REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 24 of 1998

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

VERSUS

KIMAIYO CHEPSIROR …….. RESPONDENT

(An Appeal from the Judgement and decision of the Honourable F. M. O. Kadima Senior Resident Magistrate in Eldoret Civil Suit No. 2135 of 1994 delivered on 17th April, 1998)

JUDGEMENT

This is an appeal against the decision of the Senior Resident Magistrate in Eldoret Civil Suit No. 2135 of 1994 delivered on 17th April, 1998. The Appellant raises four grounds of Appeal, to wit:-

1. The learned Senior Resident Magistrate erred in law and in fact in apportioning liability on 50:50 basis between the appellant and the Respondent when the Respondent had not proved his case on a balance of probability as by law required in the first place.

2. The learned trial Magistrate erred in law and in fact in attributing blame to the Appellant to the extent of 50% notwithstanding the Appellant's strong contention and evidence that the injuries were not suffered in the course of the Respondent's employment with the Appellant.

3. No negligence was established and proved against the Appellant entitling the Respondent to the award received.

4. The learned Senior Resident Magistrate erred on all points of law and fact applicable.

From the foregoing it is clear that the appeal is mainly based on the question of liability.

In his plaint dated 16th November, 1994, the Respondent pleaded that:-

- At all material times the Plaintiff was employed by the Defendant in their premises at Chemomi Tea Estate in Nandi Hills.

- On or about the 7/3/90, the Plaintiff was on his duty at Chemomi Tea Estate pruning tea when he was cut by a machete on his right hand.

- The particulars of statutory breach alleged against the Defendant were:-

(a) Exposing the Plaintiff to risk or damages or injuries which they knew or ought to have known.

(b) In the premises failing to provide and maintain safe plant and equipment or provide safe place of working for the Plaintiff or provide safe system of working.

(c) Failing to take any adequate precautions for the Plaintiff while he was engaged in the said work.

The injuries claimed to have been suffered by the Plaintiff were:

(a) Cut wound on the left hand.

(b) Cut on the index finger.

The Appellant claimed general and special damages against the Respondent. On question of liability, the trial Magistrate in a disappointingly brief Judgment found the Appellant liable. He had this to say on liability:-

"…….. On liability I find as a fact the Plaintiff was injured while on duty. Medical documents he produced indicate he was injured on the date in question. It is not a must one goes to company clinic as one can seek treatment anywhere. However, I apportion 50:50 as against both parties as Plaintiff should have been more cautious while using pruning knife. ……."

The Court assessed general damages at Shs. 80,000/=.

I have considered the Memorandum of Appeal, the Judgment, proceedings, pleadings and the submissions by Counsel.

The Plaintiff testified that he was injured on 7th March, 1990 while on duty. The Defendant admitted that the Plaintiff was its employee but was not on duty on the material date.

The Plaintiff did not call any other witness to the incident. The Defendant called three witnesses. DW 1 was one Michael Kimaru a Supervisor with the Company. He testified that he was on duty on 7th March, 1990 and the Plaintiff never got injured while on duty. He said that he was absent on the material day. DW 1 testified that he was the Supervisor and they kept records of workers reporting on duty. This was referred to as a check roll. D.W.2 produced the check roll. The check roll showed that on the 7th day of March, 1990 the letter "A" was entered against the name of the Appellant. DW 2 said that this stood for Absent. If he was on duty, the entry to be entered would have been "PR" for pruning. According to the record, the Appellant worked for 22 days during the month.

The Check roll is an elaborate record, quite detailed and self explanatory. The trial Magistrate did not record any reasons why he disregarded these corroborated evidence or why he did not believe the same to be true.

The burden of proof that an accident took place on the material day and that it was while the Appellant was working and on duty is upon him, the claimant. In view of the strong evidence rebutted by the three witnesses, the trial Court should have explained why it preferred the evidence of the Plaintiff.

It is my view that the testimonies of the DW 1, DW 2 and DW 3 were quite credible and strong taken together with the Check Roll produced in Court. They were sufficient to place the Plaintiff's evidence in doubt that he was on duty on the material day. There are no allegations of any falsification or forgery of the records of the Respondent.

With regard to the injury and treatment, DW 3 the Company's nurse testified and produced the

records of the Company's Dispensary for 5th March, 1990, and 7th March, 1990. The records showed that on 5th March, the Respondent was treated for headaches, joints and abdominal pains. He was given medicine. However, for the records of 7th March, 1990, his name does not appear. The record indicates that 31 patients were attended on the said date though I counted 36.

DW 3 testified that while she was not there herself on the material day, if the Respondent had been injured, he would have first been treated at the Company's dispensary and the records entered. She said that it was the Company regulations that if any worker is injured in the field, he/she would get a note from the Supervisor first and then go to the Dispensary for treatment. That such an employee cannot go to another hospital without referral from the Company dispensary. This evidence corroborates that of DW 2.

The learned Magistrate said that, "it was not a must for one to go to the Company clinic as one can seek treatment anywhere". It is clear that this was a misdirection on the part of the learned Magistrate. He could not supplant his views with the Regulations of the Company unless the employee explained or gave reasons/justification for disregarding the same e.g. that the Supervisor refused to give him a note, that the dispensary refused to attend to him, that he was rushed to the District Hospital due to severe injuries etc. In this case, the Appellant did not give any reason why he did not go to the Company Clinic. I do not think that it is an unreasonable practice, and to the contrary I think it is the most prudent policy so that an employee gets immediate medical attention.

On being cross-examined the Respondent admitted that he went to hospital on 21st February, 1990 as indicated in Ex. No. 1. It is certain that there was no medical evidence to show or prove that the Respondent was injured on 7th March, 1990. He conceded in his evidence that he did not have any such evidence.

From the foregoing, the trial Magistrate erred in fact and law in finding that the Respondent was injured on the material date. I find that the Respondent could not have been injured on 7th March, 1990 as he had already attended an outside hospital on 21st February, 1990 and treated.

The inconsistencies of the Respondent's case comes out clearly in his cross-examination where he claims that he was compensated for under the Workmen's Compensation Act in the sum of Kshs. 2,000/= and for another sum of Shs. 4,960/=. If this was true, then they would appear to be in respect of other injuries.

In any case, what was before the trial Court was the alleged injury that allegedly took place on 7th March, 1990.

I do find that no accident involving the Respondent at his work place took place on the material date. This suit is fictitious, perhaps even dishonest on the part of the claimant and an abuse of the Court process.

I do allow the appeal and set aside the judgment in its entirety with costs to the Appellant in this Court and in the Court below. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF FEBRUARY, 2008.

M. K. IBRAHIM

JUDGE