



IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.74 OF 2006

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

VERSUS

CALEB EMBEHERE.....RESPONDENT

(An Appeal from the judgment/decree of Hon. J. M. NJOROGE Senior Resident Magistrate, in Kapsabet C.M.C.C.No.270 of 2004 dated 23rd May, 2008)

JUDGMENT

1. The respondent was employed as a tea plucker by the appellant company. On the 22nd December, 2003, the respondent was injured by a tree stump whilst in the course of his employment.
2. The respondent was awarded the sum of Kshs.60,000/= as general damages for the injuries sustained and Kshs.2000/= as special damages. Liability was apportioned on a ratio of 80% to 20% with the Appellant bearing the larger portion.
3. The appellant being dissatisfied with the decision of the Hon. John Njoroge, Senior Resident Magistrate, Kapsabet delivered on 23rd May, 2006 preferred this appeal.
4. The appellant listed five (5) grounds of appeal in its memorandum of appeal.
5. The grounds of appeal are *inter alia*:
 - i. THAT the learned trial magistrate erred in law and in fact in holding the appellant liable in negligence and/or in contract without any sufficient evidence in that regard having been tendered.
 - ii. THAT the learned magistrate erred in law and fact in failing to hold that there was no evidence that the respondent was injured as alleged in the plaint or at all.
 - iii. THAT the learned trial magistrate erred in law and in fact in failing to dismiss the respondent's claim for want of proof.
 - iv. THAT the learned trial magistrate erred in law in failing to hold in accordance with the judicial authorities cited by the appellant which were binding on the trial magistrate.
 - v. THAT the learned trial magistrate erred in fact and in law in failing to apply the provisions of **Order XX Rule 4** of the **Civil Procedure Rules**.
6. At the hearing of the appeal, both counsel for the appellant and the respondent opted to rely on their written submissions.
7. After reading the written submissions of both the parties, this court finds the following issues for determination:
 - i. burden of proof;
 - ii. liability;
 - iii. quantum of damages

8. This being the first appellate court, this court is duty bound to re-assess and re-evaluate the evidence on record and arrive at its own independent decision. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 others**, C.A. NO.344 of 2004 2 KLR.
9. The respondent testified that on 22nd December, 2003, whilst in course of his employment, he was injured by a dry tree stump which occasioned a deep cut wound on his left leg.
10. The respondent's evidence was that the appellant had failed to provide him with proper protective clothing in the form of gumboots.
11. The evidence of P.W.2, Dr. Obedi Omuyoma was that he relied on a medical treatment chit from Nandi Hills District Hospital which confirmed that the respondent was treated thereat on the 22nd December, 2003.
12. P.W.2 examined the respondent and prepared a medical report which he produced into court as "P Exh.2." The said report confirmed that the respondent had sustained a deep cut wound on his left leg.
13. It is the appellant's contention that the respondent was not injured on its premises on that material date as the supervisor was not duly informed nor is there any record at the appellant's dispensary relating to the respondent's injury.
14. The appellant submits that since there is no evidence adduced by the respondent, he had therefore failed to prove his case.
15. It is trite law that he who alleges must prove his case and that in civil cases, the standard of proof is on a balance of probabilities.
16. The medical report prepared by P.W.2 makes reference to the medical treatment notes prepared by Nandi Hills District Hospital. The evidence of P.W.2 is that he examined the respondent and confirmed the injuries sustained.
17. The appellant called the supervisor D.W.1, James Rabole Maina who tendered evidence to show that indeed the respondent was an employee of the appellant company and he produced a master roll to confirm that the respondent was on duty on that material date.
18. D.W.1 made reference to the fact that the appellant's dispensary had a daily list of attendee patients but none was produced to controvert the respondent's evidence.
19. I have had occasion to peruse the record of appeal and find that the particulars of injuries set out in the plaint are commensurate with those adduced in evidence by the respondent and corroborated by P.W.2 and this court is satisfied that the respondent had adduced evidence that he sustained injuries and that he proved his case on a balance of probabilities.
20. On the second issue of liability. The respondent's evidence was that the appellant had failed to provide him with protective boots.
21. Refer to the case of **Clifford V. Charles & Sons Limited** (1951) All E.A. where it was held that the employer owes the employee a common law statutory duty of care and must provide a safe working environment and a safe system of work.
22. The appellant did not offer any evidence to controvert the evidence of the respondent that it had failed to provide any protective gear in the form of gumboots to the respondent.
23. It is also not disputed that tree stumps existed on the appellant's tea plantation.
24. This court finds that due to the presence of the said tree stumps, the risk was foreseeable and finds that the appellant was in breach of its statutory duty of care in that it failed to provide the respondent with protective clothing in the form of boots. Had the same been provided, the injuries would have been minimized or not occurred at all.
25. This court also notes that the respondent proceeded to work at the appellant's tea plantation notwithstanding, the fact that he had none of the protective boots or clothing and I find the maxim "*volenti non fiti injuria*" is applicable.
26. For the reason stated above, I find no reason to interfere with the trial magistrate's finding on liability and apportionment.
27. On the last issue of the award of quantum of damages, this court finds that the appellant made no submissions on this issue. The court therefore concludes that this ground of appeal as having been abandoned therefore there is no need for this court to interfere with the trial magistrate's award.
28. In conclusion, this court finds that the appeal lacks merit and the same is hereby dismissed.
29. The respondent shall have the costs of this appeal.

Dated and Signed at Eldoret this day of.....,2013.

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 20th day of March, 2013 by Hon. Justice Fred A. Ochieng'

FRED A. OCHIENG'

JUDGE