REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 47 OF 2000

EASTERN PRODUCE (K) LTD .....APPELLANT/APPLICANT

VERSUS

AMOS MALEZI TALIA ..... RESPONDENT

(Being an appeal from the Judgment of the Honourable F. A. Mabele (Senior Principal Magistrate) in Kapsabet Principal Magistrate's Civil Case No. 113 of 1999 delivered on 28th March, 2000)

JUDGMENT

The Respondent herein had sued the Appellant for general damages arising from a snake bite he sustained while in the employment of the Appellant. He was bitten on his left index finger. Liability was entered at 100%. He was awarded general damages of Ksh. 55,000/= and special damages of Ksh. 2,000/=.

The Appellant raised seven grounds of appeal which I summarize into two;

(a) Whether the Respondent proved liability against the Appellant.

(b) Whether the damages awarded were excessive in the circumstances.

The appeal was disposed of by way of filing written submissions. Those of the Appellant were filed on 18th October, 2013 by M/s. Nyairo & Company Advocates while of the Respondent were filed on 28th October, 2013 by M/s. Nyachiro Nyagaka & Co. Advocates. I have accordingly considered them in arriving at the finding I will in this Judgment.

This being the first appellate court, must consider the evidence on record and draw its own conclusions based on the findings. See – **KUSTON (KENYA) LIMITED (2009) 2 E.A., 212**.

LIABILITY

The Respondent pleaded that he got injured due to the negligence and breach of statutory duty on the part of the Appellant. He testified as PW1. He recalled on 24th November, 1997, he was doing hand-weeding at Kaboswa Tea Company farm when he was bitten by a snake. He then blamed the Appellant because it did not spray with chemicals the tea bushes to keep snakes at bay and also because it did not issue him with protective gloves.

The defence (Appellant) did not call any witness.

The Appellant submitted that it was too remote for the Appellant company to foresee that the Respondent would be bitten by a snake, a fact that was confirmed by the Respondent who indicated that he too did not expect to be bitten by a snake.

It was also submitted that liability must come with fault and the Respondent failed to demonstrate that negligence was solely attributable to the Appellant. That further the Magistrate ought to have considered the prevalence of the snakes in that locality. Further, the fact that the Appellant paid Ksh. 4,000/= compensation to the Respondent showed that it was not negligent.

Court was referred to the case of **EASTERN PRODUCE (K) LIMITED -VS- WILFRED KASAVULI FUGISI – ELDORET HIGH COURT CIVIL APPEAL NO. 59 OF 1998** which the court stated:-

"For the employer to be obligated to spray tea bushes it must be shown that presence of such insects are known, common and dangerous to the employee. It must be established that it is possible to spray or remove such insects without any adverse effect on the tea bushes or crop."

In making a finding on liability the learned trial Magistrate stated:-

"It is apparent that he was not wearing any protective gear such as gloves, otherwise he would not have been bitten by the snake. He could not therefore have been provided with any protective devices as alleged.

The Defendants have also not shown that they were not under any obligation to spray the tea bushes to prevent snakes from entering therein."

But again, the duty of proving that the snake entered into the tea bushes because the bushes were not sprayed with chemical squarely lay on the Respondent. He also had the obligation of demonstrating that the snake bite was foreseeable by the Appellant. This would have been demonstrated, as argued, by the Appellant, by citing the prevalence of snakes in that area or in tea bushes. The Respondent failed to do this. He also failed to show, with the least iota of evidence that the snake entered the tea bushes because the bushes had not been sprayed with chemicals. Common knowledge has it that a snake could run into an area that is ordinarily not its habitat for refuge or food or just for transit. Otherwise, holding that the snake bite was foreseeable would be to set such high bar for tea farmers.

I believe this is a case in which the incident was so remotely foreseeable. And in those circumstances, would be unjust to hold that the bite was as a result of lack of protective gloves. I therefore hold that the Appellant was not negligent. He neither abdicated his common law duty of care to his employee – the Respondent herein.

In the end, I allow the appeal and set aside the Judgment of the trial court. The suit in that court is dismissed with costs. The Respondent shall also pay the costs of this appeal.

DATED and **DELIVERED** at **ELDORET** this 18th day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Makuto Advocate for the Appellant/Applicant

Mr. Kigamwa holding brief for Nyachiro for the Respondent