



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 55 OF 2011.

TINDERET TEA ESTATES (1989) LIMITED ::::::::::::::: APPELLANT.

VERSUS

SIMON AYIENDA ::::::::::::::: RESPONDENT.

J U D G M E N T.

INTRODUCTION.

1. The respondent case was that on 5th December, 2008 he was on duty plucking tea on the instructions of his employer's agent when he slipped into a ditch and got injured on the left leg and back.
2. He was treated at Nandi Hills District Hospital. He blamed the appellant for the accident because no warning signs were placed on the tea fields and the appellant did not provide him with gumboots.
3. As a result, he sued employer/appellant in Hamisi SRMCC 36/2010 for general and special damages for injuries sustained on 5th December, 2008 while in the cause of his employment with the appellant.
4. The matter proceeded to a full hearing and both plaintiff and defendant availed 2 witnesses each. The trial court handed judgment on 15th April, 2011 against defendant with liability apportioned at 80:20 in favour of the respondent where upon the plaintiff was awarded Ksh. 81,500/= together with costs and interest.
5. The appellant being dissatisfied with the said verdict, filed the instant appeal on liability. The appellant set out the following grounds of appeal:-

(1) The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same;

(2) The learned trial magistrate did not in the alternative consider or sufficiently consider the demand of contributory negligence based on the evidence adduced and the submissions filed by the defendant;

(3) The learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities in the written submissions presented and filed by the defendant;

(4) The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him and in particular the evidence presented on behalf of the defendant;

(4) The learned trial magistrate erred in failing to hold that the plaintiff had failed to prove negligence on the part of the defendant;

(5) The learned trial magistrate erred in law by introducing extraneous factors and consequently applied wrong legal principles and precedents and as such foisted liability on the defendant without any basis in law or fact.

Plaintiff's case.

6. The plaintiff testified and called one witness.

7. He testified that on the material date while at work plucking tea he slipped into a ditch and got injured on his left leg and back. He went to Nandi District Hospital where he was treated. He identified treatment chit, medical report. He also produced employment contract. He blamed the company as he was not given gumboots and there were no signs showing presence of a ditch.

8. On cross-examination, he confirmed he had worked for 4-5 days. He had not seen the ditch. Among other workers only him went to the ditch.

9. PW2 was a clinical officer who treated him (respondent). He produced treatment chit P. Exh. 2. On cross examination he stated that the injuries were one day old. He (respondent) was treated for back pain and left ankle joint. The plaintiff closed his case at this stage.

Defendant's case.

10. The defendant also called 2 witnesses. DW1 Joseph Kiprof Keter, clerk of the appellant testified that he worked for appellant since 1989. On the material day, the respondent worked for the appellant as a tea plucker. The respondent was not injured as alleged. If he was injured he never reported to the clerk or supervisor as required. He has to report as above so that he can be taken to the employer's dispensary and also for purposes of record and compensation.

11. On cross examination, the witness stated that he cannot tell whether the respondent was injured as alleged as he never reported the alleged injuries.

12. DW2 Joan Kapkerich clinical officer of the appellant testified and produced records of 5th December, 2008 which showed respondent was never treated at appellant's clinic. It was mandatory for one to go to the dispensary to report injury. The sick register never reflected any report of respondent's sickness. On cross examination, DW2 denied authoring the sick register. The defence was closed at this stage.

13. The court directed that the appeal be heard by way of written submissions. Only appellant filed submissions. The respondent never complied dispute service nor attend court during the highlighting.

14. The appellant's submissions is that the claim is fake. The defence witnesses testified that it is mandatory for injured employee to report the accident to the clerk who is to issue him with a referral letter to the appellant clinic.

15. The respondent did not produce any evidence of referral or treatment at appellant dispensary. In cross examination, the respondent said he went to Nandi District Hospital after 3 weeks. The treatment chit talks of the treatment on the same day 5th December, 2008. He said he did not go to Nandi hospital on 5th December, 2008. He said the right left was injured on 16th concerning the other case. The evidence shows the respondent was never injured on 5th December, 2008.

16. The appellant relied on the case of **MOSE NYAUNDE OPONDO VS. TAWFIQ B. CO. LTD KISUMU HCC 204/00** where court held that failure to prove fault on driver rendered case to be dismissed.

Analysis and Determination.

17. The plaintiff's plaint dated 29th April, 2010, 2008 pleaded that the plaintiff sustained alleged injury on 5th December, 2008 while working as a factory worker of the appellant. He blames the defendant/appellant for the accident and pleads particulars of negligence. However, his evidence, that of his witness, PW2 and the document produced are contradictory and incongruent with his pleadings.

18. In cross examination, he alleges to have gone to appellant's dispensary and treated same day 5th December, 2008 and to Nandi Hill Hospital after 3 weeks. PW3 talks of treating respondent on 5th December, 2008 and produced treatment chit from Nandi Hills Hospital showing date as 5th December, 2008.

19. The contradictions over the alleged injuries and treatment are irreconcilable and incongruent thus constrain the court to find that the liability was not proved on balance of probabilities.

20. The trial court seems not to have appreciated the aforesaid vital discrepancies in vital evidence which goes to the root of the respondent case. The court therefore finds that the appeal has merit and thus allows the same with no orders as to costs as same was not defended.

SIGNED, DATED and DELIVERED this 13TH day of **DECEMBER**, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

.....**Tarus for Muganga****for the Appellant.**

.....**N/A****for the respondent.**

.....**Anunda****Court Assistant.**