



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Appeal 25 of 1998

EASTERN PRODUCE (K) LIMITED APPELLANT

VERSUS

JOHN LUMUMBA MUKOSERO RESPONDENT

JUDGEMENT

This is an appeal against the judgement of the Honourable Senior Resident Magistrate Mr. F. M. Kadima delivered in Eldoret SPMCC No. 267 of 1995 on the 17th April, 1998.

In the suit heard by the trial Court, the Plaintiff (the present Respondent) filed the suit claiming general and special damages for injuries sustained by him while in the course of his employment with the Defendant (the present Appellant).

It was averred in the plaint that on or about 16.8.94, the Plaintiff was on duty in the course of his employment when he fell in a ditch thereby suffering serious bodily injuries. In his testimony, he said that he worked as a tea sprayer and used a solar machine. His leg entered a trench and he fell. That the trench which was about 3 feet deep was used to drain water from the tea plantation. He said that the machine he used for spraying hit his back. He was injured on the back and chest.

He claimed that he was treated at Savani Dispensary and given four (4) days off after being given drugs. He said he spit blood and some black substance. He did not call any other witness.

The Defendant called two witnesses. DW.1 was the Savani Estate Supervisor. He said that Plaintiff was never on duty on the material day, 16/8/94. He produced a check roll register which showed that the Plaintiff was on sick pay from 15/8/94 to 20/8/94.

The second witness DW.2 was the nurse at Savani Dispensary. She produced the out-patient register for out-patients. She testified that she attended to the Plaintiff on the said date. He was coughing and spitting blood. It came from the chest. She said that she found he was suffering from bronchitis.

After hearing the parties and their witnesses, the learned trial Magistrate found that the Plaintiff had been on duty on the material day and that he fell down and suffered soft tissue injuries on the chest and lower back. He awarded a sum of Kshs. 100,000/= as general damages. He apportioned liability at 70% - 30% in favour of the Plaintiff. He awarded special damages in the sum of Kshs. 1,000/= together with costs and interest.

I have considered the Memorandum of Appeal and grounds therein, the judgement, proceedings and submissions by Counsel.

It is trite law, that it was for the Plaintiff to prove, on a balance of probability that:

1. He was on duty on the material day.
2. He fell and sustained the injuries on the back and chest.
3. The accident took place due to the negligence of the Defendant and/or its employees/agents. The ingredients of negligence is that there was a duty of care, there was a breach of the duty and that he suffered loss and damage as a result.

The Plaintiff did not call any eye witness to the accident. In cross-examination he said that he never reported the accident to the Company though in re-examination he tried to correct this. He did not produce any documentary evidence of the report.

The Defendant called two witnesses and they produced the Company's records. The learned Magistrate does not explain how he reaches his conclusion and finding on liability. He does not state on what basis he preferred the testimony of the Plaintiff as against that of the Supervisor and the nurse.

The learned Trial Magistrate stated that "**he must have fallen on duty.**" This is not a clear and certain finding and is based on conjecture and/or speculation. He either was injured while on duty or not.

I find that the Defence's evidence was sufficient to rebut the allegations of the Plaintiff. DW 1 and DW 2 produced documentary evidence which were weighty and credible. There were no allegations or proof that the exhibits were forgeries. There is no explanation why a professional nurse would falsify the treatment notes to such an extent as to endanger the life of the Plaintiff.

I think and hold that the Plaintiff did not prove that the accident did take place in the first place. He was clearly on paid sick off and he was suffering from bronchitis or other medical condition. The Medical Reports of the two doctors cannot prove that the accident if any took place on the material day, while the Plaintiff was on duty and working within the scope of his employment. Such evidence would amount to hearsay as none of them was at the Defendant's premises or scene on the material day.

With respect, the trial Court ought to treat the parties fairly and equally. The fact that one party has filed a suit or made a claim by itself is not proof that there is a "**prima facie case**" which the Defendant must rebut. It is for the Plaintiff to prove liability. This onus of proof does not shift whatsoever. Once the trial is over, it is for the Court to apply the standard set by the law, the balance of probability after analyzing and assessing all the material and evidence on record.

These standards were not satisfied and this appeal must succeed. I do hereby allow the appeal and set aside the Judgement in its entirety with costs to the Appellant. The Respondent/Plaintiff shall also bear the costs of the suit in the trial Court.

DATED AND DELIVERED AT ELDORET ON THIS 12TH DAY OF MARCH, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Yego for the Appellant

Mr. Cheluget for Mr. Andambi for the Respondent