



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 51 of 2002**

**EASTERN PRODUCE (K) LIMITED.....APPELLANT**

**VERSUS**

**EDWIN ABDALLA WASIKE.....RESPONDENT**

**(Being an appeal from the judgement and decree of Ms. F. Mabele, Principal Magistrate delivered on 15<sup>th</sup> May 2002 in Kapsabet No. 123 of 2000)**

**JUDGEMENT**

The Respondent presented a Plaint at the Principal Magistrates Court at Kapsabet seeking general and special damages in respect of injuries sustained on the 19<sup>th</sup> day of March 1998 while working for the Appellant. The Respondent averred that the Appellant was negligent in failing to provide or maintain adequate or sustained plants, tackle and appliances to enable the Plaintiff carry out the said works; failure to provide and/or maintain a safe and proper system of work; exposing the Plaintiff to a risk of injury or damage to which he knew or ought to have unknown and causing or permitting the Plaintiff to work without protective gear. The Appellant was served did not appear and ex-judgment was obtained. The Appellant however applied and succeeded to set aside the judgment and filed its defence. It denied that an accident occurred as alleged on 19<sup>th</sup> March 1998 and averred in the alternative that if an accident occurred it was contributed to substantially be the negligence of the Respondent. It pleaded particulars of negligence in paragraph 5 of the defence. The suit was heard by F.A. Mabele and in judgment delivered on 15<sup>th</sup> May 2002 he awarded the Respondent general damages of Kshs. 160,000/= subject to 10% contributory negligence by the Respondent. The Appellant was aggrieved and lodged the present appeal contending as follows in its Memorandum of Appeal dated 3<sup>rd</sup> June 2002:

1. That the Learned Trial Magistrate erred in law and fact in holding the Appellant liable without any or any sufficient evidence having been adduced by the Respondent;
2. The Learned Trial Magistrate erred in law and in fact in failing to appreciate the evidence adduced by the Appellant thereby leading to a miscarriage of justice;
3. The Learned Trial Magistrate erred in law and fact in holding that the Respondent sustained chemical burns without any evidence in that regard having been adduced;
4. The Learned Trial Magistrate erred in law in awarding damages to the Respondent without any factual or legal basis;

5. That without prejudice to the foregoing the learned trial magistrate erred in law and fact in awarding damages that were excessive in view of the injury allegedly sustained.

On the hearing of the Appeal, counsel for the Appellant counsel argued grounds 1 to 5 together. He submitted that the Respondent had pleaded contract of employment and that the Appellant failed to provide him with protective gear. That no damages would be payable unless the Respondent proved breach of contract. That the evidence on record showed that the Appellant had provided protective gear. That the Respondent was a grass cutter. He was experienced and that instructions were given on how to do the work. That the burns occurred in the fields while the Respondent was applying fertilizer. The Respondent was expected to be careful. That the Respondent did not suffer any burns at all. DW3 gave testimony that he treated the Appellant for wound not burns. That the trial court did not refer to the Appellant's evidence. On quantum counsel submitted that the award was extremely high. The injuries were 3<sup>rd</sup> to 4<sup>th</sup> degree burns. That 1<sup>st</sup> and 2<sup>nd</sup> degree burns the court awarded damages of between 100,000 to 150,000/=. That the sum of Kshs. 160,000/= was exorbitant for 3<sup>rd</sup> and 4<sup>th</sup> degree burns.

Counsel for the Respondent opposed the appeal. She submitted that case was between employer and employee. Issue of employment was not disputed. Neither the fact that he was on duty on 19/3/1998. It was also not disputed that the Respondent was treated at the Appellant's dispensary on the same day at around 3pm. That DW1 supports the evidence of PW1. PW1 said that the nurse referred him to Nandi District Hospital. Where he was treated and discharged. Case was based on breach of contract and tort. She urged the court to consider the evidence especially the medical reports and to determine that the Respondent suffered burns. That the judgment on liability was sound. It was apportioned at 90:10. Counsel referred to the following cases as in support of the proposition that an employer is liable to an employee for breach of implied conditions in a contract of employment. **Clifford v Charles H Challen (1951) 1 All ER 72; Kipchomo Tea Estate v Evans Ongeisia Tome , Eldoret HCCA 80 of 1999; and Eldoret HCCA 58 of 1996 Kaptindo Tea Estate v Rodah Lugonzo.**

On quantum counsel submitted that it was necessary to consider the injuries. Further than an appellate court has no advantage enjoyed by the trial court of watching the witnesses. That an appellate court will not interfere with an assessment of damages unless it was against principles of law. Counsel cited the case of **Karanja v Malele [1983] KLR 142.**

I have considered the respective submissions and two issues arise for determination. (1) Whether the trial magistrate was right to find the Appellant liable in negligence and (2) whether the sum of Kshs. 160,000/= awarded as general damages was excessive taking into account the nature of injuries. It is the duty of this court to reevaluate the evidence and test the findings of the trial magistrate of course giving allowance for lack of eye contact enjoyed by the trial magistrate. It is necessary to consider the evidence of the Respondent in detail. He stated as follows:

***"I was working at E.P.K. Chemoni Estate on 19.3.98. I was on duty at Chemoni Estate. I was cutting grass around the estate. I had been employed to do that job. While doing so around 8.00am in field no. 6 the supervisor came and called me to go and apply fertilizer as people doing so were not enough. I went and was given a tin and I started to apply the fertilizer. At about 11am he noticed that his legs were beginning to be affected with chemical burns. I then went and informed the supervisor and he gave me a chit and I went to the dispensary. He then followed me to the dispensary and was taken by a motor vehicle to Nandi Hills District Hospital where I was treated and discharged. I went back on 20.3.98. I last went to hospital on 1.10.98 and was treated and went home. Right now I have healed. These are the treatment chits...I blame the company because had I been given gum boots, gloves and a mask and an overall, a helmet and Vaseline oil I would not have been injured. I would have put on that gear to prevent the dangerous chemicals reaching me. I had not used fertilizers or chemicals before. I was injured on the toes and legs. Toes on both legs were affected (shows scars). I was also injured on the hands"***

The Medical Report of Dr. Aluda was produced by consent as P Ex 2. DW1 gave testimony for the Appellant. He confirmed that he knows the Respondent. They worked with him. On 19.3.98 he was supervising fertilizer application in field no. 6. The Respondent was one of them. That they started with

him on 1.3.98 and then broke off abit and resumed on 13.3.98. They were using agriculture line. He went to the store and was given eye goggles dust masks, plucking caps and containers from the store. They also had grease to apply to the body parts that are not covered with the plucking cape. These are the hands and legs. They do not allow anyone to work without these required apparels. On the material day he worked without any problems, normally each person is given 3 bags of 50Kgs each. When one finishes he goes home. That day, the Respondent told him that he was unwell when he finished. He asked him to give him a chit so that he could pass through the dispensary. He gave him the chit and wrote "please attend to Edwin Wasike check roll No. 606 after duty". He could see there was an erasure to it after and is written on. The Respondent had finished his work when he wrote the chit. That the Respondent was lying if he said that he was called from other work because they had started with him from first. He did not know what he was suffering from when he told him that he was sick. He did not come to work on 20.3.98. If one uses all the apparatus, he cannot get injured.

DW2 was the check roll clerk. He produced the check roll showing that the Respondent started working under fertilizer section on 2.3.98. That he was check roll no. 606. That on 20.3.98 the Respondent was on casual leave and not sick off. DW3 was the nurse at the dispensary. She gave testimony that she treats minor cases. If the illness or injury is serious she refers to Nandi Hills District Hospital. On 19.3.98 the Respondent came and had sores on his legs. He told her that he had finished his work. She gave him injections for 3 days- one per day. It was an antibiotic. She did not refer him anywhere else. She applied G.V. on the wounds. The Respondent did not have chemical burns. She produced a copy of the out-patient register as D Ex 2.

The Trial Magistrate evaluated the evidence and summarised the findings as follows:

***"Elisha Obuya Owuor (DW1) testified to that effect and added that on that day he gave out 24 plucking capes and 24 containers to the workers. He also gave out 24 dust masks. And if the Plaintiff had those apparatus and used them properly he would not have been injured as he claims. However, he had no records to back such issuance. As seen above DW1 is merely denying the eventuality. If the Plaintiff was not injured while on duty as he has alleged, he would not have given him the chit to go to the dispensary. What would be the Plaintiff looking for there, if it was not for treatment. Evidence by the check roll clerk John Kibiego Kemei (DW2) also confirmed that the Plaintiff was on duty that 19.3.98 to 23.3.98. The nurse Jennifer Onyango (DW3) has also confirmed that she saw the Plaintiff on 19.3.98 and he had sores on his leg. She treated him for 3 days injecting him with antibiotics. She however denies that he had chemical burns. It is interesting to note here that DW1 who gave him the chit did not notice the sores that DW3 saw and treated. Why would he have given him the chit if he did not see what ailment the Plaintiff had? The only conclusion is that these witnesses are hiding something. It was not the sores or nothing that the Plaintiff was afflicted with. He had burnt by the chemicals and that is what Dr. Aluda confirmed when he examined him. The Defendants are therefore liable. They did not provide the Plaintiff with the requisite apparel that would have prevented him from getting burned by the fertilizer (line) that he was applying"***

I think the trial magistrate was perfectly entitled to ask the questions that he did. Why provide a chit if you do not know the ailments that the employee is suffering from. DW1 was not been candid. The nurse was slightly better in her approach. She confirmed that the Respondent had sores on his legs. To the nurse by virtue of her limited training could have considered those to be sores but a doctor would use the appropriate terms. The Appellant allowed the medical report of Dr. Aluda to be admitted by consent. They did not for the cross-examination of the doctor on the conclusion of chemical burns. It must be taken that the Defendants were happy with that conclusion and are therefore stopped from retracting. Reading between the lines the Respondent was not employed to apply fertilizer. The casual number that was provided by DW2 differed from his casual number provided for grass cutting. He must have been standing in for an employee with casual number 606 without his knowledge. It would appear that the Respondent did not have gum boots.

In cross examination he stated that when the fertilizer got mixed with morning dew it had a burning effect. DW1 did not state that he had provided fertilizer. He said that he provided plucking capes to cover certain body parts. Grease was to be applied on hands and legs. It is clear that the only protection offered

on the legs was grease. Gumboots would have been better protective apparel. The Respondent lamented lack of gum boots. DW1 did not state that he provided gum boots. The conclusion of the trial magistrate was sound and I do not find any ground for disturbing the same. Grounds 1 to 3 of the Appeal must fail.

Ground number 5 was on quantum of damages. The trial magistrate awarded Kshs. 160,000/= as general damages. The general principle is that a trial court will not interfere with an award of general damages unless it is shown that the award was excessive as to represent an erroneous estimate of the damages suffered. General damages should as far as possible be similar to comparable awards. I am not persuaded that the trial magistrate observed this principle. In a judgment delivered on 25.10.2000 in the same matter the trial magistrate had awarded Kshs. 100,000/= as general damages. This judgment was later set aside and the Defendant given leave to defend. The second judgment in the same matter was delivered on 15.5.2002. The interval between the two judgments is 19 months. The deterioration in the value of the shilling could not have been 160% over this period. The injuries were the same and nothing had changed apart from the aspect of contributory negligence of 10% that was to be borne by the Respondent.

This court is persuaded that an error of principle was committed and it has grounds to interfere. I therefore set aside the award of damages of Kshs. 160,000 and substitute a sum of Kshs. 100,000/= as general damages for pain and suffering. I will not disturb the apportionment of liability of 10:90 as against the Appellant. Ground 5 of the appeal succeeds.

The upshot is that the appeal is allowed. The award of general damages of Kshs. 160,000 is set aside and a sum of Kshs. 100,000/= is substituted as general damages for pain and suffering. Each party will bear own costs of the appeal as the ground of appeal on error of principle was raised by the court in so far as general damages were not comparable for same injuries in same file. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OCTOBER 2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Kathili h/b for Mr. Nyairo for the appellant

Mr. Cherutich h/b for Ms Kipseii for the respondent