REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 1 OF 2015

EASTERN PRODUCE (K) LIMITED..... APPELLANT

VERSUS

EDITH KAVERE.....RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate Honourable P. Mosiria in Kapsabet Civil Case No. 183 of 2011, dated 2nd December, 2014)

JUDGMENT

The Appellant instituted the appeal after being dissatisfied with the judgment in PMCC 183/11 Kapsabet, delivered on 2nd December 2014.

BRIEF FACTS

The Respondent sued the Appellant for injuries sustained on 31st January 2009 while ferrying tea leaves on the appellant's premises. She slipped and fell in an unmarked ditch and dislocated her left knee joint. The magistrate delivered judgment in favor of the Plaintiff by finding the appellant 100%

liable for injuries sustained. Judgment was entered at Kshs. 101,500 with costs and interest.

The Grounds for the appeal are;

a) The Learned Magistrate erred on liability which was not supported by evidence.

b) The Learned Magistrate erred by basing findings on irrelevant matters.

c) There was no basis on which the appellant could be blamed for the alleged injuries.

d) Assessment was inappropriate and irregular vis-à-vis the circumstances of the case.

e) The Learned Magistrate erred on all points of fact and law in as far as liability is concerned.

APPELLANT'S CASE

The appellant submitted that an injury alone cannot hold someone liable on negligence. The respondent has to prove a causal link between the injury and the negligence on the part of the appellant. The law does not impose a duty of care on an employer that goes beyond expectations of a reasonable employer.

The appellant relied on ***Sotik Tea Highland Estate v Francis Nyambeni (2001) eKLR*** where it was held that the law required an employee to take all reasonable precautions not to be injured while undertaking his duties.

The work required personal attendance and she had been an employee for 10 years so she was aware of the presence of the holes dug to prevent erosion. He further submitted that the respondents did not show how gumboots would have prevented the injury from occurring.

The appellant submitted that animals stay in the plantation and the existence of holes is undeterminable. The requirement to put signs goes beyond the normal call of duty. He further contends that the respondent did not call the supervisor as a witness to corroborate her evidence. He maintained that the respondent failed to produce evidence proving negligence. The witnesses brought by the respondent were medical practitioners in Eldoret and weren't cognizant of the respondent during employment or the injury.

The appellant had 2 witnesses. DW2, a supervisor testified that the respondent did not get injured. He produced the months' attendance checklist corroborating that the respondent was present and completed work.

DW1 a nurse at the dispensary produced an outpatient register for 31st January 2011 which did not show the respondent as one of the patients who were treated on that day. The appellant relied on section 106 and 107 of the Evidence Act on burden of proof. He further relied on the case of Vincent Okello v AG on the shift of the burden of proof.

He maintained that the negligence of the respondent caused the injury. He further stated that the award of Kshs 100,000 was too high. He referred to the medical report by Dr. S.I Aluda and stated that those were soft tissues injury that were healed by the time of examination. The award of Kshs. 50,000 was sufficient according to the appellant. The appellant relied on ***Eastern Produce v Joseph Mamboleo and Purity Wambui Muriithi v Highlands Mineral Water Co. Ltd.***

RESPONDENTS' CASE

The respondent submitted that she testified on oath and produced documents that proved that she was an employee and that she sustained injuries. She reported to work on the material date and her supervisor assigned her the duty of picking tea. During performance of her duty she slipped and fell and was taken to Nandi Hills District Hospital where she was treated as an outpatient. She produced PEX2 as proof.

She availed 2 witnesses. Dr. S.I Aluda produced the medical report and a clinical officer from Nandi Hills Hospital who produced a treatment chit as P.EX3.

The appellant availed Leonard Matsaria who claimed to be a supervisor but admitted that he did not supervise the respondent, as the respondents' supervisor was Kasira Matei. The appellant could not explain why the supervisor was not present as a witness yet he was still an employee of the appellant's.

DW2 admitted that the respondent was present for duty on that day but denied that she was injured without sufficient evidence to corroborate. The respondent submitted that the 38kgs shown as the weight she collected could have been picked before injury.

The respondents' supervisor was not availed thus there was no muster roll or accident register produced in court. The respondent relied on ***Eastern Produce v Nicodemus Ndala*** where the appellant was found to have breached duty of care by failing to cover a hole within the plantation.

The appellant failed to rebut the respondents' claim. The documents were exclusively filed by the appellant. DW1 also admitted that there were no treatment cards issued by the dispensary. The respondent maintained that she proved her case on a balance of probabilities.

The appellant failed to demonstrate that the estimate of damages was inordinately high and that the magistrate applied the wrong principles.

ISSUES FOR DETERMINATION:-

a) Whether the decision on Liability & Quantum is proper

The Respondent had worked for 10 years and was aware of the holes but she did not see it because it was overgrown with grass. It was the responsibility of the appellant to maintain a safe working environment for the employees. The appellant failed to do so by not marking out dangerous holes.

She claimed gumboots would have prevented the accident as she would not have slipped. She was wearing slippers. The appellant failed to prove that there was protective gear issued to the respondent and how it would not have helped if they had been issued. For the Respondent, the gumboots would have prevented her from slipping into the hole.

The appellant admitted that they did not have treatment notes or cards and no attendance cards were issued to patients. DW1 admitted this and further stated that they never kept the referral notes issued by supervisors.

DW2 confirmed that the worker carries nothing to show that she was being treated as the nurse issues nothing and the supervisor keeps the referral notes. Further, the supervisor was not called to testify. This appears to be a deliberate attempt to obstruct injured employees from seeking legal redress.

The Respondent produced P-Ex2 as proof that she was treated on the day of the injury therefore on a balance of probabilities it is likely she got

injured at the workplace. This is furthered by the fact that the appellant chose not to call a witness, the respondent's immediate supervisor, who would have settled the issue of her attendance to work and whether she was injured on the material date. It appears a calculated move to conceal information.

The Respondent however admitted that she was aware of the ditches and the holes. Having worked there for 10 years, she had a primary duty to keep a look out. I find that both parties were liable but to different extents. The appellant 80% and the respondent 20%. Further the assessed amount is not too high and nor too low in line with ***Peter Kahugu & another v Ongaro, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR*** where the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was granted. Therefore, the Quantum is a reasonable amount and the court finds no cause to interfere with the same.

The award to the Respondent of general damages of 100,000/- is adjusted to 80,000/- and special damages of 1,500/- reduced to 1,200/-, giving a total of 81,200/-. Each party to bear own costs on this appeal.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of May, 2019

In the absence of:

Mr. Kibichy for the appellant

Mr. yego for the respondent

And in the presence of Sarah – Court assistant