



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 203 OF 2011**

**EASTERN PRODUCE (K) LTD (KABOSWA TEA ESTATE).....APPELLANT**

**VERSUS**

**CHRISTOPHER MUDESHI IMBOHA.....RESPONDENT**

**(An Appeal arising out of the Judgment of Hon. G. A. M'masi SRM**

**delivered on 26<sup>th</sup> February, 2009 in the Chief Magistrate's Court Eldoret**

**Civil Suit No.2840 of 1995)**

**JUDGMENT**

The Appellant was the Defendant and the Respondent the Plaintiff in the original trial in **Eldoret Chief Magistrate's Court Civil Case No.2840 of 1995**. The Respondent instituted the said suit in the trial court seeking 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 26<sup>th</sup> February 2009, 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.130,000/-, damages for loss of future earnings amounting to Ksh.50,000/- and special damages amounting to Ksh.1,200/- 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 of the view that the Respondent failed to prove her case to the required standard of proof on a balance of probabilities. The Appellant was aggrieved that the trial court failed to acknowledge that if at all an accident occurred, it was due to the negligence of the Respondent and the Appellant could not have done anything to prevent it. He faulted the trial magistrate for failing to adjudicate and determine all issues that were raised in the pleadings, evidence and submissions of the parties to the suit. Finally, the Appellant asserted that the trial magistrate applied the wrong principles in assessing damages awarded to the Respondent.

By consent of the parties, the appeal was disposed of by way of written submissions. The Respondent filed his written submissions. The Appellant failed to file their written submissions. Counsel for the Respondent, while opposing the appeal, submitted that the Respondent had established liability against the Appellants. He argued that the Respondent demonstrated that a duty of care was owed to him by the Appellant. The same was breached. He asserted that the Respondent was injured in the course of performing his duties of trapping moles at the Appellant's farm. He averred that the Appellant failed to provide the Respondent with protective gear including heavy duty gloves. He submitted that failure by the Appellant to provide the Respondent with protective gear exposed him to unnecessary risk since he could not defend himself from attack by wild animals. He was of the view that the accident was foreseeable. He maintained that the Respondent had reported to the Appellant that there were wild dogs roaming within the farm. The Appellant ought to have ensured that a safe working environment was provided to the Respondent. He asserted that the Respondent was not negligent and did not contribute to the occurrence of the accident. 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. In the premises, he prayed for the Appellant's appeal to be dismissed.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submission made by one of 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.”***

In the present appeal, the issues for determination are whether the Respondent proved that he 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 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 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 Appellant, and to show that he was also not negligent in the performance of his 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 he was employed by the Appellant at the tea farm, and that on the day of the accident he was carrying out duties assigned to him in the course of his employment was not disputed or controverted by the Appellant. The Respondent produced in evidence a certificate of employment as **Plaintiff Exhibit No.3**. The Appellant did not challenge this fact during cross-examination. The Appellant also failed to adduce evidence in the trial court to rebut the same. Therefore, the Respondent established that there existed an employer-employee relationship on the material day and the Appellant owed him a statutory duty of care.

It was the Respondent's testimony that he was injured while carrying out his duty, which was to trap moles at the Appellant's farm. The Respondent stated that on 16<sup>th</sup> February 1995, while undertaking the said duty, he was bitten by a wild dog that had rabies at the Appellant's farm. He managed to overpower the dog. He carried the dog and took it to his supervisor, Mr. Koech. He reported to the supervisor that the wild dog had bit him while he was undertaking his duties. He was taken to the company dispensary where they kept him for observation for a few days. However, he lost consciousness and was taken to Nandi District Hospital. The Respondent produced a treatment card from Nandi Hills District Hospital dated 20<sup>th</sup> February 1995. The Respondent also produced a medical report by Dr. J.K Kattam dated 6<sup>th</sup> March 1995 which 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 did not avail any witnesses to adduce evidence in the trial court. The Respondent's evidence was therefore unchallenged. The Appellant failed to adduce evidence to rebut the Respondent's claim that he was injured while at work. 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 trap moles 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 he sustained the injuries while on duty working for the Appellant.

The other issue for determination by this court is 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 that he was bitten by a rabid dog while trapping moles at the Appellant's farm. He told the court that he was not provided with any protective wear such as gloves. He submitted that he ought to have been furnished with protective gloves since he was handling trapped moles and other animals with his bare hands. He averred that had he been wearing the heavy duty gloves, the accident would have been minimized since he would have defended himself better from the rabid dog which bit his finger. The Respondent also told the court that the Appellant was aware of the existence of the wild dogs as he had reported the same to the Appellant.

As stated earlier in this judgment, the Appellant owed the Respondent a duty of care while the latter was engaged in duties assigned to him at the Appellant's farm. This duty included providing the Respondent with a safe working environment and investigating the report of the existence of wild dogs at the farm made by the Respondent for appropriate remedial action. The Appellant failed to demonstrate what reasonable care it took to ensure the safety of the Respondent while at work since the Appellant did not adduce any evidence at the trial court. The Appellant had a duty not to expose the Respondent to any unnecessary risk while at work. In addition, 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, being aware of the existence of wild dogs at the farm, failed to execute its duty of care hence the Respondent cannot be held to have contributed to his injuries. No evidence was led by the Appellant to show that the Respondent acted negligently in any way. Consequently, this court upholds the trial magistrate's finding that the Appellant was liable for injuries sustained by the Respondent.

## **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 [1988] eKLR.**)

In the present appeal, the Appellant in his grounds of appeal asserted that the damages awarded to the Respondent were excessive in the circumstances. The Respondent on the other hand submitted that the Appellant failed to demonstrate why this court ought to interfere with the award of the trial court. He was of the view that the same ought not to be disturbed.

The trial court in awarding damages relied on the case of **Patrick Odhiambo Obiro vs Catholic Diocese of Nakuru Nakuru HCCC. No. 177 of 1995 (unreported)** which was also cited by the Respondent in his trial court submission. In that case the plaintiff suffered a cut on the left thumb, a cut on the 3<sup>rd</sup> and 4<sup>th</sup> finger of the left hand and a fracture of the middle phalanx finger. He was awarded Kshs.200,000/- as general damages for pain, suffering and loss of amenities.

In the present appeal, according to the medical report by Dr. Kattam adduced in evidence, the Respondent sustained injuries to the distal phalanx of his left middle finger. He also suffered blood loss and shock due to the injuries. The report also indicated that the injuries may be fatal if the dog had rabies and the Respondent failed to get the required anti-rabies vaccines. The injuries in the cited case were comparable to those in the present Appeal. The trial court in its judgment took into account inflation and passage of time. This court is of the view that the trial magistrate's award of Ksh.130,000/- 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 is the view of this court that the damages are commensurate with injuries sustained.

The Respondent was terminated from his employment due to his deteriorating health caused by the injuries he suffered. He adduced in evidence a termination letter to that effect. The trial court awarded the Respondent Ksh.50,000/- as damages for loss of earning capacity. This court notes that the medical report adduced in evidence did not indicate that the Respondent suffered any permanent disability. The report indicated that the finger had healed. No evidence was led by the Respondent to prove that he suffered permanent disability and was unable to get gainful employment due to injuries suffered. The trial court therefore erroneously awarded the Respondent damages for loss of earning capacity.

For the foregoing reasons, this court finds that the Appellant's appeal on liability is without any merit. The same is dismissed. The Appeal on quantum is allowed to the extent that award of general damages to the Respondent for loss of future earning capacity amounting to Ksh.50,000 is set aside. The award of general damages for injuries sustained amounting to Ksh.130,000/- as well as special damages amounting to Ksh.1,200/- awarded to the Respondent by the trial court is upheld. Interest shall be paid from the date of the delivery of the judgment by the trial court. The Respondent will have the costs of the suit in the lower court as well as costs of the appeal. It is so ordered.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE 2019**

**L. KIMARU**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 27<sup>TH</sup> DAY OF JUNE 2019**

**HELLEN OMONDI**

**JUDGE**