REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 33 OF 2013

BENARD MMAITISI ANANDE.....APPELLANT

VERSUS

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

(An Appeal against the Judgment of G. Adhiambo, PM Delivered on the 19th Day of March, 2013 in Kapsabet Pmcc No. 126 of 2011)

JUDGMENT

1. The Appellant **(BERNARD M'MAITISI ANANDE)** had sued **EASTERN PRODUCE (K) LTD (SAVANI TEA ESTATE) (the respondent)** for both general and special damages for an alleged accident that occurred on the **29th day of January, 2011** while engaged in his duties at his place of work. He attributed the accident to the respondent's negligence in failing to provide him a safe working environment, and safety gears resulting in him getting pricked on the leg near the knee joint by a tea stump while plucking tea leaves.

2. **BENSON KURGAT (DW1)** who worked as a supervisor at the respondent's estate confirmed that the appellant was on duty the whole day on the date in question. He stated that the appellant was not injured while on duty that day because the practice is that whenever a worker gets injured while on duty, a report is made to him and he then refers the affected individual to the doctor with a referral note, yet he never made any such referral on that day.

3. **FAITH CHELAGAT (DW2)** a nurse at the respondent's dispensary also told the trial court that the appellant never sought treatment at the facility on the date in question as his names did not appear in the outpatient register. Further there was no referral note made by the supervisor presented by the appellant on that date nor did the appellant's name appear in the injury book/register. The respondent's position was that if the appellant sustained injury, then that was outside the scope of his employment, and the respondent would not be liable

After a full trial, the learned magistrate rendered his decision dismissing the suit with costs pointing out that the appellant's evidence about seeking treatment was rebutted by the evidence of his supervisor **BEN KURGAT** and the nurse at the dispensary plus records availed. Further, that although the appellant claimed to have been in the company of another worker when he got injured, he failed to avail that witness, and his evidence failed to prove the respondent's liability

4. The appellant being aggrieved by the decision of the court, appealed entirely against the said judgment, saying the magistrate erred in dismissing the appellant's case in favour of the respondent without any legal basis. He listed the following condensed grounds:

i. The trial Magistrate erred in failing to consider the overwhelming evidence in favour of the Appellant or even the written submissions.

ii. The trial Magistrate erred in failing to hold that the appellant had proved his case on a balance of probability.

5. The appellant's counsel submitted that the evidence presented demonstrated that the respondent failed to provide a safe working environment by failing to remove the dry tea bushes in the field or provide safety gadgets. It was the appellant's contention that since he testified that he was in the company of one **WESLEY AVISA** when he got injured, it was up to the respondent to avail that individual to rebut such claim.

6. The appellant also faulted the trial magistrate's finding that the documents the appellant produced did not indicate what time he sought treatment, saying this reasoning was based on speculation as DW1 had conceded that the supervisor did not keep a daily log book which would have been of great assistance.

7. It is trite law that there is no liability without fault and that for liability to lie; this has to be proved on balance of probabilities in civil cases. The duty of a first appellate court is now well settled that a first appellate court is enjoined to re-evaluate all the evidence adduced before the lower court in order to reach its own independent conclusions but in doing so, it should give due allowance to the fact that it did

not have the opportunity of seeing or hearing the witnesses.

8. As a general rule, an appellate court should not interfere with the findings or decision of a lower court unless it is demonstrated that in reaching its decision, the lower court made an error of law or took into account irrelevant considerations or that the court based its decision on no evidence or a misrepresentation of the evidence.

9. **PW3, (the respondent)** testified before the trial court that he had been assigned work to pick tea by his supervisor **BEN KURGAT**, when he slid, fell and got pricked by a tea stem and he sustained the injuries. He went to the company's dispensary where he was given pain killers but the pain intensified so he sought further treatment at **NANDI HILLS DISTRICT HOSPITAL.** His complaint was that the appellant did not provide him with gum-boots and an apron which would have afforded him protection from injury.

On cross examination he stated that the tea had been previously pruned, and that was the first plucking after pruning

The respondent's counsel submitted that in the case of **Kiema Mutuku vs. Kenya Cargo Hauling Services Limited** the court stated,

> **"there can be no liability without fault and there must be proof of negligence where the claim is based on it."**

In **Statpack Industries vs. James Mbithi Munyao, NAIROBI HCCA NO. 152 OF 2003** where **Justice Visram** (as he then was) stated 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 a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."**

The respondent argued that the Appellant failed to call any colleague to corroborate his assertions that he was injured on the material date or better still, failed to call one **WESLEY ARISA** who he alleged was his helper. I concur with the trial court, and the submissions made by the respondent's counsel that the trial court rightly held that the burden of proof would not shift on to the respondent to prove that the named **WESLEY** was on duty in company of the appellant. Indeed that burden remained with the appellant, and he failed to discharge it. . **PW1 (DR SAMUEL ALUDA) and PW2 (SIMON KIPLAGAT RONO)** who testified on behalf of the Appellant merely confirmed that the Appellant was injured on that particular day but not the place he was injured at.

The Respondent's supervisor testified, **DW1**, state that the Appellant never reported any injury on the alleged day. **DW1**, produced checklist, which showed that the Appellant herein plucked tea which was more or less equal to those plucked by other workers and showed that he worked for 8 hours on that particular day. There is nothing to suggest that the appellant should have worked for more than 8 hours on that particular day. The trial court correctly observed that the Appellant was not treated at the dispensary as his name was not in the register and **DW2** further produced an **incident register**, which indicated that no one was injured in the month of January, 2011.

I share the sane sentiments expressed in **NANDI TEA ESTATE LIMITED vs. EUNICE JACKSON WERE [2006] eKLR,** the court held that,

> ***"The existence of the injury and her being attended at Nandi Hills Hospital on the said date is not proof that the injuries were sustained at her place of work."***

Further **the duty of care is within specific confines of the law. It must be reasonable and foreseeable in circumstances and situations in question."**

In the case of **STATPACK INDUSTRIES V JAMES MBITHI MUNYAO [2005] eKLR** the court held:-

> ***"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"***

I cannot fault the trial magistrate's determination in holding that the mere fact that the plaintiff was treated in Nandi Hills Hospital did not prove that he was injured at the place of work. I concur with her finding that:

> ***"It was wrong for the plaintiff to allege that he had a helper and to expect the defence to prove that he had none."***

10. <u>QUANTUM</u>

A court is obliged to make a finding on quantum even when the matter is for dismissal. In the present appeal, the Appellant had sustained injuries which did not lead to any permanent disability. Basically he sustained soft tissue injuries which had healed.

> **Dulu (J)** in **Joseph Musee Mua v Julius Mbogo Mugi & 3 others [2013] eKLR, the court said;**
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> **the damages should represent a fair compensation but should not be excessive. In particular, courts have stated that** ***Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages***

are inevitably passed to the members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. See the case of Osman Mohammed & Ano. Vs Saluro Bundit Mohammed Civil Appeal No. 30 of 1997."

I have considered the decided cases cited by both counsel, and the factors to take into consideration in assessing damages, including the nature and extent of the injury, the residual effects, and the current economic trends and hold that were the claim to succeed I would have awarded damages of Ksh 40,000/-

However as matters stand, the appeal lacks merit and is dismissed with costs to the respondent.

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

H. A. OMONDI

JUDGE