REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 35 OF 2013

JOHN KARANJA NJUGUNA……..……..……...APPELLANT

VERSUS

EASTERN PRODUCE (K) LIMITED (SAVANI TEA ESTATE)…..... ….RESPONDENT

(Being an appeal from the original decree and judgment of G. Adhiambo, Resident Magistrate in Kapsabet CMCC No. 182 of 2011 delivered on 15th March 2010)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 15th March 2010. The appellant was the plaintiff in the lower court. He had filed a suit against the respondent claiming special and general damages. The respondent denied the claim *in toto*. After considering the evidence, the learned trial Magistrate dismissed the suit with costs to the respondent
2. It was common ground that the appellant was employed by the respondent to pick tea on its estate. The appellant claimed that on 30th June 2010, his supervisor assigned him duties to pick tea. As he was taking the tea leaves to the weighing shed, he slipped and fell into an unmarked ditch or hole. He sustained injuries. He produced treatment notes from Nandi Hills District Hospital to prove the injuries and the nature of treatment. He also called Dr. Aluda and a clinical officer from Nandi Hills District Hospital to testify on those injuries.
3. The appellant blamed the respondent for negligence; or, breach of contract of employment; and, breach of statutory or common law duties of care. The particulars of negligence or breach of duty of care were pleaded as follows: Failing to provide the appellant with gloves, apparel, gumboots, masks goggles or any other protective gear; failing to provide a safe working system or to prevent the accident; failing to warn the appellant of impending danger or to take any measures to prevent the accident; instructing the appellant to work under unsafe conditions; and, failing to supervise the appellant.
4. The respondent's case in the lower court was on a three-strand: first, that that the Plaintiff could not and was not injured while on duty; secondly, that the respondent was not negligent or in breach of any statutory or common law duties of care; and, thirdly, that the appellant did not suffer the injuries claimed. The learned trial Magistrate found as follows-

> *"It is not enough to prove that the plaintiff sustained the injuries. An employer is not liable for all the injuries sustained by the employees. It must be proved on a balance of probability that the plaintiff sustained the injuries while on duty working for defendant……In this case I find that the plaintiff failed to avail the witnesses who would have corroborated his evidence. This court is not certain that the plaintiff sustained*

the injuries in the course of performing his duties at the defendant company as the same had not been proved on a balance of probability…..It is for this reason I find that the defendant cannot be held liable for the said injuries and further do find that the plaintiff cannot be said to be entitled to damages.

"If the plaintiff would have been able to prove this case on a balance of probability, which is not the case, I would have been guided by authority cited by the plaintiff Catherine Wanjiru Kingori and 30 others -Vs- Gibson Theoni Gichubi Njeri HCCC NO. 320 of 1993 particularly the award given to the 2nd plaintiff and would have awarded the plaintiff general damages of not more than Kshs. 100,000."

5. The appellant was dissatisfied with those findings. He has lodged a memorandum of appeal dated 19th March 2013. He has pleaded four main grounds: First, that the trial court erred by holding that the case was not proved on a balance of probabilities; secondly, that the trial Magistrate disregarded the appellant's submissions; thirdly, that the trial court failed to appreciate that the respondent did not rebut the appellant's case; and, lastly that the impugned decision was not supported by the evidence or the law.
6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1. 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.
7. It was not seriously contested that the appellant was injured on the chest, back and leg. He was treated at Nandi Hills District. Any doubt is removed by plaintiff's exhibit 2 showing he was treated at the facility. There is also the evidence of PW2 and PW3, the doctor and the clinical officer respectively. The real question was whether the injuries occurred in the *course* of his *employment*. First, the respondent's position was that the appellant was not injured at work on 30th June 2010. Secondly, the medical report by Dr. Aluda (exhibit 3A) was prepared more than a year after the alleged accident. Thirdly, the appellant claimed that he was injured at 2.00 pm and sought outpatient services at the company's dispensary. According to the respondent's witness DW1, a clinical officer at the respondent's dispensary, the appellant did not visit the dispensary on 30th June 2010.
8. The respondent's second witness was the appellant's supervisor. He confirmed that the appellant was on duty on the material day. However, no injury was reported to him. He testified that the appellant picked 12.5 kilogrammes of tea and worked for eight hours. A check list was produced to confirm it. The appellant had claimed he plucked tea weighing 22 kilos. If the plaintiff worked for eight hours, he could not have been injured at 2.00 pm or left his post at that time. DW2 testified that there are no holes or ditches on the tea plantation except on the roads. The holes on the actual plantation are burrowed by animals or made to prevent soil erosion. The appellant testified he had picked tea in the estate for over four years. In cross examination he conceded he was "aware of the ditches".
9. On revaluation of that evidence, I find that the appellant's case had serious gaps. Although he said the accident was witnessed by two people, Solomon Libuya and Peter Benta, they were *not* called to testify. The appellant was *aware* of the ditches on the farm. He had worked there for four years. Although the appellant claimed to have been injured at 2.00 pm, his immediate supervisor had *no* report of any injuries. The dispensary at which the appellant sought outpatient care had *no* records of his attendance. The medical report from his doctor was made a year *after* the accident. The treatment records at Nandi Hills Hospital may show the plaintiff was injured: but they *do not* prove the injuries occurred in the *course* of his *employment*.
10. I am afraid that on the preponderance of the evidence, the plaintiff's case was not made out. There was conflicting evidence. But the legal burden of proof fell squarely on the appellant's shoulders. See section 107 of the Evidence Act. The trial court had to weigh the evidence and find whether the plaintiff had established he was injured *at* work. I accept the analysis of evidence and findings by the learned trial magistrate that I cited earlier at length.
11. But even assuming that the injuries were caused by the fall in the course of employment, I am *not*

satisfied that the particulars of negligence were *proved* on a *balance of probabilities*. The appellant testified that the respondent did not provide him with gloves, an overall and gumboots which would have given his feet a firm grip and prevent him from sliding and falling into the ditches. He had done that work for four years. It was not the kind of work that required special training from the employer. I do not see what the employer could have done to ensure the appellant never slipped into a ditch while walking. There was an implied term of the contract that the appellant took the risks *incidental* to his contract. He was aware of the dangers of walking next to an unmarked ditch. It was then the appellant's primary duty to keep a safe look out. I am in agreement with the learned trial Magistrate that negligence or breach of any statutory duty of care was *not* established.

12. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 (unreported).
13. I also agree with the trial court that had the appellant succeeded on liability, general damages would not have exceeded Kshs 100,000. From the medical report of Dr. Aluda dated 26th April 2011, the appellant suffered blunt trauma to the chest, spinal injury and right ankle. The treatment given comprised of antibiotics and analgesics. Clearly, the appellant suffered minor soft tissue injuries. I am guided there by *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR. There, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was granted. In *Sokoro Saw Mills Limited v Grace Nduta Ndungu* High Court, Nakuru, Civil Appeal 99 of 2000 [2004] eKLR, the court reduced the general damages for soft tissue injuries to Kshs 30,000. But that now is all water under the bridge.
14. The appellant having failed to establish his case on liability, this appeal fails in its entirety. It is dismissed. The appellant shall meet the costs of the respondent in the lower court and in this appeal.

It is so ordered.

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

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

Mr. Aseso for Mr. Chanzu for the appellant instructed by Z. K. Yego & Company Advocates.

No appearance for the respondent

Mr. J. Kemboi, Court clerk.