REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO.223 OF 2006

BETWEEN

JAMES FINLAY (K) LTD. ……..……. APPELLANT

AND

EVANS NYATI ……..…….. RESPONDENT

(Being an appeal arising from the judgment and decree of the principal Magistrate, Honourable S.M. Soita delivered on 2nd August 2006 in Kisii CMCC No. 57 of 2005)

JUDGMENT

1. The Appellant was the Defendant in the lower court case being Kisii CMCC No.57 of 2003. The Respondent sued the appellant, James Finlay Kenya Limited seeking both special and general damages, costs of the suit, interest and any other relief that the honourable court would deem it fit to grant.

2. The Respondent's claim arose out of a contract of employment in which the appellant had been hired as a general worker at the appellant's factory and tea fields at Kericho. The Respondent alleged that the appellant was in breach of its duty of care to the Respondent when it failed to take all reasonable precautions for the safety of the Respondent while the latter was engaged upon his work, thereby exposing the Respondent to risk of damage or injury which the appellant knew or ought to have known. Particulars of breach of statutory duty on the part of the appellant are set out in paragraph 6 of the plaint dated 14th January 2005 and filed in court on 17th January 2005.

3. The appellant entered appearance and filed defence in which it refuted all of the Respondent's allegations. In the alternative, the appellant averred that if an accident occurred as alleged (which was denied) then the same was occasioned wholly and/or substantially by the negligence on the part of the Respondent as more particularly set out in paragraph 5 of the statement of defence. The appellant also denied that the Chief Magistrate's court had jurisdiction to hear and determine the Respondent's claim. The appellant urged the trial court to dismiss the Respondent's case with costs.

4. From the evidence on record, the facts were that on the material day, the Respondent was on duty picking tea in field No.14. As he did so, he fell into a ditch. There was no warning of the existence of the said ditch. As a result of the fall, the Respondent got injured on the right leg and shoulders. He reported the accident to the dispensary where he got his initial treatment as per **Exhibit MF1-1**. Later on, he was treated at Kericho District Hospital.

5. On 11th February 2005, the Respondent was examined by Dr. P.M. Ajuoga, a consultant surgeon at

Awendo. From the examination carried out on the Respondent, he was said to have suffered the following injuries:-

- **blunt injury on the right foot**
- **blunt injury on both shoulders**

6. Dr. Ajuoga charged Kshs.3000/= for the examination. The report prepared by Dr. Ajuoga (PW1) was produced as **P. Exhibit 2**. PW2 said he relied on the treatment notes from Kericho District Hospital but never saw the treatment notes from Chepgoiben Dispensary where the Respondent was taken to soon after he allegedly fell into the open ditch.

7. The Respondent was unable to produce x-rays films taken of his dislocated leg, though he blamed the appellant for the accident.

8. The appellant called two witnesses. DW1 was Erick Mutai, a field supervisor attached to fields 14, 15 and 16. On 12th January 2004, he was attached to field 14. He refuted the Respondent's claims of having been involved in any accident on the material day; that the Respondent did not make any report of injury to DW1, though on 18th May 2004, the Respondent complained of back pain and was given a referral sheet for treatment.

9. DW1 stated that on 12th January 2004 the Respondent plucked $34^1/_2$ Kgs of leaf which was the requirement for a normal day's work. On 13th January 2004, the Respondent plucked $62^1/_2$ Kgs which according to DW1 showed that the Respondent was not injured. DW1 produced the Accident Report Register as **D. Exhibit 1** for 12th January 2004 which showed that the Respondent was not injured. The Respondent's pay slip was produced as **D. Exhibit 2**. DW1 averred that the Respondent's allegations that he was injured while on duty on 12th January 2004 were falsehoods.

10. DW2 was Bernard Okal, the appellants check roll clerk. He said he had worked for the appellant for about 20 years as at the time of his testimony. He testified that the Respondent's payroll number was 06629 and that in the month of February 2005, there was no single day that the Respondent did not work, including the day of the alleged accident and throughout the remaining days of that month. That any day an employee was sick and/or absent, that information would be reflected on the pay roll. DW2 stated that if the Respondent had been injured as alleged, he would not have worked on the subsequent days and harvested so much leaf. For example on 13th January 2004, the Respondent plucked $62^1/_2$ Kgs of leaf. DW2 was of the view that an injured person could not pluck so much leaf in a single day.

11. After hearing evidence in the matter, the trial court also received submissions by counsel. After carefully considering the evidence on record, the trial court found that the Respondent had proved his case against the appellant on a balance of probabilities. The appellant was held liable for 90% of the negligence while 10% liability was attributed to the Respondent. No reasons were assigned by the trial court for assigning liability between the parties.

12. As for general damages, the trial court assessed the same at Kshs.80,000/= less 10% contribution. Specials were awarded at Kshs.3000/=. The Respondent was also awarded costs and interest.

13. The appellant was aggrieved and brought this appeal. The appellant raised the following four (4) grounds of appeal:-

1. The Learned Trial Magistrate erred in law in and in fact in apportioning liability at the ratio of 10%:90% in favour of the Respondent against the weight of the evidence.

2. The Learned Trial Magistrate erred in law and in fact in failing to take into account the submission by the Appellant on the issue of liability.

3. The Learned Trial Magistrate erred in law in and in fact in awarding damages which was inordinately excessive in the circumstance of the case.

4. The Learned Trial Magistrate erred in law in and in fact in failing to consider factors which ought to have been considered while making the awards both on liability and quantum.

14. The appellant prayed that the judgment of the trial court be set aside and be substituted with an order dismissing the suit. The appellant also prayed for costs of the appeal.

15. By consent of the parties, the appeal proceeded by way of written submissions. The appellant's case is that it ought not to have been held liable in negligence because the appellant was able to rebut the Respondent's case to the required standard. In particular it was contended on behalf of the appellant that the illness which took the Respondent to hospital on 17th January 2004 was completely unrelated to the alleged accident. It was also the appellant's case that the evidence on record clearly showed that the Respondent did not attend Chepgoipen dispensary on 12th January 2004 as alleged both by himself and Dr. Ajuoga, but that instead the Respondent went to Kericho Hospital on 17th January 2004 and did not take sick leave. Further that the Respondent admitted every fact contained in his pay slip for the month of January – **D. Exhibit 2**.

16. It was also the appellant's case that if the Respondent was truly injured as alleged, then his conduct of continuing with work on the date of the alleged accident and on the days following immediately thereafter was inconsistent with a person who had been injured. Counsel submitted that this appeal should succeed on the additional grounds that:-

§ The Respondent in his pleadings stated that the Appellant owed him a statutory duty of care. It is now trite law that an open field whether tea field, sugar cane or any other type of field do not fall under the provisions of the factories Act and hence there is no statutory duty accruing to him.

§ The Respondent also appears to have his case founded on the common law negligence. However even then his claim cannot succeed since no existence of contract was established neither was the duty of care alleged to have been owed by the Appellant demonstrated.

§ It is now trite law that where work is being undertaken in the field especially in a tea plantation if an injury occurs from events whose occurrence is too remote an employer should not be held liable. In this instant case the hole which the Respondent allegedly fell into is not a manmade hole, it is a hole whose existence was too remote for the Appellant to have knowledge about. It is therefore against this background that even assuming that indeed there was duty of care owed to the Respondent, the claim by the Respondent would not fall as part of those the Appellant would be held liable for breach of duty of care cause existence and possibility of causing injury was too remote.

17. Regarding the issue of quantum, it was submitted that the award made was unwarranted. Reliance was placed on a number of authorities namely:-

1. Brooke Bond (K) Ltd. –vs- Francis Motugutu Bokea
HCCA No. 31 of 2004
Delivered by L. Kimaru, J. on 22/03/07

2. Mumias Sugar Co. Ltd. –vs- George Mulunda Maende,
HCCA No. 20 of 2001
Delivered by G.B.M. Kariuki,J. on 22/07/05

3. Timsales Limited –vs- Stephen Gachie [2005] E KLR
HCCA No. 79 of 2000

18. The Respondent's case is that the appellant did not expressly deny the existence of a ditch or a hole in field No. 14 where the Respondent was working and that in the circumstances, the appellant's supervisor, being DW1 failed in his duty of care towards the respondent. That in the circumstances, the trial court's finding on liability was well founded.

19. On award of general damages, for pain suffering and loss of amenities, it was submitted that the same was not excessive in the circumstances. Reliance was placed on two decisions:- **Margaret Njeri Njiri –vs- Mohamoud A. Mohamed & another – Nairobi HCCC NO. 5497 of 1990** and **Francis Ngui Huve –vs- Sammy Wachaga Njuguna – Nairobi HCCC NO.4004 of 1986**.

20. I have now carefully read the pleadings filed by the parties to this appeal. I have also read and carefully considered both the proceedings and the judgment of the lower court. I know this is a first appeal and in the circumstances, I am required by law to reconsider and evaluate the whole evidence afresh with a view to reaching my own independent conclusion in the matter. See **Peters –vs- Sunday Post [1958] EA 424**. It is however worth noting that as an appellate court, this court does not have the benefit which the trial court had of hearing and seeing the witnesses and seeing their demeanour. To that extent, this court is handicapped. See also **Mwangi –vs- Wambugu [1984] KLR 453** as cited by Kimaru J at page 3 of the judgment in **Kericho HCCA No.31 of 2004 – Brooke Bond (K) Ltd. –vs- Francis Motugutu Bokea**. See also generally **Selle & another –vs- Associated Motor Boat Company Ltd. & others [1968] EA 123, 126 (CA-Z)** and **Williamsons Diamond Ltd. –vs- Brown [1970]EA 1 12 CA-T**.

21. In the instant appeal, the issues that arise for determination are **(i)** whether the Respondent demonstrated that he was involved in an accident on 12th January 2004 while working in field No. 14 and if so, whether he went for treatment at the appellant's appointed health institution. The third issue is whether the award of general damages was excessive in the circumstances. Fourth, ought the trial court to have apportioned liability and fifth did the Appellant owe the Respondent any statutory duty which was breached?

22. As regards the first issue, I am of the considered view that the Respondent did not demonstrate that he was involved in the alleged accident. The Respondent testified that he fell into a ditch as he picked tea and that thereafter, he went to Chepgoipen Health Centre for the first treatment. It was however clear from the evidence that was placed before the trial court that the Respondent had nothing to show that indeed he went to Chepgoipen Health Centre, the appellant's first port of call for its injured and ailing staff. The medical report by Dr. Ajuoga, PW1, was apparently based on the fact that the Respondent went for first treatment at Chepgoipen. The treatment notes relied upon by Dr. Ajuoga were those from Kericho District Hospital, but the visit to Kericho District Hospital by the Respondent was on 17th January 2004, some 5 days after the alleged fall. Why take so long to do what should have been done on 12th January 2004?

23. Secondly, the evidence offered by the Appellant completely destroyed the contention by the Respondent that he had been injured in the fall. **D. Exhibit 2** showed that the Respondent did a full day's job on 12th January 2004 and continued to work full throttle the next day and also the 14th January 2005. The conclusion I have reached on the first and second issues is that the Respondent was not involved in any accident at all and that he never attended Chepgoipen Health Centre for first line treatment. I also find, and as per the evidence on record, that the visit to Kericho District Hospital by the Respondent was unrelated to the alleged accident.

24. As regards the issue of quantum of damages, I must agree with appellant's counsel that the sum of Kshs.80,000/= was excessive in the circumstances of this case. The evidence on record shows that the Respondent seemed to have suffered 2 blunt injuries, one on the right leg and the other on the shoulders. The injuries were treated by applying liniment. The principles for the guidance of the court as to whether or not to revise an award of damages by the lower court were laid down by the Court of Appeal in **Butler –vs- Butler [CA 49 of 1983]**. These are:-

"(a) That the court acted on wrong principles;
(b) That the court has awarded so excessive or so little damages that no reasonable court would;

(c) That the court has taken into consideration matters that he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision."

25. In the instant case, the trial court failed to consider that the injuries sustained by the Respondent were minor blunt injuries in the right foot and the shoulders. The injuries were classified as soft tissue. If the Respondent had proved his case against the appellant, the proper assessment of damages would have been Kshs.30,000/=. See **Nairobi HCCC No.4150 of 1991 – Loice Nyambeki Oyugi –vs- Omar Haji Hassan**. The award of Kshs.3000/= as special damages seems to have been fair and just, though the amount was not specifically pleaded in the plaint.

26.Fourthly, was the trial court justified in apportioning liability? From the record, there was no evidence or allegation that the appellant contributed to the accident in question. Further the trial court did not give any reason for the apportionment. I see no such reason myself. I therefore conclude that there was no justification for apportioning liability.

27.The last issue for determination is whether the appellant owed a duty of care to the Respondent. From the facts and the circumstances of this case, could the appellant be held liable for breach of duty to the appellant? It is worth noting that it is not under all circumstances that an employee is injured while on duty and the employer is held liable in negligence or under common law. In the instant case, the respondent's case is that while he picked tea, he fell into a ditch, thereby sustaining injuries to his foot and shoulders. The question that this court must ask itself is what the appellant could have done to prevent the respondent from injuring himself.

28.The appellant's witnesses testified that the appellant was not aware of the hole/ditch into which the respondent allegedly fell. If the existence of this ditch had been brought to the attention of the appellant, either by the respondent or other staff of the appellant, and the appellant had turned a blind eye to the same, no doubt the appellant would have been liable in negligence for the injuries sustained by the respondent. The evidence on record does not show that the appellant was made aware of the said ditch and it follows that it could not be held liable in negligence for the respondent's injuries sustained in the alleged accident.

29.The question that now follows is: under what circumstances will an employer be held liable for the injuries by its employees. In his book, entitled **"Employer's liability of Common Law, 9th Edition, London Butterworth's 1979, John Munkman** says the following at p.74:

"General Nature of duty
It is the duty of an employer acting personally or through his servants or agents, to take reasonable care for the safety of his workmen and other employees in the course of their employment. This duty extends in particular to the safety of the place of work, the plant and machinery, and the method of work. But it is not restricted to these matters."

30.In the **Brooke Bond (K) Ltd. case** above, Kimaru, J. referred to a persuasive English authority,

namely **Walker –vs.- Northumberland County Council [1955] 1 All ER 737** in which it was held that once a duty of care was established, the standard of care required for the performance of that duty was that of a reasonable conduct on the part of the person in that position who owes the duty. It is not the duty of an insurer who insurers against injury caused by the person who has caused the injury. The court further said:-

> **"It calls for no more than a reasonable response, what is reasonable being measured by the nature of the neighbourhood relationship, the magnitude of the risk of injury which was reasonably foreseeable, the seriousness of the consequences for the person to whom the duty is owed of the risk eventuating, and the cost and practicability of preventing the risk."**

31.In the instant case, it would be unreasonable to expect that the appellant would ensure that there were no holes/ditches in the tea plantation. It is possible, as it often happens that holes in a tea plantation could be dug by wild animals over which the appellant had no control. In my view therefore, it would be unreasonable to hold the appellant liable for the Respondent's injuries in the circumstances.

32.In any event, the respondent did not make any mention of the Workmens' Compensation Act under which he would have or may have been compensated for these injuries. A claim under the Workmens' Compensation Act would have worked better for the respondent.

Unfortunately for the respondent, he failed to prove that the appellant owed him a duty of care in the circumstances under which he claimed to have been injured.

33.In the premises and for the reasons herein above stated, this appeal is allowed. The judgment and decree of the lower court is set aside; and in its place I order that the Respondent's suit being No. CMCC NO. 57 of 2005 be and is hereby dismissed with costs to the appellant.

Dated and delivered at Kisii this 27th day of October, 2011

RUTH NEKOYE SITATI
JUDGE
in the presence of:
Mr. Oguttu for Songok for Appellant
Mr. Odhiambo for Minda for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.