on record discloses that the Respondent was employed by the Appellant at Chemomi Tea Estate, working as a tea plucker. On or about 15th May 2009 the Respondent while engaging on his lawfully assigned duties, due to breach of contract of employment and/or breach of statutory duty and/or breach of common law duty of care by the appellant and/or its servants, agents or other employees, the Respondent was seriously injured when he slipped and fell into a ditch/trench within the tea farm while carrying tea to the buying centre and as a result he sustained severe pains during and after the injury, of a pricked wound on the right leg (shin) which was tender. He therefore claimed against the Appellant for special damages amounting to 1,500/- and general damages.

The Appellant denied the claim and averred in the defence that any injury suffered by the Respondent was self-inflicted and outside the scope of duty.

During the hearing of the case, the Respondent stated that on 15th May, 2009 he was at Chemomi Tea Estate working. He had reported on duty at 7.00 a.m and at around 10 a.m he had plucked tea along the rows in the tea bushes. While he walked to weigh the tea he had picked, he was caught up by one of the protruding tea bushes, newly pruned. It caught him at the right leg and was injured.

The Appellant's case is that the Respondent was not injured for if he had as he claimed he would have been referred to the dispensary and his name recorded in the dispensary register. His name was not in the dispensary register record of 1st May 2009.

The trial magistrate weighed the evidence and found the appellant 100% liable. She awarded to the Respondent general damages of 70,000/- and special damages of 1,500/-.

The Appellant, dissatisfied with the said finding appealed to this court on the grounds that:-

(1) The Respondent's case was not proved on a balance of probability as is required by law.

(2) The appellant's liability was exaggerated notwithstanding the evidence on record.

(3) The judgment does not establish or set out proper grounds for the finding.

(4) The evidence was misconceived as well as all the issues for determination.

(5) The decision is based on irrelevant considerations.

(6) Appellant's defence was not properly weighed.

(7) The apportionment of liability was erroneous.

(8) Trial court erred on all points of fact and law in as far as both liability and award of damages is concerned.

I have considered what is carried in the plaint, the defence, evidence adduced by each side, the judgment passed, memorandum of appeal and response to it as well as submissions by both sides.

The plaint in paragraph 5 and also the Respondent's submissions on the appeal in paragraph 2, shows that the Respondent got injured on 15th May, 2009 when he slipped and fell into a ditch/trench while ferrying plucked tea to the buying centre within the tea farm. However, his evidence which was offered in court on 16th August, 2011 shows otherwise. He claimed that while ferrying tea to the weighing centre, he was caught up by one of the protruding tea bushes and pricked on his right leg. There is no evidence that he slipped and fell into a ditch/trench, leading to the claimed injury. This grave contradiction between the claim in the plaint and the evidence, was not considered by the trial magistrate. Parties are bound by their own pleadings and any evidence which tends to be at variance with the pleadings should be rejected. The said position was held in the ***Civil Appeal No. 52 of 2017, of Daniel Otieno Migore –vs- South Nyanza Sugar Co. Ltd [2018] eKLR***. The plaint even in paragraph 6 particularizes the claimed negligence by the Appellant and in (g) it is stated:-

> ***"Failing to notify the plaintiff of existence of ditches/trenches/holes within the tea farm a fact which was known to the defendant hence exposing plaintiff to harm".***

The foregoing shows the Respondent presented a different case in the hearing, from the one pleaded. Such evidence then ought to have been rejected by the trial court. If that had happened, the trial court wouldn't have found that the Respondent's case was proved on a balance of probability as required in law. The case would have been dismissed with costs to the appellant. On this ground the appeal has merit. It is allowed with costs to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **28th** day of **March, 2019**

In the absence of:

The appellant

The respondent

And in the presence Mr. Mwelem – Court assistant