



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 59 OF 2000

EASTERN PRODUCE (K) LIMITED.....APPELLANT

VERSUS

EZEKIEL KIPCHOGE TABUT.....RESPONDENT

*(Being and Appeal from the Judgment of Hon. F. A. Mabele (Senior Principal Magistrate) in  
Kapsabet*

*Senior Resident Magistrate's Civil Case No. 188 of 1998 delivered on 11th May, 2000)*

### JUDGMENT

In a Judgment of the trial court delivered on 11th May, 2011, the Respondent was awarded general damages of Ksh. 65,000/=, special damages of Ksh. 1,500/= plus costs of the suit and interests thereon.

The claim filed by the Respondent was as a result of a snake bite injury the Respondent sustained on his right foot while engaged at work as an employee of the Appellant on the 13th February, 1996.

The Respondent, in a plaint dated 21st July, 1998 blamed the Appellant stating that the Appellant was negligent and had breached the contract of employment and statutory duty he owed to the Respondent.

The Appellant was dissatisfied with the Judgment of the trial court and preferred this appeal. In a Memorandum of Appeal dated 19th May, 2000, it raised five grounds of appeal which are;

- 1. That the learned trial Magistrate erred in law and fact in failing to hold that the snake bite was too remote a consequence of the Plaintiff's contractual duties and therefore the Defendant could not be held liable.***
- 2. That the learned trial Magistrate erred in not finding that no duty of care could exist in the circumstances of this case.***
- 3. That the learned trial Magistrate erred in law in holding the defendant liable in negligence.***
- 4. That the learned trial Magistrate erred in law and fact in holding that non provision of protective apparels caused the snake bite.***
- 5. That the learned trial Magistrate erred in law and fact in awarding damages to the Plaintiff.***

The above grounds can be summarized under two heads; first that the liability against the Appellant was not proved and two, that the trial court erred in awarding damages to the Respondent.

It is trite law that the duty of the trial court is to re-evaluate the evidence on record and draw its own conclusions. See – **KENYA PORTS AUTHORITY -VS- KUSTON (KENYA) LIMITED (2009) 2 E.A., 212.**

The Respondent herein was the Plaintiff in the court below and he testified as PW1. He described himself as a businessman. He testified that on 13th February, 1996, he was working at Chemomi Tea Estate as a tea plucker. As he worked he was bitten by a snake. He managed to kill it with a stick. He informed his supervisor about the incident. He went to the dispensary where he was treated. He later went to Nandi Hills Hospital for further treatment.

He testified that he blamed the Defendant (Appellant) as it had not supplied him with gumboots.

In cross-examination, PW1 stated that he had not received any payment or compensation of any kind from the Defendant. He stated that he was not expecting to find a snake in the fields and did not also know that he would be injured. He also stated that he was not wearing shoes. He further indicated that the Defendant could not have expected to find a snake in the farm and that his injury was an accident. He also stated that it was risky to work without gumboots.

In re-examination, he stated that the Defendant had an obligation to supply him with gumboots. He also added that he was the first person in the company to be bitten by a snake.

The defence called one witness one Arnold Kiprongo Tanui (DW1). He testified that he was a supervisor Grade 1 and had worked for the company since 1985. He confirmed that PW1 worked for the Defendant company and was on duty as a tea plucker on 13th February, 1996. He also confirmed that he was bitten by a snake on the material date although he found when he had already been taken to the hospital. He testified that PW1 filled the Workmen Compensation Form but he could recall him being paid. He said that PW1 was bitten on the big toe.

DW1 further testified that the Defendant never used to supply gumboots to its tea pluckers due to their large numbers. In any case, the Defendant would not expect that a snake would be found in the tea bushes.

In cross-examination, he reiterated that PW1 had not been issued with gumboots and that the Defendant would not have expected a snake in the farm. He also said he could not tell if the Plaintiff was paid under the Workmen's Compensation Act.

Parties filed written submissions on the appeal. Those of the Appellant are dated 14th March, 2014 and were filed on 18th March, 2014. Submissions of the Plaintiffs are dated 17th June, 2013 and were filed on 20th June, 2013. I have accordingly considered them.

In the present case, the Respondent blamed the Appellant because the latter had not provided him with protective garments, namely, gumboots. Thus, implying that the Appellant abrogated its duty of care over him to provide him with a safe working environment and system.

It is trite law, both statutory and in common law that an employer owes a duty of care to his employee. See Halsbury's Laws of England, 4th Edition, Volume 15 at paragraph 560:-

***“At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk.”***

But this duty of care is within specific confines of the law. It must be reasonably foreseeable in circumstances and situations in question. The obligation for the duty of care must also be reasonable as observed in the case of **KREATIVE ROSES LIMITED -VS- OLPHER KERUBO SUMO (2014) @**

**KLR, HC AT NAKURU CIVIL APPEAL NO. 151 OF 2008**, Hellen Omondi, J while referring to Halsbury's Laws of England stated:-

***“The Court of Appeal quoting Halsbury's Laws of England in the case of Mwanyale Said t/a Jomvu Total Service Station stated as follows:-***

*“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the work upon which he is engaged. The employer is not liable to the employee for damages suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employees' safety, exercise of due care and skill suffices.”*

From the above observations, all the Respondent needed to demonstrate was that the snake bite was foreseeable by the Appellant and in that case the Appellant failed to provide him with reasonable care.

In his evidence in chief and in cross examination, the Respondent was categorical that he did not expect the bite. He also did not expect to find a snake in the tea bushes. Indeed he added that the bite was a pure accident. This was also the contention of the Appellant's witness. In fact, the Respondent added that his accident was the first of a kind. In those circumstances, it follows that the snake bite was not foreseeable both by the Respondent and the Appellant. The Appellant could not in the circumstances, be under a duty to provide gumboots to the Respondent.

In any case, the Respondent failed to cite the prevalence of snakes in that locality and particularly in the tea bushes. Had this been done, probably, the court would have found that, with high prevalence of snakes, the Appellant ought to have provided protective apparels that would prevent workers from snake bites. But this burden was not discharged by the Respondent. As I stated in my own Judgment in the case of **EASTERN PRODUCE (K) LIMITED -VS- AMOS MALEZI TALIA ELDORET HIGH COURT CIVIL APPEAL NO. 47 OF 2000**, a party must demonstrate that it was within the knowledge of the Appellant that a snake would enter the tea bushes. I did also note that common knowledge has it that snakes can run into an area that is not ordinarily their habit for refuge, food or transit. This was the scenario presented in this case as the Respondent stated that the bite was purely accidental.

See also **SEGWICK KENYA INSURANCE BROKERS -VS- PRICE WATER HOUSE COOPERS KENYA, HIGH COURT CIVIL APPEAL NO. 720 OF 2006 (NAIROBI)** in which learned Lesiit, J. cited the case of **CAPARO INDUSTRIES LIMITED PLC -VS- DICKMAN & OTHERS (1990) 1 ALL ER, 658**, where the House of Lords held thus;

***“The three criteria for the imposition of a duty of care were foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty of care. In determining whether there was a relationship of proximity between the parties the court, guided by situations in which the existence, scope and limits of a duty of care had previously been held to exist rather than by a single general principle, would determine whether the particular damage suffered is the kind of damage which the Defendant was under a duty to prevent and whether there were circumstances from which the court could pragmatically conclude that a duty of care existed.”***

This court therefore finds that there was no amount of reasonableness on the part of the Appellant that would have enabled it to foresee the snake bite. This is a case that was so remotely foreseeable. And so one cannot conclude that the Respondent was bitten because he was not wearing gloves.

Effectively, I allow the appeal. I set aside the Judgment of the trial court which I hereby dismiss with costs. The Respondent shall also pay the costs of this appeal.

**DATED and DELIVERED at ELDORET this 20th day of November, 2014.**

**G. W. NGENYE - MACHARIA**

**JUDGE**

**In the presence of:**

Mrs. Khayo for the Appellant

Mr. Aseso holding brief for Chepkwony for the Respondent