REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 65 OF 2013

KAPCHORWA TEA CO.LIMITED …… APPELLANT

VERSUS

REBECCA NYAMBURA NJUGUNA ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Principle Magistrate Honourable A. LOROT (SRM), in KAPSABET PMCC No. 238 of 2010, dated 26th March, 2013)

JUDGMENT

1. This appeal arises from the judgment of *Hon. Lorot H R* (SRM) in Kapsabet SRMCC No. 238 of 2010 dated 26th March, 2013. The respondent in this appeal was the plaintiff in the suit while the appellant was the defendant. The respondent had sued the appellant seeking general and special damages for injuries sustained on 5th November, 2009 in the course of her employment with the appellant. She was awarded a total sum of Kshs. 121,000 together with costs and interest after the appellant was found 100% liable for her injuries.

2. The appellant was aggrieved by the learned trial court's decision. It lodged an appeal to this court challenging the trial court's finding on both liability and quantum of damages. In the memorandum of appeal dated 7th May, 2013, the appellant urged seven grounds which can be condensed into the following three main grounds;

> **(i)** That the learned trial magistrate erred in law and fact in failing to apply the law applicable to a claim of negligence in the factual context of the respondent's claim and thereby arrived at an erroneous finding on liability.
>
> **(ii)** That the learned trial magistrate erred in law by failing to properly analyse the evidence in its totality and in ignoring the appellant's written submissions.
>
> **(iii)** That the learned trial magistrate misdirected himself in the assessment of damages and awarded the respondent damages that were manifestly excessive considering her injuries.

3. By consent of the parties, the appeal was prosecuted by way of written submissions. Those of the appellant were filed on 9th June, 2016 while those of the respondent were filed on 5th April, 2016. The submissions were highlighted before me on 14th June, 2016. Learned counsel *Ms. Nasimiyu* urged the appeal on behalf of the appellant while learned Counsel *Mr. Wamboba* represented the respondent.

4. This being a first appeal to the High Court, my duty is to re-examine and re-evaluate all the evidence presented to the trial court in order to independently determine whether the decision arrived at by the trial

court on such evidence should stand. In undertaking that task, i should be careful to remember that I did not have the benefit of seeing or hearing the witnesses and give due allowance to that disadvantage: See – ***Peters V Sunday Post (1958) EA 424***; ***Williamson Diamond Ltd V Brown (1979) EAI.***

5. It is pertinent to note at this juncture that though an appellate court is mandated to interfere or reverse the findings of a lower court, this jurisdiction must be exercised with caution. It must be exercised in limited circumstances. This is where the court is satisfied that the trial court's findings or decision was not based on any evidence or that the trial court considered irrelevant factors or acted on the wrong legal principles:-

> See – ***Ephantus Mwangi V Duncan Mwangi Wambugu (1982 -88) I KAR 278***; ***Mwana Sokoni V Kenya Bus Service (1982 -88) I KAR 870***; ***Sumaria & Another V Allied Industries Ltd (2007)2KLR I.***

6. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the rival submissions made by the parties and the persuasive authorities cited. Having done so, I find that the issues for my determination in this appeal are twofold. The first one is whether the learned trial magistrate erred in his findings on liability and if the determination in the first issue is in the negative, the second issue that will arise for determination is whether the damages awarded to the respondent were manifestly excessive.

7. In order to resolve the first issue, it is necessary to revisit the evidence presented before the trial court. In support of her case, the respondent testified as PW1. She called two other witnesses who testified as PW2 and PW3. In her evidence, she testified that she was employed as a tea plucker by the appellant. On 5th November, 2009 she was plucking tea when she fell into a trench which she had not seen as it was covered by grass. She was injured on her back and chest.

8. PW3 witnessed the fall. She called their supervisor one Maurice and together they took PW1 to Kapchorua Dispensary for treatment. She was later taken to Nandi Hills District Hospital for further treatment. PW2, a clinical officer at Kapsabet District Hospital did not examine PW1 but he produced a medical report dated 15th November, 2009 on behalf of the hospital's medical superintendent.

9. In her evidence in cross examination, PW1 stated that she had worked in the appellant's premises in the same capacity for 12 years. She blamed the appellant for her injuries because the company did not erect any warning signs to warn its workers about the existence of the trench.

10. In its defence, the appellant called two witnesses. DW1, it's field operations supervisor admitted that the respondent was employed by the appellant as a tea plucker but gave contradictory evidence regarding whether she was on duty on the material date. In his evidence in chief, DW1 maintained that she was not on duty that day as her number 1108 was missing from the daily green leaf weightment sheet. But in cross examination, DW1 stated as follows; ***"I did not say she was not on duty. The daily works allocation does not show pluckers…"***

11. DW2 was a clinical officer attached to the appellant's dispensary. Relying on a daily sick register for the dispensary compiled by another clinical officer, DW2 supported the appellant's claim that the respondent was not injured on 5th November, 2009 as her name was missing from the list of employees in the register who were treated in the dispensary on the material date.

12. In his very brief judgment, the learned trial magistrate did not give any reasons for his finding that the appellant was liable in negligence for the respondent's accident and resultant injuries at a 100%.

13. On my own evaluation of the evidence, I find that the respondent proved on a balance of probabilities that she was on duty on the date alleged and that she actually fell into a trench sustaining some injuries. I say so because her evidence on this point was collaborated by the evidence of PW3 who witnessed the fall and the medical evidence adduced during the trial.

14. However, for the respondent to succeed in her claim, she needed to prove to the required legal standard that not only was she injured on that day in the course of her employment but that the appellant breached its duty of care towards her and that it was as a consequence of the breach of that duty that she fell and sustained the injuries in question. Put another way, she had to establish a causal link between her injuries and the appellant's negligence.

15. As I held in ***Loice Iminza vs Nyayo Tea Zones Development Corporation Eldoret HCCA No. 185 of 2010***, the law of negligence is based on the concept of foreseeability. And an employer can only be held liable for damage which was foreseeable and which he failed to avoid by taking reasonable precautions. I agree with the appellant's submissions that the learned trial magistrate in his judgment did not address his mind to the issue regarding whether the respondent had proved the particulars of negligence attributed to the appellant in her plaint and to the principle of causation in claims based on the tort of negligence – See : ***Statpack Industries Limited V James Mbithi Munyao Nairobi HCCA No. 1152 of 2003*** where the court held that not every injury is necessarily the result of someone's negligence and in order to succeed in a claim based on negligence, the plaintiff (in this case the respondent) had to establish by evidence a connection between the injury and the defendant's negligence.

16. In this case, the respondent and PW3 testified that she fell into a trench that was not visible as it had been covered by grass. They had both worked for the appellant for over ten years and none of them was aware of its existence. They did not give any description regarding the alleged trench in terms of depth or size on the basis of which a reasonable inference could be drawn on whether it was actually man made or whether it may have been made by wild animals or natural factors like soil erosion considering that it was in a tea plantation. I wholly agree with *Sitati J* in ***James Finlays 'K' Ltd V Evans Nyatii Kisii Civil Appeal No. 223*** where in an appeal based on similar facts as the instant one, the Hon. Judge held as follows;

> ***"It is now trite law that where work is being undertaken in the field especially in a tea plantation if an injury occurs from events whose occurrence is too remote an employer should not be held liable. In this instant case the hole which the Respondent allegedly fell into is not a manmade hole, it is a hole whose existence was too remote for the Appellant to have knowledge about. It is therefore against this background that even assuming that indeed there was duty of care owed to the Respondent, the claim by the Respondent would not fall as part of those the Appellant would be held liable for breach of duty of care cause existence and possibility of causing injury was too remote".***

17. Though in this case there was no evidence to prove whether the said trench was man made or not, considering that it was not visible and it was in a tea plantation which no doubt must have covered a big area, it was incumbent on the respondent to prove by a preponderance of evidence that the appellant was aware of its existence and that it failed to take reasonable precautions to avoid the risk of it's employees falling into it and sustaining injuries. No such evidence was adduced by the respondent.

18. For all the foregoing reasons, I find that the respondent failed to prove her claim in this case on a balance of probabilities as required by the law. It is thus my finding that the learned trial magistrate erred in his finding on liability in this case.

19. In the result, I find that the appellant's appeal is merited and it is accordingly allowed. I consequently set aside the trial courts judgment dated 26th March, 2013 and substitute it with a judgment of this court dismissing the respondent's case against the appellant with costs.

Each party shall bear its/her own costs of the appeal

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of October 2016

In the presence of:

Mr. Aseso holding brief for Ms. Nasimiyu for the appellant

Mr. Womboba for the respondent

Ms Naomi Chonde Ct Clerk.