



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL CASE NO. 105 OF 2012
KAPCHORWA TEA COMPANY LIMITED.....APPELLANT
VERSUS
JOSEPHAT INDULACHI.....RESPONDENT

JUDGMENT

This matter now comes up for the man appeal filed by the appellant, Kapchorua Tea Company Limited. In the memorandum of appeal, filed on 18th December, 2012, the appellant listed up to 9 grounds of appeal. At the time of hearing however, the appellant had several of the grounds consolidated and argued jointly (grounds 1 to 8). The Respondent opposed the appeal.

First, counsel for the appellant submitted that the Respondent during the trial, did not prove his case on a balance of probabilities. That he offered unreliable and uncorroborated evidence. The arguments were based on the following: -

- **That the Respondent only gave oral evidence the he had been on duty at the alleged time of accident.**
- **That the supervisor (DW2) denied ever given the Respondent permission as alleged.**
- **That it was not proved that the injuries were sustained while at work. It was otherwise admitted that the Respondent had been on duty.**
- **That the treatment card (DExh-2(b)) shows that the Respondent was first seen in Hospital at 8:00PM for a painful left leg and not any sort of injury.**
- **Counsel challenged the records from Nandi Hills District Hospital since they were not from the first point of treatment.**

On the issue of negligence, counsel relied on the evidence of the supervisor (page 25) that contrary to the evidence of the Respondent, warning signs had been placed. And finally, that being soft tissue injury, the award of 150,000/- was excessive. She proposed a figure of 60,000/-

In opposing the appeal, counsel for the Respondent (Mr. Yego) submitted that this appeal lacks merit. That both sides admit that the appellant was attended to at the appellant's dispensary proving that he was injured while on duty. And that the diagnosis was consistent with the injury on the knee. That whereas arthritis is an ailment for the elderly, Respondent was only 43 years old. He challenged the appellant for

not producing the accident register i.e to conceal the injury to the Respondent.

On liability, counsel agreed with the court's apportionment at 80:20. Also the assessed quantum of Kshs. 150,000/-.

I have considered the 2 sets of submissions. I have also perused the evidence and proceedings of the lower court. On this issue of liability, I have considered the evidence of the Respondent (PW1) at page 3 of the proceedings. The Respondent gives details of how he fell in a ditch while he was at work. That he could not have seen the ditch because of the nature of tea plantation. He sustained injuries on the left knee and proceeded to the Dispensary on directions of his supervisor, Mr. Joseph Akama. He produced the dispensary note and outpatient record book as exhibits together with the X-ray film. This witness clearly denied having gone to the Dispensary at 8:00p.m nor having arthritis problem. And further that he had not seen the ditches being dug. He blamed the company for failure to fix warning signs of the ditches.

The Doctor who examined the Respondent at Nandi Hills Hospital the following day, (PW2, Simon Kiplagat) confirmed that he had sustained a dislocation. And in his opinion, problems of the knee could be caused by other factors like arthritis, but this on people of higher age.

In effect, during the trial, the Respondent gave evidence that he had in fact been on duty on the material date. And that he sustained injuries when he fell on a ditch at the tea plantation. His evidence was that had been a warning sign on the existence of the ditch, he would not have fell in it and got injured. Of the exhibits he produced, the records from Nandi Hills Hospital confirm that he was X-rayed on the knee joint which was found to have a dislocation.

And what was the defence of the appellant? The appellant has conceded that the Respondent was indeed at work on the material date. It was however denied that the Respondent brought any report of injury. The witness of the appellant denied ever referring the Respondent to the Hospital. It was also denied that there was any ditch where the Respondent worked.

This is a civil case and the onus on the Respondent (original plaintiff) is to prove the case on a balance of probabilities. He proved that he had been on duty. He proved both by oral evidence and documentary records in the form of treatment notes and X-ray reports and X-ray films that he had sustained dislocation of the knee joint. The X-ray examination was 1 day after the date of the alleged incident. How would the Respondent have obtained the X-ray records if he had not got injured? I do not see this feasible. On the other hand, the appellant called 1 witness who apparently only denied the allegations of the plaintiff. The witness denied ever being a ditch at eh relevant spot in the plantation. He denied receiving any report of the incident. The Respondent brought up the issue that the Respondent probably suffered from arthritis. No evidence of this was however produced in court. And it was the opinion of the clinical officer (PW2) that this was not possible in view of the youthful age of the Respondent, and the specific findings from the X-ray examination.

Considering these 2 conflicting pieces of evidence, this court agrees with the lower court finding that the plaintiff (Respondent) proved on a balance of probabilities that he was injured while at work. As the employer, the appellant is statutorily under a duty to ensure a safe working environment for its employees. It failed to ensure this when it did not fix any warning signs of the ditches at the plantation. It has to take liability for this accident.

I have noted however, that the Respondent himself, was a seasoned worker at the plantation. He ought to have known of the existence of the ditches and acted accordingly and avoid falling into one and having himself injured. He also must share in the blame. The trial court assessed liability at 20:80 in favour of the Respondent. This figure has not been challenged, by the appellant. The Respondent is on his part, in agreement with this finding on liability. On my part, I find this assessment reasonable in view of the circumstances of this case and I have no reason to interfere with the finding on liability at 20:80. I so hold.

On quantum, it is clear from the medical report produced that the Respondent had sustained swollen and tender bruised knee and dislocation of the left patella. These were basically soft tissue injuries. A sum of Kshs. 150,000/- was awarded on 100% basis. This, to me is reasonable and ought to stand. I find so.

In all therefore, I do not find any merit in this appeal (both on liability and quantum). I dismiss the same wholly. I award costs of this appeal to the Respondent.

DATED, SIGNED and DELIVERED at ELDORET, this 28th day of June, 2017.

D.O. OGEMBO

JUDGE

Judgment read out in open court in presence of: -

Mr. Ayieko for Ms. Chege for Respondent and in absence of Plaintiff's counsel

D.O. OGEMBO

JUDGE