



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL DIVISION

CIVIL APPEAL NO. 100 OF 2014

EASTERN PRODUCE (KENYA) LTD.....APPELLANT

VERSUS

AGNETA ASANI MBULE.....RESPONDENT

(Being an appeal from the judgement and decree of the Principal Magistrate Court at Kapsabet in Kapsabet PMCC NO. 241 of 2011 on the 17th July 2014 by the learned Resident Magistrate Honourable G. Adhiambo)

JUDGMENT

The Appellant, Eastern Produce Kenya Ltd, was the Defendant in **Kapsabet Principal Magistrate Civil Case No.241 of 2011**. The suit was filed by the Respondent who sought special and general damages for injuries sustained on 5th February 2009 when she allegedly slipped and fell down while working at the Appellant's Kibabet tea farm. The Respondent blamed the accident on the Appellant's negligence. In her view, the Appellant owed her a statutory duty to provide her with a safe working environment. The Appellant denied liability for the Respondent's injuries and claimed that she contributed to the same. After full trial, the trial magistrate found that the Respondent had proved her claim to the required standard. The trial court held that the Appellant was 100% liable for the injuries sustained by the Respondent. As such, judgment was entered in favour of the Respondent in the sum of Kshs.120,000/- in general damages, Kshs.1,500/- special damages as well as costs of the suit and interest. The Appellant was aggrieved by that decision and filed an appeal to this court.

In the Memorandum of Appeal, the Appellant raised several grounds of appeal challenging the trial magistrate's decision. The Appellant was of the view that the Respondent's case was not proved to the required standard. He was aggrieved that the learned magistrate exaggerated the Appellant's liability despite the evidence on record. The Appellant complained that the learned magistrate's judgment did not establish or set out proper grounds for her findings. The Appellant stated that the trial magistrate misconceived the evidence on record as well as all the issues for determination. Further, the Appellant was aggrieved that the learned magistrate based her decision on irrelevant considerations. In its view, the learned magistrate should have held that the Appellant's case in defence was unchallenged. Finally, the Appellant was of the view that the learned magistrate erred on all points of fact and law in so far as both liability and award of damages was concerned. For the above reasons, the Appellant urged the court to set aside the trial court's decision in entirety and allow this appeal with costs.

At the hearing of the Appeal, the Appellant presented written submissions in support of the appeal. The Respondent on the other hand did not file any written submissions on the Appeal. This court shall revert to the arguments made in the submissions after briefly setting out the claim as pleaded and the evidence adduced during trial.

In the Plea, the Plaintiff pleaded that the Defendant owed her a statutory duty to take all reasonable precautions for her safety while she was working in the Defendant's tea farm. For that reason, she attributed the injuries she sustained on 5th February 2009 to the Appellant's negligence. The particulars of negligence were stated, *inter alia*, as non-provision of protective devices and clothing, failure to keep a safe working place and failure to take any measures to prevent the accident from occurring. The injuries were particularized as a pricked wound on the right knee which was tender and a dislocation of the right knee joint.

PW1, Dr. Samuel Aluda, told the trial court that on 25th May 2011, he examined the Respondent. She claimed she was injured on 5th February 2009 while on duty. He stated that the injuries had healed at the time of examination which was about two years and three months later. He confirmed that the same were soft tissue injuries but he could not tell whether or not the Respondent had suffered a dislocation. He stated that he conducted a physical examination and also relied on the treatment notes from Nandi Hills District Hospital dated 5th February 2009. Thereafter, he prepared medical report and was paid Kshs.1,500/- for which he issued a receipt. He produced the medical report and the receipt as ***P.Exhibits 1a*** and ***1b*** respectively. He also produced the treatment notes from Nandi Hills District Hospital as ***Exhibit 2***.

PW2, the Respondent herein, testified that on 5th February 2009, she was on duty picking tea leaves at the Appellant's Kibabet Tea Estate where she was engaged as a tea plucker. As she was going to get her tea weighed, she slid and fell on a tea stem. She sustained an injury on her right leg, her knee dislocated and the stem cut her knee. She told the trial court that a new colleague whose name she could not recall

lifted her up and took her to the weighing area. She then reported the incident to her supervisor Peter Ndeda who referred her to Kibabet dispensary where spirit was applied on the bleeding wound. Thereafter, she was referred to Nandi Hills District Hospital where she was taken with the company's welfare vehicle. The Respondent blamed the Appellant for not providing her with gumboots, overall and gloves and denied injuring herself purposely. Upon cross examination, she stated that it was muddy as it had rained. This caused her to slide and fall as there was a hole which she did not see until after she had fallen. She reiterated that she was never provided with gumboots which would have prevented her from sliding. She insisted that the supervisor gave her a referral note although she did not avail it in court as it remained in the dispensary. She reiterated that the Appellant was to blame for the injury and denied contributing to the same.

In the Defence, the Appellant denied liability for the Respondent's injuries and claimed that she substantially contributed to the same. DW1, Peter Kipkoech Cheruon, who worked as a field plucking supervisor at the Appellant's Kibabet Tea Estate confirmed that the Respondent was a tea plucker at the Appellant's tea estate. He testified that he was the supervisor in charge of the Respondent on 5th February 2009. He however insisted that the Respondent never reported the alleged injury to him for referral to the dispensary, as was practice in the Appellant's company. He told the trial court that that was proof that she did not sustain any injury while on duty. He confirmed that he had a checklist showing that the Respondent was on duty on 5th February 2009 and plucked 22kgs of tea leaves. He produced the checklist as **D.Exhibit 1**. On cross examination, DW1 stated that there are three supervisors at Kibabet namely Peter Ndeda, David Chemobo and himself. However, he reiterated that the Respondent was under his supervision on 5th February 2009 and that nobody was injured in his zone on that day. He however did not produce proof of the same.

DW2, Basscillisah Ludenyo, a nurse from the Appellant's Kibabet tea estate told the court that the Respondent's name did not appear on the dispensary's out-patient register of 5th February 2009. This therefore meant that she did not get injured as alleged and did not attend the dispensary for treatment. She produced a copy of the outpatient register as **D.Exhibit 2**. On cross examination, she stated that she joined Kibabet dispensary in June 2011 and confirmed that she did not know what transpired at the health facility prior to that. The court however confirmed that the register she had produced was for Kipkoigen dispensary and not Kibabet dispensary.

In the submission filed by the Appellant in support of the Appeal, the Appellant submitted that the trial magistrate erred by failing to apportion liability between the Appellant and the Respondent. The Appellant argued that if indeed the Respondent slipped, fell down and sustained injuries, then the injuries suffered were self-inflicted. As such, the injuries were outside the scope of the Appellant's duty hence the Appellant was not liable. Further, the Appellant asserted that the employer's duty at common law is to take reasonable steps to ensure the employee's safety but not baby sit or watch over the employee constantly. The Appellant cited the case of **Stat Pact Industries -vs- James Mbithi Munyao [2005] eKLR** where it was held that a party who alleges to have been injured as a result of someone's negligence must prove that there was a causal link between that person's negligence and his injury. In the Appellant's view therefore, the trial magistrate erred by arriving at 100% liability against the Appellant.

As regards the issue of quantum, the Appellant submitted that the trial magistrate's award of damages was manifestly excessive. According to the Appellant, an award of Kshs.30,000/- would have sufficed in view of the injuries sustained by the Respondent. The injuries as pleaded by the Respondent were a pricked wound on the right knee which was tender and a dislocation of the right knee joint. To support these submissions, the Appellant relied on the case of **Socfinaf Company Limited -vs- Joshua Ngugi Mwaura [2005] eKLR** in which the Plaintiff was awarded Kshs.20,000/- in general damages. The Appellant also cited the case of **Sokoro Saw Mills Limited -vs- Grace Nduta Ndungu [2006] eKLR** where the appellate court substituted the trial court's award of Kshs.90,000/-with Kshs.30,000/-.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion whether or not to uphold the decision of the trial court. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See **Selle -vs- Associated Motor Boat Ltd & Others [1968] EA 123**). Further, this court will only interfere with the trial court's decision if the same is founded on wrong principles of the law or if the findings of facts are at variance with the evidence adduced. (See **Nkuba v Nyamiro [1983] eKLR 403**).

In the present appeal therefore, there are three issues for determination. First, whether the Respondent proved that she sustained the alleged injuries while on duty working for the Appellant. Secondly, if the first issue is answered in the affirmative, whether the Appellant is liable for the injuries sustained and thirdly, whether the trial court's assessment of damages was fair in the circumstances.

In the judgment delivered on 17th July 2014, the trial court found that the Respondent proved that she sustained a dislocation of the right knee and a cut wound on the right knee while on duty working for the Appellant on 5th February 2009. This was in view of the treatment note dated 5th February 2009 from Nandi Hills Hospital produced in evidence. The treatment note indicated that the Respondent sought treatment for the aforesaid injuries in the health facility on that day. Further, according to the Trial magistrate, the extract of the outpatient register relied on by DW2 as proof that the Respondent did not attend the Appellant's dispensary as claimed was for Kipkoigen dispensary and not Kibabet dispensary where the Respondent was referred to.

In addition, the Respondent testified that on the material day, she was being supervised by Peter Ndeda. DW2, Peter Cheruon, confirmed that Peter Ndeda was indeed one of the Appellant's field supervisors. He however insisted that on the material day, the Respondent was under his supervision but did not avail any proof of the same. Instead, he produced an attendance checklist showing the Respondent was on duty but not him. The Appellant did not also deem it fit to call the said Peter Ndeda who is its employee to confirm or deny the allegations. In view of the foregoing, this Court is in agreement with the trial court's finding that the Respondent was injured while on duty.

As regards the issue of liability, the Respondent blamed the injuries on the Appellant's negligence. It was her case that the Appellant owed her a statutory duty of care to provide her with a safe working environment. She testified that the Appellant failed to provide her with gumboots which would have assisted her to have a firm grip and prevented her from sliding since the place was muddy and sloppy. This court has reviewed the evidence on record and confirmed that none of the Appellant's witnesses rebutted this assertion. They did not avail any proof that the Respondent was provided with any protective gear that would have prevented the fall which resulted in the injuries sustained. Instead, the Appellant was of the view that the Respondent solely and/or substantively contributed to her injuries. However, the trial court found that the Appellant did not prove contributory negligence on the part of the Respondent and found the Respondent liable

100%.

This court has reviewed the particulars of negligence pleaded in the plaint. The Respondent pleaded, *inter alia*, that the Appellant failed to provide her with a safe working place. She also pleaded that the Appellant failed to provide any or adequate precautions for her safety while she was working. Notably however, the Respondent testified that she was an experienced tea worker. She stated that she had worked for the Appellant for nineteen (19) years without being provided with gumboots. She confirmed that it had rained on the day she was injured hence it was muddy. She was barefoot so she slid and fell. This Court is persuaded that the fact the Respondent had worked for the Appellant for such a long period without laying any false claim against the Appellant proved that she is an honest person. The long period of employment did not lessen the Appellant's statutory duty to provide the Respondent with a safe working environment.

As correctly stated by the Appellant in their submission before this court, the duty of the employer is to ensure the safety of an employee is not *absolute*. An employer is only obliged to take reasonable *care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, where it was stated:

“It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him from an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices..”

However, in the present case, it is clear that the Respondent did not knowingly expose herself to the dangers that led to her falling and sustaining the injuries claimed. She was in her usual working place undertaking the exact duties which she was engaged to do. The Appellant was therefore liable to ensure her safety as she undertook those duties. Failure by the Appellant to provide the Respondent with work gear renders its objection to the Respondent's claim unsustainable. In the circumstances, this court finds that the trial magistrate was right in finding the Appellant 100% liable for the injuries sustained by the Respondent.

On the issue of quantum of damages, the Appellant contends that the sum of Kshs. 120,000.00 awarded as general damages was inordinately high. The Appellant was of the view that a sum of Kshs.30,000/- was sufficient for the injuries sustained. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. In **BUTT VS KHAN (1977) 1KAR** Law JA stated that;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”

The Respondent injuries were particularized as a pricked wound on the right knee which was tender and a dislocation of the right knee joint. This court has reviewed the treatment notes dated 5th February 2009 from Nandi Hill Hospital and confirmed the injuries. This Court has also reviewed the Medical Report dated 25th May 2011. Further, Dr. Aluda (PW1) told the trial court that the injuries sustained by the Respondent, though healed as at the time of examination, were severe except for occasional pains, which could be suppressed with the use of analgesics. The injuries left the Respondent with a scar which will remain a permanent feature on her body.

In view of the uncontroverted evidence in the trial court's record and taking into account the nature of the injuries, this court is satisfied that the damages awarded cannot be considered as manifestly excessive or inordinately high. The authorities cited by the Appellant in its submissions in support of this appeal are clearly distinguishable from this case. The injuries sustained in the said cases were less severe than that of the Respondent in this appeal. Further, PW1 produced a receipt for Kshs.1,500/- as proof of the special damages incurred being the cost of the preparation of the medical report. The same was pleaded in the Plaint and strictly proved. The court will therefore not interfere with the trial court's assessment of damages.

In the premises, this court finds that the Appellant's appeal is not merited. The same is hereby dismissed with no orders as to costs since the Respondent did not attend court during the hearing of the appeal. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF DECEMBER 2018

HELLEN OMONDI

JUDGE