



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 95 OF 2009

KAPCHORUA TEA ESTATE LIMITED.....APPELLANT

VERSUS

SAFANIA ONDIEKI ONGERIRESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate Honourable G. A. M'MASI in Eldoret CMCC No. 232 of 2004, dated 2nd June, 2009)

JUDGMENT

The appellant herein urges this court to set aside the decision of the lower court in Eldoret CMCC No. 232 of 2004, on both quantum and liability on the following grounds:-

- (1) The finding on liability was not supported by the evidence.
- (2) The trial court misconceived the cause of action in existence.
- (3) The Respondent's case was not proved on balance of probabilities as is required by law.
- (4) Respondent's alleged injuries were not proved or verified.
- (5) The awarded damages for loss of expectation of life and loss of dependency were exaggerated.
- (6) The decision by the trial magistrate was erratic and irregular vis-à-vis the legal principles applicable where a deceased plaintiff is substituted.
- (7) Trial magistrate erred on all points of fact and law in as far as both liability and award of damages is concerned.

The case arose from an incident at the Appellant's Estate where the plaintiff's late husband worked as a casual labourer. He was employed as a tea pruner. On 10th June, 2003 he was on duty and was hit and or pricked by a piece of stick in the left eye. He was treated at Kapsabet eye clinic, Sabatia eye clinic and at Moi Teaching and Referral Hospital. According to *Dr. Aluda* who attended to him twice prior to his death, the deceased suffered a corneal perforation which resulted to complete loss of the left eye sight. The deceased later developed conjunctival growth on the left eye which led to corneal excision. The growth was cancerous and affected the right eye making him totally blind. The condition was life threatening and he eventually died. The said injuries are blamed on the appellant for negligence in failing to provide the deceased with protective apparel while on duty.

The appellant denied having the deceased as their employee within existing contract of employment and further denied that the deceased was on duty on 10th June, 2003. The appellant further alleged that if at all the deceased suffered the alleged injuries it was out of his own negligence and while on his own frolics.

The duty of the court in the first appeal is as was expressed in the case of ***Selle and Another –vs- Associated Motor Boat Co. and others (1968) EA 123.***

The court is not bound necessarily to accept the finding of fact by the lower court. The court must consider the evidence, evaluate it itself and draw its own conclusions though it must always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.

On whether the deceased was an employee of the appellant, DW-1 (*Shem Kibet*) a supervisor at Kapchorua Tea Company told the court that

the deceased was an employee at their company but claimed that on the material day, 10th June 2003, the deceased was not present at work.

However on cross examination he revealed that he was not the one who wrote the records in Dexh 11(a). He admitted that the records were entered at the end of the day after employees were through with the day's work. The trial magistrate rightly observed that if that was the case, the deceased's name could have missed on that day if he was rushed to hospital before the register information was entered. The court therefore found that the deceased was on duty on the day it is claimed he was injured. The court also found that he was injured while on duty and had not been provided with protective gear. The appellant was found to have been negligent in not doing so. The total damages awarded to the Respondent is 337,690/=

In the case of **Butt –vs- Khan (1982–88) 1KAR,1** the court pointed out that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on the 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 was found wholly liable. The award is lenient to the appellant given that the deceased lost both eyesight's before he eventually passed on. No wrong principles of law were employed in arriving at the decision and the award. There is no cause for this court to interfere with the decision. The appeal therefore fails and is accordingly dismissed with cost to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 27th day of November, 2018

In the absence of:

All parties

And in the presence of Mr. Mwelem – Court assistant