



REPUBLIC OF KENYA

IN THE HIGH COURT OF ENYA AT ELDORET

CIVIL APPEAL NO. 50 OF 2013

JOSEPH KEDOGO NYANGWESO.....APPELLANT

VERSUS

EASTERN PRODUCE (K) LTD

(KAPSUMBEIYWA TEA ESTATE).....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate Honourable

G. Adhiambo in Kapsabet Civil Case No. 146 of 2011, dated 16th April, 2013)

JUDGMENT

The appeal arises from the judgment of the Resident Magistrate in Kapsabet PMCC No. 146 of 2011 delivered on 16th April 2013. The appellant's suit was dismissed with costs as he had failed to prove his case against the respondent on a balance of probability.

The appellant filed a suit against the respondent claiming special and general damages for injuries allegedly sustained on 16th November 2007 while on duty working for the respondent.

The appellant cited several grounds of appeal including, in a nutshell;

- a) The trial magistrate erred in dismissing the Plaintiff's case without any legal basis.
- b) The trial magistrate erred in failing to appreciate the overwhelming evidence in favour of the applicant.
- c) The trial magistrate erred in failing to appreciate the plaintiffs' submissions.
- d) The trial magistrate erred in failing to hold that the plaintiff had proved his case on a balance of probability.
- e) The trial magistrate erred in failing to hold that the defendant had failed to rebut the plaintiff's case
- f) The learned magistrate erred in failing to find in favour of the appellant.

The appellant submitted that he testified and produced documents in court in support of his claim. That on 16th November 2007 he was working at the respondent's premises as a tea-plucker and was assigned duty by Mr. Solomon the supervisor to carry a sack of tea to the weighing shed. While undertaking the duty he slipped and fell into an unmarked ditch and injured his left ankle joint.

His supervisor issued him with a referral chit to go to Nandi Hills Hospital for treatment. He produced the same as Exhibit 1. He blamed the respondent for failing to issue him with gumboots and overalls that would have prevented the injury. Further, they did not put any warning signs to warn the appellant of existing ditches which had been covered. He contended that it was the duty of the respondent that was not met, thus exposing him to risk resulting to his injury.

He availed a clinical officer from Nandi Hills District Hospital who produced the treatment chit and Dr. S.I Aluda who testified and produced the medical report which both confirmed the injury he sustained.

The respondent availed 2 witnesses; DW1 Simon Macharia who claimed he was the grade 1 supervisor at the appellant's workplace but confirmed he was not the appellants' supervisor and further, that the supervisor was Solomon as mentioned by the Appellant. Solomon was

not availed in court to rebut the evidence of the appellant.

DW1, Samuel Lagat claimed Linner Ng'etich was the estate nurse at the time and claimed 30 patients were treated at the dispensary. He failed to produce the accidents register in court.

The respondent failed to rebut the appellants' evidence which remains unchallenged. The supervisor was not called to rebut the evidence that he received a report on the injury of the appellant whilst on duty and that he referred him to the dispensary. This was deliberately left out to conceal the true position and would have been unfavourable to the Respondent. The defence failed to produce the clinical notes or the referral notes to prove whether the appellant was treated on the said date or not. The failure to avail the check roll clerk and the dispensary nurse creates the suspicion that the evidence would have been adverse to the respondent's case.

The trial magistrate at page 108 of the record of appeal stated that DW1 failed to prove that Mr. Solomon used to deliver injury reports or that such reports were usually made to him. Further, she stated that the attendance checklist produced by the respondent failed to show whether the appellant's work was interrupted on the material date. Despite noticing the evidence of the respondent did not rebut the appellants evidence the trial magistrate proceeded to hold that the case had not been proven on a balance of probability.

The appellant relied on Criminal Appeal No. 144 of 2011; ***Peter Wafula Juma & 2 others vs Republic*** on the sifting of the burden of proof on the defendant. Further, the respondent was unable to discharge the same.

The appellant relied on the case of ***Eastern Produce (K) Ltd. Vs Nicodemus Ndala; Eldoret HCCA No. 96 of 2010*** on the duty of care owed by the employer.

The appellant relied on the case of ***Catherine Wanjiru King'ori & 3 others vs Gibson Theuri Gichubi in Nyeri HCCC No. 320 of 1998*** where the court awarded kshs. 300,000/- for soft tissue injuries and proposed the same be awarded.

The respondent was given 7 days to file submissions on 5th April 2019. There are no submissions on record for the respondent.

ISSUE FOR DETERMINATION

- a) Whether the Appellant proved his case on a balance of probabilities

This is a first appeal to the High Court, it is thus an appeal on both facts and the law. The court is required to re-evaluate all the evidence on record and to draw independent conclusions as per the precedent in ***Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.***

It is not in dispute that the appellant was injured on the premises of the respondent on the said date. The trial court also found that the respondent was unable to rebut the evidence of the appellant and further that the checklist did not provide proof as to whether the appellant was injured and his work interrupted on the material date or not. The court further found that the document produced by DW2 to rebut the evidence of the plaintiff, the outpatient register, was not produced by the maker and it had no reason to believe it had been doctored. It proved that he had not been treated on the said date.

The court was convinced that the appellant sustained the injury but doubted whether the same was sustained on duty as there were no witnesses to corroborate the same. The stumbling block for the appellant's case was that he could not prove that the injury occurred while he was on duty.

In the circumstances, the main bone of contention is whether the appellant proved that the injury was sustained while on duty. The outpatient register did not contain any proof that the appellant was treated on the same day at the dispensary. Further, it was not proven to be a forgery or doctored.

The appellant did not call any witnesses to corroborate his evidence of injury while on duty.

In the case of ***Bungoma Criminal Appeal No. 144 of 2011; Peter Wafula Juma & 2 others vs Republic***, the court held;

“Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence..... Even in civil cases, when prima facie evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are not entitled to call for evidence in rebuttal, and where evidential burden is not discharged, judgment may be entered against the defendant –in case of a civil case – or a conviction against the accused – in case of a criminal case.”

The failure of the respondent to produce the supervisor as a witness may serve as proof of an effort to conceal evidence but the same cannot serve as proof that the injury was sustained while on duty. The appellant adduced prima facie evidence that he was injured on the material date and the respondent produced the out-patient register in rebuttal of his claim that he was injured while on duty. I would agree with the trial magistrate that the appellant did not prove on balance of probabilities that he was injured while on duty. The appeal therefore fails and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 25th day of May 2019

In the presence of:

Mr. Mathai holding brief for Mr. Yego for the appellant

And absence of Firm of Kamau Lang'at for the Respondent

Ms Sarah – Court assistant