REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 250 OF 2011

KIPKEBE LIMITED……APPELLANT

VERSUS

THOMAS AMORO NGARISA…….....……RESPONDENT

JUDGMENT

1. The Respondent in this appeal was the plaintiff in the Senior Resident Magistrate court at Keroka being Civil suit No. 219 of 2009 against the Appellant (defendant) herein Kipkebe Limited in which he claimed:-

a. *Special damages.*
b. *General damages*
c. *Costs*
d. *Interest on (a),(b) and (c) above at court rates.*
e. *Any other relief that this Honourable court may deem fit and just to grant.*

2. The cause of action was captured from paragraph 4 of the respondent's plaint where he averred that the was an employee of the Appellant Company at Kipkebe Limited. That his claim arose out of injuries he sustained on the 17th day of November, 2006 at the appellant company while as he plucked tea leaves, he was hit by a sharp stick covered by tea bushes and thus as a result, he sustained a deep cut wound on the right leg as a consequence of which he suffered pain, loss and damage. He attributed the injuries to the Appellant's negligence of breach of duty of care or contract to him. Such particulars of negligence or breach of duty of care and contract were particularized under paragraph six(6) and 7 of the plaint respectively.
3. The particulars of injuries were stated in paragraph (7) of the plaint as follows:-

a. *Nature of injuries*

- *Deep cut wound on the right leg.*

b. *Continuing effects*

- *Pain of the right leg*

4. The appellant on its part filed a statement of defence and denied the respondent's claim in total. The appellant stated that it was a stranger to the alleged accident on the 17th November, 2006.

Without prejudice to the aforesaid denial the appellant averred that the alleged accident was caused or contributed to by the respondent's negligence. Particulars of the alleged negligence were set out in the defence and included, inter alia that the respondent went about his duties in reckless and haphazard manner without regard to persona safety.

5. During hearing the respondent testified as PW1. He told the court that on the material day i.e. 17th November, 2006 he was an employee at the appellant company. He produced his payslip as P.Exh.1 to evidence this fact. That as he picked tea he was hit by a sharp edges of the tea bushes i.e. stick on the plantations which had been covered by the tea bushes. As a result, he got injured on his right leg and his chin. He blamed the appellant for the said accident as he had not been provided with canvas apron i.e. an apron that they usually wear made of canvas which is long as it covers their feet.
6. He also alleged that if he had been provided with the said canvass apron and gumboots the stick would not have pierced him. Thus he blamed the appellant for the said accident.
7. After the accident, he informed his supervisor Nyamoko and went to the appellant's factory clinic. He produced a copy of the documents he was given at the clinic as MFI.2 and explained that the original copy remained at the clinic. He also produced an LD 104 from which was filled at the appellant's firm and produced the same as evidence.
8. Furthermore, he also went for a medical examination performed by Dr. Ajuoga who filled page 11 of the LD P4 form. He produced the said form as evidence which was marked MFI-6 and paid kshs. 6,500.
9. Lastly he stated that he was not fully recovered as he experienced pain in the site.
10. PW2 was Dr. P.M. Ajuoga a consultant at Awendo. He told the court that on 23.11.2006 he examined the respondent who had an accident on 17.11.2006. He observed that the respondent had a deep cut wound on the leg which was in good condition, he had suffered soft tissue injuries and had no permanent disability. He produced the said medical report as P.Exb.2 and corroborated the respondent's testimony that he had paid kshs. 6,500 for it.
11. PW3 was Peter Nyadigo Mokaya a clinical officer at Mongoris Health Centre though previously he was employed at the appellant's dispensary. He produced a letter of appointment dated 8.10.2003 showing that he was engaged as a nurse based at appellant's company. The said letter was marked P.Exh.7. he produced a note from the appellant's medical centre written by the doctor. He confirmed that he wrote a re-visit (i.e. for the respondent to come back to the clinic on 24th November, 2006. He confirmed that the re-visit was on 24.11.2006 when the respondent came for bed rest. He also confirmed that the card is usually kept by in-charge and its usually locked up. Lastly, he produced a treatment card from appellant's factory as the maker of it as P.Exh.2. This marked the end of the respondent's testimony.
12. DW1 was Joseph Mbugua a check roll clerk with the appellant company. He told the court that his duties included interalia: recording dates for the workers, keeping company records including the checkroll and indicating the names of the workers including the work done. He explained that when an employee was absent he indicated in the checkroll(absent) and when sick or injured he indicated in the register with(s) or (p) for sick or dispensary.
13. He produced the checkroll for November, 2006 on 17th November, 2006 and confirmed that indeed respondent was a plucker of tea leaves, he was on duty, he was neither injured nor treated of any injury, he did not report to him of any injury on the said date and he plucked 12kgs.
14. Furthermore, he explained that incase of any injury, he would know as he would 1indicate in the register and could not fail to know of any injury unless he got the information from a supervisor. Lastly, he produced a copy of the checkoll register as DExhibit.1.
15. On cross-examination, he explained that he was not the plaintiff's immediate supervisor on that day, his supervisor was Christopher Angwenyi as he was presently on duty.
16. DW2 was Daudi Kipchirchir Koech a clinical officer in the appellant's company. He told the trial court that his duties included keeping documents including registers, treatment cards and O.P.P registers. That in the O.P.P. register, he recorded the patient and the treatment given. He produced the register of 17.11.2010 and confirmed that he attended to 17 patients though the plaintiff was not one of them. He produced the said register as D.Exhibit.2.
17. On cross-examination, he revealed that on 17.11.2006, he was not on duty and he did not know the nurse who attended to patients that day.
18. In their submissions in the trial court the respondents counsel urged the court to award a sum of

kshs. 150,000 in general damages and cited one authority. On the other hand the appellant's counsel deemed kshs. 40,000 was reasonable and also relied on one authority.

19. The learned trial magistrate in his judgment found that the respondent was indeed on duty on 17.11.2006, he (respondent) had worked for several years and was conversant with his work thus he was aware of the dangers even without the gumboots and overalls. However, since the appellant did not produce any evidence to show what safety gear he provided the plaintiff with, he apportioned liability at 50:50 and found a sum of kshs. 70,000 for general damages and kshs. 6,500 as special damages.
20. It is the above judgment that has now triggered this appeal. The appellant in its memorandum of appeal dated 23rd November, 2011 cites the following grounds:-

1. *The learned Trial Magistrate erred both n fact and in law when the same entered judgment in favour for the Respondent whereas the Respondent failed to discharge the burden of proof to the requisite standard.*
2. *The learned trial magistrate erred in law and in fact by proceeding to assess and award the Respondent damages whereas the Respondent failed to prove that he sustained any and/or the purported injuries, in view of the fact that medical evidence adduced were insufficient and of no probative value.*

3. *The learned trial magistrate erred in law and infact by awarding the Respondent general damages in the sum of kshs. 100,000/- which damages were excessive in the circumstance and not proved at all.*

4. *The learned trial magistrate erred in law and in fact by holding the appellant liable at 60% whereas the evidence on record did not disclose any negligence or breach of any duty of care on the party of the appellant and neither was the same proved or at all.*

5. *That learned trial magistrate erred in law and in fact, by failing to dismiss the Respondent's suit with costs to the appellant.*

21. When the appeal came before Sitati, J on 12.6.2014 it was agreed among other directions that the appeal be canvassed by way of filing and exchanging written submissions.
22. When the appeal came before me on 12.11.2014 both counsel's representing the respective parties confirmed that they had indeed filed their written submissions which I have duly read.
23. This court being conscious of its role as the first appellate court as stated in **Selle vs. Associated Moor Boat Co. Ltd [1968] E.A. 123** has to re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions. The court must, however, bear in mind that it neither saw nor heard the witnesses and hence make due allowance for that.
24. This court was urged to interfere with the trial court's finding on both liability and quantum of damages. In considering whether the trial court properly arrived at a finding on liability it must be borne in mind that an appeal court

> *'will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or the judge is shown demonstrably to have acted on the wrong principle?.*

Ephantus Mwangi and Geoffrey Nguyo Ngatia –vs- Duncan Mwangi Wambugu [1982-1988) 1 KLR, 278.

25. In the instant case, the respondent himself produced evidence to attest to the fact that on the material date he was an employee in the appellant's company. This evidence was not at all disputed by the appellant. The respondent also stated that he had been employed by the appellant for a long period of time, as a tea plucker and had not been given any protective gear i.e. canvass apron or gumboots. The appellant on the other hand never adduced any evidence to controvert the fact that he had never provided the respondent with any protective gear. Thus in my humble view, I totally agree with the trial court's apportionment of liability at a ratio of 50:50 because in as

much as the respondent did not have any protective gear, he had at all times known the risk of plucking tea and had actually plucked tea leaves with no protective gear for many years and on the other hand, the appellant knew very well that there would be injuries on their employees for not providing any protective gear for them while plucking tea but nevertheless took no measures to provide the said protective gear. Thus on a balance of probability, the trial court was right in awarding 50:50 on liability for both parties.

26. On quantum it is now settled that :

> *"an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the judge proceeded on wrong principles or that he misapprehended the evidence in some material aspect".*

See **Kamotho & others vs. vesters and Another Civil Appeal No. 4 of 1984.**

27. In this appeal, the appellants, counsel submits that a sum of kshs. 40,000 would be adequate compensation. Whereas counsel for the Respondent maintain that the trial court's award was proper and adequate compensation.

28. In the matter that was before the trial court, a medical report was produced by PW2 which clearly indicated that the respondent suffered from a deep cut wound on the leg, he had soft tissue injuries but with no permanent disability.

29. In my humble view and in reference to the authorities provided by both counsels representing both parties an award of kshs. 70,000 was not inordinately high nor was it shown that the learned trial magistrate took into account an irrelevant factor in his assessment of damages. In such circumstances, this court will not interfere with the exercise of discretion by the learned trial magistrate. Consequently, I dismiss this appeal and award costs thereof to the respondent.

Dated and delivered at KISII this 31st day of July 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

M/S O. M. Otieno (absent) for the appellant

M/S Nyangosi for the respondent

Samuel Omuga: Court Clerk.