REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 179 OF 2011

EASTERN PRODUCE (K) LTD……..…….APPELLANT

VERSUS

JONAH KIBIWOTT YEGO...……RESPONDENT

[An appeal from the original decree and judgment of G. Mutiso, Senior Principal Magistrate, in Kapsabet SPMCC No. 341 of 2010 delivered on 25th October 2011]

JUDGMENT

1. The appellant is aggrieved by the decree of the Senior Principal Magistrates Court dated 25th October 2011.

2. The appellant was the defendant in the lower court. The respondent was employed by the appellant as a guard at Chemomi Tea Factory. He pleaded in the plaint that on 13th June 2009 he was *"pricked by a dry tea stump while guarding fertilizer"*. He suffered an injury on his left shin; and, severe pain. He blamed the appellant for negligence. By a statement of defence dated 11th January 2011, the appellant denied the claim *in toto*.

3. The learned trial magistrate found that the respondent contributed to the accident to the ratio of 10% while the appellant was blamed at 90%. He assessed general damages at Kshs 150,000; and, special damages at Kshs 1,500. The respondent was also granted interest and costs.

4. The appellant lodged an appeal on 4th November 2011. There are *seven* grounds of appeal. They can be condensed into *three*: First, that the trial court misapprehended the evidence; secondly, that the case was *not* proved on a balance of probabilities; and, thirdly, that the learned trial magistrate applied erroneous principles in assessment of damages.

5. The appeal is contested. The appellant filed submissions on 6th February 2013. The respondent filed his on 12th February 2013. On 25th April 2017 learned counsel for both parties addressed me on those submissions.

6. The appellant's learned counsel, *Ms. Sitienei*, submitted that the there was no evidence that the respondent was injured at work; and, that the award of general damages was exorbitant. She relied on a list of precedents. The respondent's counsel retorted that the supervisor on duty on the material date was not called to the stand. He submitted further that the medical chits indicated that the respondent received treatment at the company's dispensary. He blamed the appellant for not providing safety gear to the respondent. He submitted that the award of damages was commensurate with the degree of injuries.

7. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.

8. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court, the precedents and the submissions by learned counsel.

9. The respondent (PW1) testified as follows-

> *"I blame the defendant and the supervisor [who] assigned me [duties] in a place I had not worked before; and, for failing to give me an apron and gumboots. It was not possible for me to see the dried tea stick [sic] as it was hidden under the bushes……..I did not deliberately injure [sic] myself. I was not given protective gear……."*

10. Upon cross examination, he said that he was employed as a *factory* security guard; *not* a *field* guard. He said he did not receive any training; and, he could not question his supervisor. He said he did not request for gumboots because he was not a field worker. He conceded that he had lodged another suit at Kapsabet being *PMCC 193 of 2009* but it was over a different cause of action. Regarding the present dispute, he claimed he received first aid at the defendant's clinic. He referred the court to the outpatient report.

11. The defendant called two witnesses. DW1 confirmed that the respondent was employed as a factory guard. His employment number is 1566. He was supposed to be guarding firewood. The witness conceded that he was not the respondent's supervisor. The supervisor was Grace Jepkemboi. He was not also the one who filled in the *Daily Task Sheet* (defence exhibit 4). He said that workers do not write details in the task sheet. It is the duty of the supervisor. DW1 did not know whether the plaintiff was transferred to another section.

12. DW2 was Millicent Otieno. She is a nurse at the appellant's Chemomi Estate dispensary. She was on duty on 13th June 2009. She said the respondent was not treated at the clinic on that date. She produced the outpatient register (defence exhibit 2). She said any injured worker would report to the supervisor who would refer the worker to the dispensary. She clarified that the company runs two dispensaries. The main dispensary was the Kipsigak Dispensary. The notes from supervisors are retained at the dispensary. The company does not give treatment notes to workers. Workers do not also sign the register.

13. My view of the matter is as follows. The duties of the respondent were to guard the *factory*. 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*. DW1 confirmed that the respondent was on duty but guarding firewood. As he was *not* the immediate supervisor, he could not tell whether the respondent was allocated duties in a different section. I have no cause to then doubt that the plaintiff was tasked by his supervisor to guard fertilizer in the *open field*. He did not have gumboots. The appellant did *not* controvert that fact.

14. I thus readily find that he did not have protective gear for the assignment at hand. The tea bushes had been pruned. The respondent was pricked by a dry tea stump. He could not see the stump as it was hidden by tea bushes. As I will discuss shortly, the injuries were severe but have healed.

15. DW2 said the respondent did not seek treatment at the dispensary. Obviously, one of the parties was *not* telling the *truth*. But to be fair to the respondent, he sought further treatment at Nandi Hills District Hospital. He produced the treatment notes (plaintiff's exhibit 2). The workers would not sign the register or be given treatment notes at the company's dispensary. My conclusion is that the respondent suffered injuries at work on 13th June 2009. I remain alive that the respondent had brought a different suit for yet other injuries sustained at work. But I am *not* satisfied that the present claim was bogus.

16. The next key question then is whether the employer was *liable negligence;* or, paraphrased in breach

of its statutory duties or common law duties of care. I have already found that the respondent proved on a balance of probabilities that he was on duty when the alleged accident occurred. For starters, the legal burden of proving *negligence*; or, *breach* of any statutory duty of care fell squarely on the respondent's shoulders. See section 107 of the Evidence Act.

17. 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, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR, *John Karanja v Eastern Produce (K) Limited*, Eldoret, High Court Civil Appeal 35 of 2013 [2014] eKLR.

18. In this case, the respondent *proved* that he was guarding fertilizer in the open plantation. He had no gumboots. But the tea bushes had been pruned. Although the stump that pricked him was hidden by tea bushes, it remained his *primary duty* to keep a look out. The respondent did not say he was a *new* employee in the company. The task he was given was simple and did *not* require any special training. I thus find that the respondent substantially *contributed* to the accident. Granted those circumstances, I find that both parties should share *equal liability* for the accident.

19. I will now turn 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.

20. From the medical report by Dr. Samuel Aluda [plaintiff's exhibit 3 (a)], the respondent had a prick wound on the left leg (shin); and suffered severe pain during and after the injury. The wound was cleaned and dressed. He received an anti-tetanus injection, algesics and antibiotics. The injuries have *healed* but there is a scar. These were then *soft tissue injuries* which have completely *healed*. There was *no* permanent injury. The general damages awarded by the lower court were *too* high in the circumstances.

21. 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. Granted the age of the authority, I am of the view that a sum of Kshs 100,000 is sufficient. The special damages of Kshs 1,500 were specifically pleaded and strictly proved by the respondent.

22. In the result, the appeal succeeds in part. The judgment of the lower court dated 25th October 2011 is hereby *set aside*. Judgment is now entered in favour of the respondent against the appellant as follows-

a) Liability is apportioned equally between the appellant and respondent at 50% to 50%.

b) General and special damages are assessed at Kshs 101,500 *less 50% contributory negligence* which is to say *Kshs 50,750.*

c) The respondent is awarded *interest* on the above sum from the date of the *original decree* till full payment.

d) I award the respondent *half* of the costs in the *lower court*. Each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 18th day of May 2017.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the appellant.

Mr. Z. Yego for the respondent instructed by Z. K. Yego Advocates.

Mr. J. Kemboi, Court clerk.