REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 94 OF 2012

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

VERSUS

MAGITALENA CHEPKOECH KULOPA……..…….RESPONDENT

[An appeal from the original decree and judgment of G. Adhiambo, Resident

Magistrate, in Kapsabet PMCC No. 171 of 2011 delivered on 16th August 2012]

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 16th August 2012.

2. The appellant was the defendant in the lower court. The respondent claimed special and general damages for negligence. In a plaint dated 26th April 2011, she pleaded that she was employed to pick tea at the appellant's *Kibabet Tea Estate*. On 27th December 2008 she *"slipped and fell into an unmarked ditch and sustained serious injuries"*. The injuries disclosed in the plaint were: blunt trauma to the chest; and, swollen left shoulder with a prick wound at the back.

3. By a statement of defence dated 27th May 2011, the appellant denied the claim *in toto*.

4. The learned trial Magistrate found that the appellant was wholly to blame. She assessed general damages at Kshs 70,000; and, special damages at Kshs 1,500. The respondent was also granted interest and costs.

5. The appellant lodged an appeal on 3rd September 2012. There are *five* grounds of appeal. They can be condensed into *three*: First, that the trial court erred by holding that the appellant was 100% liable for the accident; secondly, that the respondent did not prove her case on a balance of probabilities; and, thirdly, that the damages awarded were exorbitant.

6. The appeal is contested. The appellant filed submissions on 23rd September 2015. The respondent filed hers on 21st July 2015. On 25th July 2017 learned counsel for both parties addressed me on those submissions. The appellant's learned counsel, *Ms. Magut*, submitted that the respondent had worked on the plantation since 1997. As she knew the terrain, she should have been more vigilant. It was submitted that protective gear like gum boots, overalls or gloves would have made little or no difference. Learned counsel submitted that the respondent was negligent. Considering the nature of injuries, counsel was of the view that an award of Kshs 30,000 would have been sufficient.

7. The respondent's learned counsel *Mr. Yego* submitted that the ditches were dug up by the appellant. They were unmarked. The respondent was not provided with safety gear like gumboots. It was the respondent's case that the evidence of negligence was not rebutted by the appellant. Lastly, learned counsel submitted that the damages awarded were commensurate with the degree of injuries. I was implored to dismiss the entire appeal with costs

8. 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.

9. 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.

10. The respondent (PW1) testified that she was employed by the appellant. She said that on the material date, she was picking tea. She testified as follows-

> *"I fell into the hole. There was no warning sign. My foot was not injured but I fell on my back and a stick pricked my back near the left shoulder. I also sustained injuries on my chest and on my left hand. When I went to the dispensary, I was not treated but was referred to Nandi Hill District Hospital"*

11. Paragraph 3 of the defence *denied* that the respondent was employed by the appellant. I have considered the evidence of the appellant's witness (DW1). He conceded that the respondent worked at *Kibabet* estate. I am also fortified by the *Attendance Checklist* (Defendant's exhibit 1) showing the employee's number and name. I thus concur with the learned trial magistrate that the respondent was an *employee* of the appellant. I also find that the respondent was a casual labourer. Her duties were to pick tea in the appellant's estate.

12. 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 her testimony, the respondent claimed that she fell into an *unmarked ditch*. The appellant's witness DW1 confirmed that the ditches were dug up by the appellant to prevent soil erosion. At paragraph 6 of the plaint, the respondent blamed the appellant for not providing a safe working environment or equipment; failing to provide supervision; and, breaching the contract of employment. In particular, she faulted the company for failing to provide her with gumboots or other protective gear; and, failing to mark the ditches.

13. I have studied the record very carefully. On cross examination, the respondent conceded that she had worked in the estate since 1997. She said as follows:

> *"I am aware that holes are dug in [the] tea plantation. The holes are dug where tea leaves are uprooted.…..…You will be lying to say that I was not careful. The supervisor referred me to the dispensary. Mary did not give me medicine but she applied medicine on the wound. Mary referred me to Nandi Hills District Hospital…the gloves could have protected my hand. The company ought to have placed a flag to show it was a dangerous place".*

14. DW2, Miriam Warau, was *not* the duty nurse at the company's clinic on the material day. She testified that the respondent did *not* attend the dispensary on 27th December 2008. DW2 was relying on company records. She was of the view that the respondent was not injured at work. If she had, she would have been treated at the company's dispensary. Obviously, one of the parties was *not* telling the *truth*. But to be fair to the respondent, she sought further treatment at Nandi Hills District Hospital. She produced the original treatment notes (plaintiff's exhibit 1). My conclusion is that the respondent suffered injuries at work on 27th December 2008.

15. The next key question then is whether the employer was *liable* for the injuries; or, for not marking the

ditch. Paraphrased, was the appellant *negligent* or in breach of statutory duty or common law duties of care? I have already found that the respondent proved on a balance of probabilities that she 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.

16. 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.

17. In this case, the respondent *proved* that the company dug up the ditches to arrest soil erosion. She had worked in the estate since 1997. She conceded that she was aware of the ditches. It was the respondent's *primary duty* to keep a safe look out. True, the appellant had not provided her with gumboots, overalls or gloves. It remains theoretical how those items would have prevented her fall or prevented the injuries to her back.

18. I thus find that the respondent partially *contributed* to the accident. Granted those circumstances, I find that both parties should share *equal liability* for the accident. See *Woods v Durable Suites Ltd* [1953] 2 All ER 391, *Devki Steel Mills Limited v Joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR, *Statpack Industries v James Mbithi Munyao*, High Court Nairobi, Civil Appeal 152 of 2003 [2005] eKLR, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR, *Elgeyo Saw Mills Ltd v Alfred Rotich* High Court, Eldoret Civil Appeal 100 of 2012 [2016] eKLR.

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 of Dr. Samuel Aluda dated 1st April 2011 [plaintiff's exhibit 2(a)], the respondent had *"slight tenderness in the chest, back left shoulder; and, a scar on the back"*. These were *soft tissue injuries* which had *healed*. There was *no* permanent injury save for the scar. The pain would subside with use of analgesics. 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. The special damages of Kshs 1,500 were specifically pleaded and strictly proved by the respondent. The damages awarded in the present case *may* seem a little high. But I cannot say the award is *exorbitant* or founded on *wrong principles*. I thus decline to disturb the award.

21. In the result, the appeal succeeds in part. The judgment of the lower court dated 16th August 2012 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 71,500 *less 50% contributory negligence* which is to say *Kshs 35,750.*

c) The respondent shall have *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 21st day of September 2017.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by counsel for the appellant.

Mr. Misoi for Mr. Yego for the respondent instructed by Z. K. Yego & Company Advocates.

Mr. J. Kemboi, Court Clerk.