REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 1 OF 2014

EASTERN PRODUCE (K) LTD

(KAPSUMBEIYWA TEA ESTATE).....APPELLANT

VERSUS

JAMES MAINA KARUGU..... RESPONDENT

(An Appeal from the Judgment of the Principle Magistrate Honourable B. Mosiria in Kapsabet PMCC No. 23 of 2011, dated 10th December, 2013)

JUDGMENT

The appellant filed the present appeal after being dissatisfied with the decision in Kapsabet CMCC No. 23 of 2011 delivered on 10th December 2013. The respondent by way of a plaint dated 31st January 2011 instituted a suit against the appellant. The cause of action was that as an employee carrying out his duties of tea plucking on 4th august 2008 he sustained injuries when he slipped and fell into a ditch on the appellant's premises, a tea farm.

The trial court found in favour of the respondent and held the appellant 100% liable. The respondent was awarded kshs. 191,500/- plus costs and interest.

APPELLANT'S CASE

The appellant consolidated its grounds of appeal in submissions.

The appellant in submissions denied that the respondent was injured during his course of work. The matter of concern is that the respondent did not make any claim or report of being involved in an accident to the supervising officer on the material date. The respondent failed to tender any evidence that he was injured while working for the appellant.

The only documents tendered by the respondent was a treatment chit and Dr. S.I Aluda's medical report. The same only shows that he was injured but does not infer liability on the appellant and neither does it confirm where the accident took place.

The respondent did not call any eye witness who saw him fall in the ditch. The appellant cited the case of ***Kebirigo Tea factory v Richard Ochieng Obare (2010) EKLR*** on this point. Further, it submitted that the fact that an accident occurred does not connote liability on the appellant. It relied on the case of ***Nandi Tea estate v Eunice Jackson Were [2006] EKLR.***

The plaintiff's testimony as to occurrence of the injury is marred by contradictions. In the plaint the plaintiff indicated that the date of the accident was 4th august 2008 and produced the treatment card and the medical report dated 14th January 2011 issued three years after the alleged injuries. The injuries could have been sustained elsewhere. The appellant cited the case of ***Timsales Ltd. V Wilson Libuywa (2008) EKLR***. It further submitted that the plaintiff failed to discharge the burden of proof that was on him.

In relation to ground 2 and 7 the appellant submitted that in the unlikely event that the court finds that the respondent was injured in the appellant's premises, the respondent has to prove his claim for negligence. The respondent was solely responsible for the injuries.

The respondent failed to show a link between the appellant's negligence and his injury. In support of this the appellant cited the case of ***Statpack Industries v James Mbithi Munyao; Nairobi HCCA No. 152 of 2003.*** It also relied on the case of ***South Nyanza Sugar Co. Ltd. V Wilson Ongumo Nyakweba (2008) EKLR.***

The appellant provides its employees with protective gear and the respondent owed himself the duty to ensure that he worked in a safe

environment and ought to have foreseen the likely danger of failing to wear safety gear. The holding that the appellant was 100% liable should be set aside.

On ground 6 the appellant submitted that the trial court awarded damages that were inordinately too high. An award of kshs. 40,000/- would have been sufficient. The respondent sustained the following injuries;

a) The right ankle was swollen and tender

b) He sustained a dislocation of the left ankle joint.

In ***Scofinaf Limited v Joshua Ngugi Mwaura HCA 742 of 2003*** an award of kshs. 70,000/- was reduced to kshs. 20,000/- where only the right forearm was injured.

In ***Nakuru HCCC No. 99 of 2003, Sokoro Saw Mills Limited v Grace Nduta Ndungu*** the high court set aside an award of kshs. 90,0000 and substituted it with an award of kshs. 30,000/-.

RESPONDENT'S CASE

The respondent submitted that he produced crucial documents to support his

case including a treatment sheet from Nandi Hills District Hospital PExh2, a medical report from Dr. S.I Aluda PExh3, and a receipt for kshs. 1,500 and a demand letter which confirmed the injuries.

He testified that on 4th August 2008 he was on duty at the appellant's premises and he was assigned duties by his supervisor, Mr. Bett. While undertaking the duty he slipped and fell into an unmarked ditch injuring his right ankle and dislocated his left ankle. He reported the incident to his supervisor who issued him with a referral chit to go for medical assistance at the factory dispensary. He received first aid and went to Nandi District Hospital for treatment (PExh1) and he was issued with patient number 1236/08.

The respondent blamed the appellant for instructing him to work in unsafe conditions. The appellant did not mark the ditches or provide safety equipment which would have prevented him from falling.

The appellant availed 2 witnesses, the supervisor, David Bett and Samuel Kiplagat, a nurse at the tea estate dispensary. DW1 claimed the respondent was not on duty on the material date and therefore did not report any injury. He did not have the muster roll for that day. The task allocation sheet was not produced either.

DW2 stated that the respondent was seen at the clinic, evidence which contradicted the evidence of DW1.

DW2 testified that he was not on the premises on that day therefore his evidence is shaky. As per the entry in the clinical register, DW2 was seen at the clinic on that day. The appellant was unable to rebut the respondent's evidence by failing to produce any muster roll or task allocation sheet to justify its case. The respondent proved his case on a balance of probability and on the contrary the appellant was unable to rebut the respondent's case.

The respondent relied on the case of Eastern Produce Limited v Nicodemus Ndala and submitted that the appellant owed the respondent a duty of care which was breached when the appellant failed to cover a hole within the plantation exposing the respondent to danger.

No accident register was produced in court despite the admission of having custody of the same. No protective gear issuance records were produced in court either to confirm that the respondent was issued with protective gear. The respondent cited the case of Peter Wafula Juma & 2 others v R on the issue of evidence in rebuttal.

The appellant has not demonstrated that the award of damages is inordinately high as to be a wholly erroneous estimate of the damages suffered and that the learned magistrate applied the wrong principles in assessing damages. He cited the case of ***Joseph Henry Ruhui vs Attorney General (Nairobi HCCA No. 701 of 2001.***

The respondent sustained a pricked wound which was swollen and tender therefore the award of general damages of kshs. 100,000/- is commensurate with the injury sustained and took into account proper legal principles.

The appeal lacks merit and should be dismissed.

ISSUES FOR DETERMNATION

a) Whether the respondent sustained the injury on the premises

b) Liability & Quantum

WHETHER THE RESPONDENT SUSTAINED THE INJURY ON THE PREMISES

The respondent submitted that the injury was sustained on 4th August 2008. As per page 29 of the record of appeal, the clinical register

(Dexh-1) shows that the respondent was indeed treated at the clinic/dispensary. DW2 confirmed the same as per the proceedings on page 29 of the record of appeal, he however claimed that the treatment was for malaria but a perusal of the register does not confirm the same as the handwriting is illegible. The respondent also produced the treatment chit from Nandi hills district hospital evidencing that he was treated for the injuries sustained on the material date. In the premises, it is evident that he was injured on the premises of the Appellant, on the material date. The appellant failed to produce the checklist for the weighing of tea and the attendance checklist. Neither did he produce the accident register. These were crucial pieces of evidence that would have served to rebut the respondents' evidence and proven the contrary.

In the case of ***Bungoma Criminal Appeal No. 144 of 2011; Peter Wafula Juma & 2 others vs Republic***, the court held;

> ***"Evidential burden initially rests on the party with legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence…. Even in civil cases, when prima facie evidence is adduced by the plaintiff, evidential burden is created on the shoulders of the defendant who must be called upon to prove the contrary. In both cases, where evidential burden has been properly created in law, the accused and the defendant are not entitled to call for evidence in rebuttal, and where evidential burden is not discharged, judgment may be entered against the defendant –in case of a civil case – or a conviction against the accused – in case of a criminal case."***

I find that on a balance of probabilities, the respondent proved that he was injured on the appellant's premises in the course of his duties.

QUANTUM & LIABILITY

The appellant has a duty of care to employees to provide a safe working environment. The appellant failed in that regard by not marking the holes with warning signs.

Having worked there for 10 years, the Respondent had a primary duty to keep a look out and should have been aware of the ditches and holes. He admitted in cross examination that he was given gumboots and overalls to protect himself. I find that both parties were liable and the liability of the appellant is reduced to 70% and the respondent 30%. Further the assessed amount is not too high and not too low in line with ***Peter Kahugu & another v Ongaro, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR.*** There, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was granted. Therefore, the Quantum is a reasonable amount and this court has no cause to interfere with the same.

The award of damages is adjusted as follows:-

(1) General damages Kshs.190,000 less 30% = 133,000/-

(2) Special damages Kshs. 1,500 less 30% ….= 1,050/-

Total damages 134,050/-

Costs and interest to the Respondent

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of October, 2019

In the presence of:

Mr. Kipkurui holding brief for Mr. Yego for the Respondent

And in the absence of Mr. Kibichy for the Appellant

Ms Abigael – Court Assistant