REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 105 OF 2014

NANDI TEA ESTATES LIMITED.....APPELLANT

-VERSUS-

MUSA IGUNZA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Kapsabet in Kapsabet PMCC No. 40 of 2011 dated 7 August 2011 by Hon. Mosiria, PM)

JUDGMENT

[1] The appellant herein, **Nandi Tea Estates Limited**, was sued by the respondent, **Musa Igunza,** in **Kapsabet PMCC No. 40 of 2011: Musa Igunza vs. Nandi Tea Estates Limited**. The respondent's cause of action was that, on or about **23 November 2007**, while engaging in his lawfully assigned duties as a tea picker in the employ of the appellant, he slipped and fell into a ditch within the appellant's tea plantation and got injured. He blamed the appellant for his injuries, alleging that it was in breach of their contract of employment. According to him, it was a term of their employment contract that the appellant would take all reasonable measures to ensure his safety while he was engaged upon his work; and that it would not expose him to risks or damage or injury of which the appellant knew or ought to have known; and that the appellant failed to ensure his safety as agreed. He gave particulars of breach of duty of care or contract at paragraph 6 of his Plaint to support his claim for general and special damages together with interest and costs for his loss, pain and suffering.

[2] The appellant denied the claim vide its Statement of Defence dated **14 March 2011**. It denied that there existed a contract between it and the respondent as alleged or at all. It further denied that the respondent was injured as alleged or at all or that its agents, servants and or employees were in any way negligent or in breach of contract. In the alternative, and without prejudice, the appellant averred that, if an accident occurred as alleged, then the same was wholly occasioned by the negligence of the respondent. The particulars of the respondent's negligence were supplied at paragraph 5 of the Defence. Accordingly, the appellant prayed for the dismissal of the respondent's suit with costs.

[3] Having heard the parties and their witnesses the lower court found in favour of the respondent on liability and awarded him **Kshs. 81,500/=** as general and special damages for his pain and suffering, together with interest and costs. Being aggrieved by that decision, the appellant filed this appeal on **29 August 2014** on the following grounds:

> **[a]** That the learned trial magistrate erred in law and in fact in relying on extraneous evidence and delivering judgment in favour of the respondent;
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> **[b]** That the learned trial magistrate erred in law and in fact in failing to establish that the respondent had not proved the suit on a balance of probability;
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> **[c]** That the learned trial magistrate erred in law and in fact in failing to make a finding in her judgment that the appellant was not responsible for the hole or terrace in which the respondent fell and that the respondent ought to have exercised due care and attention;
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> **[d]** That the learned trial magistrate erred in law and in fact in awarding general damages which were excessive so as to amount to an erroneous judgment;
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> **[e]** That the learned trial magistrate erred in law and in fact in failing to appreciate that the respondent fell into a hole as a result of slippery floor and that the appellant was not liable in negligence for the cause of the accident;
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> **[f]** That the learned trial magistrate erred in law and in fact in holding that the appellant was 100% liable and awarding the

respondent **Kshs. 80,000/=** as general damages.

[4] Thus, it was the Appellant's prayer that the appeal be allowed and that the Judgment and Decree in **Kapsabet PMCC No. 40 of 2011** be set aside and replaced with an order dismissing the suit with costs.

[5] At the instance of the parties, directions were issued herein on **18 July 2017,** that the appeal be canvassed by way of written submissions. Thus, counsel for the respondent, **Mr. Yego**, of the firm of **Z.K. Yego Law Offices,** filed their written submission on **19 September 2017,** while **Mr. Kitur**, learned counsel for the appellant, filed his written submissions herein on **5 December 2018**. In his written submissions, **Mr. Kitur** collapsed all the five grounds of appeal into one, namely, that there was no evidence adduced by the respondent or his witnesses that the hole or trench into which he fell was dug or created by the appellant company. He accordingly developed his arguments around that single issue and posited that the learned trial magistrate misapprehended the evidence adduced by the respondent, as there was no proof at all that the appellant was to blame for the fall, if at all. He wondered too how gum boots or overall would have forestalled the accident. Counsel relied on **High Court Civil Appeal No. 110 of 2012: Kapsumbai Tea Estate vs. Duncan Ngugi** and **High Court Civil Appeal No. 184 of 2009: Timsales Ltd vs. Andrew Omoori Nyangeri** in urging the Court to allow the appeal.

[6] Mr. Yego, on the other hand, defended the judgment of the lower court. He submitted that the respondent had discharged the burden of proof and demonstrated that he was injured while at work due to the appellant's negligence; and that no rebuttal evidence was offered by the appellant, granted that it failed to call the respondent's supervisor, one **Mr. Kiptoo** to counter the respondent's evidence. Counsel, therefore, urged the Court to find as a fact that the appellant was in breach of its duty of care by failing to mark the particular ditch and thereby warn the respondent of its existence; and by failing to issue the respondent with protective apparel, including gum boots. Counsel 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.

[7] On quantum, it was the submission of **Mr. Yego** that the appellant had not demonstrated that the award of damages is inordinately high as to be a wholly erroneous estimate of the damage suffered by the respondent; or that the learned trial magistrate applied wrong principles in assessing damages. In defending the lower court's award and urging for the dismissal of the appeal, **Mr. Yego** referred the Court to **Joseph Henry Ruhui vs. Attorney General** in which it was held that:

> **"The test as to whether an appellate court may interfere with an award of damages was stated by Law, J.A. in Butt –vs- Khan (1977) 1 KAR as follows:-**
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> **An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely 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."**

[8] I am mindful that this is a first appeal, and that this Court is expected to undertake a re-evaluation of 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 well articulated 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..."**

[9] Before the lower court, the respondent testified as **PW3.** His evidence was that he used to work for the appellant, **Nandi Tea Estate Ltd** as a tea picker; and that, at the material time, he was working under the supervision of a **Mr. Kiptoo**. He further testified that he reported for duty as usual on **23 November 2007** but did not finish the day's work well for the reason that, in the course of his work, he fell into a hole in the appellant's tea plantation and sustained injuries on his back and chest, for which he was attended to at the appellant's dispensary. He later saw **Dr. Aluda** for purposes of examination and the compilation of a Medical Report as to his injuries.

[10] The respondent produced his pay slip for the month of **November 2007** before the lower court as an exhibit (marked **the Plaintiff's Exhibit 1)** in proof of the fact that he was an employee of the appellant. He blamed the appellant for his injuries, not only for failing to supply him with gum boots, but also for not placing a warning sign in connection with the hole into which he fell. It was his evidence that he did not know of the existence of that particular ditch and hence fell as he was carrying tea leaves to the buying centre. On that account he prayed for compensation in general and special damages together with interest and costs.

[11] The respondent called two other witnesses, namely, **Dr. Samuel Aluda (PW1)** and **Mr. Tom K. Kilel (PW2),** a Clinical Officer then based at Nandi Hills District Hospital. **Dr. Aluda,** a private medical practitioner in Eldoret Town, confirmed that he examined the respondent on **21 December 2010** in respect of injuries sustained at his workplace on **23 November 2007**. **Dr. Aluda** also confirmed that the respondent's injuries had already healed by the time and that they were soft tissue injuries. He produced his Medical Report as **the Plaintiff's Exhibit 1a** and the receipt for **Kshs. 1,500/=** which he charged for his services, as **the Plaintiff's Exhibit 1b** before the lower court. He added that he relied on the treatment notes given to the respondent at Nandi Hills District Hospital.

[12] Mr. Kilel, on his part, told the lower court that the respondent, a 28-year-old male, visited their facility on **23 November 2007**, with a history of having fallen down while on duty and sustained injuries on his chest and back. He further testified that the impression formed on examination was that he had suffered soft tissue injuries and was treated accordingly. **Mr. Kilel** produced the respondent's treatment book as **the Plaintiff's Exhibit 2** before the lower court.

[13] On behalf of the appellant, evidence was called from **Kennedy K. Mutai (DW1),** a clinical officer in the employ of the appellant at its **Kapsiwon Division**. He confirmed that he knew the respondent; and that he was one of the employees of the appellant at **Kapsiwon**. He explained that whenever an employee was injured while on duty, he would go to the supervisor in charge who would then issue him with a referral note to take to the dispensary for treatment. His evidence was that no injury was drawn to their attention on **23 November 2007**. He also denied that there were any trenches at the appellant's farm. He however conceded in cross-examination that he did not know much about field work; and that the respondent's supervisor would be best placed to testify about what exactly happened on **23 November 2007.**

[14] It is therefore manifest, from there foregoing summary, that there is no dispute that the respondent was, at all times material to the suit, employed by the appellant as a tea plucker. He produced his pay slip for the month of **November 2007** to confirm that he was an employee of the appellant and that he earned a salary for that month. The appellant had the opportunity to rebut the contention by the respondent that he reported for work on **23 November 2007** and worked for only part of the day, but it opted not to utilize that opportunity. It failed to either call the respondent's supervisor, or produce the attendance register in its possession to refute the respondent's allegations. Accordingly, it is my finding that the respondent was indeed on duty on **23 November 2007** as was alleged by him.

[15] In the premises, the key issues for determination before the lower court were whether indeed the Appellant got injured on **23 November 2007** while in the course of his work as a tea plucker; and if so, whether the injuries were attributable to the negligence of the appellant. As indicated herein above, the respondent's evidence 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 appellant's tea plantation and sustained injuries on his chest and back. He also stated that he immediately reported to his supervisor, one **Mr. Kiptoo**, and was given a chit with which he went to the appellant's dispensary for treatment. According to the respondent, he was attended to and given first aid at the appellant's dispensary within the tea estate, before being referred to Nandi Hills District Hospital for further management of his injuries.

[16] The respondent's evidence was corroborated by the evidence of both **Dr. Aluda (PW1)** and **Mr. Kilel (PW2)** as well as the treatment notes and Medical Report prepared by **PW1**. They all go to confirm that the respondent sustained injuries on his chest and back on **23 November 2007** in the course of his duty. In any event, that evidence was not refuted by the appellant; and although in his written submissions, counsel for the appellant stated that **DW1** produced both the Medical Register and the Accident Register as exhibits before the lower court, there was, in fact, no such evidence. All **DW1** said was that he had records of the dispensary. No specific register was produced. What was filed along with the witness statement of **DW1** were Leaf Collection Sheets and Staff Pay Roll, and even these were never formally produced and marked as exhibits before the lower court.

[17] Hence, in **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others** [2015] eKLR, in which the central issue in the appeal was the probative value, if any, of a document marked for identification but which was neither formally produced in evidence nor marked as an exhibit. The Court of Appeal held that:

> **"The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held as proved or disproved. First, when the document is filed, the document though on the file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; …Third, the document becomes proved, not proved or disproved when the court applies it judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case…a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness…we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they had simply been marked for identification and they have no evidential weight…"**

[18] Hence, in my re-evaluation of the evidence adduced before the lower court, it is clear to me that the respondent placed sufficient material before the lower court to demonstrate, on a balance of probabilities, that he sustained work-related injuries on **23 November 2007.** The respondent's assertion that the ditch that he fell into had been dug by the appellant's employees, servants or agents; and that there was no warning or notice of its existence, was also not refuted. It is therefore easy to see the distinction between the cases cited by counsel for the appellant and the facts of this case. In **Eastern Produce (K) Ltd (Kapsumbai Tea Estate) vs. Duncan Ngugi** [2015] eKLR, which is only of persuasive value, the respondent had not availed any medical evidence to prove his alleged injuries; and the appellant had called the respondent's supervisor and a nurse from its dispensary to produce its pertinent records.

[19] 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..."**

[20] 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, if it was the contention of the appellant that the respondent was himself negligent in the manner in which he went about his duties on the **23 November 2011**, which is what is alleged in paragraph 5 of the Defence, then evidence ought to have been led in that regard by the Respondent. No such evidence was presented before the lower court. Thus, there was no proof that the respondent willfully exposed himself to a risk which he knew or ought to have known or that he failed to exercise caution while engaged in his work. There was likewise no proof that the respondent failed to keep or maintain any proper look out or to have any sufficient regard or take precaution for his safety while engaged in his work; or that he failed to follow the safety regulations issued by the appellant. Certainly, there was no proof that he was furnished with protective gear and that he failed to wear them.

[21] This is pertinent, because **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** 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.

[22] 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.***

[23] There was therefore clear proof by the respondent 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 and that they posed a danger to its employees and therefore owed a duty of care in connection therewith, to alert its employees including the respondent, by way of a warning sign. There was therefore sufficient cause for the lower court to hold the Respondent 100% liable for the Appellant's injuries; and I so find.

[24] On quantum, the lower court's assessment took the view that an amount of **Kshs. 80,000/=** was a fair recompense for the respondent's injuries. It is noteworthy that, while positing that that award was excessive, counsel for the appellant did not present either the lower court or this court with authorities on comparable awards. 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."**

[25] Thus, the approach taken by **Hon. Wambilyanga, J.** in **HCCC No. 752 of 1993: Mutinda Matheka vs. Gulam Yusuf**, was 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."**

[26] 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."**

[27] 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. The Medical Report prepared by **Dr. Aluda** shows that the respondent had fully healed as at the time of examination, save for occasional pains which, in **Dr. Aluda's** prognosis, would subside with the use of analgesics. In the light of the foregoing, I have looked at comparable 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/=.**

[28] Thus, granted the nature of the Respondent's injuries, it cannot be said that the lower court's award was way off the mark. I therefore find no reason to interfere with it. 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 1b** produced before the lower court by **Dr. Aluda (PW1).** The same is therefore due to the Appellant.

[29] In the result, the appeal fails and is hereby dismissed with costs.

It is so ordered.

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

OLGA SEWE

JUDGE