REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 99 OF 2015

EASTERN PRODUCE LIMITED.....APPELLANT

VERSUS

JOSEPH ANDAYI ANYANDA.....RESPONDENT

(An appeal arising from the judgment of Honourable. G. Adhiambo (SRM) in Kapsabet PMCC NO.293 of 2011 delivered on 19/08/2015)

JUDGMENT

The appellant filed the present suit being dissatisfied with the decision of the trial court in Kapsabet PMCC No. 293 of 2011. The cause of action in the trial court was that the respondent sustained injuries while working on the appellant's farm premises. The court delivered judgment in favour of the respondent wherein liability was held at 100% in favour of the plaintiff and damages of Kshs. 102,000/- awarded.

APPELLANT'S CASE

The appellant filed submissions on 20th September 2018.

The appellant submitted that the respondent did not demonstrate to the court that he was at work or was injured in the course of employment on the material day. He did not call a witness to corroborate his story. The appellant relied on the case of **Statpack Industries v James Mbithi Munyao CA No. 152 of 2003** to support this submission. The appellant owes no duty of care to the respondent and shall not be subjected to the employee's negligence.

The nature of the work of the appellant entails picking tea in large open fields which are beyond the maintenance and control of the employer and contain an aspect of danger which entails the employees own care while performing their duties.

The respondent failed to prove how the provision of the pleaded safety gear would have prevented his injury. The respondent failed to prove his case on a balance of probabilities and therefore the finding of 100% liability was erroneous.

The assessment of damages at Kshs. 102,000/- was excessive and too high for soft tissue injuries. The soft tissue injuries as testified by Dr. Aluda and had the respondent proved his case, would be sufficiently compensated by an award of Kshs. 30,000/-.

They prayed that the appeal be allowed.

RESPONDENT'S CASE

The respondent filed submissions on 15th October 2018.

He submitted that as per the record of appeal he called 2 witnesses other than the plaintiff. PW2 was a clinical officer who administered treatment and the other was a doctor who re-examined the respondent and prepared a medical report.

The appellant called two witnesses who were not working for it at the time of the injury, and therefore they could not clarify what transpired on the said date. The respondent demonstrated that he had been employed by the appellant and as a result of the negligence he sustained injuries while on duty.

The magistrate was guided by the injuries sustained by the respondent as pleaded in the plaint. The same were confirmed by the medical

report which indicated that at the time of re-examination the plaintiff had not healed completely. The doctor opined that the injuries were severe. Bearing in mind the rate of inflation, Kshs. 100,000/- is in fact not sufficient compensation.

ISSUES FOR DETERMINATION

a. Whether the respondent proved his case on a balance of probabilities

b. Whether the award for damages was excessive

WHETHER THE RESPONDENT PROVED HIS CASE ON A BALANCE OF PROBABILITIES

The appellant's main contention is that the respondent never proved that he was injured on the premises on the material date, 31/05/2007. The appellant however never provided a copy of the accident register to buttress the testimony of DW1 that only one person had been injured in the month of May. Further, the clinical officer and the supervisor who worked at the time of the accident were not called as witnesses as they had resigned. This however could not restrain them from testifying on behalf of the appellant.

Failure to produce the accident register, most likely than not, was an attempt to conceal evidence. It would have cleared any doubts as to whether the respondent was injured on the material date. Further, DW2 could not prove that he worked for the appellant on the material date and as a supervisor. The evidence of the plaintiff when weighed against the evidence of the defendants tilts the scale of justice in favour of the plaintiff.

The defendant did not provide any evidence that there were markings to warn the respondent of the dangers on the farm such as the ditches. The plaintiff however failed to prove that any equipment would have mitigated the injuries. Further, having worked there for 9 years, the respondent should bear some liability for the injuries as he was aware of the possible danger. In that regard I would reduce the liability of the appellant to 80%.

Other than that, I find that the respondent proved his case on a balance of probabilities.

WHETHER THE AWARD FOR DAMAGES WAS EXCESSIVE

The test as to when an appellate court may interfere with an award of damages was stated by Law, J.A. in ***Butt vs Khan (1977) 1 KAR 1*** as follows:

> **"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."**

The appellant has not demonstrated that the trial court proceeded on wrong principles or that the evidence was misapprehended in any way. The respondent has not cited any authorities to buttress his claim that the damages are sufficient and not inordinately high. In ***Eastern Produce (K) Limited v Joseph Mamboleo Khamadi*** the court set aside the damages awarded of Kshs. 120,000 and substituted it with an award of Kshs. 51,500/- for soft tissue injuries.

I find that, taking into consideration the effects of inflation, an award of Kshs. 90,000/- should suffice.

The appeal succeeds partly in terms of liability and quantum. The award is accordingly adjusted as follows:-

General damages --- 72,000/-

Special damages ------ 1,600/-

73,600

Given that the appeal has partly succeeded, each party to meet own costs in the appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **17th** day of **December, 2019**

In the absence of:

Ms Kibichiy for the appellant

Mr. Too for the respondent

And in presence of Ms Abigael – Court assistant