



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 10 OF 2018**

**KAPCHORUA TEA COMPANY LTD..... APPELLANT**

**VERSUS**

**FLORENCE MUDESHI.....RESPONDENT**

*(An appeal arising from the judgment of Honourable. C.M KESSE (SRM) in Kapsabet PMCC NO.167 of 2014 delivered on 24/11/2018)*

**JUDGMENT**

1. The appellant being aggrieved by the decision of the Honorable (R.M) in Kapsabet PMCC NO.33 of 2015 delivered on 20/12/2016 prefers this appeal on the grounds :-

- i). THAT the Learned trial magistrate erred in law and in fact in failing to dismiss the Respondents claim.
- ii). THAT the Learned Magistrate erred in law and in fact in failing to hold that the respondent had not proved that he sustained the alleged injury while on duty and/or in the course of employment with the appellant.
- iii). THAT the Learned Magistrate erred in law and in fact in holding the appellant 80% liable in negligence and at/or at all considering that no evidence had been adduced in support of the same.
- iv). THAT the learned magistrate erred in law and in fact in failing to hold that the respondent had not proved having sustained any injury on the date of the alleged accident.
- v). THAT the learned Magistrate erred in law and in fact in failing to hold that the respondent had been treated of a natural ailment and not an injury as alleged and therefore the appellant could not be held liable.
- vi). THAT the learned magistrate erred in law and in fact in failing to give a basis for the decision made contrary to the provisions of order 21 rule 4 of the civil procedure rules 2010.
- vii). THAT the learned Magistrate erred in law and in fact in disregarding the evidence adduced by the appellant.
- viii). THAT without prejudice to the foregoing, the learned trial magistrate erred in law and in fact in awarding damages which are manifestly excessive in view of the injuries allegedly sustained.

2. In their submissions, the Appellant stated that it is not in dispute that the Respondent was an employee of the Appellant and that she was on duty on the material date of the accident. The only dispute is the occurrence of the accident.

3. The Respondent testified that on 7/1/2013 while walking to the weighing shed, she fell into a trench and injured her leg. She reported the accident to her supervisor one Mr. Luke who gave her a referral letter to go to the dispensary. First aid was administered to her and referred to Nandi Hills Hospital. The said supervisor DW1 denied the occurrence of the accident.

4. The Respondent alleged to have been treated at Nandi Hills Hospital the following day. No treatment chits were produced save for the prescription note produced dated 19/4/2014 and was for treatment of malaria and a fungal infection.

5. As regards to liability, the Appellants stated that the responded alleged to have fallen into a trench at the appellant's plantation. She blamed the Appellant for not erecting any signs or flags to alert her of any eminent danger.

6. DW1 stated that the company provides protective apparels and they usually raise red flags on the farm if there existed any holes. Further,

that it is the duty of the employees to inform the supervisor if there were any holes or trenches in the plantation.

7. On quantum, the Appellant submitted that the Respondent sustained the following injuries:-

- i. Blunt injury on the chest
- ii. Blunt injury on the back
- iii. Cut wound on the left leg
- iv. Severe pains incurred during and after the injury.

8. The injuries were soft tissue and thus the trial magistrates holding in awarding damages was based on an irrelevant factor at that time. The injuries had healed and the Appellant submits that a sum of KSHS. 50,000 to 70,000 would have been reasonable compensation.

9. The Respondent on their part submitted that she was employed by the Appellant as a tea plucker. While in the course of her duties, she fell into an unmarked ditch while carrying tea to the weighing shed within the plantation.

10. She blames the Appellant for failing to put warning signs on the ditches which had been covered by tea bushes. She was also not issued with protective apparels like gumboots.

11. Upon being injured, she was issued with a referral note to go to the dispensary. PW1 a doctor from Nandi Hills Hospital confirmed the Respondent having been treated at the facility on 19/4/2014.

12. The document supplied missed the Respondents name a proof that the document was falsified for purposes of an attempt to defeat the respondent's case. Omission of the Respondent's name was deliberate with the aim of defeating justice.

13. The Appellant failed to mark and/or alert the Respondent of the existing dry tea stumps and holes and also did not issue her with protective apparels.

14. On quantum, the Appellant never raised it in their memorandum of appeal but raised it in submission and therefore the same should be disregarded and dismissed with costs.

15. The Respondent sustained a blunt injury to the chest and back of the neck, a cut wound on the left leg and severe pain during and after the injury. The award of Kshs. 150,000 is commensurate with the injuries sustained.

#### **Issues for determination**

16. The main issues for determination is whether the Respondent got injured while working for the Appellant and who was liable for the accident.

17. As a first appellate court, I have the duty to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD & ANOTHER (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that I had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not normally interfere with a lower court's decision on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

***“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”***

18. This court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

19. The duty of the first appellate court is to reevaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions – see **STANLEY MAORE -VS- GEOFFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002 – “the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses.”**

20. On considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court “**will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles**” - **EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278.**

21. 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 (and I add Magistrate) proceeded on wrong**

**principles or that he misapprehended the evidence in some material respect”**

22. On the question as to whether the appellant was *liable* for the injuries. The respondent proved on a balance of probabilities that she was on duty when the alleged accident occurred. The legal burden of proving *negligence* or *breach* of any statutory duty of care fell on the respondent’s shoulders.

23. The duty of the employer to ensure the safety of an employee is not absolute; it is one of reasonable care against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee’s insurer round the clock.

24. The Respondent testified that while going on with her duties as a tea plucker, she sustained injuries when she fell into a trench at the Appellant’s plantation. She further stated that the Appellant had not erected any sign or red flag on the farm to alert her of any eminent danger. That the plantation was so grown that she could not see the ground. As much as the Respondent was in control of her own steps, the trial court was right in finding that the appellant was duty bound not to expose her to eminent danger.

25. As regards to quantum of damages. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high, or, inordinately low; or, founded on wrong principles. See *Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Akamba Public Road Services Ltd v Omambia Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.*

26. From the medical report of *Dr. Patrick Kiprono*, the report concluded that the Respondent sustained severe injuries in which pain should subside with the use of analgesics.

27. In *Peter Kahugu & another v Ongaro, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR* an award of Kshs 80,000 was given for soft tissue injuries. The special damages of Kshs 1,500 were specifically pleaded and strictly proved by the respondent.

28. The Appellant has not demonstrated that the amount is so inordinately high to represent an entirely erroneous estimate and the trial magistrate’s decision is founded on wrong principle. In a nutshell the appeal lacks merit and is hereby dismissed with costs to the respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 26<sup>th</sup> day of November, 2019**

In the presence of:

Miss Muiruri holding brief for Mr. Onyinkwa for the appellant

Miss Mibei for the respondent

Ms Abigael – Court assistant