



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 21 of 2004

EASTERN PRODUCE (K) LIMITED (KAITET ESTATE) APPELLANT

VERSUS

JOSEPH LEMISO OSUKU RESPONDENT

**(Being an appeal from the judgment and decree in Kapsabet PMCC No. 89 of 2003 dated 20/1/2004
by F. Mabele Esq. (P.M.))**

JUDGMENT

Joseph Lemiso Osuku claimed to have been employed by **Eastern Produce Company Limited** at its Kaitet Estate in Nandi Hills during the year 2003. He sued his employer on 13/3/2003, against who he sought judgment and an order for both general and special damages, allegedly incurred as a result of injuries which he sustained on his right ankle and foot as well as his left shoulder on 10/5/2001 after he fell into a hole in the tea Estate as he carried out his duties.

It was his contention that his employer owed him a duty of care at the material time and that it ought to have ensured his safety, but that it failed to take adequate precaution for his safety and thus exposed him to danger, and was thus negligent and had therefore breached the contract between them by amongst others.

Eastern Produce (K) Limited which I shall hereinafter refer to as (“the Company”) denied that he was their employee. It also denied that the said accident had occurred. It was its contention that if at all the accident had occurred he was responsible for it, and it therefore attributed blame for the injuries so sustained to him and averred that he had acted negligently and that he had contributed substantially to the accident. The particulars of the sole or contributory negligence were spelt out in its defence which allegations Osuku denied.

After a full trial in which the plaintiff gave evidence and called one witness, without the defence calling any evidence, the learned trial Magistrate found that Osuku had proved his case on a balance of probability and awarded him K.Shs. 80,000/- and K.Shs. 1,500/- as general damages and special damages respectively. She also awarded him costs of the suit and interest thereon at court rates.

Being aggrieved by the said judgment, the Company has preferred this appeal which it bases on the following grounds.

“1. *The learned Magistrate erred in law and in fact in holding the appellant liable contrary to the*

evidence on record.

2. *The learned Magistrate erred in law and in fact by failing to hold that the evidence on record did not support the pleadings thus the respondent's claim did not lie.*
3. *The learned Magistrate erred in law and in fact in making an award for damages for alleged injuries when the evidence tendered in support of the same was purely hearsay evidence which was not even corroborated.*
4. *The learned Magistrate erred in law and in fact in failing to take into account the appellant's submissions and authorities cited before him in arriving at his judgment."*

Mr. Mwinamo, who appeared for the company decided to combine grounds the first two grounds and to urge them as one and the rest individually. He also urged the court to find that his 4th ground would apply generally to the other three grounds.

It was his submission that the respondent had not proved his case as expected as evidence adduced was contrary to his pleadings, in which case his claim could not lie, and in this connection he relied on the case of **Meshack Olang v. Erick HCCC (Nrb) 2371/1990** where Hon. Justice Mwera reiterated the legal position that *'it is trite that whatever is put in evidence should support what has been pleaded. An award or indeed a relief will issue when what has been pleaded is proved'*". He also relied on the case of **Delmonte Kenya v. David N. Gerald HCCA (Nrb) 520/2002** at page 3, where Hon. Justice Visram held that a Magistrate *"would not be entitled to enter judgment for the plaintiff where the pleadings and the testimony are at variance"*.

It was also his submission that the learned trial Magistrate should not have found in the respondents' favour as he had not provided vital medical documents, and that his evidence lacked corroboration. He relied on my decision in **Eastern Produce (K) Ltd v. James K. Ngetich H.C.C.A (Eld) 21/2004** where I held that *"failure to produce dispensary medical chits proved fatal for that respondent as he was therefore not able to prove his case on a balance of probability as required"*.

Indeed Mr. Omwenga for the respondent conceded that whatever is tendered in evidence must support the pleadings. It was however his submission that failure to produce medical chits was not fatal, and that the evidence on record which was adequately corroborated supported his client's pleadings and that the learned trial Magistrate had addressed the issue and made the correct finding.

I have as is expected of me, re-evaluated the evidence on record with a view to establishing whether the respondent was able to prove his case on a balance of probability, a standard required in civil claims.

It cannot be gainsaid that it was for the respondent to prove his claim as contained in his pleadings for it is trite that the burden of proof falls upon he who alleges. It is also trite that parties are bound by their pleadings.

The respondent's evidence was that he was assigned tea plucking duties by the company's supervisor on the morning of 10/5/2001; that at 10.00 a.m. while engaged in his duties, he fell into a hole, as result of which he sustained injuries on his leg and hand. He attributed the blame to the company, which he claims should have filled in the hole and which had failed to provide him with protective gear such as gumboots and gloves. He conceded during cross-examination that he had sustained injuries on his left leg, a fact which he confirmed during re-examination. This line of evidence clearly contradicted his allegations as contained in his pleadings.

Though it was necessary for the respondent to ensure that his evidence about the accident, and the fact that he fell while on duty was corroborated he did not offer additional evidence to support that line of evidence, neither did he furnish proof to show that he was actually treated at the company's dispensary soon after the accident, or that he was also treated at Nandi Hills District Hospital thereafter. Unfortunately that omission proved fatal to his case.

Faced with the respondent's evidence, which in my view was not corroborated, and which did not support his pleadings, the learned trial Magistrate should have concluded that the respondent had not proved satisfactorily that he had actually been injured, or that he had been injured while on duty as alleged or even that his employer was liable for his injuries, and she should have found that he had not been able to prove his case on a balance of probability and the only logical step would have been for her to dismiss the suit with costs.

The upshot of all this is that I do allow this appeal. I hereby set aside the judgment of 20/1/2004, and dismiss the respondent's suit against the company with costs.

Each party shall however bear its costs of this appeal.

Dated and delivered at Eldoret this 24th day of May 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Shivaji for the appellant

No appearance for the respondent