



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 58 OF 2012

KAKUZI LIMITED.....APPELLANT

-VERSUS-

GABRIEL IKARI LOGARI.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court

in Kapsabet PMCC No. 306 of 2010 dated 10 May 2012 by Hon. B. Mosiria, PM)

JUDGMENT

[1] This is an appeal from the decision of the Principal Magistrate's Court (**Hon. B. Mosiria**) in **Kapsabet in Civil Case No. 306 of 2010: Gabriel Ikari Logari vs. Kakuzi Limited**. The Respondent had sued the Appellant in that suit, claiming general damages, special damages, interest and costs for injuries sustained by him at his place of work on **16 August 2009**. It was the contention of the Respondent that while lawfully going about his duties at the Appellant's tea plantation where he was then working as a tea picker, he slipped and fell on a tree stump and sustained a cut on his right knee.

[2] It was further the contention of the Respondent that the loss and pain he suffered as a result of the accident was directly attributable to breach of contract on the part of the Appellant, by failing to provide him with protective gear. Thus, in paragraph 5 of its Plaint dated **30 November 2010**, the Respondent set out the particulars of breach on the part of the Appellant as follows:

- [a] Failure to keep a safe working environment for the Plaintiff;
- [b] Exposing the Plaintiff to a risk of injury which they knew or ought to have known;
- [c] Failure to provide and or maintain a safe and proper system of work or to instruct its workmen, including the Plaintiff to follow that system;
- [d] Failure to provide any or adequate precautions for the safety of the Plaintiff while he was engaged upon his work;
- [e] Failure to provide protective devices and or clothing;
- [f] Failure to take any measures to prevent the said accident from occurring;
- [g] Res Ipsa Loquitur.

[3] The Respondent's claim was resisted by the Appellant vide its Defence dated **25 December 2010**. The Appellant denied that the Respondent was its employee at the time, or at all; or that there existed a contract of employment between it and the Respondent as was alleged in paragraph 4 of the Plaint. The Appellant further denied that an accident occurred on **16 August 2009** or at all. It therefore denied the allegations of negligence and/or breach of statutory duty on its part.

[4] In the alternative, and without prejudice to the position aforesaid, the Appellant averred that if at all an accident occurred as alleged, then it was due to the sole or contributory negligence of the Respondent. The Appellant further averred in the alternative and without prejudice that, in accepting employment, the Respondent freely accepted to run the risk of all purely accidental harm foreseeable, connected with and/or incidental to such employment, and sought to rely on the doctrine of *volenti non fit injuria*. Accordingly, the Appellant prayed

that the lower court suit be dismissed with costs.

[5] Upon hearing the parties, the learned trial magistrate apportioned liability between the Appellant and the Respondent at 70:30 and assessed general damages at **Kshs. 50,000/=** less 30% contribution. She also awarded the Respondent **Kshs. 1,500/=** as special damages, together with interest and costs in a Judgment delivered on **10 May 2012**. Being aggrieved by that decision, the Appellant lodged this appeal on **8 June 2012** raising the following grounds:

- [a] That the learned Magistrate erred in law and fact in holding the Appellant 70% liable without any evidence in that regard.
- [b] That the learned Magistrate erred in law and in fact in failing to hold that the Respondent was not on duty on the **16 August 2009**.
- [c] That the learned Magistrate erred in law and fact in failing to hold that on the material date of **16 August 2009**, the Respondent was not in the Appellant's employment.
- [d] That the learned Magistrate erred in law and fact in failing to take into account the fact that the Respondent failed to report the alleged accident.
- [e] That the learned Magistrate erred in law and fact in failing to hold that no accident occurred within the Appellant's premises.
- [f] That the learned Magistrate erred in law and fact in failing to deal with, and consider all issues raised in the pleadings and the evidence on record hence arrived at an erroneous judgment.
- [g] That the learned trial Magistrate erred in law and in fact in contravening the provisions of **Order 21 Rule 4** of the **Civil Procedure Rules**.
- [h] That the learned trial Magistrate erred in law and in fact in failing to hold that if at all an accident occurred, the same was not foreseeable, and was therefore an inevitable accident.
- [i] That the learned trial Magistrate erred in law and fact in failing to dismiss the Respondent's case with costs to the Appellant for want of proof.
- [j] That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent had not proved his case on a balance of probabilities as expected by law.
- [k] That the learned trial Magistrate erred in law and in fact in failing to consider and apply the provisions of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, and particularly **Sections 107, 108 and 109** thereof.
- [l] That in the alternative and without prejudice to the foregoing, the learned trial Magistrate erred in law and fact in failing to hold that the alleged accident, if at all it occurred, was wholly and/or substantially caused by the Respondent's own carelessness and/or negligence while carrying out his duties.

[6] It was on account of the foregoing grounds that the Appellant prayed that the Judgment of the lower court be set aside and that in lieu thereof there be an order dismissing the Respondent's claim with costs.

[7] Pursuant to the directions given herein on **8 April 2014**, the appeal was urged by way of written submissions. To this end, Counsel for the Appellant filed written submissions on **24 June 2014**, contending that the Respondent did not offer any evidence whatsoever to show that he was the Appellant's employee and/or confirm that indeed he was the Appellant's employee on **16 August 2009**. It was further the assertion of the Appellant that, as no evidence was adduced at the trial to demonstrate that the Appellant was contractually obligated to provide the Respondent with protective apparel, the trial magistrate fell into error in not paying heed to the provisions of **Section 107** of the **Evidence Act**. Counsel relied on **Sotik Tea Highlands Estate Ltd vs. Francis Nyaberi Omayo** [2007] eKLR for the proposition that, even where the duty of care is demonstrated, the standard of care expected of an employer can only be within reasonable limits. Counsel also relied on **Eastern Produce (K) Ltd vs. Joseph Wafula Mwanje** [2008] eKLR and **Nandi Tea Estates Ltd vs. Eunice Jackson Were** [2006] eKLR, in support of his submissions.

[8] On behalf of the Respondent, **Mr. Nyambegera** relied on his written submissions filed herein on **12 July 2017**. He defended the decision of the subordinate court contending that there was sufficient evidence to warrant the conclusion reached by the learned trial magistrate. He urged the Court to note that the document marked as **Defence's MFI 1** was never produced in evidence; and therefore that the Appellant utterly failed to rebut the Respondent's evidence, particularly the evidence that he was an employee of the Appellant and that he was injured in the course of his work. As regards quantum, Counsel urged the Court to bear in mind that assessment of damages is a matter of judicial discretion and that an appellate court can only interfere if it is shown that the sum awarded is based on wrong principles; is manifestly excessive or inadequate; or is extravagant and oppressive. **Nairobi Civil Appeal No. 152 of 2001: Gichuki vs. TM-AM Construction Group (Africa) Ltd** was cited by Counsel to buttress his submission on the applicable principles, and in urging the Court to dismiss this appeal with costs.

[9] This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own conclusions and findings on the basis thereof, while giving allowance for the fact that it did not have the advantage 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..."

[10] In the light of the foregoing principle, I have carefully considered the evidence that was presented before the lower court, in which the Respondent, **Gabriel Ikari Logali**, testified as **PW1**. He told the lower court that, in **2009**, he was working for the Appellant, **Kakuzi Ltd**, at its **Kaboswa Estate** as a tea plucker; and that he had worked there for two years by **16 August 2009** when the alleged accident happened. He produced his Pay Slip for the month of **February 2010** as **the Plaintiff's Exhibit 1**.

[11] The Respondent further stated that, while engaged in the course of his work on **16 August 2009**, he slid and fell into a hole in the tea plantation, and was injured by a tea stump on the around the knee cap. He added that he was given first aid at **Kaboswa Dispensary** before being taken to **Nandi Hills District Hospital** for further treatment. He produced his treatment documents before the lower court as **the Plaintiff's Exhibit 2**. The Respondent blamed the Appellant for his misfortune, contending that had the hole been marked, the accident would have been avoided. He also blamed the Appellant for not supplying him with protective gear such as gum boots and protective overall garment. The Respondent also told the lower court that he later saw **Dr. Aluda**, for purposes of examination and that he paid him for his services.

[12] **Dr. Samuel Aluda**, a private medical practitioner in Eldoret Town, testified as **PW2** before the lower court. He confirmed that he examined the Respondent on **28 September 2010** and that the Respondent presented a history of having been injured on **16 August 2009** while working. He further confirmed that the Respondent had sustained a cut wound on the knee which had healed, though still tender as at the time of examination. He produced his Medical Report as **the Plaintiff's Exhibit 3**. He also produced his receipt for the **Kshs. 1,500/=** that he charged the Respondent for his services. It was marked **the Plaintiff's Exhibit 4** before the lower court.

[13] The Respondent's last witness before the lower court was **Tom Juma Barasa (PW3)**. He was then serving as a Clinical Officer at **Nandi Hills District Hospital**; and his evidence was that the Respondent was attended to at their facility on **16 August 2009**; and that he gave a history of having sustained an injury to his right leg. On examination, he was found to have sustained a deep cut wound for which he was treated and given 5 days off duty. **PW3** produced the Respondent's treatment documents as **the Plaintiff's Exhibit 2**.

[14] The Appellant called one of its field supervisors, **Patrick Cheruiyot (DW1)** as its witness. **DW1** testified that he had worked at the Appellant's **Kaboswa Estate** for 15 years and confirmed that he knew the Respondent as one of the tea pluckers employed by the Appellant. He however asserted that the Respondent was employed on **9 November 2009**, and therefore could not have been at work on **16 August 2009**, when he was allegedly injured. **DW1** conceded in cross-examination that he was not on duty on **16 August 2009**; and that he did not avail the Accident Register to show the names of the people who were injured around the date in question. He also conceded that, although **16 August 2009** fell on a Sunday, the Appellant's **MFI 1** revealed that the tea pickers would work for 7 days a week, including Sundays and public holidays.

[15] Thus, having given due consideration to the foregoing summary of evidence in the light of the grounds of appeal set out in the Appellant's Memorandum of Appeal dated **8 June 2012** and the written submissions filed herein by the parties, the key issues for consideration in this appeal are;

[a] Whether the Respondent was an employee of the Appellant and whether he was on duty on **16 August 2009**;

[b] Whether the Respondent got injured as alleged and, if so, whether the Appellant was to blame for it;

[16] On whether the Respondent was an employee of the Appellants in **2009**, his testimony before the lower court was that he had been working for the Appellant at **Kaboswa Estate** for two years prior to **16 August 2009**; and that he continued to work for it for another one year. He produced his Pay Slip for **February 2010** as an exhibit and it confirms the evidence of the Respondent in this regard. The Outpatient Treatment Record Card also shows that when the Respondent went to **Nandi Hills District Hospital** for treatment on **16 August 2009**, he gave his address as **Kaboswa** and presented a history of having been injured on the right leg while plucking tea.

[17] Although the Appellant vehemently denied that the Respondent was its employee as at **16 August 2009**, it failed to refute the Respondent's evidence that he had already worked for two years as the Appellant's tea picker by that date. **DW1** conceded in cross examination that he availed no document, not even the list of casual workers for **16 August 2009** or the Accident Register, to disprove the Respondents assertions. Moreover, **DW1** conceded that he was not on duty on the date in question. As such, he could not speak with conviction as to the happenings of **16 August 2009**. I also note that the feeble attempt by **DW1** to show that tea pickers would not work on Sundays, was shot down in cross-examination, when **DW1** himself conceded that the Appellant's tea pickers would work throughout the week, including Sundays and public holidays. There was therefore credible and uncontroverted evidence presented by the Respondent to prove that he was, at all material times, an employee of the Appellant; and that he was on duty on **16 August 2009**.

[18] As to whether the Respondent got injured on the **16 August 2009**, his evidence about the occurrence was that, while picking tea leaves in the midst of the thick and dense tea bushes, he fell into a hole underneath which he had not seen and was thus injured by a tea stump. He further stated that he was first taken to **Kaboswa Dispensary** for treatment on the instructions of his supervisor before being taken to **Nandi Hills District Hospital**. The Respondent's evidence was augmented by the evidence of **PW2 and PW3** and the Treatment Card aforementioned. That document confirms that the Respondent sustained a deep cut wound on his right knee while plucking tea. Again, no evidence to the contrary was availed before the lower court. The Respondent's supervisor was not called as a witness and therefore the assertions by the Respondent remained uncontroverted. In such circumstances, the trial magistrate cannot be faulted for arriving at the conclusion she reached.

[19] The Respondent blamed the Appellant for his injuries, contending in the main that, since the hole into which he accidentally fell was dug out by the Appellant's employees for purposes of soil conservation, it behooved the Appellant to at least place a mark to warn the

workers of the hazard posed thereby. He also contended that had he been supplied with protective clothing, such as gum boots and overall, his injuries would have been avoided altogether or minimized. Again, there was no rebuttal evidence presented before the lower court. Likewise, the assertion by the Respondent that the hole in question was of the Appellant's making and that it was covered by the tea bushes so that it was not visible.

[20] It is manifest therefore that the Appellant was at fault for not marking the hole to warn its workers of its location. There was also no attempt by the Appellant to demonstrate that the Respondent was to blame for the accident; and therefore I am in agreement with the holding in **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001** that:

“...where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”

[21] In the premises, I am satisfied that the Respondent made a good case before the lower court and therefore duly established a connection between his injury and the breach of duty of care on the part of the Appellant. 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...”

[22] In arriving at the aforementioned conclusion, I have given due consideration to the authorities relied on by Counsel for the Appellant. It is however noteworthy that in **Sotik Tea Highlands Estate Ltd vs. Francis Nyaberi Omayo** (supra), the holes were not dug by the Appellant, as was the case herein, but were said to have appeared spontaneously in the middle of the tea plantation; and that the Respondent conceded as much. Similarly, the facts of **Eastern Produce (K) Ltd vs. Joseph Wafula Mwanje** (supra) are easily distinguishable from the facts at play herein. In that case the Plaintiff had alleged that he had been injured while slashing grass in the Defendant company's premises. On appeal the High Court took the view that there was evidence to show, on a balance of probabilities, that the Plaintiff was injured while playing football.

[23] It is also noteworthy that in **Nandi Estates Ltd vs. Eunice Jackson Were** (supra), which the Appellant relied on, the Plaintiff offered no proof, by way of documentary evidence, that he was an employee of the Defendant. That is not the case herein. Accordingly, all the three authorities are distinguishable in more ways than one and are therefore inapplicable to the situation at hand.

[24] As there was no quarrel with the lower court's apportionment of liability and quantum, I hereby confirm the same, with the result that I find the appeal to be devoid of any merit. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF MAY 2020

OLGA SEWE

JUDGE