



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 109 OF 2018

KAIMOSI TEA ESTATE APPELLANT

-VERSUS-

FLORENCE MBOKA BISIA RESPONDENT

JUDGEMENT

1. In this Appeal, the Court is called upon to upset the decision of Hon. C.M. Kesse delivered on 27th June 2018 in Kapsabet PMCC No. 176 of 2017 Florence Mboka Bisia -vs- Kaimosi Tea Estate.

2. The suitor for that intervention is Kaimosi Tea Estate (the Appellant) but who for ease of reference is referred to as the Defendant as it was at Trial. The Defendant was at all material times the employer of Florence Mboka Bisia (the Respondent or Plaintiff) and as at 16th August 2016, said to be the date when the incident alleged to give rise to this action supposedly occurred, the Plaintiff had been in employment for over 14 years.

3. The Plaintiff's duty was to tea pluck for the Defendant Company. Her case, at Trial, was that while on duty she fell into an unmarked and inconspicuous ditch which had been freshly dug. This resulted in injury to her right leg and back. Her evidence she got initial treatment at the company dispensary and a referral was made to Kapsabet Sub-County Hospital. In the Complaint dated 10th October 2017 presented to the Kapsabet Court, she lists the particulars of injury sustained as:-

- i. Deep cut wounds on her right leg below the knee;
- ii. Back injury;
- iii. Severe pain during and after sustaining the injury

4. She blames the Defendant Company for the accident and in paragraph 5 of the Complaint sets out a catalogue of particulars of negligence and breach of statutory duty said to be the infraction on the part of the Defendant. These include that the Defendant failed to give proper instructions and directions/warnings to its employees, her included, on how to safely carry out assigned duties; failing to provide and/or maintain a safe working environment and; failing to supervise the Plaintiff while engaged upon her duties.

5. On its part, the Defendant denied any aspect of negligence and indeed denied the occurrence of the incident at the place of work. Further the company's case was that if the accident occurred then the Plaintiff contributed or was wholly to blame for it.

6. Having considered the pleadings and evidence, the Trial Court found liability at 80% to 20% as against the Defendant. On damages, the Court made an award of Kshs. 160,000/= on General Damages and Kshs. 4,000/= on the Special damages, both awards were subjected to the contributory negligence. Costs of the suit were also awarded to the Plaintiff. That is the decision that aggrieves the Defendant.

7. The Memorandum of Appeal dated 14th September 2018 raises seven (7) grounds but which reveal real three issues: -

- i. Did the Plaintiff sustain injuries on 16th August 2016 at her place of work?
- ii. If so, who was to blame?
- iii. Is this Court entitled to interfere with the award of damages made by the Trial Magistrate?

8. The Court, on this occasion, is an Appeal Court of first instance. Its role is to re-evaluate the entire pleadings and evidence as though in conduct of a re-hearing with a view to reaching its own determination. However, the Court is cautioned that unlike the Trial Court, it did not see nor hear the witness testify and therefore due allowance must be given in drawing the conclusions (Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123)

9. The Plaintiff's evidence in respect to the incident is that after she sustained injury,

“I was given a referral unit from Kaimosi at about 11.00am”

On cross-examination, she said;

“I was given a referral by the nurse. The superior sent me to the claims. I went to the Dispensary at 11.00 am. I don't know if there is a book filled in respect of the injury.”

10. Emerging from the evidence is that the referral was from the Defendant's dispensary to Kapsabet Sub-County Hospital. Although the treatment chit from the hospital was filled by one Bernard Lagat, he was not available to testify and so it was produced by one Danson Gichungi (PW1). His evidence was:-

“Florence Mbote on the 16th August 2016 on a referral with a history of a fall at Kaimosi Tea Estate. She was given first aid. Referral No. 2513.”

11. On cross examination, the witness, partly, responded:

“I don't have the original patient file....she came with a referral letter. There was a stamp from Kaimosi not indicated. Medical report by Bernard Lagat relied on an initial report, clinical findings not review findings.”

12. On its part the Defendant through the evidence of Steward Kidero (PW2), proposed that the Plaintiff was treated on the material day at 7.00 a.m for osteoarthritis. A daily sick sheet register in that regard was tendered as evidence.

13. On this first issue, the Trial Court found in favour of the Plaintiff and held:

“The treatment chit states that the plaintiff presented with severe back ache and a deep cut wound on the right knee. The treatment s\ chit further stated that the plaintiff sustained the said injuries while plucking tea at Kiamosi Dispensary where she was given first aid.

Before being referred to Kapsabet District Hospital for further specialized treatment. Given that the evidence produced matched the testimony of the plaintiff and the defence failed to controvert this evidence. I find that the plaintiff evidence overwhelmingly titled the scales in her favor.”

14. This Court has considered the submissions made by counsel. As a start, the onus is on the Plaintiff to prove what she alleges or asserts. The allegation was that she sustained injuries on 16th August 2016 at her place of work. In its defence, the Defendant specifically averred:-

“6. As regards paragraph 5 of the plaint, the defendant denies the contents therein and avers that the plaintiff did not sustain any injuries on 16/8/2016 or at all as alleged. The defendant puts the plaintiff to strict proof thereof.

7. The defendant avers that the plaintiff was on the material date on 16/8/2016 treated for a natural ailment and not an injury and further denies that the plaintiff ever sustained any injuries in the course of employment with the defendant.”

15. These pleadings put the Plaintiff on notice that she would be required to prove that the accident took place in the first place. This was always going to be a preface issue. This Court has set out the two competing versions.

16. Other than her own account of the accident, the Plaintiff did not present any other eye witness. And the Court does not suggest that the only additional evidence that could prove that the accident occurred needed to be that of another eye witness. However, her evidence needed to be corroborated. Her written account was:-

“I was on duty on 16th August 2016, working with the Defendants. while working in the fields I fell in an unmarked and inconspicuous ditch which had been freshly dug.....The ditch had dry and prickly sticks which pierced and injured me on my right leg and my back injuries(sic)....

I was assisted by my co-workers to rise and get out of the ditch.”

17. Corroborative evidence may have come from the chits on her initial treatment at the dispensary. In her evidence was that upon examination at Kaimosi, she was given a referral hit by the nurse to take to Kapsabet Sub-County Hospital. That chit, in my view, was a critical document as it would inform on the nature of treatment the Plaintiff received at Kaimosi and the referral made to Kapsabet. Now, the evidence of the clinical officer from Kapsabet was that he did not have the original outpatient file. It was not in his custody while he testified.

The Court was not told why the file was not made available.

18. The importance of the file is that it would have the all-important report chit and that would be able to tell the story as to whether there was indeed a referral and if so, the nature.

19. What was left was the account of the Plaintiff to be placed on a scale against that of the Defendant. That of the Defendant being that the only treatment received by the Plaintiff was for any ailment, osteoarthritis from which a daily sick register for that day (16th August 2016) was produced.

20. This Court has a difficulty agreeing with the Trial Court that there was sufficient evidence, of course on a balance of probabilities, that tilted the scales in favour of the Plaintiff. On my part, I would not come to the conclusion that the Plaintiff had proved that she sustained injuries in the course of employment on that day and that would be the end of the matter,

21. But because this Court may be in error in that conclusion, the Court must discuss the aspect of quantum.

22. On quantum, the Trial Court made an award of Kshs. 160,000/= for a deep cut wound on the right leg below the knee, back injury and severe pain during and after sustaining the injuries. The Appellant thinks that award to be high and submits that a sum of Kshs. 50,000/= to be Kshs. 70,000/= would be reasonable and places reliance in the decision of Buds and Bloom Ltd v Lawrence Emusugut Obwa [2016] eKLR. There, on 5th May 2016, Mulwa J. made an award of Kshs. 50,000/= for a deep cut on the left leg and soft tissue injuries on the leg.

23. The Plaintiff on the other hand asked this Court not to disturb the award and sought support from the decision of Aburili J. in Garton Limited v Nancy Njeri Nyoike [2016] eKLR.

24. Having read both decisions, the Plaintiff's injuries align more with those in Buds and Bloom Limited (supra). In Garton Limited, the injury sustained by the Plaintiffs was not only soft tissue injury on the left leg but also a deep injury that required hospitalization for 4 days. Further, the Plaintiff was left with recurrent headaches. Here, although there was severe back pain, there was no leg injury. Here, there was no need for inpatient treatment. Here other than a scar, the wound had healed. In the view of this Court an award of Kshs. 160,000/= is inordinately high and ought to be disturbed on the set out principles set out Butt Vs Khan (1982-1988) KAR 1.

25. But again the decision on quantum may be needless as the Plaintiff was unable to establish liability.

26. The Appeal succeeds. The Judgment delivered by the Trial court on 27th June 2018 is hereby set aside and in its place an order is made dismissing the Plaintiff's suit with costs. Costs of the Appeal to the Appellant.

Dated, Signed and Delivered in Court at Eldoret this 5th Day of May 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Wesonga for the Appellant.

Omusundi for the Respondent.