



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 82 OF 2009

WILLIAMSON TEA (KENYA) LIMITED.....APPELLANT

VERSUS

RICHARD KIPLIMO SIRMA.....RESPONDENT

(Being an appeal from the original decree and judgment of J. M. Njoroge, Principal Magistrate, in Kapsabet PMCC No. 172 of 2006 delivered on 26th May 2009)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 26th May 2009. The appellant was the defendant in the lower court. The respondent had filed a suit claiming special and general damages for negligence. The respondent claimed that on 28th May 2003 he was pruning tea at the appellant's estate. He fell into an unmarked ditch; and, dislocated his right hand. By a statement of defence dated 4th May 2006, the appellant denied the claim *in toto*.
2. After considering the evidence, the learned trial Magistrate found the appellant was wholly liable for the accident. He assessed general damages at Kshs 100,000; and, special damages at Kshs 3,000. The respondent was also granted interest and costs.
3. The appellant was aggrieved by those findings. It lodged a memorandum of appeal dated 8th June 2009. There are *eight* grounds of appeal. They can be condensed into *six*: First, that the trial court erred by holding that the appellant had a contractual duty to provide a safe working environment; secondly, that the trial court erred in concluding that failure by the appellant to call evidence amounted to an admission; thirdly, that the learned trial magistrate erred in finding that the respondent was injured at work; fourthly, that there was no proof that the appellant was negligent; fifthly, that the respondent did not prove his case on a balance of probabilities; and, sixthly, that the award of Kshs 100,000 was manifestly high.
4. On 31st May 2016 learned counsel for both parties appeared before me. The appellant's learned counsel, *Mr. Kapele*, submitted that the impugned decision found little support in the evidence or the law. I was referred to discrepancies in the dates of the alleged injury and the dates the respondent sought treatment at Nandi District Hospital. Reference was also made to a list of authorities filed on 5th December 2012. The respondent's learned counsel, *Ms. Kibiego*, left the matter to the decision of the court.
5. 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.
6. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court, the authorities and the submissions by learned counsel.

7. The respondent (PW1) testified that he was an employee of the appellant. He gave his employment or payroll number as 5699. He also produced his staff identification card (exhibit 1). As I stated, the appellant filed a defence denying the claim *in toto*. The appellant did *not* lead any evidence at the trial. That did *not* mean that it *admitted* the claim. The statement of defence joined issues with the respondent on his entire claim. Paraphrased, the burden of proof that the respondent was an employee *initially* fell upon the respondent.
8. The respondent discharged that burden on a burden of probabilities by citing his *payroll number* and producing his *staff identity card*. At that point, the burden *shifted* to the appellant to *rebut* the fact. In the absence of a rebuttal; or, any meaningful cross-examination on that aspect, I concur with the learned trial magistrate that the respondent was an *employee* of the appellant. True, the respondent did not exhibit a *formal* contract of employment. But documentary evidence is just but *one* of the *means* of proving or disproving a fact in issue. That ground of appeal fails.
9. The crux of the appeal is whether respondent was injured *at work*; and, whether the appellant was *negligent*. In his testimony, the respondent claimed that on 28th May 2003, he was assigned duties to prune tea bushes. In the course of his work, he fell into an unmarked ditch. He said the hole was covered by tea leaves and he could not detect it. In paragraphs 6 to 8 of the plaint, he blamed the appellant for not providing a safe working environment or equipment; failing to provide safe means to access the plaintiff's place of work; failing to provide supervision; and, breaching the contract of employment. Regarding particulars of negligence, the respondent pleaded that the appellant failed to take precautions to ensure his safety; failed to clear any danger; and, exposed him to risk of injury.
10. I have studied the record very carefully. Regarding negligence, the respondent told the court that he "*fell into the ditch that was covered by tea leaves and dislocated [his] hand at the wrist joint*". In cross-examination, he answered further that he "*did not see the ditch before [he] fell into it*". He also blamed the employer for failure to provide him with *gumboots and gloves; and, for failing to erect warning signs*.
11. The key question then is whether the employer was *liable* for the fall; 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 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.
12. Secondly, I do not see what the employer could have *reasonably* done to ensure the appellant never slipped into an unmarked ditch. The respondent testified that the company should have erected a sign to warn him of the danger. But there was an implied term of the contract that the appellant took the risks *incidental* to his contract of employment. The respondent did not say he was a *new* employee in the company or that he did not know the terrain. It was the respondent's *primary duty* to keep a safe look out.
13. Thirdly, no evidence was led on the kind of *clothing* that could have been supplied to the respondent to avoid the type of injuries he sustained. I am at a loss how a set of gloves would have prevented the fall or the sprain on his wrist. Perhaps a pair of gum boots would have provided a better grip. What were the conditions? Was it wet for example? The respondent did not simply lead such vital evidence. It was not a matter where the trial court could take *judicial notice*. I thus, with respect, *disagree* with the learned trial Magistrate that negligence or breach of any statutory duty of care was proved on a balance of probabilities.
14. 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.
15. I am in the end *not* satisfied that the appellant was negligent or failed to provide a safe working environment. See particularly *John Karanja v Eastern Produce (K) Limited*, Eldoret, High Court Civil Appeal 35 of 2013 [2014] eKLR whose facts were on all fours with this case. See also *Nandi*

- Tea Estates v Alfonse Dera Ainea, Eldoret, High Court Civil Appeal 128 of 2010 [2016] eKLR. It follows as a corollary that the respondent failed to establish liability against the appellant on a balance of probabilities.
16. 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.
17. From the evidence of PW2 (Dr. P. M. Ajuoga), the respondent suffered a *sprain* on the right wrist. They were *soft tissue injuries* which had *healed*. There was *no* permanent injury. The treatment given comprised of a prescription of antibiotics, analgesics and liniment. Clearly, the appellant suffered *minor* soft tissue injuries which have completely healed. The general damages awarded by the lower court were neither too high nor too low. 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 3,000 were specifically pleaded and strictly proved by the respondent. I would not in the circumstances have interfered with the award of general and special damages. But that now is all water under the bridge.
18. The appellant having failed to establish his case on liability, this appeal must succeed. I set aside the judgment and decree of the lower court dated 26th May 2009. I substitute it with an order dismissing the respondent's case in the lower court. Costs follow the event and are at the discretion of the court. I will grant the appellant costs in the lower court; and, also in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of June 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

No appearance for the respondent.

Mr. J. Kemboi, Court Clerk.