REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 7 OF 2013

KEPHER MAGARE NYAKWAYE.....APPELLANT

VERSUS

KAPCHORUA TEA COMPANY LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Kapsabet in Kapsabet PMCC No. 10 of 2012 dated 27 December 2012 by Hon. G. Adhiambo, RM)

JUDGMENT

1. This is an appeal from the decision of the Resident Magistrate, **Hon. G. Adhiambo**, in **Kapsabet PMCC No. 10 of 2012: Kepher Magare Nyakwaye vs. Kapchorua Tea Company Limited**. The Appellant was the Plaintiff in that suit, and his cause of action before the lower court was that, on or about **13 September 2011**, while on duty as an employee of the Respondent, he was injured when he fell into a ditch within the Respondent's tea plantation. He blamed the Respondent for his injuries, alleging that it had breached its common law duty of care and/or terms of employment by failing to take all reasonable measures to ensure his safety while he was engaged upon his work. Accordingly, the Appellant claimed general and special damages together with interest and costs for his loss, pain and suffering.

2. The Respondent, as the Defendant before the lower court, denied the claim vide its Statement of Defence dated **20 March 2012**. It denied that the Plaintiff was its employee or that he was injured on **13 September 2011** while on duty as alleged. The Respondent denied the Particulars of Negligence and the Particulars of Injuries as pleaded by the Appellant in his Plaint. In the alternative, the Respondent had averred that, if at all the accident occurred, then the same was due to the sole or contributory negligence of the Appellant. Accordingly, the Respondent prayed for the dismissal of the Appellant's suit.

3. The lower court heard the parties and their witnesses between **22 May 2012** and **6 December 2012**; and in its Judgment dated **27 December 2012**, it dismissed the Appellant's suit with costs. Being aggrieved by that decision, the Appellant filed this appeal on **18 January 2012** on the following grounds:

(a) That the learned trial magistrate erred in dismissing the Appellant's case in favour of the Respondent without any legal basis;

(b) That the learned trial magistrate erred in failing to appreciate the overwhelming evidence in favour of the Appellant;

(c) That the learned trial magistrate erred in failing to appreciate Appellant's written submissions;

(d) That the learned trial magistrate erred in failing to hold that the Appellant had proved his case on a balance of probability;

(e) That the learned trial magistrate erred in failing to hold that the Respondent had failed to rebut the Appellant's case;

(f) That the learned trial magistrate erred both in law and in fact in failing to find in favour of the Appellant.

4. In the premises, it was the Appellant's prayer that his appeal be allowed and that the Judgment of the lower court be set aside and substituted with an order allowing the Appellant's case with costs of the appeal and in the subordinate court matter.

5. Pursuant to the directions issued herein on **12 February 2019,** the appeal was urged by way of written submissions. Thus, the Appellant's written submissions were filed by the firm of **Z.K. Yego Law Offices** on 2**6 April 2019,** while the Respondent's written submissions were filed on **13 March 2019** by **M/s Kamau Lagat & Co. Advocates**. The contention of Counsel for the Appellant was that the Respondent had failed to rebut the Appellant's evidence that he was on duty on **13 September 2011** as a tea picker in its employ when he slipped and fell into a ditch and got injured. Counsel urged the Court to draw an adverse inference from the fact that the Respondent failed to call its supervisors

and medical staff to testify before the lower court.

6. Counsel for the Appellant further urged the Court to note that, whereas in her Judgment, the trial magistrate had observed that the Attendance Checklist produced by the Respondent was of no assistance in ascertaining whether or not the Appellant's work was interrupted on the material date, she nevertheless proceeded to hold that the Appellant's case had not been proved on a balance of probability. This, according to Counsel, was a misdirection, as it was not obligatory for the Appellant to avail eye witnesses to prove his case. According to him, the Appellant had made his case, and it was for the Respondent to rebut the same. Reliance was placed on **Bungoma Criminal Appeal No. 144 of 2011:Peter Wafula Juma & 2 Others vs. Republic** wherein **Hon. Gikonyo, J.** held that:

> **"Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence ... Even in civil cases, when prima facie evidence is adduced by the Plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where the evidential burden is not discharged, judgment may be entered against the defendant - in case of a civil case - or a conviction against the accused - in case of a criminal case."**

7. Accordingly, Counsel urged the Court to find that the Appellant had discharged his legal burden and that the evidential burden had shifted to the Respondent for purposes of rebuttal; and therefore that in the absence of rebuttal evidence, the lower court ought to have entered Judgment in favour of the Appellant. Counsel also relied on **Eldoret High Court Civil Appeal No. 96 of 2010: Eastern Produce (K) Limited vs. Nicodemus Ndala**, wherein **Hon. Gacheche, J.** held that the Appellant owed the Respondent a duty of care which was breached when the Appellant failed to cover a hole within the tea plantation, thereby exposing the Respondent, a tea plucker, to danger. The Respondent fell into an unmarked ditch within the tea plantation while plucking tea for the Appellant. In particular, Counsel urged the Court to be persuaded by the finding that the holes in the plantation posed a danger to the tea pluckers and that the Appellant ought to have sealed them. In that appeal the Appellant was held liable in negligence.

8. On quantum, Counsel for the Appellant proposed an award of **Kshs. 350,000/=** and relied on **Nyeri HCCC No. 320 of 1998: Catherine Wanjiru King'ori & 3 Others vs. Gibson Theuri Gichubi** where **Hon. Khamoni, J.** awarded **Kshs. 300,000/=** for soft tissue injuries on **1 July 2005**. He cited effluxion of time and inflation as relevant factors to take into account in seeking that the decision of the lower court be set aside and replaced by Judgment in the Appellant's favour for the sum of **Kshs. 350,000/=** plus costs and interest.

9. On behalf of the Respondent, **Ms. Awinja** referred the Court to the persuasive authority of **Saluenta Kennedy Sita & Another vs. Jeremiah Ruto (suing as the Legal Representative of the Estate of Joyce Jepkemboi)** [2017] eKLR with regard to the duty of the first appellate court; which is to re-evaluate the evidence adduced before he lower court in order to reach its own independent conclusions. Counsel stressed the principle that there can be no liability without fault. The Respondent's Counsel relied on **Kiema Mutuku vs. Kenya Cargo Hauling Services Limited; Statpack Industries Ltd vs. James Mbithi Munyao** to buttress her submission that the Appellant was under obligation to demonstrate the connection between the Respondent's alleged negligence and his injuries; which he did not do.

10. It was also the submission of learned Counsel that an adverse view should be taken of the failure by the Appellant to call any colleague, and in particular, **Peter Mose**, to corroborate his assertions that he was injured while on duty on the material date. He posited that, given this failure, the trial magistrate rightly held that the Appellant had failed to discharge the burden of proving his case on a balance of probabilities. He particularly urged the Court to note that the treatment notes from **Kapchorua Dispensary**, which the Appellant relied on, were to the effect that he had been treated for, *inter alia*, URTI, that is to say, Upper Respiratory Tract Infection, and not work related injuries. The case of **Nandi Tea Estates vs. Eunice Jackson Were** [2016] eKLR was cited for the proposition that the mere fact of an injury and subsequent treatment in respect thereof, is no proof that the alleged injury was sustained at the place of work. Consequently, Counsel urged the Court to instead go by the evidence adduced by the defence witnesses and find that the Appellant's case deserved dismissal.

11. With regard to quantum of damages, Counsel for the Respondent urged the Court to consider that no permanent injury was suffered by the Appellant; and that whatever injuries he may have suffered have fully healed and have not prevented him from engaging in gainful employment. And so, on the basis of **David Okola Odero vs. Kilindini Tea Warehouses Ltd** [2008] eKLR and **Sokoro Mills Ltd vs. Grace Nduta Ndungu**, Counsel proposed that an award of **Kshs. 40,000/=** would otherwise have been adequate as general damages had the Appellant proved his case.

12. This being a first appeal, it is the duty of the Court to evaluate the evidence adduced before the lower court with a view of drawing its own conclusions on the basis of the material that was presented before the lower court, while making allowance for the fact that it did not have the advantage of seeing or hearing the witnesses. This principle was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** 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. The Appellant testified before the lower court as **PW1** and stated that he was then employed by the Respondent as a tea plucker. His evidence was that he was on duty on **13 September 2011**, plucking tea leaves at the Respondent's tea plantation when he accidentally fell into a ditch that had been dug by the Respondent in the said plantation. It was **PW1's** evidence that, as a result, he sustained injuries on his chest, back and on the right eye. He further told the lower court that he reported the accident to his supervisor, **Mr. Joash Makora**, and was given a referral note to take to the dispensary for treatment. It was thus the evidence of **PW1** that he was treated for his injuries at Kapchorua Dispensary on **13 September 2011** by a clinical officer called **Annah.** He thereafter visited Nandi Hills Hospital on **20 September 2011** for further management of his pain. **PW1** produced his treatment documents as exhibits before the lower court and they were marked the **Plaintiff's Exhibit 1 to 5**.

14. In support of his case, the Appellant called **Simon Kiplagat Rono**, a Clinical Officer then based at Nandi Hills District Hospital, as **PW2**; and **Dr. Samuel Aluda** as **PW3**. **PW2** confirmed that the Appellant visited their facility on **20 September 2011**, complaining of chest pain with a history of having fallen down. He further stated that the Appellant was attended to and was put on pain killers and antibiotics. He produced the Appellant's treatment notes and Medical Report as exhibits and they were marked as the **Plaintiff's Exhibit 3 and 4** before the lower court.

15. **Dr. Aluda (PW3)** on his part testified that the Appellant visited his clinic with a history of having been injured at his place of work. He consequently examined him on **16 December 2011** and prepared a Medical Report detailing his findings and opinion. He confirmed that the Appellant had indeed sustained blunt trauma to the right eye which was tender; blunt trauma to the chest as well as the spinal column; and that the injuries had healed at the time of examination. He also confirmed that the Appellant paid him **Kshs. 1,500/=** for his services, for which he issued a receipt. He produced both the Medical Report and the receipt for **Kshs. 1,500/=** as exhibits before the lower court.

16. On its part, the Respondent called as its witness, **Naomi Chepkosgei (DW1),** a Clinical Officer in its employ. **DW1** testified that her duties entail record keeping. It was therefore in that capacity that she produced the Daily Sick Register maintained at the Respondent's Kapchorua Dispensary. She confirmed that the Appellant's name appears in that register, and that he was attended to at the dispensary at 11.25 a.m. on **13 September 2011.** It was however her evidence that the Appellant was treated, not for work related injuries, but for malaria and URTI. She produced the register as an exhibit (**the Defendant's Exhibit 1)** and was categorical that the Respondent did not have any other records indicating that the Appellant suffered injuries on his chest, spinal column or eye.

17. The Respondent also called one of its Field Supervisors, **Shem Kibet** as **DW2**. He testified that he was on duty on **13 September 2011** and that he allocated work to the Respondent's employees as usual. He explained the applicable procedure whenever there occurred workplace injury of any sort. He conceded to knowing the Appellant and confirmed that he was an employee of the Respondent's; and that he was deployed in Sirwa Division as a tea plucker on **13 September 2011**. He however denied that the Appellant was injured in the course of his work that day; and added that had this been the case, he would have issued him with a note and referred him to the dispensary for treatment. He however conceded in cross-examination that the supervisor who was directly in charge of the Appellant was **Joash Mukora**; and that it was the said **Joash Mukora** who was best placed to tell the lower court whether or not there was an accident. **DW2** produced the field records for **13 September 2011** as exhibits to demonstrate that the Appellant was on duty on **13 September 2011** and that his yield for the day was 31.5 Kgs of tea leaves.

18. From the foregoing summary, there is no dispute that the Appellant was, at all times material to the suit, employed by the Respondent as a tea plucker; or that he was on duty on **13 September 2011**. One of the documents produced by the Appellant was a Pay Slip for the month of **September 2011**. The said document, a copy of which is at page 33 of the Record of Appeal, leaves no doubt that the Appellant was, at all material times, an employee of the Respondent and that he worked and was paid his salary for the month of **September 2011**. Indeed, the Respondent also produced before the lower court the Appellant's Employee Performance Statement for **September 2011** as **Defence Exhibit 2**; and the document confirms that the Appellant was indeed on duty and that he plucked 31.5 Kgs of tea leaves.

19. In the premises, the key issues for determination before the lower court were whether indeed the Appellant got injured on **13 September 2011** while in the course of his work as a tea plucker; and if so, whether the injuries were attributable to the negligence of the Respondent. As indicated herein above, the Appellant's testimony before the lower court was that, while in the ordinary course of his work as a tea plucker, he fell into a ditch in the Respondent's tea plantation and sustained injuries on his chest, back and right eye. He also stated that he immediately reported to his supervisor, one **Joash Mukora,** and was given a chit with which he went to the Respondent's dispensary for treatment. The Appellant produced that chit before the lower court as his **Exhibit 2.** A copy thereof is a page 24 of the Record of Appeal and it shows that the document was prepared and signed by **J. Mukora** at 11.27 a.m. on **13 September 2011.**

20. According to the Appellant, he was treated at Kapchorua Dispensary not only on **13 September 2011**, but also on **14 September 2011,** and mentioned that he was attended to by **Annah**. He produced the treatment chits he was given at the dispensary as the **Plaintiff's Exhibits 3**; and, through **Simon Kiplagat Rono (PW2)**, a Clinical Officer then attached to Nandi Hills District Hospital, the Appellant demonstrated that he also went to Nandi Hills District Hospital for treatment between **14th and 20th September 2011**; and the treatment documents produced by **Mr. Rono**, especially **Exhibits 4 and 5**, confirm that he complained of chest pain, and that he had presented a history of having fallen in a ditch on **13 September 2011** while on duty plucking tea leaves. This evidence was corroborated by the evidence of **Dr. Aluda, PW3**, who also found as a fact that the Appellant had sustained blunt trauma to his right eye, chest and spinal column.

21. It is therefore questionable that in the Respondent's Daily Sick Register, the indication was that the Appellant was treated for URTI and malaria. I say questionable because **DW1** who produced the register, conceded in cross-examination that she was not on duty at the dispensary on **13 September 2011** and that she had not started working at the Kapchorua Dispensary at the time. She therefore, could not authoritatively say that the Appellant was not treated for work injuries on **13 September 2011**. It is also noteworthy that the supervisor who testified as **DW2**, conceded that the Appellant was under the direct supervision of **Joash Mukora**. Indeed, it was the evidence of the Appellant that he made a report of his injury to **Joash Mukora** and that it was **Joash Mukora** who referred him to the Dispensary for treatment. Hence, in cross-examination, **DW2** conceded that:

> **"…The supervisor who was in charge of Kepha was Joash Mukora; yes Joash Mukora is the person who is best placed to tell us if there was an accident. I used to move around, the information given to me is sounding verbal. Joash was in charge of over 100 employees. I was in charge of 4 supervisors. Yes there were about less than 1400 employees. It is not possible to know everything about all the workers…"**

22. Hence, in my evaluation of the evidence adduced before the lower court, it is clear to me that the Appellant placed sufficient material before the lower court to demonstrate, on a balance of probabilities, that he sustained injuries while in the course of his work on **13 September 2011**; and that his evidence was not sufficiently rebutted by the Respondent. It is also manifest that the Appellant's assertion that the ditch that he fell into had been dug by the Respondent and that there was no warning or notice of its existence, was also not refuted.

23. As to whether the Respondent was to blame for the Appellant's injuries, it is trite that it was the responsibility of the Respondent, as an

employer, to provide its employees, including the Appellant, with safe working conditions. In **Purity Wambui Muriithi vs. Highlands Mineral Water Co. Limited [2015] eKLR** 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..."**

24. While it is true that the duty of care is circumscribed and that an employer is not expected to baby-sit an employee or to watch over him constantly, it was upon the Respondent to satisfy the lower court that the Appellant was negligent in the manner in which he went about his duties on the **13 September 2011** and was therefore solely to blame for his injuries as was alleged in paragraph 8 of the Defence. No such evidence was presented before the lower court, yet the provisions of **Sections 107, 109 and 112** of the **Evidence Act,** ***Chapter 80*** *of the* ***Laws of Kenya,*** are clear on this. **Section 107(1)** of the ***Evidence Act,*** is states 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. Likewise, **Sections 109** and **112** of the **Evidence *Act*** provide that:

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***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.***

26. I would entirely agree therefore with the expressions of **Hon. Gikonyo, J.** in **Bungoma Criminal Appeal No. 144 of 2011: Peter Wafula Juma & 2 Others vs. Republic** that:

> **"Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence ... Even in civil cases, when prima facie evidence is adduced by the Plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are entitled to call for evidence in rebuttal, and where the evidential burden is not discharged, judgment may be entered against the defendant - in case of a civil case - or a conviction against the accused - in case of a criminal case."**

27. There was therefore clear proof by the Appellant of a causal link between the Respondent's negligence and his injuries. In this regard, I would be persuaded by the position taken by **Hon. Gacheche, J**. in **Eastern Produce (K) Ltd vs. Nicodemus Ndala** (supra) that the company was very well aware that such holes existed from time to time and that they posed a danger to its employees and therefore owed a duty of care in connection therewith to its employees including the respondent. There was therefore sufficient cause for holding the Respondent 100% liable for the Appellant's injuries; and I so find.

28. On quantum, I note that the lower court refrained from carrying out an assessment, on the basis that no liability was proved and therefore that the issue of damages did not arise. That was a misdirection. The obligation by a court of first instance to assess damages that would have otherwise been payable, even where liability is not established, cannot be overemphasized. This obligation was restated by the Court of Appeal in **Andrew Mwori Kasaya vs. Kenya Bus Service** [2016] eKLR thus:

> **"…the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:**
>
> > **"The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"**
>
> **This principle has religiously been followed by the courts below…"**

29. The observation in **H. West & Son Ltd vs. Shephard [1964] AC 326**, is instructive, namely, that:

> **"...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

30. What then, is the correct approach to employ? In this respect, I find instructive the approach taken 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."**

31. 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."**

32. As is evident from the summary of the Respondent's evidence herein above, there is no dispute that the injuries suffered by him were soft tissue injuries from which he was expected to fully heal, with no residual disability. **Dr. Aluda** confirmed that the Appellant had sustained blunt trauma to the right eye which was tender; blunt trauma to the chest as well as the spinal column; and that the injuries had healed at the time of examination. In the light of the foregoing, I have 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**.

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/=.**

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/=.**

33. Thus, granted the nature of the Respondent's injuries, it is manifest that the award made by the lower court for General Damages is on the higher side for soft tissue injuries. In the same vein, it is my view that the proposal by Counsel for the Respondent and the authorities relied on are not comparable. For instance, in the **Sokoro Saw Mills case (supra)** in which a general damages award of **Kshs. 30,000/=** was made on appeal, was decided in **2006.** Thus, having taken all the foregoing factors into account, I would, on my part, assess the general damages payable at the Appellant at **Kshs. 100,000/=**. The special damages component was specifically pleaded in the sum **Kshs. 1,500/=.** It was proved by way of the receipt marked **the Plaintiff's Exhibit 6b** produced before the lower court by **Dr. Aluda (PW3).** The same is therefore due to the Appellant.

34. In the result, the appeal is hereby allowed and the Judgment and Decree of the lower court is hereby set aside and substituted with Judgment in favour of the Appellant in the aforementioned sum of **Kshs. 101,500/=** together with interest and costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY, 2020

OLGA SEWE

JUDGE