REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET
Civil Appeal 85 of 2002
(From Original judgment and decree in Kapsabet PMCC no. 57 of 2002 dated 23rd July 2002 by F. M. Mabele, Esq. PM.)

EASTERN PRODUCE (K) LIMITED……APPELLANT

V E R S U S

JAMES KIPKETER NGETICH……..…….…..….RESPONDENT

JUDGMENT

This appeal emanates from the decision of the Principal Magistrate Kapsabet, in which he entered judgment in favour of **JAMES KIPKETER NGETICH** against **EASTERN PRODUCE (K) LIMITED,** and awarded him both special and general damages.

Briefly, James Kipketer Ngetich, claimed in the subordinate court, that he sustained injuries to his leg on 8/12/2001, at a time when he was employed by the appellant as a general labourer. He blamed his employer for the injuries so sustained, as it was his contention, that his employer had failed to provide a safe working environment for him, and that it had thus exposed him to danger. He therefore urged the court to find that his employer was negligent, and that it had breached an implied term of the contract between them. He prayed for judgment and for both general and special damages, costs and interest thereon.

The appellant denied the claim in its totality and put him to the strict proof thereof, to which denial he filed his reply, and reiterated his stand.

His adduced evidence to the effect that he had been employed by the appellant as a tea plucker; that he was assigned the duty of splitting wood on 8/12/2001, and that as he carried on with his duties, a dislodged piece of wood hit him on his left leg; that he was taken to the appellant's dispensary and was later taken to Nandi Hills Hospital. It was also his evidence that he would not have sustained the said injuries had his employer had provided him with gumboots.

PW2, a medical doctor, confirmed that the respondent who had consulted him on 16.1.2002, and that sustained soft tissue injuries, which had healed after 5 weeks, but that the scar would remain a permanent feature on his body.

The appellant called DW1, its general supervisor, whose evidence it was that the respondent was a general worker. The witness denied that the accident had occurred for he could not recall having heard of it, nor could he remember having received a report to that effect, for had he been informed, he would have issued the respondent with a chit.

The learned trial Magistrate found that the respondent had proved his case on a balance of probability and assessed liability at 80% in the respondents favour.

Being aggrieved by the said decision, Eastern Produce (K) Ltd, which I shall hereinafter refer to as "the appellant" has now preferred this appeal which is based on the grounds that:

> ***"1. The learned trial Magistrate erred in law and in fact in holding the defendant liable without any or any sufficient evidence in that regard having been adduced.***
>
> ***2. The learned trial Magistrate erred in law and fact in awarding damages to the Respondent against the weight of the evidence adduced.***
>
> ***3. In the alternative to (2) above, the learned trial Magistrate erred in law and in fact in awarding damages that were excessive in the circumstances of the case.***
>
> ***4. The learned trial Magistrate erred in law and fact in failing to hold that the Respondent sought to prove unpleaded issues and matters.***
>
> ***5. The learned trial Magistrate erred in law and fact in failing to dismiss the suit for want of proof."***

Mr. Shivaji, learned counsel for the appellant, chose to combine grounds 1 and 5, then 2 and 3. He however abandoned ground 4.

It was his submission that liability would only have been proved had the respondent shown that he was actually injured at the place of work on the material day, but that fact had been denied by the appellant, and that in any event, the injury which he claims to have sustained was within his special knowledge, yet he did not produce medical evidence to the effect, for the evidence of PW2 did not bear any weight, as not only had he examined him after the injuries had healed, but that it was secondary evidence, which the court should have disregarded as it was hearsay evidence, and in this connection, he relied section 66 of the Evidence Act, whose sub section (e), I find would readily apply herein for PW2 referred to a medical chit which had been issued by the appellants dispensary, but which was never produced. The said section of the Evidence Act stipulates that:

"Secondary evidence includes-

> ***(a) certified copies given under the provisions hereinafter contained;***
>
> ***(b) copies made from the original by mechanical processes which in themselves ensure accuracy of the copy, and copies compared with such copies;***
>
> ***(c) copies made from or compared with the original;***
>
> ***(d) counterparts of documents as against the parties who did not execute them;***
>
> ***(e) oral accounts of the contents of a document given by some person who has himself seen it."***

It was therefore his submission that the injuries were not proved and damages should not have been awarded.

He also urged the court to find that the damages awarded were in excess of what the respondents' counsel had prayed for, and that in any event, the injuries were of a minor nature as they had healed long before 5 weeks were over, and that in the circumstances the award was too high.

Mr. Ougo, the respondents learned counsel who opposed the appeal, claimed that all the relevant documents had been produced at the trial, however urged the court to uphold the judgment and the award, as the appellants had failed to produce the register of the people who had sustained injuries on the material day, and that the trial Magistrates finding was proper. It is trite law that *"in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving*

or disproving that fact is upon him" (section 112 of the Evidence Act).

Having reevaluated the evidence on record I find that the respondent, did not produce the initial medical chits to show that he had actually been injured and then treated at the appellants dispensary on the day when he claims to have sustained the injuries. In my mind, lack of such evidence should have raised doubts in the trial Magistrates mind, who should have found that there was no sufficient proof that the respondent was injured while at work as he had alleged. The fact that PW2 gave evidence that he had seen the respondent on 16.1.2002, would not suffice as he relied on what the respondent told him as he had not witnesses the incident. I find that the omission to produce the dispensary medical, proved fatal for the respondent as he was therefore not able to prove his case on a balance of probability as required.

I do in the circumstances allow this appeal, set aside the judgment and dismiss the respondent's suit with costs. Each party shall however bear the costs of this appeal.

Dated and delivered at Eldoret this 7th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of: