REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 143 OF 2012

METRINE MUHONJA KADANYA ..... APPELLANT

-VERSUS-

EASTERN PRODUCE (K) LIMITED ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Kapsabet in Kapsabet PMCC No. 13 of 2012 dated 19 December 2012 by Hon. G. Adhiambo, RM)

JUDGMENT

[1] This appeal arises from the decision of the Resident Magistrate, **Hon. G. Adhiambo**, in **Kapsabet PMCC No. 13 of 2012: Metrine Muhonja Kadanya vs. Eastern Produce (K) Limited**. In that suit, the Appellant, **Metrine Muhonja Kadanya**, had sued the Defendant, **Eastern produce (K) Limited,** claiming General and Special Damages for injuries allegedly sustained by her on **21 October 2011** while on duty working for the Defendant as a tea plucker. The Appellant had alleged that it was on account of the negligence of the Respondent that she slipped and fell into an unmarked ditch while plucking tea, and was pricked on her left eye.

[2] Upon hearing the case, the Learned Trial Magistrate was far from satisfied that the Appellant had discharged the burden of proof in the matter, and accordingly dismissed the suit with costs. Being aggrieved by that decision, the Appellant filed this appeal, citing six grounds of appeal thus:

> **[a]** The Learned Trial Magistrate erred in dismissing her case in favour of the Defendant without any legal basis;
>
> **[b]** The Learned Trial Magistrate erred in failing to appreciate the overwhelming evidence in favour of the Appellant;
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> **[c]** The Learned Trial Magistrate erred in failing to appreciate Plaintiff's written submissions;
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> **[d]** The Learned Trial Magistrate erred in failing to hold that the Plaintiff had proved his case on a balance of probabilities;
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> **[e]** The Learned Trial Magistrate erred in failing to hold that the Defendant had failed to rebut the Plaintiff's case;
>
> **[f]** The Learned Trial Magistrate erred both in law and in fact in failing to find in favour of the Appellant.

[3] Accordingly, the Appellant prayed that the appeal be allowed and the Judgment of the Learned Trial Magistrate be set aside and substituted with an order allowing the Appellant's case with costs of the appeal and in the subordinate court matter. It is now trite that, in a first appeal such as this, it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the lower court reached the right decision. This principle was aptly expressed in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[4] The appeal was urged by way of written submissions. The Appellant's written submissions were filed on **6 February 2018,** while the Respondent's written submissions were filed on **1 March 2018**. In the Appellant's written submissions, Learned Counsel **Mr. Changi**, summarized the evidence that was adduced before the lower court and thereupon made the assertion that the decision of the Learned Trial Magistrate was based on speculative reasoning at pages 75 and 76 of the Judgment, given the evidence of **Agnes Chepkosgei Melly (DW2),**

that the Appellant was treated at **Kapsigak Dispensary**. According to him, the evidence adduced by the Respondent in response to the Appellant's claim was inconsistent, incoherent and incredible; and therefore insufficient to rebut the Appellant's case.

[5] Counsel for the Appellant relied on **Bungoma Criminal Appeal No. 144 of 2011:Peter Wafula Juma & 2 Others vs. Republic** for the holding that:

> **"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 entitled to call for evidence in rebuttal, and where the 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."**

[6] Thus, it was the submission of **Mr. Changi** that the Appellant discharged her burden of proof, whereupon the evidential burden shifted to the Defendant, but that the Defendant did not effectively discharge that burden by way of rebuttal. Counsel also relied on **Eldoret High Court Civil Appeal No. 96 of 2010:Eastern Produce (K) Limited vs. Nicodemus Ndala**, wherein **Hon. Gacheche, J.** found that the Appellant owed the Respondent a duty of care which was breached when the Appellant failed to cover a hole within the tea plantation, thereby exposing the Respondent, a tea plucker, to danger. The Respondent fell into an unmarked ditch within the tea plantation while plucking tea for the Appellant and the Court held the Appellant liable in negligence.

[7] In the premises, Counsel for the Appellant urged the Court to find that the Learned Trial Magistrate erred in not properly analyzing the evidence on record, and consequently arrived at the wrong decision. He prayed that the appeal be allowed and the Judgment delivered by **Hon. G. Adhiambo, RM,** on **19 December 2012** be set aside and be replaced by a Judgment in favour of the Plaintiff for the sum of **Kshs. 150,000/=** plus costs and interest. On quantum, Counsel relied on **Nyeri High Court Civil Case No. 320 of 1998:Catherine Wanjiru King'ori & 3 Others vs. Gibson Theuri Gichubi** in which **Hon. Khamoni, J.** awarded the sum of **Kshs. 300,000** on **1 July 2005** for soft tissue injuries.

[8] Ms. Ondeyo, Learned Counsel for the Respondent, on the other hand, defended the decision of the Learned Trial Magistrate, arguing that she was right in reaching the decision she reached, and in dismissing the Appellant's suit on the ground that it was not proved on a balance of probabilities. According to Counsel, there was no evidence adduced by the Appellant to show that she had sustained any injuries in the course of her duties, or at all; and that for the Respondent to be held liable for any injuries allegedly suffered by the Appellant, she had to establish not only that the same were sustained in the course of employment, but also that the same were attributable to the negligence on the part of the Respondent.

[9] Ms. Ondeyo relied on **Nandi Tea Estates vs. Eunice Jackson Were [2016] eKLR** for the proposition that the existence of an injury and subsequent treatment in respect thereof, is no proof that the alleged injury was sustained at the place of work. She pointed out the inconsistencies and contradictions in the evidence that was presented by the Appellant before the lower court, including the incongruity in the medical evidence, and urged the Court to uphold the decision of the Learned Trial Magistrate and dismiss this appeal with costs.

[10] From a review of the evidence adduced before the lower court, there appears to be no dispute that the Appellant was, at all times material to the suit, an employee of the Respondent. She was engaged as a tea plucker in the Respondent's tea plantation; and it is common ground that she was on duty on the **21 October 2011,** the date when the accident is alleged to have taken place. Both sides are in agreement that the Plantation records confirm that the Appellant plucked no less than 28 kilograms of tea leaves on that day; her contention being that this was before she got injured. Hence, the key issue that fell for determination before the lower court was whether indeed the Appellant got injured in the course of her work as a tea plucker; and if so, whether the injury was attributable to the negligence of the Respondent.

[11] In connection with the alleged occurrence, the evidence of the Appellant before the lower court was to the effect that the immediately reported the incident to her supervisor, **Lameck Arusei**. The said **Lameck Arusei** testified before the lower court as **DW1** and stated thus:

> **"I work at Chemoni tea estate as a supervisor. I have worked there for 11 years. I know Metrine she used to work at the estate as a tea plucker. She worked under me for about 4 months. On 21/10/11 she came to work. We were both on duty nothing out of the ordinary took place. She plucked 28.5 kgs of tea leaves. I have records to prove the same. This is the attendance checklist..."**

[12] Hence, **DW1** denied that any such occurrence on **21 October 2011** as was alleged by the Appellant. **DW1** specifically asserted, in cross-examination, that the Appellant did not report to him that she had sustained an injury. It was also his evidence that it was a requirement for all those who were injured on duty to be provided with referral notes for purposes of treatment and follow up of their cases. He was emphatic that, since the Appellant did not report her alleged injury, he did not issue her with any referral note. Further to the testimony of **DW1**, the Respondent called **Agnes Chepkosgei Melly (DW2),** a Clinical Officer at its dispensary, whose evidence was that:

> **"...I did not attend to the plaintiff on 21/10/2011 personally. I have the original records of 21/10/2011...The name Metrine Muhonja does not feature anywhere implying that she was not treated at the dispensary on 21/10/11. We record all ailments whether natural or injuries on this register. We cannot treat someone and not make entry for purpose of accountability for the drugs issued and also for reference. According to records the plaintiff would be lying to say that she was treated at the dispensary on 21/10/ 2011. Metrine was treated on 22nd and not 21st, she was treated for an eye infection ... The history of the patient was taken on 22/10/2011 and not 21/10/2011. She was treated for an eye infection. I have the original register. The history of the patient was taken on 22/10/2011. She did not give a history of injury. She only complained of eye pain and irritation. If a patient comes with a referral note from the supervisor we retain it and it will be irregular for a patient to have a note from the supervisor after treatment..."** (as lifted from the original handwritten proceedings of the lower court).

[13] It is manifest therefore that, whereas there was a set procedure for handling workplace injuries, the Appellant opted not to follow that process; and what was her explanation for this state of affairs? According to the Appellant, it was the supervisor, **Mr. Arusei**, who told her that since the dispensary had been closed, she could go for treatment the next day; and that the following morning, she went to **Kipsagat** dispensary where she was treated. As has been pointed out herein above, the supervisor, **Mr. Arusei** (**DW1** before the lower court), denied these allegations; and his evidence was supported by the Clinical Officer who was then in charge of the Company dispensary, whose evidence it was that the dispensary operates on a 24 hour basis, and that the **21 October 2011** was no exception.

[14] There were other contradictions and inconsistencies noted by the Learned Trial Magistrate, such as the Appellant's contention that she was treated at **Nandi Hills Hospital** on **22 October 2011**, yet the evidence of **PW2,** the Clinical Officer from **Nandi Hills Hospital** to the lower court was that she was attended to on **25 October 2011**. I would therefore find no fault in the Learned Trial Magistrate's conclusion that the testimony of the Appellant and her witness left many questions unanswered and therefore that she had failed to prove on a balance of probabilities that she had sustained an eye injury while on duty working for the Defendant on **21 October 2011.**

[15] Having come to that conclusion, the Learned Trial Magistrate was under no obligation to consider the issue of liability or damages. Here is how she expressed herself in that regard:

> **"It is my humble view that the issue of liability can only arise after it has been proved that the plaintiff sustained an injury while on duty working for the defendant. An employer is not liable for all the misfortune that befalls his employee. It must be proved that the employer was negligent and that as a result of negligence the employee suffered damages. There must be a causal link between the negligence of the defendant and the injury sustained by the plaintiff. In the instant case it has not been proved on a balance of probability that the plaintiff sustained an eye injury let alone while on duty working for the defendant and as such the issue of liability does not arise. The issue of damages is also dependent on the issue of liability which I have earlier on made a finding that it does not arise for the reasons earlier fore stated and as such I also find that the issue of damages does not arise..."**

[16] Thus, in sum, it cannot be said that the Learned Trial Magistrate dismissed the Appellants case without any legal basis; or that she failed to appreciate the evidence adduced in the matter. To the contrary, the lower court record confirms that she set out and analyzed in her Judgment the totality of the evidence adduced by the parties and that way was able to arrive at a balanced conclusion. The record further shows, at page 73 of the Record of appeal that the Learned Trial Magistrate paid attention to the Appellant's written submissions. Thus, having reconsidered the entire record of the lower court, I am far from persuaded that the Learned Trial Magistrate erred or misdirected herself in any way that would my disturbing her decision. It bears repeating the words of **Sir Kenneth O'Connor** in **Peters vs. Sunday Post Limited [1958] EA 424** that:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[17] The foregoing being my view of the matter, I would dismiss this appeal, which I hereby do; and as the Appellant was only a casual labourer who appears from the lower court record to have since ceased working for the Respondent, it is hereby ordered, in the interests of justice, that each party shall bear own costs of the appeal as well as costs of the lower court suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JULY 2018

OLGA SEWE

JUDGE