REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CIVIL APPEAL NO. 124 OF 2013

TINDERET TEA ESTATES (1989) LTD.....APPLICANT

VERSUS

SUSAN AKAI EKARAPO.....RESPONDENT

(An appeal from judgment decree of A. Lorot (SRM) in Kapsabet PMCC No. 342 of 2010 delivered on 10.09.2013)

JUDGMENT

1. The appellant **TINDERET TEA ESTATE (1989) LIMITED i**s dissatisfied with the decision where the Respondent ***(SUSAN AKAI EKARAPO)*** was awarded general damages in the sum of Kshs.100,000/- and special damages of Ksh.1500/- after the appellant was found 100% liable for injuries she sustained while working for the appellant.

The appellant had denied liability.

2. The Respondent's case was that while picking tea on 16.09.09, at the appellant's tea estate, she was pricked by a stick protruding from the ground, resulting in injury. She stated that, the stick was part of the remnants of pruning that were usually left to remain on the ground as humus. However these prunings were not visible to the respondent as they were covered by the canopy of tea bushes, so she got pricked, it was her evidence that she was not provided with gum boots which could have given her some protection. She reported her injury to a supervisor named **ERIC,** who gave a referral chit to attend the estate dispensary. She was subsequently referred to Meteitei Sub-district hospital, then to **NANDI HILLS** district hospital for specialized treatment. She produced the medical records as exhibit.

3. On cross examination she explained that for the 5 years that she had worked as a tea plucker, the sticks left for pruning were never removed from the ground, and she could not have contemplated getting injured because the ground was covered under the canopy of tea bushes.

4. She was examined by **DR. FEROZ ALIBHOY** of Aga Khan Hospital in Kisumu who found that she had a scar on the left foot near the ankle area, - which injury he classified as soft tissue injury on the left part. There was a slight disfiguring scar at the left ankle joint – the medical report was produced as exhibit.

5. The appellant's field assistant **(WILSON KIPSIGEI LELEI)** who kept the muster roll, work allocation sheet and employee performance statement, testified that the Respondent had worked for the appellant but she left their employment. It was his evidence that on 16.09.2009, the respondent was not on duty as she had been referred to **NANDI HILLS** district hospital for checkup/follow-up as she had a history of back aches. He insisted that she was not injured on the date in questions saying the appellant maintained a list of all pricked patients referred to hospital on 16.09.09 (produced as D.Ex.1), and the respondent was not among them. He however conceded that her performance statement indicated that on 16.09.09, she was marked as sick.

6. On cross examination DW1 admitted that the respondent was attended to at the estate's on 16.09.09 then referred to Nandi Hills Hospital.

7. The nurse at **TINDERET ESTATE** dispensary **(JOAN NEKOYE WAFULA)** (DW2) told the trial court that from the Daily Sick Register, the respondent's name appeared, but she was not treated, and was referred to Nandi District Hospital for review. It was her contention that the respondent had suffered a lumbar injury in 2003 and claimed she was still experiencing back pains, hence the referral to Nandi Hills Hospital. She produced the Daily Sick Register as D.ex2.

8. Apparently the Respondent's name appeared in the original register but in the copy supplied to the respondent's counsel it was missing and the appellant's witness had no explanation for this. She however denied suggestion by Respondent's counsel that the appellant had falsified its records.

9. In making a finding in favour of the respondent, the trial magistrate noted that whereas DW1 claimed that the Respondent was not on duty on 16.09.09 produced a list of parties referred to hospital on the said date, his name also appeared on that list. Further that although the

appellant's witnesses claimed that the Respondent went to hospital on account of a back problem, treatment notes from Miteitei Health facility showed she was treated for a wound. The trial court was persuaded that the documents confirmed what the Respondent had stated and that indeed she was exposed to such injury for want of protective boots while performing her work. The appellant was thus held 100% liable.

The trial court also pointed out that neither party filed submissions to suggest what would be reasonable compensation and he thus awarded general damages of Ksh.100,000/-.

10. These findings were contested on appeal on the following condensed grounds.

- **The trial magistrate misdirected himself on the issue of liability and failed to consider the aspect of respondent's contributory negligence based on the evidence present.**

- **The trial magistrate ignored the principles applicable and relevant authorities on quantum and awarded damages which were excessively/inordinately high.**

- **The trial magistrate ignored principles applicable and relevant authorities in question and awarded damages which were excessively/inordinately high.**

11. The appeal was canvassed by written submissions wherein the appellant's counsel argued that he Appeal offered evidence which was not rebutted by the Respondent, and which demonstrated that the respondent was referred to hospital for other conditions not related to injuries suffered while on duty. Emphasis was laid to the record in the Daily Sick Register where the Respondent's name did not appear and counsel submitted that the evidence tendered by the Respondent was not sufficient to impart negligence on the Appellant's part.

12. On this ground the respondent's counsel – pointed out that the appellant had a dubious record where the original record included the respondent's name yet in the photocopy her name was missing, for reasons which could not be explained. It was his contention that this was a clear demonstration by the appellant to falsifying documents so as to defeat the Respondent's case.

He also pointed out that the original register confirmed that the Respondent was among the patients treated at the appellant's dispensary on 16.09.2009 but the diagnosis was not indicated. Furthermore that DW2 who claimed the appellant presented with a back ache, was not the one who attended to her, as the records showed she was attended to by **BETTY CHELAGAT** who was not availed to the court to deny or confirm the Respondent's evidence.

13. It was also pointed out that the Respondent's supervisor **ERICK CHEPKWONY** was not availed to deny the Respondent's claim about being injured while at work, nor were records such as the muster roll, task allocation sheet or green left weighment records produced to rebut the Respondent's evidence that she reported the incident to the supervisor one **CHEPKWONY.** Counsel also pointed out that the Respondent was aware of the pruned tea stumps, but failed to remove them or even provide the Respondent with protective boots thus exposing her to risk of injury.

He urged this court to be guided by the decision in **EASTERN PRODUCE (K) Ltd VS NICODEMUS NDALA Eld HCCA No.96 of 2010,** to find that the appellant was properly held to be liable and had a duty of care to the respondent.

14. Three factors definitely tilted the balance of probability against the appellant.

a) The denial that the Respondent ever went to its factory for medical attention, and ever supplied the respondent's counsel with altered record, to support such denial, only to be faced with the original record which showed her name as one of the patients. This obviously dented its credibility.

b) All the appellant's employees who the Respondent mentioned as having directly dealt with her on the date in question and were informed about the incident failed to attend court either rebut or confirm the Respondents' claims.

c) The respondent's evidence that;

i) **There were pruned tea stumps left on the ground,**

ii) **The said stumps were not visible as they were covered by a canopy of then bushes,**

iii) **The respondent was not provided with protective boots.**

I therefore cannot fault the trial magistrate's findings on liability.

There was no evidence presented to suggest that the Respondent was in any way/manner negligent and thus contributed to her mishap. Therefore I uphold the trial court's findings on liability at 100%.

15. On quantum of damages – the appellant's counsel submitted that given the nature of the injury and going by past decision such as the case of ***GILBERT ODHIAMBO OWUOR VS NZOIA SUGAR COMPANY BGM C.A NO. 46 OF 2010 (reported in [2012]*** Eklr where the plaintiff was awarded Ksh.50,000/= for pain and soft tissue injuries. On the basis of this, he submits that general damages of ksh.100,000/- excessive and awarded without any basis, saying Ksh.50,000/- is sufficient compensation.

16. The Respondent's counsel on the other hand, contends that the appellant has not demonstrated that the award of damages is inordinately high as to be wholly erroneous, nor is there anything to suggest that the trial magistrate applied wrong principles in assessing damages.

17. Indeed the test as to whether a court ought to interfere with an award of damages was stated by ***Law (J.A), in BUTT Vs Kha (1977) 1 KAR*** that:

> **"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent 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 as either inordinately high or low."**

Of course in assessing damages, the court does not just pluck a figure from the abacus and paste it as damages – there, must be definite parameters, which include but not limited to the nature of injuries, the residual effect/prognosis, and of course past decisions dealing with similar injuries.

In the present case, the trial magistrate did not specify the basis of the award, simply saying that having considered the nature of injuries, the sum of Ksh.100,000/- was adequate compensation. The medical report by **Dr. Alibhoy** indicated that the injury had healed with a slightly disfiguring scar at the ankle joint, and indeed the injury was classified as soft tissue in nature. Going by the past decision cited and the prognosis bearing in mind that the cited decision is over 5 years old, and taking into account the dwindling value of the Kenyan Shilling, and the current economic trends, I am of the view that Kshs.100,000/- was inordinately high, as to warrant this court's interfere by setting aside the said award and substituting it with an award of ksh.70,000/- (Seventy thousands only).

The special damages were merited and the same shall remain as awarded by the trial court.

The respondent shall bear the $^{1}/_{3}$ of costs of this appeal and appellant bears $^{2}/_{3}$ costs.

DELIVERED and **DATED** this 6th day of **FEBRUARY** 2019 **ELDORET**

H. A. OMONDI

JUDGE