**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 26 OF 2012**

**KAPCHORUA TEA ESTATE……..APPELLANT**

**VERSUS**

**HELLEN KIMUMA ONGADI……RESPONDENT**

***(An appeal arising from the judgement of G.M. Mutiso (RM) in Kapsabet PMCC NO.195''B'' of 2002 delivered on 21/2/2012)***

**JUDGMENT**

1. The appellant **(KAPCHORUA TEA ESTATE)** has appealed the decision where judgement was entered in favor of **HELLEN KUMUMA ONGADI** (The respondent) on liability at 80% and general damages plus special damages awarded at Kshs. 81200/-. The appellant being aggrieved by the decision of the Honorable G.M MUTISO (R.M) in Kapsabet PMCC NO.195"B'' of 2002 delivered on 21/2/2012 prefers this appeal on the grounds :-

i) THAT the trial court erred in law and/or fact in making an award in favor of the Respondent when his presence on duty at the Appellant's work place at the material time was not established.

ii) That the trial court erred in law and in fact in making an award in favor of the Respondent for an alleged injury not supported by medical evidence.

iii) That the trial court erred in law and in fact in making an award in favor of the Respondent when the alleged cause of action was never corroborated by sufficient evidence.

Iv) That the trial court erred in failing to take cognizance of the clear variance in the alleged dates of injury in the pleadings as well as the evidence adduced as well as the nature of the injuries allegedly sustained and which was material to the claim.

v) That the trial court erred in law and in fact in totally disregarding the Appellant's defence, evidence as well as submissions before reaching his decision.

v) That the award of Kshs. 100,000/= in favour of the plaintiff was totally unwarranted, unjustified and against the principles of the law and/or practice.

2. The background to this matter is that the respondent who was employed as a tea-picker by the appellant, filed a suit against the appellant seeking general and special damages for injuries she sustained on 7th November 2001, when she slipped and fell in a ditch within the appellant's premises, resulting in a tree stump pricking her leg.

3. The respondent claimed to have informed her supervisor named **MADIBE** about the incident and was given a note to go to **Kapchorwa** dispensary where she was treated the next day. Her condition deteriorated and she was transferred to **Nandi Hills District hospital**. She attributed the incident to negligence and breach of statutory duty on the part of the appellants saying they failed to provide her with gum boots and warn her of the presence of the hole.

4. The appellant denied the same incident saying the respondent did not have treatment notes reflecting the date the incident occurred.

5. In the evidence presented at the trial the respondent testified as PW1 and informed the trial court that she was plucking tea in the appellant's field No.8 on 7/11/2001 when she stepped into a hole which had been dug by the appellant's employees and which was hidden under a thicket.

**PW4 (ELISHA MAGUT)** a nurse at **KAPCHORWA TEA ESTATES** told the trial that he was on duty on 07/11/2001 but he never saw the respondent at the health facility on that date or that year. He recalled that the respondent had been treated for a festering wound on her

left leg in July 2001 and she again visited the dispensary with the same complaint in January 2002. He also presented patient records from the facility and apparently the respondent's name did not appear anywhere!

**DAVID MBOGO (PW5)** the appellant's manager confirmed that the respondent was employed by the appellant upon being shown a form purportedly issued from SIRWA manager in relation to the respondent's injuries told the trial court that he was never given a copy of the said form.

**DR KALYA (PW2)** of **NANDI HILLS HOSPITAL** informed the trial court that the respondent was first attended to at the hospital on15.12.2002 when a small piece of wood was found in a septic wound on her left leg.

SHEM KIBET (DW1) who maintained the record of workers told told the trial court that the respondent worked the whole day and was on duty even on 8th November (the next day after the day she allegedly got injured). He explained that it is the Farm Clerk who gives him record whenever a worker is injured

In his judgment the trial magistrate held that just because there were no records from the dispensary to prove that the respondent got injured on 07/11/2001 did not mean she was not injured as there was a document showing that she was treated for a septic wound on 13/12/2001.

The trial magistrate held that the appellants were liable because they did not deny being responsible for the hole which was dug in the field, and that they failed to warn the respondent of its existence or provide her with gumboots which would have ameliorated the injury.

However the trial court was of the view that the respondent was not all together blameless as she ought to have taken care to avoid the injuries. Liability was thus apportioned at 80% against the appellant and 20% against the respondent. **General damages for pain and suffering were awarded at Ksh 100,000/- plus special damages of Ksh 1500/- less the apportioned contributor negligence on the respondent's part to give a net award of Kshs 81,200/-**

In their submissions, the Appellant's counsel stated that the Respondent alleged that she was injured on 7th November, 2001 but did not produce any treatment notes to proof the same and also, that her name did not appear in the on the sick register for that day.PW4 stated that the only time the Respondent visited their clinic was on 13th December, 2001.

Also, the Appellants submitted that the Respondent failed to proof the particulars of negligence of the Appellant. The Respondent stated that she fell in a trench and blamed the Appellant for failing to warn her of the existence of the trench and that she was not issued with gumboots.

On quantum, the Appellant stated that the Respondent sustained a prick wound to the leg and the doctor classified it as a soft tissue injury. It was their submissions that the award of Kshs. 100, 000 was inordinately high in the circumstance considering the fact that they minor injuries.

The Respondents in their submission stated that the trial court correctly found that the Respondent was the Appellants employee and that she was on duty on the material day. This fact was admitted by the defendant's witness **DW 1, SHEM KIBET** admits so.

It was further not disputed that the appellant did not provide the plaintiff with any protective clothing and that the trench that the plaintiff fell into while in the course of duty a fact which the appellant did not deny.

On quantum, the Appellant's challenged the courts judgment on both liability and quantum but have not demonstrated that the award was too high or that the court did not apply the principles of law judiciously.

As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of **SELLE&ANOTHER VS ASSOCIATED MOTOR BOAT CO. LTD &ANOTHER (1968) EA 123**, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect. In addition, this Court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law. The Court of Appeal in the above case further held that:

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

From the above decisions which echo section 78 of the Civil Procedure Act, it is clear that this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

It is now settled law that the duty of the first appellate court is to reevaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions – see **STANLEY MAORE -VS- GEOFFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002 – "the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses."**

In considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court "**will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles" - EPHANTUS MWANGI AND GEOFFREY NGUYO**

**NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR,**

**ISSUES FOR DETERMINATION**

The main issue for determination in this appeal is whether there was evidence confirming the presence of the Respondent at the Appellant's work place at the material and sustaining an injury thereto. Was the alleged cause of action ever corroborated by sufficient evidence to prove the respondent's claim on a balance of probabilities?

Everything that the appellant presented, whether it was the treatment notes, or her own witnesses, negated her claim that she got injured on the material date. Even if she was to be given the benefit that the appellant would not bring the records to court so as to defeat her claim, then how is it that she did not have any treatment document supporting her version of events, even if she had gone to seek treatment a week later. Instead the best that can be presented is a document relating to 15th December 2001

> ii) That the trial court erred in law and in fact in making an award in favor of the Respondent for an alleged injury not supported by medical evidence. The respondent had an injury but as to whether it was an old injury, or it was sustained elsewhere other than the place of work was not established. Actually that form shown to PW5 was asking for verification regarding the respondent's injury and read thus: "Sirwa Manager, please verify for dispensary records do not support this" It is instructive that the respondent did not have treatment documents covering the period in question, and on cross examination she stated:-
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> > "**…**Yes that is the only treatment document I have brought. Yes the first day of treatment is 15.2.2002….yes it refers to 20.02.2002. It was on the 20th that we said the leg was healing. Yes I never went back after that. Yes the removal of the stick was on 16.2.2002…"
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> iii) Once these two limbs were not established on a balance of probabilities then the trial court erred in law and in fact in making an award in favor of the Respondent when. That the trial court erred in failing to take cognizance of the clear variance in the alleged dates of injury in the pleadings as well as the evidence adduced as well as the nature of the injuries allegedly sustained and which was material to the claim.

Consequently there is reason to interfere with the finding of a fact by the trial court as it was not any evidence and there was a misapprehension of the evidence. The judgement entered herein is thus set aside. The appeal is merited and is allowed on grounds that the respondent failed to prove her claim. The costs of the appeal are awarded to the appellant.

**DELIVERED and DATED this 18th day of July at ELDORET.**

**H. A. OMONDI**

**JUDGE**