



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO.8 OF 2007**  
**(An Appeal from Order and Ruling of Hon. A. G. Kibiru – SRM,**  
**Sotik SRM Civil Case No.13 of 2005)**

**MARY MORAA ABUTO.....APPELLANT**

**VERSUS**

**KIPKEBE LIMITED.....RESPONDENT**

**J U D G M E N T**

Mary Moraa Abuto, the Appellant herein, filed a suit by way of a plaint dated 11<sup>th</sup> January 2005, against Kipkebe Ltd, the Respondent herein before the subordinate court, vide the Sotik SRMCCC. No.13 of 2005 in which she sought for interalia:

General and special damages for the injuries she sustained in the course of the employment of the Respondent. The suit was defended. It was heard and dismissed by Hon. A. G. Kibiru, learned Senior Resident Magistrate on 10<sup>th</sup> May 2007. Being aggrieved, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds of appeal:

- i. THAT the learned Senior Resident Magistrate erred in law and in fact in dismissing the appellant's case.
- ii. THAT the learned Senior Resident Magistrate erred in law and in fact in holding that documentary evidence overrides oral evidence.
- iii. THAT the learned Senior Resident Magistrate erred in law and in fact in doubting the authenticity of the treatment chit from the Kericho District Hospital produced as Appellant Exhibit 2.
- iv. THAT the learned trial Magistrate erred in law and in fact in holding that the Plaintiff did not prove that she was on duty with the Respondent on the 11<sup>th</sup> day of August, 2003.
- v. THAT the learned trial Magistrate erred in law and in fact in finding the Appellant to be on leave against the weight of evidence.
- vi. THAT the learned Senior Resident Magistrate erred in law and in fact in failing to consider the Appellant's written submissions.
- vii. THAT the learned Senior Resident Magistrate erred in law and in fact in failing to hold the

defense testimony was a departure from the pleadings.

viii. THAT the learned Senior Resident Magistrate erred in law and in fact in assessing damages below the current trend of awards.

Before delving deeper into the substance of the appeal, let me outline in brief the case that was before the trial court. The Appellant was employed by the Respondent to pluck tea at Kiptenden Estate No.9. The Appellant alleged that on 11<sup>th</sup> August, 2003, she was pierced by a sharp tea bush while she was plucking the Respondent's tea in the aforesaid tea estate. As a result, the Appellant averred that she suffered penetrating wound on the right leg. The Appellant blamed her employer for what befell her. She claimed that the Respondent had failed to adequately provide her with protective gear to make her working environment safe. She specifically stated that she was not provided with gumboots. She further argued that the Respondent knew or ought to have known that its tea estate was dangerous in that it is bound to be with sharp tea bushes. For the above reasons the Appellant averred that the Respondent, breached the common law duty and or contract of employment.

The Appellant testified in support of her case before the trial court without summoning the evidence of independent witnesses. She told the trial magistrate that on the material day she was deployed to pluck tea without gumboots. She said she was injured on the right leg below the knee by a sharp tea stump. She stated that had she been issued with gumboots she would not have been injured. She visited Kiptenden Dispensary for treatment and later went to Kericho District Hospital. She claimed the Respondent's Dispensary *i.e.* Kiptenden Dispensary retained her treatment notes but she was nevertheless given by the Kericho District Hospital, which she produced in evidence as an exhibit.

The Respondent summoned the evidence of two witnesses in support of its case. Naftaly Omboga Begi (DW1), the Respondent's chief clerk, produced the check roll showing that Mary Moraa Abuto was on leave as from 6<sup>th</sup> August 2003 up to the end of August 2003. James Obosso (DW2), the Respondent's manager in charge of Kiptenden Estate Dispensary, produced the register showing that on 11<sup>th</sup> August 2003, he attended 120 patients and the name of Mary Moraa Abuto was not among them. DW2 stated that if the Appellant was injured, it would be reflected in the accident book in the custody of the manager.

At the close of the evidence, learned counsels filed written submissions. The learned Senior Resident Magistrate, considered the evidence and the submissions and came to the conclusion that the Respondent did not prove her case to the required standard on a balance of probabilities. He consequently dismissed the case with costs to the Respondent.

When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. At the time of taking directions, there was pending on record, the Motion dated 17<sup>th</sup> May 2010 in which the Respondent sought for this appeal to be dismissed for want of prosecution. Learned counsels appeared before me on 5<sup>th</sup> March 2014 and recorded the aforesaid consent order without referring to the Motion. I will infer that learned counsels intended to have the Motion withdrawn to pave way for the appeal to be disposed of on its merits. I say so, because it would not make sense for learned counsels to pray to be given 21 days each to file written submissions on such an application. For the above reasons, I will treat the Motion dated 17<sup>th</sup> May 2010 as having been withdrawn and abandoned with no order as to costs. What is puzzling is that the Respondent instead of filing submissions in respect of the appeal instead filed submissions in respect of the Motion. I will therefore ignore those submissions and proceed to determine the appeal despite the absence of the Respondents submissions.

Though the Appellant put forward a total of eight grounds of appeal, the same may be summarized to four:

- i. The trial court erred by dismissing the Appellant's case yet she had proved her case on a balance of probabilities.

- ii. The trial court failed to consider the Appellant's written submissions.
- iii. The trial court erred by failing to find that the Respondent's evidence was a departure from the pleadings.
- iv. That the trial court's assessment of damages was below comparable awards.

I will chronologically consider the above grounds. The first question is whether or not the Appellant proved her case on a balance of probabilities? It is the Appellant's submission that she presented cogent evidence to prove liability and quantum against the Respondent hence she should have been given judgment. She pointed out that where the documents were in possession of the Respondent, she duly served the Respondent with a notice to produce. She mentioned some of the documents to include: Work attendance records, Hospital attendance records, Treatment records, and Workman Compensation forms. The Appellant argued that the Respondent failed to produce the injury book before court to ascertain whether or not the Appellant was treated at the Appellant's dispensary. I have carefully re-evaluated the evidence presented before the trial court. It is clear from the beginning, that the Respondent denied the occurrence of the accident. It even stated in its defence that on the material date, the Appellant was not on duty. It was therefore incumbent upon the Appellant to tender evidence to prove that she was injured while on duty and in the course of her employment. She testified and stated that she was on duty on 11<sup>th</sup> August 2003 plucking tea when she was injured. She stated in cross-examination that when she was injured she was treated by a Mr. Obosso. She also stated that her name was recorded in the patients' register. She denied that she was on leave at the time of the accident. The Respondent countered the Appellant's evidence by summoning two crucial witnesses. The Appellant's immediate supervisor, Naftaly Begi testified and produced the check roll for the month of August 2003 which indicated that the Appellant was on her annual leave on 11<sup>th</sup> August 2003 the date of the accident. Mr. James Obosso, the person the Appellant alleged to have treated her on 11<sup>th</sup> August 2003, testified and informed the trial court that on the aforesaid date he attended 120 patients at Kiptenden Dispensary. He produced the outpatient register for that day which did not contain the Appellant's name. After a careful analysis of the evidence I am convinced that the Appellant was on her annual leave when she was injured. In other words, she was not injured in the course of her employment with the Respondent. The trial Magistrate cannot therefore be faulted on this aspect. The appellant was enjoined by law to prove that she was injured while in the course of her employment but unfortunately she failed to discharge that burden.

The appellant has complained that her submissions were not considered. I have looked at the record and I agree with her. However, this being the first appellate court, I am enjoined by law to re-consider the same. I have done so and hold that the same did not assist the appellant to salvage her case. The appellant simply failed to tender cogent and credible evidence to prove her case.

The appellant has further complained that the Respondent tendered evidence which was inconsistent with the pleadings. I have already stated that the Respondent made specific averment and that it presented evidence to establish those allegations. I do not find any inconsistency between the evidence and the pleadings.

The appellant has complained that the award of Kshs.40,000 suggested by the trial court is inordinately low. I have considered the authorities submitted by the parties before the trial court and I find the award suggested not inordinately low. The same is reasonable for such injuries.

In the end, I see no merit in the appeal. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered in open court at Kericho this 30<sup>th</sup> day of May, 2014**

**J.K.SERGON**

**JUDGE**

**In the presence of:**

- **Muthee holding brief for Appellant**
- **Mutai holding brief for Ochieng for Respondent**