



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 205 OF 2011

EASTERN PRODUCE (K) LIMITED.....APPELLANT

VERSUS

EVANS IKHESI MUGOYANI.....RESPONDENT

(An appeal arising from the judgment of Honourable J.M. Njoroge (PM) in Kapsabet PMCC NO.324 of 2006 delivered on 18/5/2010).

JUDGMENT

1. The appellant was the defendant in the lower court. The respondent (**EVANS IKHESI MUGOYANI**) claimed special and general damages for negligence where he pleaded that he was employed by **EASTERN PRODUCE (K) LIMITED** (Appellant) as tractor turn boy at its *Chemomi Tea Estate*.

2. On 28th November, 2011 while working for the Appellant, he was injured when a tractor drove over a stone which flew and hit him on the right foot and toe and he sustained a bone fracture. The injuries sustained were pleaded as being that the right foot was swollen and tender, fracture of the right metatarsal bone of the middle toe and fracture of the right metatarsal bone of the second toe.

3. **The Appellant denied** the claim *in toto*.

1. The learned trial Magistrate found that the appellant was wholly to blame. She assessed general damages at Kshs 20,000; and, special damages at Kshs 2,000. The respondent was also granted interest and costs.

2. The appellant being aggrieved by the decision preferred this appeal on the grounds :-

i) That the trial court erred in law and in fact in failing to hold that the respondent was not injured at the appellant's property.

ii) THAT the trial court erred in law and/or fact in failing to hold that the respondent was at work on 28/11/2001 and worked and worked full hours for the day without any problem.

iii) That the trial court erred in law and in fact in failing to take into cognizance of the fact that the appellant owns a dispensary for the treatment of his employees and the Respondent did not seek treatment at the dispensary.

iv) That the trial court erred in law and in fact in holding that the appellant was liable yet neither the evidence nor the circumstances of the alleged accident disclosed any negligence on the part of the Appellant.

v) That the trial court erred in law and in fact in failing to hold that the accident if at all it occurred was due to the negligence of the Respondent and the appellant could have done nothing to stop it.

vi) The trial court is also faulted for failing to correctly apply the law relating to negligence and ignoring credible evidence of the defence that the respondent was employed as tea plucker and not as a turn boy of the tractor and his work was confined within the tea field and not in the factory.

viii) Further that the trial magistrate erred in failing to arrive at the finding that the evidence adduced was insufficient to prove the claim on a balance of probabilities.

ix) That the trial magistrate erred in awarding damages to the respondent without any basis and which damages were inordinately high as to amount to a gross overstatement of the loss suffered.

6. 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. There is a caveat because it neither saw nor heard the witnesses. See Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.

7. The grounds of appeal, the pleadings in the lower court, the evidence in the trial court, the precedents and the submissions by learned counsel ought to be considered.

8. The respondent (PW1) testified that he was employed by the appellant and that on the material date, he was weighing tea when he was hit by a flying stone that the tractor had stepped on.

9. The crux of the appeal is whether respondent was injured *at work*; and, whether the appellant was *negligent*. A related issue is whether the respondent was guilty of *contributory negligence*. In his testimony, the respondent claimed that he was hit by a stone after the tractor stepped on it. He stated that the appellant was to blame for leaving the stones lying carelessly at the weighing centre.

10. The respondent blamed the appellant for exposing him to the risk of injury, failing to warn the respondent on the dangers at work, failing to provide her with gumboots or other protective gear, failing to ensure that where the plaintiff carried his out his duties was safe and free from any impediments, failing to remove stones from the path of moving tractors and trailers and allowing its driver to drive dangerously within its premises.

11. **DW1 (BERNARD OSOO)**, the appellant's supervisor maintained that the respondent was not injured while on duty. He however contradicted himself by stating that the plaintiff was on duty the whole day therefore likely he was injured while on duty.

12. The trial court held that he appellant did not challenge being the owner of the tractor or that it was driven by its employee and the appellant ought to have provided the respondent with gum-boots which would have minimized the risk of injury, and that there was nothing to show that the respondent contributed to the accident. The appellant was found to be 100%liable.

13. The appellant's, submitted that on the fateful day the respondent was at duty and he picked tea for a whole day and was given a sick leave the following day.

14. Secondly, that the evidence adduced was not in conformity with the provisions of section 107, 108 and 109 of the evidence act which places the burden of proof wholly on the respondent to prove the particulars of negligence.

15. Thirdly, the appellant urged the court to find that the respondent was fully to blame for the accident insisting that the duty of the employer to ensure safety of the employee is not absolute but one of reasonable measures or precautions. They relied on the case of **Mwanyule vs Said (2004)EKL R 309, Eldoret Steel Mills Ltd vs Maonga obina and John Karanja vs Eastern Produce (K) limited.**

16. On liability, it was submitted that the respondent did not undertake to ensure his safety and the injuries sustained were due to his negligence. The employer's duty is to ensure safety of the employee which right is not absolute.

17. The respondent submitted that from the evidence tendered he was at work the whole day when he got injured. It was his contention that a stray stone hit him on the right foot and toes. The said testimony was never challenged as the driver of the said tractor was not called as a witness. Lastly, that if he been supplied with protective apparels by the appellant, the risk would have been minimized.

18. The appellant's counsel argued that the evidence presented clearly showed that the respondent was a tea plucker and not a tractor turn-boy, and pluckers were not allowed in the factory. Further that the respondent failed to show any fault on the part of the appellant as the duty of care was not absolute

19. The respondent's counsel argues that the evidence demonstrated that the appellant had carefully left loose stones, and it had a duty to ensure that the area of work was safe.

20. From the record, the Out Patient register showed that the respondent was treated at the dispensary. The appellant did not challenge the evidence that it owned the tractor or that it was being driven by its employee. There is no doubt that the respondent got injured while within the appellant's premises and he proved on a balance of probabilities that he was on duty when the alleged accident occurred. However the question is what protective gears should the appellant have provided, and was the situation a foreseeable one? Where was the stone in relation to the tea centre or the spot where the applicant stood while weighing the tea? Was the stone part of many stones just lying near the centre or was it part of what formed the path used by vehicular objects at the premises? It was important to have an answer to these questions so as to establish the issue of foreseeability and the duty of care.

21. If these questions were answered then the next key question then is whether the employer was *liable* for the injuries. For starters, the legal burden of proving *negligence* or *breach* of any statutory duty of care fell squarely on the respondent's shoulders. Section 107 of the Evidence Act provides that:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist

That duty remains on the respondent even where the standard of proof is on a balance of probabilities.

22. 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. **See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562.** With the earlier questions posed not having been established by the evidence presented at the trial, then the respondent failed to discharge the burden of proof.

23. Consequently the trial court erred in holding the appellant liable and the judgment entered be and is hereby set aside and the respondent's claim stands dismissed. The respondent shall bear the costs of this appeal.

Delivered and dated this 29th day of November 2018 at Eldoret.

H.A.OMONDI - JUDGE