REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 2 OF 2015

EASTERN PRODUCE (K) LTD

(KABOSWA TEA ESTATE).....APPELLANT

VERSUS

JEMIMA OSIDE AMBENGE .....RESPONDENT

(An Appeal arising out of the Judgment of Hon. B. Mosiria PM Kapsabet delivered on 2nd December, 2014 in PMCC No. 272 of 2011 -Vs- Eastern Produce (K) Ltd.)

JUDGMENT

The Appellant was the Defendant and the Respondent the Plaintiff in the original trial in **Kapsabet Principal Magistrate's Court Civil Case No. 272 of 2011**. The Respondent instituted the said suit in the trial court for general and special damages on account of the Appellant's alleged breach of its statutory duty to provide him with a safe working environment. The trial magistrate, in a judgment delivered on 2nd December, 2014, held that the Respondent was able to prove that the Appellant was 100% liable for the injuries sustained by the Respondent, and awarded the Respondent general damages amounting to Ksh. 100,000/- and special damages amounting to Ksh.1,500/- as well as costs of the suit .

The Appellant, being dissatisfied with the said judgment, filed an appeal against the same. The Appellant raised several grounds challenging both quantum and liability. The Appellant faulted the trial magistrate for arriving at a finding on liability which was not supported by evidence. The Appellant was aggrieved that the trial court based its findings on irrelevant matters. The Appellant asserted that the trial magistrate applied the wrong principles in assessing damages. Finally, the Appellant was of the view that the Respondent failed to prove her case to the required standard on a balance of probabilities.

During hearing of the appeal, counsel for the Appellant stated that the Respondent testified that she was injured while plucking tea at the Appellant's farm. Learned counsel argued that the Respondent was an experienced tea plucker. She was aware of the existence of the stumps. She therefore ought to have been careful. Counsel for the Appellant, relied on **Section 13(1)** of the **Occupational Safety and Health Act**. It requires every employee to ensure their own safety while at the workplace. She asserted that there was contributory negligence on the part of the Respondent since the Respondent failed to observe the same. On quantum, learned counsel was of the view that the amount awarded by the trial court as damages was inordinately high. She averred that a sum of Ksh.30,000/- was sufficient in the circumstances since the accident occurred in 2011.

Counsel for the Respondent, while opposing the appeal, submitted that the Respondent had proved liability against the Appellants. He argued that the Respondent demonstrated that a duty of care was owed to her by the Appellant. This same duty was breached. He asserted that the Respondent adduced evidence to prove her claim. The same was not rebutted by the Appellant. He maintained that the Appellants failed to avail the Respondent's supervisor to rebut the claims made by the Respondent. Learned counsel stated that the Respondent was issued with a referral letter to go to the hospital. He submitted that the Respondent was not provided with required safety apparel. In addition, the Appellants failed to put up warning signs to inform the workers of the presence of the pruned tea leaves stumps. On quantum, counsel for the Respondent was of the view that the amount awarded by the trial court was reasonable. He urged this court not to disturb the same. He prayed for the appeal to 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 a first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. This principle of law was well settled in the case of **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123** where **Sir Clement De Lestang** stated that:

"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear

in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955) 22 EACA 270)."

In the present appeal, the issues for determination are whether the Respondent proved that she was injured while at work at the Appellant's premises and secondly, if the first issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment 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 the 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 Respondent has to prove that she was injured while engaged on duties that she was assigned or expected to perform in the course of her employment. Further, she also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Appellant, and to show that she was also not negligent in the performance of her duties.

This statutory duty stems from **The Occupational Safety and Health Act, 2007** which, in **Section 6(1),** 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 Respondent that she was employed by the Appellant at the tea farm, and that on the day of the accident she was carrying out duties assigned to her in the course of her employment was not disputed or controverted by the Appellant. The Respondent produced in evidence a pay slip for the month of November, 2010 as plaintiff exhibit no.3. The Appellant confirmed that the Respondent reported to work on the material day and plucked 15kgs of tea leaves. The attendance register produced in evidence by the Appellant confirmed the same. Therefore there existed an employer-employee relationship on the material day; hence the Appellant owed the Respondent 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 Appellant's farm. The Respondent stated that on 14th December, 2010, while undertaking the said duty, she was pricked by a stem of a pruned tea plant while plucking tea leaves at the Appellant's farm. She reported the incident to her supervisor, David Arusei, who referred her to the company's dispensary where she received First Aid. At the dispensary, she was attended to by a clinical officer by the name Mr. Serem. Mr. Serem issued her with a sick off slip which she produced in court ***(Plaintiff Exhibit 4).*** She afterwards went to Nandi Hills District Hospital for further treatment. The Respondent produced a treatment card from Nandi Hills District Hospital dated 14th December, 2010 ***(Plaintiff Exhibit 2).*** The Dr. Aluda also testified and produced a medical report (plaintiff exhibit 1) which also confirmed the Respondent's pleaded injuries. None of the exhibits produced by the Respondent were challenged by the Appellant.

The Appellant on the other hand availed two witnesses. The supervisor, Samuel Bungei (DW1), claimed that he was the Respondent's supervisor and not Mr. David Arusei as claimed by the Respondent. He stated that the Respondent was at work on the material day and she plucked 15kgs of tea leaves. He however denied that she was injured while at work. He stated that he did not refer her to the dispensary on the material day. However, on cross-examination, his story changed. He admitted that Mr. David Arusei was the assigned supervisor on the material day as stated by the Respondent. He claimed that on said date, he was sitting in for Mr. David Arusei. He however failed to produce any documentation to corroborate his claim that he indeed was on duty on the material day sitting in for the said Mr. Arusei. This court is therefore not convinced that DW1 was on duty at the Appellant's farm on the material day. The Appellant failed to call Mr. David Arusei to rebut the Respondent's claim that she was injured while at work.

The clinical officer, Loise Chepkemoi (DW2), claimed that the Respondent was never injured at work on the material date. She asserted that the Respondent was never treated at the dispensary on that date. She pointed out that the Respondent's name did not appear in the dispensary's outpatient register for the said date. She produced the said register in court ***(Defendant Exhibit 2).*** However, on cross examination, she admitted that she started working for the Appellant in December, 2011. She was not an employee of the Appellant, much less on duty on the material day. She can therefore not adduce evidence as to whether the Respondent was treated at the dispensary on the material day, since she was not on duty. She stated that she did not know the author of the outpatient register she produced in court. She testified that she was not the author of the said register. This court is not convinced as to the authenticity of the said register as the author of the same is unknown, and was not availed in court to produce the same.

The Respondent claimed that at the dispensary, she was attended to by a clinical officer known as Mr. Serem. Mr. Serem gave her a sick off note which she produced in court. The same was not challenged by the Appellant. DW2 confirmed that Mr. Serem used to work for the Appellant. It's this court's view that the Respondent's version of events seems consistent and truthful. The clinical officer (DW2) therefore failed to rebut the Respondent's claim.

For an act to be considered to be within the course of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible. In this case, the Respondent was authorized to pick tea leaves and was injured in the course of carrying out this duty. For the above reasons, this court is satisfied that the Respondent was able to prove that she sustained the injuries while on duty working for the Appellant.

It is also disputed, whether the Appellant was negligent and in breach of its statutory duty in failing to provide a safe working place for the Respondent, and therefore liable for the accident. The Respondent stated she was pricked by a stem of a pruned tea plant while plucking tea leaves at the Appellant's farm. She stated that he was not provided with any protective wear such as gumboots. She averred that had she been wearing the gumboots, the accident would have been averted. She would not have been pricked on her right leg. On cross examination, the Respondent faulted the Appellant for failing to place warning signs. The warning signs would have warned the Respondent as to the existence of the pruned tea stems which would have prevented the Respondent from sustaining the injuries.

The duty to exercise due care and skill falls on the Respondent where the risk is foreseeable or circumstances leading to the injury are within the knowledge of the Respondent. The duty to provide the Respondent with protective gear while at work lay with the Appellant. No reasons were given by the Appellant as to why protective apparel was not provided to the Respondent. The Appellant also failed to rebut the Respondent's assertion that the protective gear was not provided. The Appellant failed to execute such duty and so the Respondent cannot be held to have contributed to his injuries.

Consequently, this court upholds the trial magistrate's finding that the Appellant shoulders liability at 100%.

QUANTUM

It is settled principle that "***an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge or Magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect***". (See **KIMOTHO & OTHERS -VS- VESTERS AND ANOTHER CIVIL APPEAL NO. 4 OF 1984**.)

In this appeal the Appellant's counsel submitted that an award of Ksh. 30,000/= would be adequate compensation whereas counsel for the Respondent maintained that the trial court's award of Ksh.100,000/- was proper and adequate compensation.

The Appellant in the trial court cited two cases namely:-

1. **David Okoka Odero vs Kilindini Tea Warehouses Ltd [2008] eKLR** in which the High Court awarded Ksh. 40,000/= for severe personal with no permanent incapacity.

2. **Sokoro Saw Mills vs Grace Nduta Ndungu Nakuru [2006] eKLR** where the High Court awarded Ksh. 30,000/= for soft tissue injuries, which the Appellant claim were severe as compared to the present appeal.

The Respondent in the trial court relied on the case of **Catherine Wanjiru Kingori & 3 Others vs Gibson Theuri Gichubi Nyeri [2005] eKLR** where the High Court Awarded Ksh.300,000 for soft tissue injuries on 1st July 2005.

In the present appeal, the Respondent sustained the following injuries according to the treatment notes from Nandi Hills District Hospital as well as the medical report by Dr. Aluda;

i. A pricked wound on the right leg below the knee

ii. Severe pains incurred during and after the injury

Dr. Aluda (PW1) classified the Respondent's injuries as soft tissue injuries. He indicated that the same have healed. However, the scar will remain a permanent feature on the Respondent's leg.

The injuries in the cases cited by the parties are not comparable to those in the present Appeal. The High Court in the case of **Eastern Produce (K) Ltd (Savani Estate) V Gilbert Muhunzi Makotsi [2013] eKLR** awarded Ksh.70,000/- for soft injuries to the left foot. These injuries are comparable with the Respondent's injuries in the present appeal. Taking into account inflation and passage of time, this court is of the view that the trial magistrate's award of Ksh.100,000/- as general damages was not excessive in the circumstances, as to constitute a completely erroneous estimate of the assessed damages.

Therefore, this court does not find any reason why it should interfere with the findings of the trial magistrate, as the Appellant has not demonstrated that the trial magistrate acted on the wrong principle or failed to consider factors applicable in awarding general damages. It's the view of this court that the damages awarded are commensurate with injuries sustained. The special damages remain as granted.

For the foregoing reasons, this court finds that the 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 8TH DAY OF MARCH 2019

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2019

HELLEN OMONDI

JUDGE