REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 36 of 2007

NANDI TEA ESTATES LIMITED.....APPELLANT

AND

MUSA WEISIA SONGA.....RESPONDENT

(BEING AN APPEAL FROMTHE JUDGMENT AND DECREE OF W.N NJOROGE, SENIOR RESIDENT MAGISTRATE DELIVERED ON 20TH MARCH, 2007 IN PRINCIPLE MAGISTRATE'S CIVIL CASE NO. 12 OF 1999)

JUDGMENT

This appeal is from the judgment and decree of the Learned Senior Resident Magistrate **J. Njoroge** dated 20th March, 2007 in Kapsabet Principal Magistrate's Court Civil Case No. 12 of 1999. The appellant, **Nandi Tea Estate Limited,** was the defendant and the respondent, **Musa Weisia Songa,** was the plaintiff. The Learned Senior Resident Magistrate, entered judgment against the appellant and in favour of the respondent on liability in the ratio of 90%:10% and awarded the respondent Kshs. 144,000/- as general damages and Kshs. 1,500/- as special damages and thus triggered this appeal.

The respondent had been an employee of the appellant and alleged in his plaint, that on or about 11th May, 1998 while engaged upon his work with the appellant, he slipped and fell into a hole and as a result sustained serious injuries (which included a fracture of the lateral, malleous of the left tibia) loss and damages which he claimed from the appellant on the basis that the appellant, its servants and/or agents and/or employees had been negligent and or had been in breach a contract and/or statutory duty.

In the appellant's written statement of defence, it denied the respondent's claim and specifically denied, *inter alia*, that the respondent was its employee and was injured as alleged; that it or its employees, agents/servants were negligent and/or in breach of contract and/or statutory duty. In the alternative, it pleaded that if the respondent was injured, then the injuries were caused by his sole and/or contributory negligence.

In its appeal to this court, the appellant has raised six (6) grounds of appeal all of which challenge the learned trial magistrate's findings on liability and the award of damages.

The respondent's case before the Learned Senior Resident Magistrate in brief was that at the time of the alleged accident he was employed by the appellant as a tea plucker at the appellant's tea estate. While so employed, he slipped into a hole and got dislocation of the ankle joint and a fracture at the same area. He reported to his supervisor **Senso** and went to the appellant's dispensary for treatment but was referred to Nandi Hills Hospital where he was treated. Later the appellant filed a Notice of the accident under- The Workmen's Compensation Act (Cap 236 Laws of Kenya). **Dr. Aluda** also prepared a medical report of his injuries. He blamed the appellant for having dug the holes and failing to fill them up.

In cross-examination, he denied that he was injured while playing. The respondent called **Dr. Samuel Aluda** (PW1) who testified that he had examined the respondent and prepared a medical report of his injuries. He confirmed that the respondent sustained fracture of the left leg and dislocation of the left ankle joint. He produced the report at the trial.

The appellant's case before the learned Senior Resident Magistrate on the other hand was presented by J**oseph Kharengwa Limera** (DW1) and **Elisha Osula** (DW2). The two testified that the respondent was injured while playing and not while plucking tea.

After analyzing the evidence which was adduced before him, the Learned Senior Resident Magistrate found that the respondent had proved to the required standard that he had been injured while in the appellant's employment but apportioned liability as already stated.

When the appeal came up before me for hearing on 15th May, 2012, counsel agreed to file written submissions which were duly in place by 31st July, 2012. The submissions reiterated the parties' stand points taken at the trial.

I have read those submissions and the authorities relied upon by counsel. I have also given due consideration to the record of the Learned Senior Resident Magistrate. Having done so, I take the following view of this matter. This is a first appeal. It is therefore by way of a retrial. The court is required to re-evaluate the evidence which was adduced before the trial court and draw its own conclusion, bearing in mind that the court did not see or hear the witnesses testify and should give allowance for that. (see **Selle and Another -Vs- Associated Motor Boat Company Limited and others [1968] E.A. 123)**. it is also trite that the court of first appeal is not necessarily bound to follow the trial, court's findings of fact if it appears either that the court failed to take into account particular pertinent circumstances or if the impression based upon the demeanor of witnesses is inconsistent with the evidence adduced **(See Abdul Hameed Seif -Vs- Ali Mohamed Shoran [1955] 22 E.A. 270).** I am also alive to the principle enunciated in the the decision of the Court of Appeal in **Peter -Vs- Sunday Post Limited [1958] EA 424.** There it was stated as follows:-

"It is a strong thing for an appellate court to differ from a finding on question of fact of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

Given the above principles, I ask myself whether the appellant has demonstrated sufficiently that the trial court's findings of fact were not based on evidence or were based on a misapprehension of evidence or that the trial court clearly acted on wrong principles in reaching those findings of fact **(See also Ephantus Mwangi & Another -Vs- Wambugu [1983/84] 2 KCEA 100).**

In the case at hand this is what the Learned Senior Resident Magistrate said on liability.

"The plaintiff has stated that he was injured due to holes that had been dug by the defendant. He blamed the defendant for failure to fill up the holes and also for failure to place adequate warning signs. The defence did not contradict or rebut this evidence. The medical report include that the plaintiff sustained a dislocation of the left ankle joint and a fracture of the lateral malleous of the left tibia. The medical evidence is further supported by the LD 104 form filled by the defendant on behalf of the plaintiff. The defendant didn't call any evidence to rebut this document. The LD 104 states that the plaintiff sustained a fracture on his left leg in a hole while plucking tea in field No. T18 on 11th May, 1998".

The findings of the Learned Senior Resident Magistrate were not based on whim. Having perused the testimonies of DW1 and DW2, I indeed observe, that the two did not expressly deny that the respondent had been injured. The thrust of their evidence was that the respondent played with another and may have been injured at a different time. Obviously, the Learned Senior Resident Magistrate did not believe the two. There is no doubt that he had the discretion not to believe DW1 and DW2. To buttress

his findings, the Learned Trial Magistrate considered form LD 104 which the respondent produced at the trial. I have perused that form which is part of this record. The form was filled pursuant to the provisions of the Workman's Compensation Act. It was signed by the appellant's Senior Manager. It confirms that the respondent was injured on 11th May, 1998 at 12:45p.m., while plucking tea in field number T18.

The Learned Senior Resident Magistrate did not find any basis of discrediting the said form. I have, like him found no reason to hold otherwise. In the premises and given the evidence tendered by the respondent the evidence of DW1 and DW2 could not be believed. There was sufficient evidence adduced by the respondent to find the appellant liable to the extend recorded. This case is clearly distinguishable from the cases cited by the appellant. In **Eastern Produce (K) Limited -Vs- Joseph Wafula Mwanje [Eldoret HCCA No. 86 of 1999] [VR],** the respondent was injured while playing football and not while he was on his duty of cutting grass. In **Sotik Tea High Lands Estate Limited -Vs- Francis Nyaberi Omayo [Kericho HCCA NO. 4 of 2005 [UR],** the respondent was injured when he slipped into a hole created spontaneously by a dried tea bush. The court found on the respondent's an admission, that such holes would appear whenever tea bushes dried up and by burrowing wild animals. In those circumstances the court held that it was not reasonable to expect the appellant to put up warning signs.

The position in the case before me is however different. Here, the Learned Trial Magistrate accepted the respondent's testimony that the hole into which the respondent fell was dug up by the appellant and was not the type which would appear spontaneously by drying tea bushes or burrowing wild animals.

In the end the appeal against findings on liability is without merit.

With regard to the appeal against the assessment of damages the appellant has contended that the Learned Senior Resident Magistrate's assessment was excessive given the injuries suffered by the respondent. The principles upon which a court on appeal can interfere with the assessment of damages by a trial court are settled. In **Kemfro Africa Limited T/A Meru Express Service Gathong Kanini -Vs- A.M. Lubia and Live Lubia [1982 – 1988] IKAR 722, Kneller J.A** said as follows at page 730:-

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (See Ilango -Vs- Manyoka [1961] E.A. 713; Lukenya Ranching and Farming Co-operative Society Limited -Vs- Karolot [1970] E.A. 414, 418, 419). This court follows the same principles."

The appellant, despite challenging the award of damages made by the Learned Senior Resident Magistrate in its grounds of appeal, did not address that issue in its address to me. There is no dispute however that the respondent sustained, among other injuries, a fracture of the lateral malleous of the left tibia and dislocation of the left ankle joint. Those injuries however healed without leaving any permanent disability. The Learned Senior Resident Magistrate considered those injuries and the authorities cited to him before assessing the damages. I cannot fault him. I have not detected a consideration of a factor which ought not to have been taken into account or failure to take into a account a factor which ought to have been considered. I have also not detected application of a wrong principle. I also do not find the damages assessed as so inordinately high that it must be a wholly erroneous estimate of the damage suffered by the respondent.

In the end, I have come to the conclusion that the entire appeal has not merit and is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 18TH DAY OF SEPTEMBER, 2012

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Ayuma H/B for Ms. Khayo for the Appellant and

Ms. Kosgei H/B for Mr. Chepkwony for the Respondent.

F. AZANGALALA
JUDGE

18TH SEPTEMBER, 2012