REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 43 of 2004

EASTERN PRODUCE (K) LIMITED

(CHEMOMI TEA ESTATE)…….....…..…….APPELLANT

VERSUS

PATRICK JUMA…….RESPONDENT

(Being an appeal from the ruling and orders of the learned Principal Magistrate, the Hon. F. Mabele given on 10th February 2004 in Kapsabet PMCCC No. 21 of 2003)

JUDGEMENT

The Respondent presented a plaint at the Principal Magistrates court at Kapsabet seeking general damages for pain and suffering and loss of amenities and special damages of Kshs. 1,500/=. The Respondent averred that it was term of employment contract between the Respondent and the Appellant that the Appellant will provide the Respondent with the safety apparatus and to make sure that there was a safe working environment. On or about 19/4/99, the Respondent was injured in the course of his employment. He averred that the Appellant was in breach of statutory duty of care and therefore guilty of negligence. The particulars of negligence were given in paragraph 7 of the plaint as follows:

a) Exposing the Plaintiff to a risk of injury or otherwise

b) Failing to keep the term of contract so as not to expose the Plaintiff to a risk of danger that he knew or ought to have known

c) Failing to provide any precautions for the safety of the Plaintiff while he was engaged upon his duties.

d) Failing to provide the Plaintiff with any protective clothing.

e) Permitting or causing the Plaintiff to work without protective clothing.

f) Failing to provide and maintain a safe working environment.

g) Failing to train its employees on the dangers involved in carrying out their work.

The Appellant was served and filed a defence denying liability and alleged contributory negligence on the part of the Respondent. The suit was heard before Honourable Magistrate F.A. Mabele who in a judgment

delivered on 26th January 2004 apportioned liability in the ratio 15:85 against the Appellant and awarded general damages of Kshs. 80,000/= and special damages of Kshs. 1273. The net sum after contribution was Kshs. 69,275/=. The Appellant was aggrieved and lodged a Memorandum of Appeal on 24th February 2004 contending that:

1. The learned magistrate erred in law and fact in holding that the Appellant was liable in negligence for the purported injuries suffered by the Respondent.

2. The learned magistrate erred in law and fact in failing to hold that the Respondent had discharged the burden of proof on a balance of probabilities to establish negligence against the Appellant.

3. The learned magistrate erred in law and fact by failing to consider the Appellants submissions and all the issues raised at the hearing.

4. The learned magistrate erred in law and fact by placing undue reliance on the evidence of the Plaintiff despite the fact that the Plaintiff's witnesses never witnessed the alleged accident or treatment of the alleged injuries.

5. The learned magistrate erred in law and fact in making an award for damages for alleged injuries when the evidence tendered in support of the same was purely hearsay evidence which was not even corroborated.

6. The learned magistrate erred in law and in fact in making an award that was manifestly excessive in the circumstances.

7. The learned magistrate erred in law and in fact in delivering judgment on 26th January 2004 before the Respondents advocate only and thereafter inviting both parties for second delivery of the same judgment on 10th February 2002.

The Appeal was admitted to hearing. Counsel for the Appellant and Respondent made oral submissions before me on 13/2/2007. Counsel for the Appellant submitted that she will argue grounds 1, 2 and 6. Accordingly grounds 3, 4, 5 and 7 were deemed as abandoned. Counsel submitted that finding that Appellant was negligent has no basis in law. The Respondent pleaded and testified that he was not given apparel. The evidence presupposes that a duty of care exists in favour of the Respondent. No statute was pleaded in the Plaint. No terms of contract were laid before court to show existence of a statutory duty of care. The Appellant sought to argue limitation of action but counsel for the Respondent objected on the grounds that it was not an issue raised in the Memorandum of Appeal or at the trial court. In a short ruling I upheld the objection by counsel for the Respondent being of the view that the claim was based on contract of employment and limitation was therefore six years. Counsel for the Appellant continued by submitting that the burden of proof had not been discharged by the Respondent. Only the Respondent gave evidence about his injuries. Other witnesses gave account of what they were told by Respondent. Respondent gave evidence that he was injured in the course of pruning tea. Witnesses for the Appellant gave testimony that he was injured in the course of plucking tea. Plucking tea does not require a knife. That the magistrate erred in requiring authentication of computer print out. That the award of Kshs. 80,000/= was excessive. She urged that the judgment be set aside and the Respondents suit be dismissed with costs together with costs of the appeal.

Counsel for the Respondent opposed the appeal. She submitted that the Appellant and Respondent were bound by contract of employment. She referred to the evidence which was that the Respondent blamed the Appellant for not providing overalls and a safe working place. That the defence witnesses did not rebut what the Respondent had said. Magistrate was right in conclusion that Appellant was liable. That the Respondent discharged the burden of proof. An employer is obliged to provide a safe working place. The Appellant's witnesses said that Respondent was not in the field. Magistrate doubted their evidence. That the computer printout did not specify whether it was plucking or pruning. "pl" cannot be assumed to mean plucking. She submitted that there was no error of principle in awarding Kshs. 80,000/= general damages.

I have considered the submissions of both counsels and two issues arise for determination. Firstly, whether the Respondent had established liability against the Respondent and secondly whether damages awarded to the Respondent were excessive. This being a first appeal it is the duty of this court to reevaluate the evidence and test the findings of the trial magistrate of course giving allowance to the fact that the trial magistrate had the advantage of watching the demeanor of the witnesses. The Respondent gave evidence in chief as follows: - He stated that on 19/4/99 he was on duty pruning tea and he got injured in the process. The knife hit against a dry stem and cut him on the right knee. He did not see the stump because it was covered with tea foliage. He went to Nandi Hills for treatment. He was given a chit produced as P Ex. 2 and was later examined by Dr. Aluda who prepared a medical report produced as P. Ex. 3. His knee had not fully healed. It occasionally pains. He blames the company because they should have warned me of the presence of the stump. He was not given protective overalls. The stump should have been removed by the company. That he did not refuse to follow instructions. On cross examination he denied that he was plucking tea on the material day. That he went to the company dispensary but was referred to Nandi Hills Hospital. PW2 was a doctor who examined the Respondent and prepared a medical report. The wound had healed but there was a scar. PW3 was the M.O.H. Nandi Hills District Hospital. The doctor produced the treatment chit issued by Nandi District Hospital and confirmed that the Respondent was treated at the hospital on 19/4/99. He confirmed that the cut was severe enough to necessitate stitching.

The Appellant called two witnesses. DW 1 was Juma Maritim. He was a nurse at the company dispensary. He confirmed that the Respondent was one of their employees. He did not see him (Respondent) on 19/4/99. Normally when an employee is injured he is given a chit to take to Nandi Hills Hospital. He denied that Juma was injured on 19/4/99 because his name was not in out patient register D Ex. 1. DW 2 was Yohana Mushibati. He gave testimony that he is an employee of the Appellant in charge of records. That on 19/4/99 the Respondent was entered as plucking tea. His supervisor was John Kamau who was now deceased. That they do not have a clerk called Arap Juma. Upon evaluation the evidence the trial magistrate rendered herself as follows:

"The evidence adduced by the two doctors PW2 and PW3 is that the Plaintiff sustained a cut wound on 19/4/99 as shown on the medical; card issued at Nandi Hills Hospital. This evidence also confirms what the Plaintiff told the court. PW2 similarly has stated that when he examined the Plaintiff, he found that he had a scar on the right knee. These injuries are consistent with what the Plaintiff stated and prove that he was indeed injured on the material day. It cannot therefore be true as stated by DW1 and DW2 that he was not injured as alleged at all. What then caused and completed the day's task without getting injured? Both DW1 and DW2 were not in the field with the Plaintiff. Hey did not meet him and have only relied on records. DW2 when cross examined made it clear that he was only telling the court what he had been told. And that the supervisor who could confirm this is one Kamau who is now deceased. He also admitted that the Plaintiff only plucked 25 Kgs. of tea that day and the time of weighing is not specified. Of course, this appears to be a doubtful record because the Plaintiff has said that he was pruning tea that day. Only the supervisor who was not called could prove this"

I agree with the findings of the Trial Magistrate. The witnesses of the Appellant did not see the Respondent working in the field. They relied on records. The supervisor who could confirm the exact work the Respondent was doing one Kamau was deceased. The fact that his name did not appear in the out-patient register of the dispensary can be reconciled with the Respondent testimony that he was not treated at the dispensary. He went to the dispensary and was referred to Nandi District Hospital. This could be consistent with the fact that the nature of the cut required stitching and the dispensary could not provide this service. His name could not appear in the out- patient register because he was not treated there. PW3 confirmed that at times employees come without referral chits. It was not an extraordinary event for the Respondent to turn up without a referral chit. Corroboration of the injury was also provided by medical chit of Nandi Hills Hospital. PW3 did not say that it was not authentic. DW2 confirmed that the Respondent was working on 19/4/99. It was not clear the nature of the work but it is evident he was injured.

It was not necessary for the Respondent to plead the statute. It was clear that the Respondent was contending breach of statutory duty of care. The Appellant would have applied for particulars if they felt

embarrassed with the plaint. However, it was very clear that the case was all about employer's duty to an employee in relation to the work environment. It was established that the Respondent was injured in the course of employment. The next to consider is whether the Appellant was liable. The Respondent blamed the Appellant for not removing tree stumps. He also blamed the Appellant for not providing protective overall. The Appellant witnesses did not contest these facts. Accordingly the Respondent had discharged burden of proof on negligence and breach of statutory duty. Grounds 1 and 2 therefore fail.

Ground 6 was on quantum. The Appellant counsel had proposed an award of Kshs. 30,000 and the Respondent proposed an award of Kshs. 100,000. The trail magistrate awarded 80,000/=. An increase of Kshs. 50,000/= from what the Appellant counsel had submitted. In appeals against quantum the law is very well settled. An appellate court will not interfere with an award of damages unless it is manifestly high or low as to show that the trial magistrate made an error of principle. No error of principle was demonstrated by counsel for the Appellant. It must be remembered that estimation of general damages is not a scientific exercise with clear cut answers. What may be high to one judge may seem low to another. To my mind a difference of Kshs. 50,000/= does not seem high enough as to warrant interference from this court. Ground 6 therefore fails.

The upshot is that the Appeal lacks merit and is hereby dismissed with costs.

DATED AND SIGNED AT NAIROBI ON THIS 7TH DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012

F. AZANGALALA

JUDGE

In the presence of: Mr. Martin for Applicant

Mr. Esitan for Respondent