



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 47 OF 2012

EASTERN PRODUCE OF KENYA

(KAPSUMBEIWA TEA ESTATE).....APPELLANT

VERSUS

ANNAH KIPCHOGE.....RESPONDENT

(Appeal against the judgment and decree by Hon. G. Mutiso (SRM) delivered on 29th March, 2012 in Kapsabet PMCC No. 316 of 2010)

JUDGEMENT

1. The respondent sued the appellant for recovery of damages arising from an accident alleged to have occurred on or about 22nd February, 2005 while on duty as a tea plucker employed by the appellant at the appellant's premises. It was the respondent's claim that due to breach of contract of employment by the appellant she was pricked by a dry pruned tea stump thereby she sustained swelling and tender lacerated wounds on both legs and she incurred sever pains during and after the injury. She claimed special damages of KShs. 1,500/- for medical report. It was her evidence that she was on the material day plucking tea when she was pricked by a dry tea stick on the leg. She stated that she could not see the dry stick since it was hidden under the tea bushes. She screamed and Ondieki the supervisor heeded to her cry together with other workers. Ondieki ordered that she be taken to the appellant's dispensary. She was thereafter referred to Nandi Hills District Hospital where she was treated. She produced an employment card as P. Exhibit 1. She was later examined by Dr. Aluda who prepared a medical report for her. Baraza Tom Juma (PW2) who is a Clinical Officer at Nandi Hills District Hospital confirmed that the respondent was treated at the facility on 22nd February, 2005 with pain and bleeding on both legs. He produced a treatment chit thereof as P. Exhibit 2. Dr. Aluda (PW3) confirmed that the respondent suffered the injuries as pleaded in the plaint and that he prepared a medical report in that regard at a cost of KShs. 1,500/-. He produced the medical report and a receipt thereof as P. Exhibit 3a and 3b respectively.

2. The appellant denied the respondent's claims. Simon Maina (DW1) denied that the respondent was injured as alleged and that she reported any injury. That the respondent plucked 27.5 kgs of tea on the material day and produced a checklist to that effect as D. Exhibit 1. On cross examination, he stated that he was called to testify because the respondent's immediate supervisor resigned. Linah Ngetich (DW2) who is a nurse at Kipchomo dispensary and who stated that she was at the material time based at Kapsumbeiwa dispensary stated that 49 patients were treated at the dispensary on the material day but the respondent was not among the said patients. On cross examination, she acknowledged that she did not avail the returns to prove that no one was injured on the material day.

3. It was the appellant's submissions that the respondent did not call any witness to corroborate her assertions thereby failed to prove her case on a balance of probabilities. That having not been proved the appellant cannot be held liable. In that regard the appellant relied on **Kiema Mutuku v. Kenya Cargo Hauling Services Limited and Statpack Industries v. James Mbithi Munyao., NRB HCCA No. 152 of 2003.** It was further submitted that the mere fact that the appellant owed the respondent a duty of care did not mean that the appellant was meant to baby sit the respondent rather she was to be cautious. It was argued that the trial court considered extraneous factors such as that having been treated at Nandi Hills Hospital then she must have been injured at work. It was submitted that the claim was time barred as the alleged accident having occurred on 22nd February, 2005 and the plaint filed on 2nd December, 2010 thus over five years later. On quantum, it was submitted that an award of 45,000/- would sufficiently compensate the respondent. The appellant relied on inter alia **Robert Ngari Gateri v. Maingo Transporters [2015] eKLR.**

4. Aggrieved by the trial court's finding, the appellant filed this appeal on grounds that can be summarized as; the trial court erred in its decision on the issue of liability and quantum. This is a first appeal, this court is therefore under duty to re-evaluate the evidence adduced at the subordinate court both on points of facts and law and come up with its findings and conclusions. See: **Selle v. Associated Motor Boat Co. Limited [1968] EA, 123.** The issues for determination in this appeal are:

a) Whether or not the magistrate erred in apportioning liability at 100% on the appellant and enter judgment in favour of the respondent.

b) Whether or not the magistrate erred in awarding the respondent damages.

5. The appellant tendered documentary evidence to demonstrate that the respondent was not on duty on the material day and could not have been injured at the appellant's premises. It is noteworthy however that documents produced were not authentic for having no company seals. Further, I find that the appellant did not controvert the respondent's allegation that she was not issued with gloves. The appellant herein did not adduce any evidence to controvert the respondent's case. The consequence of such failure has been vastly discussed for instance in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”

It follows therefore that the appellant was in breach of duty and therefore liable. In **Winfield and Jolowicz on Tort by WVH Rogers 14th Edition, London Sweet and Maxwell at page 213** it is stated that:

“If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general satisfactory to say that the employer has not fulfilled its duty.”

6. The position was affirmed in **Mumende -v- Nyalii Golf & County Club (1991) KLR 13** where the court was of the opinion that it is the employer's responsibility to ensure a safe working place. However, in measuring the duty of care, one must balance the risk against the measures necessary to eliminate the risks. The respondent ought to have been careful having the knowledge of the fact that she did not have gloves and the risk involved. In the circumstances I find that the trial court erred in apportioning liability wholly on the appellant. Liability is hereby apportioned at the ratio of 80:20 between the Appellant and Respondent.

7. The principles to be applied by an appellate court to determine whether or not to interfere with a trial court's finding on quantum was discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held:

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga -vs- Musila (1984) KLR 257.)”

8. In awarding the said damages, the trial court bore in mind the extent of the injury suffered and authorities relevant thereto. The cases and injuries were comparable to the circumstances of the respondent. In the circumstances, I am unable to find that the trial court erred in awarding the damages as done. In the end, I set aside the trial court's finding on liability and substitute it with apportionment at 80:20 between the appellant and the respondent. The Appellant is awarded half costs of the appeal while the Respondent shall have full costs in the lower court.

Orders accordingly.

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D. K. KEMEI

JUDGE

Delivered at Eldoret this 22ND day of November, 2018.

O. SEWE

JUDGE