



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 86 of 1999

EASTERN PRODUCE (K) LIMITED APPELLANT

VERSUS

JOSEPH WAFULA MWANJE RESPONDENT

JUDGEMENT

This is an appeal against the decision of the Senior Resident Magistrate in Eldoret SPMCC No. 1370 of 1996 delivered on 7th September, 1999.

In the case, in the Subordinate Court the Plaintiff claimed that he was employed by the Defendant Company as a manual worker. He also claimed that on or about 22nd June, 1996 while lawfully engaged in his duties of cutting grass, he slipped and fell in a trench at the Defendant's premises when he sustained serious injuries. The Plaintiff asserted, inter alia, that the Defendant failed to provide a safe system of work for him.

The alleged injuries set out in the plaint were:-

- (i) Dislocation of the elbow joint of the left arm.
- (ii) Sprain of the left arm.
- (iii) Blunt trauma on both shoulders.

The trial Court found the Defendant Company liable and awarded him a sum of Kshs. 80,000/= as general damages and Shs. 1,500/= in special damages. The trial Court apportioned liability at the ratio of 50%:50%. Half of the costs and interest was also awarded.

This appeal originally was in respect of both liability and quantum of damages. However, at the hearing the Appellant only prosecuted the grounds of appeal in respect of liability. It abandoned the grounds in respect of quantum of damages.

Counsel for the appellant argued that the Plaintiff testified that he fell down and thereby sustained the injury. However, the Respondent's witnesses (DW 1, DW 2 and DW 3) testified that he had been injured while playing football on 21st June, 1996. They relied on the Dispensary records. The Appellant's Counsel further submitted that the evidence of the Appellant was corroborated and the trial Court disregarded their evidence. He added that one who is slashing cannot be supervised and there was no

proof of negligence.

On her party, Counsel for the Respondent submitted that the Respondent was injured on 22nd June, 1996. That the evidence of the Defence was not true as they had not pleaded that the Plaintiff had been injured while playing football. She said that the Plaintiff fell in a trench. That there ought to have been a warning that there was a trench where he worked.

I have considered the Memorandum of Appeal, the proceedings, the pleadings and submissions by Counsel. It is trite law that the burden of proof in the case was upon the Plaintiff. The standard is on a balance of probability. DW 1, a co-worker testified that they were playing football on 21.6.96. The Plaintiff played as a goal-keeper and that he ran to receive a ball from a team-mate, jumped up and fell on the ground. He lay on the ground for 3 minutes. He said that the Plaintiff was injured on the left elbow-joint. He denied that the Plaintiff was injured while on duty.

DW 2 was also another co-worker. He testified that on 21st June, 1996, they played football at the Company estate. He says that he played with the Plaintiff. He played position 1 while the Plaintiff played position 4. He said that the Plaintiff fell while playing and landed on his left hand. That he went for treatment at the dispensary the next day on 22nd June, 1996. DW 2 was a Senior Clerk who dealt with payment of salaries. He testified that the Plaintiff was not on duty on 22-6-1996. He referred to the Dispensary outpatient register to show that the Plaintiff was treated on 22-6-1996.

DW 3 was the nurse at the Company Dispensary. She said that she recalled that the Plaintiff had gone to the Dispensary complaining that he had been injured while playing football. She referred him to Nandi Hills Hospital. She produced the Dispensary Register.

The trial Magistrate does not explain why he disbelieved the evidence of the three defence witnesses. Why did he prefer to rely on the Plaintiff's uncorroborated evidence? There is no justification on record to show the basis for the said decision. It is my view that the Defence witnesses were able to reasonably rebut the evidence of the Plaintiff that he was injured while on duty i.e. slashing grass on the Company's premises.

On a balance of probability, the trial Court ought to have found that the Plaintiff was injured on 21-6-1996 while playing football.

It is also my view that the injury is not consistent with the nature of the job in question i.e. cutting grass with a slasher. Such a piece of work does not require any supervision. The Plaintiff should have been able to walk carefully. He was in full control of the slasher and his own movements. I do not see how the Defendant was negligent in the circumstances. This is a claim, if true, that should have been covered by Workmen's Compensation Act.

The Plaintiff did not state how the system of work was unsafe. I do not see how gum boots would have prevented him from falling, if his own methodology of slashing was faulty.

In our law, liability must come with fault. It would be stretching the realms of the law to expect that the employer had the duty to supervise one of the simple menial duties around i.e. cutting grass with a slasher. There was no allegation that the slasher itself was defective.

I do find and hold that the Learned Magistrate erred in imposing liability on the Appellant. I do therefore allow the appeal and set aside the Judgement and decree of the trial Court. I do hereby dismiss the suit in the Subordinate Court with costs to the Defendant. The Appellant will have the costs of this appeal also.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON 16TH DAY OF APRIL, 2008.

MOHAMMED K. IBRAHIM

JUDGE