REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 46 OF 2016

EASTERN PRODUCE (K) LIMITED.....APPELLANT

-VERSUS-

JULIUS ONTWEKA ONCHANGWA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court in Kapsabet PMCC No. 300 of 2011 dated 7 March 2016 by Hon. G. Adhiambo, SRM)

JUDGMENT

[1] The appellant herein, **Eastern Produce (K) Limited**, was the Defendant in **Kapsabet Civil Case No. 300 of 2011: Julius Ontweka Onchangwa vs. Eastern Produce (K) Limited**, wherein the respondent sued for general and special damages for injuries sustained by him in the course of his employment. The respondent had contended, in his Plaint dated **24 August 2011,** that he was carefully and lawfully carrying out his duties as an employee of the appellant when he slipped and fell, thereby sustaining a blunt trauma to his chest and spinal column as well as a prick wound on the left leg. The accident was alleged to have occurred on **16 March 2007** at the appellant's **Kipkeibon Tea Estate.**

[2] The respondent blamed the appellant for his injuries, alleging negligence on the part of the appellant and/or its agents, servants or other employees for his injuries. He set out the particulars of negligence at paragraph 6 of the Plaint. He also contended that it was a term of his employment that the appellant would take all reasonable precautions to ensure his safety while he was engaged upon his employment, and not to expose him to a risk of damage or injury of which the appellant knew or ought to have known. Thus, it was averred by the respondent that the accident in issue was therefore in gross breach of the aforementioned terms employment.

[3] The appellant denied the Plaintiff's claim vide its Defence dated **26 September 2011**. It basically denied that the respondent was its employee or that there was a contract of employment between it and the respondent. The appellant further denied that an accident occurred as alleged by the respondent or that the said accident was due to negligence or breach of statutory duty on its part. In the alternative, it was the contention of the appellant that, if any such accident occurred, then it was due to the sole negligence of the respondent or was substantially contributed to by him. To this end, the appellant supplied the particulars of the respondent's negligence in paragraph 8 of the Defence.

[4] The appellant further averred that, as the respondent was in exclusive control and coordination of his bodily movements, he was the sole author of his injuries, if any; and therefore that the injuries were outside the scope of duty. The appellant denied the particulars of special damages, loss, present complaints, particularly the occasional pains in the chest and spinal column. The respondent was, in the premises, put to strict proof of his injuries. The appellant also averred that the respondent's suit was fatally defective and asked that it be struck out and/or dismissed with costs.

[5] The learned trial magistrate heard the parties and their witnesses and, in her Judgment delivered on **7 March 2016**, she found appellant 100% liable to the respondent and awarded him **Kshs. 200,000/=** in general damages and **Kshs. 2,000/=** as special damages. Being aggrieved by that decision, the Appellant lodged this appeal on **9 January 2014** on the following grounds:

[a] That the learned trial magistrate erred by arriving at a finding on liability which was not supported by evidence.

[b] That the learned trial magistrate erred in law and fact in basing findings on irrelevant matters.

[c] That the respondent's case was not proved on a balance of probability as is required by law.

[d] That the trial magistrate should have found that there was no basis on which the appellant could be blamed for the incident alleged and the injuries sustained.

[e] That the learned trial magistrate's assessment of compensation was inappropriate and irregular vis-à-vis the circumstances of the case.

[f] That the learned trial magistrate erred on all points of fact and law in as far as both liability and assessment of quantum is concerned.

[6] Consequently, the appellant prayed that the appeal be allowed with costs and that the decision of the Senior Resident Magistrate on both liability and quantum in **Kapsabet PMCC No. 300 of 2011** be set aside and a proper finding be made by this Court. It also prayed for such further orders as may be just and expedient.

[7] At the instance of the parties, directions were given on **23 July 2019** that the appeal be canvassed by way of written submissions. Accordingly, in the appellant's written submissions, which were filed on **10 September 2019** by **Mr. Kibichiy**, an issue was raised as to whether the respondent discharged the burden of proof on a balance of probabilities, given that no report of the incident was ever made as required by the appellant's regulations. Counsel further submitted that, since no such accident was recorded at the appellant's dispensary, the only conclusion to be drawn is that no such accident occurred as was alleged by the respondent. Counsel relied on **Kebirigo Tea Factory Co. vs. Richard Ochiengi Obare** [2010] eKLR and **Nandi Tea Estate Limited vs. Eunice Jackson Were** [2006] eKLR for the proposition that, if indeed the respondent was involved in an accident, then some of his co-workers would have been called as witnesses before the lower court to confirm the occurrence.

[8] In discounting the medical evidence presented by the respondent before the lower court, counsel relied on **Timsales Ltd vs. Wilson Libuywa [2008]** eKLR and urged the Court to find that the injuries, if at all may have been sustained elsewhere; and that the respondent was entirely to blame for those injuries. As to whether the appellant was under obligation to provide the respondent with protective apparel, such as gum boots and gloves, counsel placed reliance on **South Nyanza Sugar Co. Ltd vs. Wilson Ongumo Nyakweba** [2008] eKLR in urging the Court to find that no evidence at all was adduced by the respondent in this regard; and that in any event, it was not demonstrated that he would not have sustained the said injuries had he been supplied with protective gear. On the authority of **Statpak Industries vs. James Mbithi Munyao, Kiema Muthuku vs. Kenya Cargo Handling Services Ltd** [1991] 2 KAR 258 as cited in **Leonard Mwashumbe Shinga & Another vs. Auto Selection (K) Ltd & Another** [2009] eKLR and **HCCA No. 30 of 2000: Eastern Produce (K) Ltd vs. Patrick Chege Mwangi**, that there can be no liability without fault; and therefore that the respondent was under obligation to prove a causal link between his injuries and some fault on the part on the appellant.

[9] On quantum, it was the submission of counsel for the appellant that the award by the lower court was inordinately high for soft tissue injuries. A proposal was made for an award of **Kshs. 50,000/=** instead, on the authority of **Eastern Produce (K) Ltd vs. Joseph Mamboleo Khamadi** [2015] eKLR and **Eastern Produce (K) Ltd vs. Edith Kavere** [2019] eKLR wherein **Kshs. 50,000/=** and **Kshs. 80,000/=,** respectively, was awarded for comparable injuries. Counsel accordingly prayed that the appeal be allowed and that the decision of the lower court be set aside and substituted with an order dismissing the respondent's claim.

[10] Mr. Too, learned Counsel for the respondent, opposed the appeal vide his written submissions dated **4 September 2019**. He urged the Court to bear in mind that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence. He relied on **Ephantus Mwangi & Geoffrey Nguyo Ngatia vs. Duncan Mwangi Wambugu** [1982-88] 1 KLR 278 to support his argument. As regards liability, it was the submission of **Mr. Too** that sufficient evidence was presented before the lower court to demonstrate that the respondent was not supplied with protective apparel as should have been the case, granted the nature of his employment as a tea picker. In his view, the appellant failed to take reasonable steps to ensure the safety of the respondent as he went about his duties. He referred the Court to **Makala Mailu Mumende vs. Nyali Golf Country Club** [1991] KLR 13, **Gatton Limited vs. Nancy Njeri Nyoike** [2016] eKLR as well as **Halsbury's Laws of England**, 4th Edition Vol. 16 at paragraph 560, for the proposition that an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances, so as not to expose them to unnecessary risk. He also relied on **Winfield and Jolowicz on Tort** by W.V.H. Rogers, 14th Edition, at page 213 where the opinion is expressed that:

> **"If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty."**

[11] On quantum, Counsel for the respondent defended the lower court's award, citing **Bashir Ahmed Butt vs. Uwais Ahmed Khan** [1982-88] KAR 5 and **Kemfro Africa Ltd T/A Meru Express Services & Another vs. A.M. Lubia & Another** [1987] KLR 30 for the principle that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate; or where it is manifest that the lower court proceeded on wrong principles or misapprehended the evidence in some way and therefore arrived at a figure which was either inordinately high or low. Accordingly, he took the view that no justification has been made for the Court to disturb the lower court's award; which in his view was reasonable in the circumstances. He relied on **Kaimosi Tea Estate vs. Thomas Busolo Esiye** [2011] eKLR and **Sher Agencies Ltd vs. Felix Musumba** [2008] eKLR to buttress his submissions.

[12] This being a first appeal, it is the duty of the Court to re-evaluate all the evidence adduced before the lower court with a view of drawing its own conclusions thereon while giving due allowance for the fact that it did not have the benefit of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was elucidated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[13] Accordingly, I have carefully considered the evidence that was presented before the lower court and note that in support of the respondent's case, a total of three witnesses testified, including the respondent. **Kipkosgei Kilel (PW1),** a clinical officer then based at

Nandi Hills District Hospital, testified that the respondent visited their facility and was accordingly attended to vide Out Patient No. 2967/2007; having presented a history of having fallen down while on duty. **PW1** further stated that the respondent had a cut wound on the left leg, as well as blunt trauma to the chest and back; and that the cut wound was stitched under local anaesthesia. He produced the respondent's treatment chit as **the Plaintiff's Exhibit 1** before the lower court.

[14] The respondent testified as **PW2** and stated that he was working at **Kipkeibon Tea Estate** as a tea plucker at the material time; and that on **16 March 2007**, while in the course of his work, he fell into an unmarked ditch at about 10.00 a.m. and sustained a cut on his left leg as well as blunt injuries on the left chin, chest and back. The respondent further stated that, as his supervisor was not close by, he went to the company hospital but was turned away for lack of drugs. He was therefore transported in a company motor vehicle to **Nandi Hills District Hospital** where he was treated as an outpatient and discharged. He added that he was thereafter examined by **Dr. Aluda** and a Medical Report prepared on his behalf dated **27 July 2011** for which he paid **Kshs. 2,000/=.** He added that his services with the appellant were thereafter terminated. He produced the termination letter dated **17 March 2007** as the **Plaintiff's Exhibit No. 3** before the lower court.

[15] Dr. Samwel Aluda (PW3), confirmed that he examined the respondent, **Julius Ontweka Onchangwa** on **27 July 2011**; and that he had a history of having been injured while on duty on **16 March 2007** for which he had been treated at **Nandi Hills District Hospital**. While confirming that the respondent sustained a blunt trauma to his chest and spinal column as well as a prick wound on the left leg, **Dr. Aluda** also testified that the injuries had healed by the time he examined the respondent. He produced his report and the receipt he issued the respondent with as **the Plaintiff's Exhibit 2a and 2b**, respectively.

[16] On its part, the appellant called two witnesses who testified in its defence. The first witness was **Joseph Kurgat (DW1),** who was one of the appellant's supervisors at its **Kipkeibon Tea Estate**. He confirmed that the respondent was an employee of the appellant; and that he was on duty on the **16 March 2007** under his charge. He further confirmed that the respondent produced 30 kgs of tea leaves on that day. It was thus the evidence of **DW1** that no accident occurred on that day and therefore it could not be true that the respondent was injured as alleged. He produced the appellant's Attendance Checklist for **16 March 2007** to support his evidence that the respondent was on duty and that he worked without any interruption; and that no accident was ever reported to him on that day.

[17] Samwel Langat (DW2), was one of the nurses who was then working at the appellant's **Kipkeibon Tea Estate**. His testimony was that he did not know the respondent; and therefore that he never treated him or attended to him. He produced the Outpatient Register for **Kipkeibon Dispensary** and told the lower court that a total of 16 patients were attended to on **16 March 2007**. He pointed out that the respondent was not one of those 16 patients. **DW2** explained that it was the procedure that in the event of workplace injury, the employees would immediately draw the matter to the attention of his/her supervisor, whereupon the supervisor would issue the employee with a referral note to take to the dispensary for treatment; and that if there was need to escalate the matter, the staff at the dispensary would refer the employee to **Nandi Hills District** Hospital. He surmised that, since the name of the respondent did not appear in the Outpatient Register, it would follow that he was not involved in an accident while on duty as was alleged.

[18] From the foregoing summary, there appears to be no dispute that the respondent was indeed an employee of the appellant and that, at all times material to the suit, he was working at the appellant's **Kipkeibon Tea Estate** as a tea picker. The respondent produced a copy of a notice of termination of employment that he was served with by the appellant, dated **13 March 2007**. He testified that he was only served with the notice on **17 November 2007**, the day after the subject accident. In any case, that notice was to take effect from **17 March 2007** to **15 April 2007,** thus confirming that, as of **16 March 2007**, the respondent was a *bona fide* employee of the appellant at its **Kipkeibon Tea Estate**. There is further no dispute that he was on duty as such on **16 March 2007**. This was expressly acknowledged by **DW1,** who also told the lower court that the respondent produced 30 kgs of tea leaves on that day. **DW1** also produced the Checklist Register which confirms that the respondent was indeed on duty on that date. Therefore, the key issues that presented themselves before the lower court are:

[a] Whether the respondent was injured as alleged; and if so, whether he was injured at his place of work;

[b] Whether the appellant is liable for the injuries sustained by the respondent; and if so, to what extent?

[c] What is the quantum of damages payable, if at all?

[a] <u>On whether the respondent was injured as alleged:</u>

[19] According to the respondent, he was injured on **16 March 2007** while going about his work as a tea picker. He explained that he accidentally fell into an unmarked ditch at about 10.00 a.m. and thereby sustained a prick injury on his left leg as well as blunt injuries on the left chin, chest and back. He produced treatment chits issued to him at Nandi Hills District Hospital and had both **Mr. Kilel (PW1)** and **Dr. Aluda (PW3)** testify on his behalf to confirm to the lower court that he indeed got injured as alleged. While conceding that the respondent was employed as a tea picker by the appellant, his supervisor, **DW1**, denied that there was such an accident; and the only reason he took that stance was because the respondent did not follow the laid down procedure for such occurrences.

[20] I note however that the respondent furnished a plausible explanation for this omission. He explained that, as his supervisor was not close by, he went to the company dispensary but could not be treated for lack of drugs; he added that he was then advised to seek help at **Nandi Hills District Hospital,** where he was treated and discharged. It is noteworthy that, the cut injury was serious enough to require suturing; and therefore it is understandable why the respondent opted to proceed to the dispensary for treatment without the supervisor's referral chit. I therefore find credible evidence to demonstrate that indeed the respondent was injured while at his place of work as was alleged by him. I note too that, whereas it was the evidence of **DW1** that a separate register was maintained by the appellant for accidents, the appellant opted not to avail it before the lower court, thus leaving the respondent's case entirely unrebutted.

[b] <u>Whether the appellant is liable for the injuries sustained by the respondent; and if so, to what extent?</u>

[21] In **<u>Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR</u>** it was held that:

"...as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety..."

[22] The respondent adduced uncontroverted evidence to show that he was never provided with protective gear, such as gum boots or a protective garment; and that had this been done, his injuries would have been minimized, if not altogether avoided. He also mentioned that this particular ditch was unmarked; and therefore that no warning at all was given of its existence to the plantation workers. Clearly therefore, the appellant not only failed to provide the respondent with a safe working environment, but also failed to provide him with protective gear that would have cushioned him from bodily harm.

[23] It is also noteworthy that, whereas the appellant urged the lower court to find that the respondent was either entirely to blame for the accident or that he substantially contributed thereto, neither **DW1** nor **DW2** made any reference to the particulars of negligence set out at paragraph 8 of the Defence. Consequently, there was absolutely no evidence that the respondent:

[a] placed himself dangerously in the place of work;

[b] intentionally and or experimentally caused harm to himself;

[c] failed to heed reprimands, warnings and/or instructions from his supervisors;

[d] worked without the presence of mind;

[e] was reckless as to his own safety; or that

[f] he engaged in frolics of his own outside the scope of duty.

[24] The appellant having made the allegations of negligence in its Defence, the burden of proof was on it to supply evidence in proof thereof, for this is the essence of **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya*****.** It provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

[25] In the premises, I would be of the same view as the trial court that there was sufficient material for holding the appellant liable to the respondent for the injuries he suffered while performing his duties at the appellant's **Kipkeibon Tea Estate** on **16 March 2007**. Moreover, there being no demonstration that the respondent was in any way to blame for the occurrence, it is my view that the case of **Statpack Industries vs. James Mbithi Munyao** [2005] eKLR, is inapplicable to the circumstances. The lower court was therefore in order in attributing 100% liability on the appellant.

[c] On Quantum of Damages

[26] It is trite that assessment of damages is a matter of discretion in respect of which an appellate court ought not to interfere unless such interference is warranted. Thus, in **Peters vs. Sunday Post Limited [1958] EA 424** it was held that:

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

[27] Likewise, in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[28] The trial court, having considered the evidence adduced before it, along with the submissions made by Learned Counsel for the parties and the authorities cited settled on an award of **Kshs. 200,000/=** as General Damages. The lower court also accepted the special damage component of **Kshs. 2,000/=** as having been proved by the receipt marked the **Plaintiff's Exhibit No. 2b**. And, while counsel for the respondent defended that award, **Mr. Kibichiy** for the appellant took the posturing that the award by the lower court was inordinately high for soft tissue injuries, and proposed an award of **Kshs. 50,000/=** instead. He relied on **Eastern Produce (K) Ltd vs. Joseph Mamboleo Khamadi** [2015] eKLR in which **Kshs. 50,000/=** was awarded for soft tissue injuries; and **Eastern Produce (K) Ltd vs. Edithe Kavere** [2019] eKLR wherein **Kshs. 80,000/=** was awarded for similar injuries.

[29] The correct approach to employ in assessing damages was well explicated by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993:**

Mutinda Matheka vs. Gulam Yusuf, that:

> **"The Court will essentially take into account the nature of the injuries suffered, the period of recuperation, the extent of the injuries whether full or partial, and if partial what are the residual disabilities: When dealing with the issue of residual disabilities the age when suffered and hence the expected life span during which they are to be borne. The inconveniences or deprivation or curtailments brought about by the disability must be considered. Then the factor of inflation must also be accounted for if the award has to constitute reasonable compensation."**

[30] And in **Stanley Maore vs. Geoffrey Mwenda [2004] eKLR,** the Court of Appeal suggested thus:

> **"…we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."**

[31] The parties were in agreement before the lower court that the injuries suffered by the respondent, namely, blunt trauma to the chest and spinal column and a prick wound on the left leg, were soft tissue in nature; and that he had fully healed therefrom by the time he was examined by **Dr. Aluda** on **27 July 2011**. **Dr. Aluda's** Medical Report also confirms that the respondent was then aged 27 years and that other than the residual scar on the left leg, his occasional pain would subside with the use of analgesics. I have accordingly looked at recent awards and note as follows:

> **[a]** In **Ndungu Dennis vs. Ann Wangari Ndirangu & Another** [2018] eKLR, an appeal from an award that was made on **10 December 2015**, the Respondent had been awarded **Kshs. 300,000/=** by the trial court for soft tissue injuries. These included minor bruises on the back and tenderness on the right leg. The award was considered manifestly excessive and was reduced to **Kshs. 100,000/=** in a Judgment delivered on **1 February 2018**.
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> **[b]** In **Godwin Ireri vs. Franklin Gitonga** [2018] eKLR, the Respondent had been awarded **Kshs. 300,000/=** as general damages for two cut wounds on the forehead, cuts on the scalp and bruises on the left ankle and right knee. The award was reduced to **Kshs. 90,000/=.**
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> **[c]** In **Maimuna Kilungya vs. Motrex Transporters Ltd** [2019] eKLR the Appellant sustained a blunt neck injury, blunt injury to the left shoulder and bruises on the left ear and was expected to recover fully. The lower court awarded **Kshs. 100,000/= which was** enhanced on appeal to **Kshs. 125,000/=.**

[32] It is clear then that the lower court's award of **Kshs. 200,000/=** was slightly on the higher side. I would reduce the same to **Kshs. 100,000/=.** As the special damage component was duly pleaded and proved, the same remains undisturbed. In the result, the appeal succeeds partially and the Judgment and Decree of the lower court is hereby set aside and substituted with Judgment in the sum of **Kshs. 102,000/=** together with interest thereon from the date of the lower court's Judgment until payment in full along with costs of the lower court suit. Each party shall, however, bear own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF MAY 2020

OLGA SEWE

JUDGE