



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

**Civil Appeal 66 of 2004**

**NANDI TEA ESTATES LTD:.....APPELLANT**

**VERSUS**

**EUNICE JACKSON WERE:.....RESPONDENT**

**JUDGEMENT**

**(being an appeal from the judgment and decree of Mr. F.A. Mabele, Principal Magistrate dated 26<sup>th</sup> March,2004 in Kapsabet PM.CC.No.253 of 2002)**

This is an appeal against the decision of the Principal Magistrate at Kapsabet in which he awarded to the plaintiff a sum of Kshs.80,000/= as general damages and Shs.1500/= as special damages. The cause of action was based on breach of statutory duty on the part of the Defendant.

The plaintiff, a farm worker with the Defendant claimed that while on duty and carrying tea on her back for weighing, she stepped into a hole and fell down. She injured her back. She blames the Company for digging the hole and not warning her of its presence. According to the claim and medical report, the plaintiff suffered blunt trauma to the spinal column and sprain also to the spinal column.

The plaintiff claimed that the Company was liable for exposing her to a risk and damage of injury of which they knew or ought to have known, failing to provide a safe working place, and failure to provide any or any adequate precautions for the safety of the Plaintiff while she was engaged upon the said work.

This appeal is only on liability. The Appellant Company through counsel, Mr. Kuloba submitted that the Respondent in this appeal was a casual worker and on the material day, she was not on duty. He argued that the Respondent's witness had produced in evidence records of the casual workers and her name did not appear on it on the date of the alleged accident, 10<sup>th</sup> April,1999. The witness, DW1 a master roll clerk with the Company, said that from 1<sup>st</sup> April,1999 to 11<sup>th</sup> April,1994, they did not employ casual workers.

This started on 12<sup>th</sup> April, 1999. The witness said he kept 2 master rolls, one for casual workers and one for permanent workers. He only produced the list for casual workers.

It is the duty of this court to re-evaluate the evidence on record to ascertain whether on a balance of probability the plaintiff was able to prove her case against the Company. This court is also obliged to be guided by the pleadings which is binding on the parties.

The plaintiff testified that she was a casual employee and she was on duty on 10<sup>th</sup> April, 1999. She said that she plucked tea leaves to be taken for weighing. It is my view that once the plaintiff admitted that she was a casual employee then the Defendant Company was only obliged to produce the master roll for casual employees on the material day. Her name was not on the list.

The burden of proof was on the plaintiff to prove that she was on duty on the material day. It is not enough to prove that she was employed as a casual worker from time to time. If the plaintiff truly worked on the said day, then she ought to have produced evidence that she was paid for her services on the material day. No such evidence was proved. The plaintiff could also have called as a witness any other casual employee who was on duty on 10<sup>th</sup> April, 1999. The plaintiff did not produce any evidence documentary or otherwise that she was on duty on 10<sup>th</sup> April, 1999, did work and was paid for it. Had she done so, she would have proved her case on a balance of probability.

The Plaintiff could also have called any eye-witness who saw her fall at the Defendant's plantation on the material day. The existence of the injury and her being attended at Nandi Hills Hospital on the said date is not proof that the injuries were sustained at her place of work. I am of the view that the Learned Magistrate erred by not explaining the basis upon which he found that the plaintiff had proved her case on a balance of probability. What evidence led him to decide that the plaintiff was injured while on duty? I see none. I find that the Learned Magistrate made his finding on the basis of no evidence.

In effect, the Learned Magistrate shifted the burden of proof to the Defendant. The law is clear in our adversarial system that he who alleges must prove his case. The standard here on is "**balance of probability**". On the question of having been on duty and that she was injured at her place of work, there was no iota of evidence to tilt the balance of probability in the plaintiff's favour.

On this ground alone I would allow the appeal on liability. As a result there is no point in dealing with the other grounds submitted upon.

I do hereby allow the appeal, and set aside the judgment and decree. I hereby do dismiss the plaintiff's suit with costs to the Defendant, the appellant herein. Orders accordingly.

**DATED AND DELIVERED AT ELDORET ON THIS 29<sup>TH</sup> DAY OF JUNE, 2006**

**M.K. IBRAHIM**

**JUDGE**