REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 4 OF 2015

EASTERN PRODUCE LIMITED

(KAPSUMBEIYWA ESTATES)……APPELLANT

VERSUS

NJOMO AJIMBA MUKODO……RESPONDENT

(Being an Appeal from the Judgement and Decree of the Senior Resident Magistrate (G. Adhiambo) delivered on 17th day of December, 2014 in Kapsabet Principal Magistrate's Court Civil Case No.329 of 2011)

JUDGEMENT

Njomo Ajimba Mukodo, the Respondent herein, contended in the Lower Court that he started working at Kapsumbeiwa Tea Estate in 1999. On 26/6/2006, he was working at the said place as a Tea Plucker. At about 3:00 pm while taking tea leaves for weighing he was tripped by a stick which had been left after tea pruning. He fell down as a result and his right forearm was pricked and injured by a tea stump which was on the ground. He informed his supervisor one Livingstone Ruto, who took no action. He weighed the tea and proceeded to Nandi Hills District Hospital where he was treated as an outpatient. On 19/5/2011 he was examined by Dr. Samuel Aluda who indicated that he had sustained a pricked wound on the right forearm which was tender. By then the soft tissue injury had healed. He was charged Kshs.3,000/= for the examination and the report.

On 4/10/2011 he filed the suit against the Appellant claiming for Special and General Damages.

The Appellant denied the claim and averred that the Respondent was not seen at Kapsumbeiywa Tea Estate Khatum dispensary on the material day. He was also not referred to Nandi Hills District Hospital at the place, as the normal procedure would be. The Outpatient Register for the dispensary for the day does not have the Respondent's name as one of the Patients attended to on the material day.

One David Cheruiyot Bett who was allegedly the Supervisor at Eastern Produce Kapsumbeiywa, alleged on 26/6/2006 he received no injury report from the Respondent.

The Trial Court weighed the evidence and found the Appellant 90% liable and the Respondent 10% liable. General Damages were assessed at Kshs.100,000/= and Special Damages Kshs.3,000/=. Total award to the Respondent was 92,700/= plus costs and interest.

The Appellant dissatisfied with the said finding appealed to this Court on 12/01/2015. The main grounds of Appeal are that the Respondent's case was not proved on balance of probability and the Learned Trial Magistrate erred on all points of fact and law in as far as both liability and assessment of quantum is concerned.

The Appellant submitted on appeal that the Respondent's claim was not corroborated and cited the case of **DPP -vs- Kilbourne (1973) 1 ALL ER 440: (1973)** AC 720. Relying on Section 106 and 107 of the Evidence Act, the Appellant contended that he who alleges must prove his claim on balance of probabilities. On liability the Appellant averred that he owed the Respondent a statutory obligation but cannot be liable for damages arising out of an Employee's negligence. He cited the case of Purity Wambui **Murithi -vs- Highlands Mineral Water Co. Ltd., 2015 eKLR.**

The award of Kshs.100,000/= was said to be unfair and relying on the cases of **Scofinaf Limited -vs- Joshua Ngugi Mwaura Nairobi HCCA No.742 of 2003** and **Sokoro Saw Mills Limited -vs- Grace Nduta Ndungu Nakuru HCCA No.99 of 2003**, proposed General Damages of 80,000/= as fair and sufficient in the circumstance.

The Respondent submitted that he was injured while on duty and protective gear and warning of the danger at the place had not been given by the Appellant.

The Appellant had failed to establish that the Respondent was solely to blame for the injury. The injuries sustained were severe and commensurate with the award.

The two issues for determination is whether liability was well established to the required standard in law and the assessment of damages.

LIABILITY

As per the Factories and other places of work Act, Cap 514, Laws of Kenya, Section 53 Provides;

> ***Where in any factory, workers are employed in any process involving exposure to wit or to any injuries or offensive substances suitable protective clothing and appliances including suitable gloves, footwear and goggles and hand covering should be provided and maintained for use of workers.***

The appellant failed to prove that the Respondent was issued with protective gear. There was no evidence to corroborate the testimony of DW.2 that they gave the workers protective gear.

In **Purity Wambui Murithii -vs-Highlands Mineral Water Co. Ltd, 2015 eKLR** the Court held:

> ***"…….it therefore follows 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 employers' failure to ensure their safety."***

By failing to provide protective gear the appellant failed to ensure the safety of the Respondent. The Respondent was also slightly liable as he was aware of the sticks presence on the ground.

The Court did not err in its apportionment of liability.

QUANTUM

The Appellant failed to demonstrate that the award for quantum was excessive. The assessed amount is not too his and not too low in line with **Peter Kahugu & Another-vs-Ongaro, High Court, Nairobi, Civil Appeal No.676 of 2000 (2004) eKLR.** In the case, the Plaintiff suffered soft tissue injuries. An award of Kshs.80,000/= was granted.

The Appellant has not demonstrated that the Trial Court proceeded on wrong principles or misapprehended the evidence in some material aspect in arriving at the figure and thus the Appellate Court has no reason to interfere with the Judgment of the Lower Court as per **Butt -vs-Khan (1977) IKAR** which set out the test as to whether an Appellate Court can interfere with an award of damages. Therefore, this Court has no cause to interfere with the same.

I accordingly find the Appeal unmerited and is dismissed with costs to the Respondent.

Dated and Delivered at Eldoret this 13th day of March, 2019.

S. M. GITHINJI

JUDGE