



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

HIGH COURT CIVIL APPEAL NO. 110 OF 2012

EASTERN PRODUCE (K) LTD

(KAPSUMBAI TEA ESTATE) APPELLANT

=VERSUS=

DUNCAN NGUGI RESPONDENT

(Being an appeal from the original judgment of Hon.R. Koech in Kapsabet PMCC No. 263 of 2010 delivered on 3rd day of October 2012)

JUDGMENT

1. ***Eastern Produce (K) Ltd*** (Kapsabet Tea Estate) was the defendant in a suit filed by the Respondent ***Duncan Nguji Kimani*** in Kapsabet Principal Magistrate's Court Civil Case No. 263 of 2010 in which he sought special and general damages for injuries he claimed he sustained in the course of his employment with the appellant.
2. In his amended plaint filed on 26th July, 2011, the respondent pleaded that on or about 9th March, 2005, while working in the appellants tea estate as a tea plucker, he slipped and fell into a ditch as a result of which he sustained serious injuries. The injuries sustained were described as blunt trauma to the chest especially on the left rib cage.
3. The respondent's claim was that the accident was occasioned solely by the appellants and/or their agents breach of statutory and common law duty of care or breach of contract of employment. The particulars of negligence or breach of duty of care were pleaded as follows:-

Failing to provide or avail the respondent with gloves, apparel, gumboots, masks, goggles or any other protective gear; failing to provide a proper system of work or safe working environment for the respondent, instructing the respondent to work in unsafe conditions/environment; failing to warn the respondent of impending danger or to take measures to prevent the respondent from sustaining the injuries; failing to provide adequate supervisory mechanisms to the respondent and failing to notify him of existence of ditches, trenches/holes/terraces within the tea farm which were known to the appellant hence exposing him to harm.

4. In the appellant's statement of defence filed on 23rd October 2010, the appellant denied the respondent's claim in total and put him to strict proof thereof. In particular, the appellant denied that the respondent was its employee or that an accident occurred on or about 10th March,

2005 in its premises. In the alternative, the appellant claimed that if the accident occurred which was denied, it was not occasioned by its negligence or breach of statutory duty but that it occurred due to the sole or contributory negligence of the respondent. Particulars of the respondent's negligence were pleaded as follows:-

Failing to adhere to safety rules and precautions, negligently exposing himself to risk of injury or damage to which he knew or ought to have known; failing to carry or make proper use of protective devices and carrying out his duties recklessly, negligently, and inflicting injury upon himself.

5. After a full trial, the trial court delivered its verdict on 3rd October, 2012. The learned trial magistrate in his judgment held that the respondent had been injured while on duty. He however found that the respondent was partly to blame for the accident and resultant injuries. He consequently apportioned liability at the ratio of 70:30% in favour of the respondent against the Appellant. He also awarded the respondent a sum of Kshs 150,000 general damages less 30% contributory negligence. The net sum awarded to the respondent was therefore Kshs 105,000 in general damages and special damages of Kshs 1,500.
6. The Appellant was aggrieved by the judgment and decree of the trial court hence this appeal. In its memorandum of appeal filed on 23rd October 2012, the appellant raised ten grounds which mainly challenged the trial court's findings on liability. The ten grounds can be condensed into two primary grounds as follows:-
 - i. That the learned trial magistrate erred in law and fact in holding the appellant liable for the respondent's injuries in the absence of evidence that he had been injured in its premises while on duty.
 - ii. That the learned trial magistrate erred in law by contravening the provisions of **Order 21 Rule 4 of the Civil Procedure Rules**.
7. This is first appeal to the High Court. It is therefore an appeal on both facts and law. I am alive to the duty of the first appellate court which is to re-evaluate all the evidence on record and to draw its independent conclusions. In doing so, I should bear in mind that I have not seen or heard the witnesses.

See:- **Sumaria & Another vs Allied Industrial Limited (2007) 2KLR1:**

Selle v Another v Associated Motor Board Co.Ltd & others (1968) EA 123.

8. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the written submissions by learned counsel for both parties.

From the evidence on record, it is common ground that the respondent was employed by the appellant as a tea plucker. According to the amended plaint and his testimony before the trial court, the respondent averred that on 9th March, 2005 he was on duty in the appellant's tea estate. He was carrying a basket full of green tea to the weighing shed when he fell into a ditch that was hidden under some tea bushes. He reported the accident to his supervisor **Mr. Livingstone Ruto** who gave him a note to take to the appellant's dispensary for treatment. He did not seek treatment at the dispensary that day but he did so on the following day. On the same day, that is, on 10th March 2005, he sought further treatment at Nandi Hills District Hospital. He produced treatment notes from Nandi Hills District hospital and a medical report compiled by PW1 **Dr. Samuel Aluda** as proof of injuries sustained and treatment given.

9. The appellant's case at the lower court was that though the respondent was on duty on 9th March, 2005, he was not involved in any accident in the course of his employment on that day. DW1 **Mr. David Bett** testified that he was the respondent's supervisor and that had an accident occurred, the same would have been reported to him. He did not receive such a report.

DW1 further claimed that he was only aware of a report he came across from the appellant's dispensary to the effect that on 10th March 2005, the respondent had been treated for injuries sustained from a fall from a roof he was constructing.

DW2 **Samuel Kimaru Lagat** a nurse at the said dispensary confirmed in his evidence that according to records kept in the dispensary, the respondent had received treatment in the dispensary on 10th March, 2005 for pain after falling from a roof.

10. The appeal was prosecuted by way of written submissions. The appellant's submissions were filed on 15th July 2014 while those of the respondent were filed on 24th July 2014. Briefly, it was submitted by **Ms. Nyairo & Company Advocates**, Learned Counsel for the appellant that the respondent had failed to establish his case against the appellant on a balance of probabilities as required by the law; that he had failed to demonstrate a causal link between his injuries and an accident in the course of his employment and that the trial magistrate erred in making a finding on the appellant's liability instead of dismissing the respondent's suit with costs.

11. The respondent's submissions made on his behalf by his advocates on record **Ms. Z.K Yego & Company Advocates** appeared to contradict the respondent's case in the lower court regarding the date on which he alleged the accident occurred. It was submitted on behalf of the respondent that he had proved on a balance of probabilities that he had sustained injuries while on duty on 10th March, 2005 (not 9th March, 2005 as claimed by the respondent during the trial). Learned Counsel for the respondent submitted that the respondent slipped and fell into an unmarked ditch while in the course of his employment; that the accident was caused by the appellant's negligence; and that the learned magistrate's decision on liability was correct and ought to be upheld by this court. The respondent urged the court to dismiss the appeal with costs for lack of merit.

12. Having evaluated the evidence on record and the parties' submissions; I find that it was not seriously disputed that the respondent had sustained some soft tissue injuries on his chest on 9th March, 2005. What was hotly contested was his claim that he had sustained the injuries in the course of his employment.

My analysis of the evidence adduced before the trial court leads me to the conclusion that the appellant's complaint in this appeal has merit. I find that the respondent's case had unsealed holes which created serious doubts regarding whether or not he had sustained the injuries in question on 9th March 2005 in the course of his employment.

13. This finding is informed by the fact that though the respondent claimed that he had been injured in an accident while on duty on 9th March, 2005, as a result of which he sustained injuries, he did not produce any medical evidence to prove that he had sustained any injury on that day. In his own admission, he did not seek treatment at the appellant's dispensary on that day despite having been given a note to authorize his treatment. He did not also seek treatment from any other medical facility that day. The question that then comes to mind is; if he had been involved in an accident on 9th March 2005 in which he sustained injuries, why didn't he seek treatment on the same day? This question remained unanswered from the evidence on record.

14. It is important to note that PW1 examined the respondent on 12th November 2010 five and a half years later. He relied on treatment notes from Nandi Hills Hospital which showed that the respondent had been treated on 10th March, 2005. The medical evidence confirmed that the respondent had a soft tissue injury on his chest. No other injury was mentioned. I find it difficult to understand how the respondent could have fallen into a ditch and sustained an injury on his chest only without sustaining any injury on either his legs or hands.

15. The respondent did not also adduce any other evidence, either from his alleged supervisor **Mr. Ruto** to whom he claimed he had reported the accident or any other fellow worker to substantiate his claim that he had in fact accidentally fallen into a ditch while on duty on 9th March, 2005.

16. The burden of proof lay squarely on the respondent to prove his claim against the appellant while the appellant was to disprove its liability against the respondent in both cases on a balance of probabilities. **Section 107** of the **Evidence Act** is very clear that he who alleges must prove. And in order to prove his claim, the respondent had to prove that not only did he sustain injuries on 9th March, 2010 as alleged but that the injuries were as a result of an accident in the course of his employment for which the appellant was liable either in negligence or for breach of statutory duty.

17. It is my finding that while the records from Nandi Hills District Hospital confirmed that the respondent had injuries on 10th March, 2005 for which he was treated, the records did not prove that he had sustained those injuries on 9th March 2005 while on duty as alleged. It was incumbent upon the respondent to demonstrate a causal link between the injuries and the alleged accident which in my view he failed to do. I am in agreement with Visram J (as he then was) in **Statpack industries v James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003** (unreported) when he stated as follows:-

“Coming now to the more important issue of ‘causation’, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable”.

18. The trial court ought to have weighed all the evidence adduced by the parties and established whether the respondent had proved his claim that he had been injured while working for the appellant.

The learned trial magistrate in making his finding that the Respondent had proved his claim to the required standard stated as follows:-

“...The defendant supervisor testified regarding the events of 10/3/05 that to dent that the plaintiff was referred to Nandi Hills District at the defendant’s dispensary.

The defendant outpatient register shows that indeed the plaintiff was attended to with a history of fall. I do find that the plaintiff has proved his case on a balance of probabilities to the effect that he fell down and got injured while working within the plaintiff’s premises ..”

19. From the above finding by the learned trial magistrate, it is clear to me that he either misapprehended the evidence adduced by the parties or that he failed to properly evaluate the same as a result of which he arrived at the erroneous conclusion that the respondent had indeed proved his claim against the appellant to the required standard.

In my opinion, the learned trial magistrate failed to appreciate that there was no evidence of the respondent having sustained injuries on the date he claims he was injured while on duty or that the injuries noted on him on 10th March 2005 were occasioned by a fall in the course of his employment as alleged. It is my finding that the learned trial magistrate’s finding on the appellant’s liability was not supported by any evidence.

The learned trial magistrate therefore erred in finding that liability had been proved to the required standard and in apportioning liability between the parties.

20. On the rather technical ground of appeal in which the appellant faulted the judgment of the trial magistrate by claiming that it did not comply with the provisions of **Order 20 rule 4** of the **Rules**, I find that though the judgment of the lower court cannot be said to have been very well reasoned or that its format was in the sequence set out in the rule, my view is that it contains the essential elements of that rule.

Order 20 rule 4 (the equivalent of **Order 21 rule 4** of the **Civil Procedure Rules 2010**) provides for the minimum contents of a judgment, that is, a concise statement of the case, the parts for determination, the decision thereon and the reasons for such a decision. The trial magistrate made reference to the amended plaint, the defence offered by the appellant, reviewed the evidence adduced by both parties and made findings on liability and quantum of damages. In my view, nothing really turned on that ground of appeal.

21. For all the foregoing reasons, it is my finding that this appeal is merited. The same is consequently allowed. I hereby set aside the judgment and decree of the lower court and substitute it with the judgment of this court dismissing the respondent's suit with costs.

As for the costs of the appeal, each party shall bear its own costs.

It is so ordered.

C. W. GITHUA

JUDGE

Dated, Signed and Delivered at Eldoret this 26th Day of February 2015

In the presence of:-

Ms. Odwa for the Appellant

N/A appearance for the Respondent