REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL 4 OF 2005

SOTIK TEA HIGHLANDS ESTATE LTD.....APPELLANT

VERSUS

FRANCIS NYABERI OMAYO .....RESPONDENT

JUDGMENT

The respondent, Francis Nyaberi Omayo filed suit against the appellant seeking to be paid damages on account on injuries he alleged to have sustained while he was on duty on the 8th March, 2001 in one of the estates of the appellant. The respondent averred that the injury he sustained was caused by the negligence of the appellant and who further breached its statutory duty of care owed to him. The respondent particularized the particulars of breach of statutory duty and the breach of contract and negligence. Of importance to this appeal, is that the respondent pleaded that he was not provided with protective gear which could have prevented him from sustaining the said injury. The appellant filed a defence and denied the allegation by the respondent that he had been injured while on duty. The appellant denied that it had breached any statutory duty of care owed to the respondent. The appellant averred that if the respondent had been injured, then it was due to his own negligence in failing to abide by the safety instructions issued by the appellant. The appellant particularized the particulars of negligence on the part of the respondent. The appellant urged the court to dismiss the respondent's suit with costs.

After hearing the evidence that was adduced by the appellant and the respondent, the trial magistrate found that the respondent had been injured while on duty. He however held that the respondent was partly to blame for the injuries that he had sustained. He apportioned liability as between the appellant and the respondent at the ratio of 80:20. The appellant was to bear 80% liability while the respondent was to bear 20% contributory negligence. The trial magistrate awarded the respondent damages of Kshs. 67,000/= less 20% contribution. The respondent was therefore awarded Kshs. 54,600/= costs and interest.

The appellant was aggrieved by the said decision of the trial magistrate and filed an appeal to this court. In its memorandum of appeal, the appellant raised four grounds of appeal challenging the decision of the trial magistrate in finding for the respondent both on liability and in damages. The appellant was aggrieved that the trial magistrate had found in favour of the respondent on liability against the weight of evidence. The appellant faulted the trial magistrate for placing undue reliance on the evidence of the respondent to the exclusion of the evidence that was adduced by the appellant. The appellant was aggrieved that the trial magistrate had considered the wrong principles of the law and thus made an award of damages that was inordinately high and excessive in the circumstances.

At the hearing of the appeal, I heard the submissions made by Mrs. Mitei on behalf of the appellant and by Mr. Orayo on behalf of the respondent. After carefully considering the said submissions, and re-evaluating the evidence that was adduced before the trial magistrate, there are three issues for determination by this court. Mr. Orayo, learned counsel for the appellant captured the said issues and

stated them to be as follows:

(i) Whether or not the plaintiff was injured while on duty.

(ii) Whether or not the appellant is to blame for the injuries that the respondent sustained.

(iii) Whether or not the award made was excessive in the

circumstances.

This court is aware of its duty as the first appellate court. The duty of a first appellate court was restated by the court of appeal in the recent case of Joseph Mung'athia vs. County Council of Meru & another CA Civil Appeal No. 146 of 2002 (Nyeri) *(unreported).* At page 11 of its judgment, the court had this to say:

"*In law, this matter coming as a first appeal, we have a duty o consider both matters of fact*

and of law. On facts, we are duty bound on first appeal to analyze the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses, hearing the witnesses and seeing their demeanour and making allowance for the same. In the case of Mwangi vs. Wambugu [1984] LR 453, at page 461, Kneller JA (as he was then) stated";

"this is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making due allowance for this: Selle & another Vs. Associated Motor Boat Company Ltd. & others [1968] EA 123. 126 (CA - Z) and Williamsons Diamonds Ltd. Vs. Brown [1970]EA 1,12 CA-T)"

In the present appeal, having re-evaluated the evidence adduced before the trial magistrates court, and also having considered the submissions made before me by the appellant and the respondent, I do agree with the finding reached by the trial magistrate that the respondent was injured while on duty. In his testimony before court, the respondent testified that at the material time, he was employed as a tea plucker by the appellant. The appellant had worked for a period of ten years prior to sustaining the said injury. He testified that while he was on duty plucking tea on the 8th March, 2001, he slipped into a hole and got injured. He testified that the hole was inside the tea plantation. He blamed the appellant for the said injuries because he alleged that the appellant had not put signs to warn him of the existence of such holes. He also blamed the appellant for failing to provide him with protective gadgets, namely gum boots. When he was crossexamined by the appellant, the respondent stated as follows:

"I knew the place well. It is true that I knew the place. Holes can come about when tea gets dried up. Animals at times are found there. They can make such holes and stay there. At one time I alerted the management about them".

The appellant vigorously mounted a defence disputing the allegation by the respondent. It called evidence to establish the fact that the appellant was on duty throughout on the material day and further that he had not sought medical attention at the dispensary managed by the appellant. As stated earlier at the beginning of this judgment, this court, upon re-evaluating the evidence adduced, is in agreement with the finding reached by the trial magistrate that the respondent had established on a balance of probabilities that he was injured while he was on duty. The trial magistrate rightly found that the defence of the appellant was riddled with contradictions.

On the second issue for determination *i.e* whether the circumstances proved by the respondent established that the appellant was liable, I do hold that the appellant's complaint on this appeal has merit. The

respondent testified that the appellant had breached the duty of care owed to him when it failed to put warning signs of the existence of the holes within the tea estate. He further blamed the appellant for failing to provide him gumboots which would have reduced the chances of him being injured if he fell in a hole. The question that this court asked itself was what the appellant could have done to prevent the said holes from appearing in the middle of a tea plantation. It is clear, as conceded by the respondent, that the said holes appeared spontaneously when some of the tea bushes dried up. The said holes were further created when wild animals barrowed the ground within the tea bushes. The respondent testified that the existence of such holes were undeterminable. He recalled an occasion when he saw the holes and informed the management. The respondent did not testify that upon informing the management of the existence of the said holes, the management of the appellant did nothing.

Now, do the circumstances of this case disclose the breach of statutory duty or common law by the appellant? I do not think so. To require the appellant to post signs warning its employees of the existence of holes within the tea plantation which the appellant itself was not aware of is to expect the appellant to go beyond the call of the normal or ordinary duty of care. Further, this court is of the view that even if the respondent was wearing gumboots, the said injury could not have been prevented because his leg entered the hole suddenly as the respondent was not aware of the existence of such a hole. The law does not impose a duty of care on an employer which goes beyond its expectations as a reasonable employer. The law requires an employee to take all the necessary and reasonable precautions not to be injured while undertaking his duties.

The circumstances under which an employer can be held liable for the injuries sustained by its employees is explained in a legal text authored by John Munkman entitled "Employer's Liability at Common Law" 9th edition, London, Butterworths, 1979 where at page 74 the author stated as follows:

"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 the employment. This duty extends in particular to the safety of the place of work, the plant and machinery, and the method and conduct of work: but it is not restricted to these matters"

In Walker vs. Northumberland County Council [1995] 1

All ER 737 at page 750 Colman J held as follows:

"It is reasonably clear from the authorities that once a duty of care has been established,

the standard of care required for the performance of that duty must be measured against the yard stick of reasonable conduct on the part of the person in that position who owes the duty. The law does not impose upon him the duty of an insurer against all injury or damage caused by him, however unlikely or unexpected and whatever the practical difficulties guarding against it. 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"

This is a persuasive authority but I agree entirely with its reasoning and conclusions. In the present appeal, it is clear that the respondent had not established that the appellant had breached the duty of care owed to him by the appellant as an employee. I think, on the facts of this case, this court would be stretching the concept of the duty of care under common law too far if it were to find that the appellant is liable for all manner of injuries that it did not anticipate or was within its contemplation. In the present appeal, it would be inconceivable to expect the appellant to be aware of the existence of all the burrows created by wild animals within its vast tea estates so as to guard against its employees being injured in the event that they fell into such holes.

The upshot of the above is that the appeal filed by the appellant is allowed and as a consequence of which the judgment and the decree of the subordinate court is hereby set aside and substituted by the judgment of this court dismissing the respondents suit with costs. The appellant shall have the costs of this suit. It is so ordered.

DATED at Kericho this 22nd day of March, 2007

L. KIMARU

JUDGE