REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET
Civil Case 39 of 2004

EASTERN PRODUCE (K) LTD ……..……. APPELLANT

VERSUS

SHIKUKU KISAMARTIN …… RESPONDENT

JUDGMENT

This is an appeal from the Judgment of F.A. MABELE Esq. Principal Magistrate in Kapsabet Principal Magistrates Civil case No. 124 of 2000 delivered on 23rd January,2004. The appeal was filed by Nyairo & Company Advocates on behalf of the appellant and was based on seven grounds:-

1. THAT the learned trial Magistrate erred in law and fact in failing to arrive at the finding that the evidence produced did not correspond to the pleadings.

2. THAT the learned trial Magistrate erred in law in failing to arrive at the finding that no evidence of any injury on 1.5.1999 was adduced. 3. THAT the learned trial Magistrate erred in law and fact in failing to arrive at the finding that the evidence adduced was irrelevant and insufficient to prove the claim on a balance of probabilities.

4. THAT the Learned trial Magistrate erred in law and fact in failing to give due weight to the evidence of Mr. David Kipsandui Chemaswet (D.W.1) that the Plaintiff reported to duty on 1.5.1999 and completed work without any problem.

5. THAT the Learned trial Magistrate erred in law and fact in holding the Appellant liable in negligence and/or for breach of statutory duty without any evidence in that regard.

6. THAT the learned trial Magistrate erred in law and fact in awarding the Respondent damages that were excessive in view of the injuries allegedly sustained.

7. THAT the learned trial Magistrate erred in arriving at a decision against the weight of the evidence on record.

At the hearing of the appeal Mr. Kuloba for the appellant submitted that there was no evidence that the respondent was injured on 1st May 1999. The exhibits produced did not relate to any injury that occurred on 1st May 1999. The date of injury in the medical report was changed from the initial date of 7th November,1999 to 1st May, 1999. He also submitted that the respondent admitted in cross-examination that he had two court cases, one of which had already been concluded. In his view the learned Magistrate did not address his mind on whether the injury occurred on 1st May 1999, which was an error. He also submitted that negligence was not established on the balance of probabilities. Though the respondent alleged that the appellant did not cover a hole he did not testify that he asked for a torch and was not given same. The learned magistrate in making findings on the torch and cells, acted on evidence which

was not tendered in court. He further submitted that the learned Magistrate erred in not giving weight to the evidence of D.W.1, the defence witness. This witness testified that on the day in question, work proceeded without any negative incident. He was the supervisor, and reports should have been made to him. Further, in cross examination, the respondent stated that he reported to another person, whom he did not identify. That evidence of the respondent should not have been relied upon.

He also submitted that the mere existence of a trench was not evidence of negligence on the part of the appellant. The respondent was required to establish the omission of the appellant, in order to establish negligence.

On quantum of damages he submitted that the appellant's proposed figure of Kshs 30,000/= as general damages was adequate compensation. The injuries were very minor. In his view, the amount of Kshs 60,000/= awarded was excessive.

He lastly submitted that the decision of the Magistrate was against the weight of the evidence. He sought to rely on the case of Galaxy Paints =vs= Falcon Guards {2000} EA 385(CAK)- that a court should only deal with pleaded or agreed issues.He also sought to rely on section 107 and 108 of the Evidence Act (cap 80) on burden of proof.

Mrs. Kittony for the respondent submitted that the evidence of P.W.1, P.W.2, P.W. 3 together with the medical reports confirmed that the respondent was injured. The oral evidence, which was primary evidence was that the respondent was injured at 2.00 a.m. on 1/5/1999. He went to the dispensary for treatment and was then referred to Nandi Hills Hospital. P.W.3 testified that he treated the respondent. The medical report in the record of appeal was not the medical report produced in the lower court, which had the date of injury as 1st May 1999. The actual medical report that was produced at the trial court was missing from the record.

She submitted that the date of injury was not contraverted in the lower court, or in the pleadings. It could not be an issue on appeal. She agreed with what the court held in the case of Galaxy Paints =vs= Falcon Guards.

She submitted that the Magistrate saw witnesses testify and was able to determine their demeanour. The issues raised in this appeal on the trench, and date of injury, were questions of fact which the trial court was better placed to determine. She sought to rely on the case of Karanja =vs Malele {1983} KLR 142.

She submitted further that the reasoning of the trial Magistrate was proper. The case was based on breach of statutory duty. The respondent testified that he reported the accident to a supervisor called Samuel Sore. That Samuel Sore was not brought to court by the appellant to deny the allegation. The witness (D.W.1) of the appellant testified that he was the supervisor, but did not bring to court documents to show that he was actually the supervisor.

In her view, the Magistrate considered the evidence of the appellant's witness in the judgement. She sought to rely on the case of Clifford =vs= Charles {1951} ALL ER 72 – on the duty of a master towards his servant. In her view, the appellant breached his duty as a master, as he did not provide the respondent with protective clothing.

I have considered the submission of both Counsel in the appeal. I have also perused the record. This being a first appeal, the court is required to evaluate the evidence on record and come to its own conclusions.

In brief the case of the respondent (who was the Plaintiff as well as P.W.1 at the trial) was that he was employed by the appellant (who was defendant at the trial). He used to do work on casual basis as a watchman. He had worked for about 8 years. On the night of 30th April/1st May 1999, he was working as a watchman for the appellant at EPK Sirot Tea Estate. He reported for work at 6.00 p.m.. About 2.00 a.m. he heard dogs barking and then saw a mongoose go towards the chicken house. He went to chase it and he slipped into a water trench. He pulled his leg out and felt some pain. He worked till morning and reported to a supervisor called Samuel Sore who told him to go to the dispensary. He was treated and told to go to

the factory manager to fill forms. That manager however told him that the injury was a small one and did not require the filling of those forms.

Then he went to a doctor at Nandi Hills and was given one day's off, but the appellant refused to give him off. His left ankle was dislocated in the accident. The appellant had provided him with a club, shoes, uniform and an overcoat. He blamed the appellant for the accident, as he had not worked in that compound before, and did not know that the trench was there. In cross examination he stated that he had two cases relating to different incidents of injuries – one of those cases had already been finalized. He called a doctor who testified for him. This doctor who treated him at Nandi Hills District Hospital (Dr. John C. Chumba) testified as P.W.2. He testified that he treated the respondent on 7/11/2001. The patient complained that he had fallen and dislocated his leg. He produced the treatment card as exhibit –P1. There was a witness P.W.3 Elphas Kibet Biwot a nurse called to testify on behalf of the respondent.

However, his evidence was abandoned, therefore it was not to be taken into account.The case for the defence was the evidence of one witness David Kipsangui Chemaswet (D.W.1). He testified that he was the security supervisor of the appellant at Siret. He knew the respondent as one of the security men and used to assign him duties. On 1st May,1999, the respondent was on duty guarding bungalow 3 and he was also on duty. The respondent did not report to him that he was injured. Even on 2/5/1999 he assigned the respondent duties and he did not complain of injuries. He knew Samuel Bore, who was also a supervisor, of a rank equivalent to his rank. Mr. Bore came after he left in October or November on transfer to Kapsumbeiywa. The plaintiff was given a torch, boots, rain coat and a helmet. In my view the appeal herein raises two issues. Firstly whether the respondent had established his case of negligence against the appellant on the balance of probabilities. Secondly whether the damages awarded were excessive in the circumstances. There is no dispute that the respondent was an employee of the appellant. The duties of an employer to an employee with regard to a safe system of work are clear to me.

Mrs Kittony has cited to me the case of Clifford =vs= Charles & Sons Ltd {1951} ALL ER 72. I am in agreement with what Denning L.J. stated in that case, that:- "When an employer asks his men to work dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must therefore, by his foremen, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself". It is therefore clear that at common law an employer is not merely required to provide a safe system of work but to establish a supervision that ensures that that safe system of work is followed by the employees. The proof as to whether the employer is negligent depends on the facts of each case. This leads me to the first point for decision in this appeal, that is whether the respondent established negligence on the part of the appellant.

The burden is always on a party who alleges negligence against another party to prove his case on the balance of probabilities. It was for the respondent to establish that he was injured on duty and in circumstances that amounted to negligence of the appellant. The evidence on whether he was injured on duty is the evidence of the respondent himself against the evidence of D.W.1 David Chemaswet. He alleged that he was injured on duty on 1/5/1999 at night. That he reported to a supervisor called Bore. D.W.1 testified that he knew Bore who was one of the supervisors, but who was not on duty that day. Bore did not testify in evidence. D.W.1 also testified that he himself was on duty and the respondent was on duty but never reported that he was injured. In considering the evidence on record, the learned trial Magistrate had this to say in his judgment:- " As clearly seen above, there is no dispute that the plaintiff was on duty on the said night. But the injury allegedly sustained while on duty is denied. The plaintiff produced a card to show that he was treated at Nandi Hills Hospital for the injury. Dr. Chumba confirmed that the injury emanated from there and the plaintiff was treated there. This shows that the plaintiff sustained the injury and was treated at Nandi Hills. This has not been challenged at all". Indeed it was not challenged that the respondent attended treatment at Nandi Hills District Hospital. However, I am of the humble view that the learned magistrate did not consider the evidence before him in totality to come to the conclusion that he came to with regard to the occurrence of the accident.

The evidential burden was on the Plaintiff to prove the occurrence of the accident on the balance of probabilities. He was the one who alleged the occurrence of the accident and had the burden of proving the same (see case of Anne Wambui Nderitu =vs= Joseph Kiprono Ropkoi , Nyeri Civil Appeal No. 345 of 2000). He mentioned that he reported the accident to a supervisor called Bore. He did not inform the court as to why he did not call that Mr. Bore to come and support his case. It was his burden to call him or to show why that Mr. Bore did not come to testify, especially when the appellant had throughout denied the occurrence of the accident. He also testified that he had reported the incident to a factory manager. He did not call that factory manager as a witness, nor did he give an explanation as to why. The evidence relied upon by the learned magistrate was on treatment of the respondent.

This evidence, in my view, did not add value to the respondent's case. P.W.2 Dr. Chumba clearly testified that the respondent went to Nandi Hills District Hospital for treatment on 7th November, 2001. The injury is alleged to have occurred on 1/5/1999. Therefore the attendance for treatment at Nandi Hills District Hospital in my view does not corroborate that the respondent was injured on duty on 1/5/1999. That treatment was more than two years from the date of the alleged accident. I have also perused the medical outpatient card (Exh.P1) for Nandi District Hospital. It was actually stamped 7th November 1999. At the bottom it is marked TCA on 13/11/1999.Even assuming that Dr. Chumba was wrong in giving a date of 2001, this treatment in November,1999 also does not establish that an injury occurred on 1/5/1999. Dr. Aluda's report exh.2 was dated 7/4/2000. It also does not add value with regard to the occurrence of the accident. What was contained in the report on the occurrence of the accident must have been what the respondent said.

I am of the humble view that, had the learned magistrate considered all the evidence in totality, he would not have come to the conclusion that the respondent had established on the balance of probabilities that he was injured on duty on 1/5/1999.

I am of the humble view that there was no evidence on record that established on a balance of probabilities that the respondent was injured on duty on 1/5/1999. There being no evidence to establish that the respondent was injured on duty on 1/5/1999, the issue of negligence of the appellant whether under common law or statutory did not arise, and therefore it is my finding that the appellant was not negligent.

On the quantum of damages, the learned trial magistrate awarded general damages of Kshs 60,000/= less 10% contributory negligence. The learned magistrate was referred to cases including the case of John Otieno Ojwok =vs= Samuel Onyango Abunga – Nairobi HCCC 2001 OF 1992 (unreported); and Kenneth Onyango=vs= Hassan Juma – Nairobi HCCC No. 3944 of 1990. The appellant's Counsel asked for general damages of Kshs 30,000/=, presumably based in the award in the case of John Otieno Ojwak –vs- Samuel Onyango in which Githinji J. as he then was, awarded Kshs 30,000/= as general damages for minor soft tissue injuries on 22/3/1994.

In our present case, the learned trial magistrate relied on the injuries in the report of Dr. Aluda which was produced by consent on 26/11/2002 as exhibit P.2 In that medical report dated 7/4/2000, Dr. Aluda found the injuries to be a swollen left ankle which was tender, and sprain on left ankle joint. He also found limitation in movement of the left ankle joint. He gave the opinion that the injuries sustained were severe though healed, with resultant pain in the left ankle. He recommended physiotherapy for the left ankle joint.

The award of damages is the discretion of the trial court. An appellate will be slow to interfere with the award of general damages unless there are justifiable reasons.The justifications on which an appellate court can interfere with the award of general damages have long been settled. The same were reiterated by the Court of Appeal in the case of Catholic Diocese of Kisumu -vs- Sophia Achieng Tote – Kisumu Civil Appeal No. 284 of 2001 – where the court of Appeal stated –

> " The appellate court can justifiably interfere with the quantum of damages awarded by a trial court only if it is satisfied that the trial court applied the wrong principles (such as taking into account some irrelevant factor or leaving out of account a relevant one) or misapprehended

the evidence and so arrived at a wrong figure so inordinately high or low as to represent an entirely erroneous estimate".

Mr. Kuloba for the appellant has not referred me to any specific misdirection of the learned magistrate. I myself do not see any . The cases relied on by the appellant were for minor superficial injuries. Considering the type of injuries as described by Dr. Aluda, which were not controverted, I do not consider that the general damages awarded were manifestly excessive. If this appeal were to fail, I would have confirmed the damages awarded by the learned trial magistrate. However, as I have stated above, I will allow the appeal.

For the above reason, I allow the appeal and set aside the judgment of the learned magistrate.

As this is an appeal between an employer and an employee, I order that each party will bear their own costs of this appeal, as well as the trial before the magistrate.

Dated at Eldoret this 17th day of November,2005.

GEORGE DULU,

Ag. Judge