



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 22 OF 2016

KAPCHORUA TEA ESTATE.....APPELLANT

VS.

JESICA MUHONJA HEY.....RESPONDENT

(Being an Appeal from the Judgment of the Resident Magistrate Honourable C. W Wattimah in Eldoret Civil Case No. 151 of 2013, dated 29th January, 2016)

JUDGMENT

The respondent instituted a suit against the appellant vide a plaint dated 24th October 2013 claiming for general damages, special damages, costs and interest. The claim was based on the allegations that on 17/5/2011 the respondent while engaged in her duties was seriously injured and as a result sustained serious injuries. The matter proceeded to hearing and resulted to this appeal.

APPELLANT'S CASE

The appellant submitted that the respondent failed to prove that she was injured in the course of employment. She did not adduce any evidence that she was injured at work. She produced a referral chit from the dispensary as PEXH1 dated 5/7/2011 and not 17/5/2011 which is the alleged date of injury. The chit indicated that the plaintiff was suffering from chest pains and not a swollen right shoulder or swollen right hip as alleged. This is evidence enough that the plaintiff was not injured at work on the said date.

DW1 stated that the respondent was not on duty on the said date of the injury. She had been given paid sick leave. He produced DEXH1 showing that he never plucked tea on that day. He produced DEXH2 which confirmed that the respondent was not allocated duties. No injury was reported on the alleged day of the injury and DW2, the clinical officer from the appellant's company corroborated evidence that the respondent was not treated for any injury. She produced the sick register as DEXH3 confirming that the respondent's name did not appear. The respondent also failed to bring in an eyewitness to corroborate the allegations.

The appellant cited the case of *Nandi Tea Estate Ltd vs Eunice Jackson Were (2006) eKLR* where it was held that the existence of an injury and subsequent treatment is not proof that the injury was sustained at the place of work.

DW2 confirmed the referral chit emanating from the dispensary indicated the respondent had been treated at the dispensary on 17/5/2011 for a natural ailment and had been given a sick off. PEXH1, a referral chit from the dispensary dated 5/7/2011 confirmed the treatment of chest pains and not the injuries alleged to have occurred.

PW2 confirmed that the patient was initially treated for a mass swelling on the right shoulder. He confirmed the injury issue arose on 19/5/2011. The fact that the respondent was to attend hospital on 25/5/2011 for surgery for removal of the lump confirms that the respondent was suffering from natural ailment.

The respondent failed to show a causal link between her injury and the appellant. She failed to establish how the appellant was negligent. She stated she had been plucking tea for 4 years and this shows that she had experience concerning the company premises. The respondent was engaged in a manual task that did not require any expertise. The respondent was entirely liable for her actions. The appellants cited the case of *John Karanja Njuguna vs Eastern Produce Limited (Savani Tea Estate) 2014 eKLR*.

The respondent failed to prove her case on a balance of probability which burden lay squarely on her. It cited the case of *Statpack Industry Ltd. Vs James Mbithi Munyao (2005) eKLR* on the same.

The appellant prayed the case be dismissed with costs.

RESPONDENT'S CASE

The respondent submitted that she established that she was injured whilst on duty. PEXH1 on pg. 45 of the record, a report from Nandi Hills District Hospital confirms the respondent was referred from Kapchorua Tea Estate and that she fell in a ditch and was brought in by the company ambulance on 17/5/2011.

DW1 in cross examination confirmed that the respondent was allocated duties on 17th May 2011 up to 19th May 2011. The appellant never produced an accident register to dispute the fact that the respondent was not injured while on duty. The history from the treatment chits confirm that the respondent was injured whilst on duty.

The court's finding on liability is sound and the same ought not be disturbed. The respondent was not given any working apparel to protect her from injuries. The burden of proving that the necessary working gear and apparel was provided lay with the appellant which was not discharged.

The award of Kshs. 80,000/- was reasonable and the same should not be disturbed. The award was adequate for the injuries sustained. They relied on the case of **NAIROBI HCCA NO. 741 OF 1999 – MARTIN M. MUGI V ATTORNEY GENERAL and NAIROBI HCCC NO. 41333 OF 1991 – JAMES GUTURO KIMANI V KAMANGA WAIREGI.**

ISSUES FOR DETERMINATION

- a) Whether the Respondent proved that she sustained the injury at work
- b) Whether the Respondent proved her case on a balance of probabilities
- c) Whether the trial court erred in its apportionment of Quantum and Liability

WHETHER THE RESPONDENT PROVED THAT SHE SUSTAINED THE INJURY AT WORK

The plaintiff claimed that she was injured on 17th may 2011 on the appellant's premises. A perusal of the record of appeal, particularly at page 45 where there is a medical extract report, indicates that she was brought to the hospital by ambulance after sustaining the injury while at work.

DW1 testified that the respondent was not on duty on the date of the accident. However, he also testified that she earned a day and that she was on paid sick leave. The earning of a day is due to the sick leave and therefore cannot be considered as proof that she worked on the said date. The employee performance statements indicate that on the date of the alleged accident she did not perform any task.

The medical reports submitted however, indicate that she sustained certain injuries. The issue for determination being whether she sustained them at work, I find that she was unable to prove that she did.

WHETHER THE RESPONDENT PROVED HER CASE ON A BALANCE OF PROBABILITIES

The medical reports do indeed prove that the respondent was injured on the said date. The respondent however failed to prove that the injuries were sustained at her place of work. PW2, the doctor, confirmed that there is no chit from Nandi Hills Hospital for the alleged date of the injury. The chit that was availed was indicative that she was treated on 19/5/2011.

As per the supervisor's note which is contained in the original file but is absent in the record of appeal, she was referred to Nandi District Hospital for a swelling on the right hip joint. There is no indication of the injuries allegedly sustained at work on the said date.

As per P-exh 3, it is evident that the respondent was not treated at the tea company on the said date. She was referred to Nandi Hills District Hospital for a swelling and was given a sick off.

Given the inconsistencies and the absence of proof that the respondent was actually on duty and injured on the alleged date of the accident, I do find that she failed to prove her case on a balance of probabilities.

WHETHER THE TRIAL COURT ERRED IN ITS APPORTIONMENT OF QUANTUM AND LIABILITY

Given that the respondent had failed to prove her case on a balance of probabilities, it is apparent that the trial court erred in its apportionment of liability.

In **SOROKO SAW MILLS LTD -VS- GRACE NDUTA NDUNGU (2006) eKLR** an appeal of an award of Kshs. 80,000/= by the Magistrate's court was reduced from 80,000/= to 30,000/= for soft tissue injuries to the right hip joint and the back.

In **PETER KAHUNGU & ANOTHER -VS- SARAH NORAH ONGARO (2004) eKLR** an award of Kshs. 150,000/= by the Magistrate's court was reduced to 80,000/= for soft tissue injuries.

I find that the quantum was within the amounts awarded by the court in similar cases where there had been similar injuries. If the case had been proved to the required standards in law, the award was adequate and reasonable. However given that it was not, the appeal succeeds with costs to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 26th day of September, 2019

In the absence of:

Ms Wesonga for the appellant

Ms Khayo, Ms Mwinamu holding brief for the Respondent

Ms Abigael – Court assistant