REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL DIVISION

CIVIL APPEAL NO. 102 OF 2012

EASTERN PRODUCE (K) LTD

(CHEMOMI TEA ESTATE).....APPELLANT

VERSUS

INEA AVUTU SHITAKWA.....RESPONDENT

(An Appeal arising out of the Judgment of Hon. Adhiambo SRM Kapsabet

delivered on 11th September, 2012 in Civil Case No. 128 of 2011)

JUDGMENT

The Appellant was the original Defendant and the Respondent the original Plaintiff in the original trial in **Kapsabet Principal Magistrate's Court Civil Case No. 128 of 2011**. The Respondent instituted the said suit in the trial court for general and special damages on account of the Appellant's alleged breach of its statutory duty to provide him with a safe working environment. The trial magistrate, in a judgment delivered on 11th September 2012, held that the Respondent was able to prove that the Appellant was 100% liable for the injuries sustained by the Respondent, and awarded the Respondent general damages amounting to Ksh.60,000 and special damages amounting to Ksh.1,500 as well as costs of the suit.

The Appellant, being dissatisfied with the said judgment, filed an appeal against the same and raised several grounds challenging both quantum and liability. The Appellant faulted the trial magistrate for pronouncing judgment in favour of the Respondent on liability when there was no legal basis of doing so. The Appellant was aggrieved that the trial magistrate pronounced judgment in favour of the Respondent despite the fact that the Respondent had not proved the Appellant's liability. The Appellant also faulted the trial magistrate for disregarding documentary evidence produced by the Appellant. The Appellant took issue with the trial magistrate pronouncing judgment in favour of the Respondent on liability without taking into account that the claim was time barred. The Appellant was of the view that the trial magistrate failed to take into account relevant factors. The Appellant asserted that the trial magistrate's verdict was erroneous for taking into account irrelevant and extraneous factors. The Appellant also faulted the trial magistrate for misapprehending the evidence on record and was therefore misdirected. The Appellant was aggrieved that the trial magistrate failed to appreciate the weight of evidence tendered by the Appellant and unjustifiably rejected the Appellant's evidence. The Appellant also faulted the trial magistrate for shifting the burden of proof to the Appellant. The Appellant was aggrieved that the trial magistrate

applied the wrong principles in assessing damages and that the damages were excessive in the circumstances. Finally, the Appellant took issue with the trial magistrate pronouncing judgment in favour of the Respondent while totally disregarding the Appellant's submissions.

By consent of the parties, the appeal was disposed of by way of written submissions. Both parties filed their written submissions. During hearing of the appeal, the Appellant submitted that the Respondent testified that he was injured at work in the presence of his colleagues. The Appellant also submitted that the Respondent blamed the Appellant for his injury. The Appellant asserted that there can be no liability without fault and that there must be proof of negligence. They relied on the case of **Kiema Mutuku -vs- Kenya Cargo Handling Services Limited [1991] 2 KAR 258** which voices this principle. The Appellant also relied on **Statpack Industries -vs- James Mbithi Munyao, Nairobi HCCA No. 152 of 2003** where Justice Visram stated that:

> ***"A person making an allegation must prove a causal link between someone's negligence and his injury. A plaintiff must adduce evidence on a balance of probability that a connection between the two may be drawn."***

The Appellant submitted that the Respondent failed to call any workmate to corroborate his claim that he was injured while at work. He therefore failed to prove his claim. The Appellant argued that the supervisor, Elisha Oboyo Owuor (DW1), testified that the Respondent never reported any injury on the alleged day. The Appellant stated that they did not dispute that the Respondent was injured, but they disputed the fact that he sustained those injuries at work. They relied on the case of **Nandi Tea Estate Limited -vs- Eunice Jackson Wete [2006] eKLR** to assert that the existence of an injury is not proof that the injuries were sustained at the workplace.

The Appellant further relied on the case of **Khetia Garments Limited -vs- Mark Otuko Maleko [2015] eKLR** where it was held that the duty of care is within specific confines of the law and it must be reasonable and foreseeable in the respective circumstances. The Appellant submitted that they produced the outpatient register and the Respondent's name was not among the entries. They also stated that the trial magistrate admitted the outpatient register as a genuine document. The Appellant argued that the trial magistrate considered extraneous factors by stating that the injury book which was not produced by the Appellant may have contained the name of the Respondent. The Appellant asserted that this led to shifting the burden of proof to the Appellant.

On quantum, the Appellant stated that the Respondent sustained injuries which did not lead to any permanent disability. They submitted that the Respondent's witness, Dr. Aluda (PW3), testified that the Respondent was fully healed and he did not have any scar. The Appellant further submitted that the said injuries did not prevent the Respondent from getting gainful employment. The Appellant argued that the award by the trial magistrate was inordinately high and an award of Ksh.50,000/- as general damages would have been adequate in the circumstances. The Appellant relied on **David Okola Odero -vs- Kilindini Tea Warehouses Ltd [2008] eKLR** where the High Court awarded Ksh.40,000/- as general damages for severe personal injuries without any permanent incapacity. In addition, they relied on **Robert Ngari Gateri -vs- Maingo Transporters [2015] eKLR** where the court awarded Ksh.60,000/- for soft tissue injuries to the lower chest, left elbow and right buttock.

The Respondent, while opposing the appeal, submitted that he was plucking tea when he fell into an unmarked ditch. He faulted the Appellant for failing to alert him on the existence of the ditches. He further faulted the Appellant for failing to provide him with protective gear such as gumboots. The Respondent also submitted that he availed two witnesses, a clinical officer, Barasa Tom Juma (PW1) and Dr Aluda (PW2), who confirmed that he indeed sustained the injuries pleaded. The Respondent stated that the Appellant's witness, Mr. Obuya (DW1), testified that on 9th October 2009, the day the Respondent claimed to have been injured, he plucked 55 kilos of tea leaves. He also testified that the Respondent plucked 99 kilos of tea leaves on 11th October 2009. It was his view that if the Respondent had actually been injured, he would not have plucked such a quantity of tea. The Respondent however argued that the fact he picked less kilos on the day of the injury as compared to 11th October 2009 showed that he was indeed incapacitated.

The Respondent stated that, Mr. Obuya (DW1), failed to produce an injury book as well as the accident register. He also admitted that gumboots were not provided to employees whose duty was to pluck tea leaves. The Respondent argued that Mr. Obuya (DW1) also admitted to the existence of holes in the farm. The Respondent further submitted that Ruth Martim (DW2) testified that she was not working at the dispensary on 9th October 2009. She also failed to produce the Respondent's clinical notes which would have shown his treatment history. She further failed to avail the accident register which contains records of all injuries sustained by employees at a work place. The Respondent argued that failure by the Appellant to produce these documents was deliberate so as to conceal the fact that the Respondent was indeed injured. The Respondent asserted that he had proved his case. With regard to quantum, the Respondent stated that the Appellant has not demonstrated that the award was inordinately high and therefore the trial magistrate's finding ought to be upheld.

This court has carefully re-evaluated the evidence adduced before the trial court. It has also considered the submissions made by the parties to this appeal.

This being a first appeal, this court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. This principle of law was well settled in the case of **Selle -vs- Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif -vs- Ali Mohammed Solan (1955), 22 EACA 270)."***

In the present appeal, the issues for determination are whether the Respondent proved that he was injured while at work at the Appellant's premises and secondly, if the first issue is answered in the affirmative, whether the amount awarded to the Respondent as damages constituted a fair assessment for purposes of compensation.

As regards an action in negligence, it is stated in **Halsbury's Laws of England, 4th Edition** at paragraph 662 at page 476 as follows with respect to what is required to be proved in an action such as the Respondent's:-

> ***"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."***

Therefore, the Respondent has to prove that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, he also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Appellant, and to show that he was also not negligent in the performance of his duties.

This statutory duty stems from **The Occupational Safety and Health Act, 2007** which, in **Section 6(1),** requires every occupier to ensure the safety, health and welfare at work of all persons working in his/her workplace. In addition, **Section 10(2)** of the **Work Injury Benefits Acts, 2007** provides that an employer is liable to pay compensation in accordance with the provisions of the **Act** to an employee injured while at work.

In the present appeal, the evidence by the Respondent that he was employed by the Appellant at the tea farm, and that on the day of the accident he was carrying out duties assigned to him in the course of his employment was not disputed or controverted by the Appellant. The Respondent produced in evidence a

payslip for the month of October, 2009 as ***Exhibit 4***. In addition, the field supervisor at Appellant's tea farm, Elisha Oboyo Owuor (DW1), stated that he reported to work on the material day and even produced an attendance register that confirmed the same. Therefore, there existed an employer-employee relationship on the material day hence the Appellant owed the Respondent a statutory duty of care.

It is however disputed whether the Appellant was injured in an accident that occurred while carrying out the said duty, which was to pluck tea leaves at the Appellant's farm. The Respondent stated that on 9th October 2009, while undertaking the said duty, he fell into an unmarked ditch and sustained injuries on his chest, right shoulder and left ankle. He reported the incident to his supervisor who referred him to Kapsigak dispensary where he received First Aid. He afterwards went to Nandi Hills District Hospital for further treatment. It is not disputed that he was at work on this material day. The Respondent availed a clinical officer from Nandi Hills District Hospital, Barasa Tom Juma (PW1), who confirmed that he treated the Respondent of the pleaded injuries on 9th October 2009. He also produced a treatment card from Nandi Hills District Hospital (***Plaintiff Exhibit 1).*** Dr. Aluda also testified and produced a medical report ***(Plaintiff Exhibit 2)*** which also confirmed the Respondent's injuries. It was the evidence of clinical officer, Ruth Maritim (DW2), who works at the Appellant's Chemoni dispensary that she treated 11 patients at Kapsigak dispensary on 9th October 2009. She stated that the Respondent was not among the said patients. She also stated that the Respondent's name did not appear in the dispensary's outpatient register for the said date. However, on cross examination, she admitted that she was not at Kapsigak dispensary on 9th October 2009 as earlier alleged, and that a different clinical officer was on duty.

Due to this contradicting evidence, it could very well be assumed that she was not the author of the said register. In addition, she cannot claim that the Respondent was not treated at Kapsigak dispensary on the said date when she was clearly not on duty. She also testified that the dispensary keeps an accident register but the same was not availed in court to disprove that the Respondent's assertion that he had sustained injuries while on duty. She therefore failed to rebut the Respondent's claim. For an act to be considered to be within the course of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible. In this case, the Respondent was authorized to pick tea leaves and was injured in the course of carrying out this duty. For the above reasons, this court is satisfied that the Respondent was able to prove that he sustained the injuries while on duty working for the Appellant.

It is also disputed, whether the Appellant was negligent and in breach of his statutory duty in failing to provide a safe working place for the Respondent, and therefore liable for the accident. The Respondent stated that he fell into an unmarked ditch in the Appellant's tea farm. He stated that he was not provided with any protective gadgets such as gumboots and overalls. Mr.Obuya (DW1) admitted that gumboots were not provided to employees whose duty was to pluck tea leaves. The Respondent however, in his testimony, did not demonstrate how the gumboots and overalls would have prevented him from falling. The Respondent also faulted the Appellant for failing to place warning signs such as flags where the holes were situated, or cover the holes all together. The flags would have warned the Respondent as to the existence of the holes which would have prevented the Respondent from sustaining the injuries.

In <u>Eldoret High Court Civil Appeal No. 96 of 2010 - Eastern Produce (K) Limited -vs- Nicodemus Ndala</u>, which the Respondent also relied on, **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 in that case and the court held the Appellant liable in negligence.

The duty to exercise due care and skill falls on the Respondent where the risk is foreseeable or circumstances leading to the injury are within the knowledge of the Respondent. In the instant case, the Respondent was not aware of the existence of the hole in the farm. The duty to provide a warning of the existence of a hole lay with the Appellant. The Appellant failed to execute such duty and so the Respondent cannot be held to have contributed to the accident that caused his injuries.

Consequently, this court upholds the trial Magistrate's finding that the Appellant shoulders liability at

100%.

QUANTUM

It is settled principle that "***an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge or Magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect***". (See **Kimoth & Others –vs- Vesters and Antoher Civil Appeal No.4 of 1984**.)

In this appeal, the Appellant's counsel submits that an award of Ksh.50,000/= would be adequate compensation whereas counsel for the Respondent maintained that the trial court's award of Ksh.60,000 was proper and adequate compensation.

The Appellant's counsel cited two cases namely:-

1. **David Okoka Odero -vs- Kilindini Tea Warehouses Ltd [2008] eKLR** in which the court awarded Ksh.40,000/= for severe personal with no permanent incapacity.

2. **Robert Ngari Gateri -vs- Maingo Transporters [2015] eKLR** where the court awarded Ksh. 60,000/= for soft tissue injuries to the lower chest, left elbow and right buttock.

In the present appeal, the Respondent sustained the following injuries according to the treatment notes from Nandi Hills District Hospital as well as the medical report by Dr. Aluda:

(i) Blunt trauma to the chest which was tender

(ii) The right shoulder was swollen and tender

(iii) The left ankle was swollen and tender

Dr. Aluda (PW3) stated that the Respondent's injuries have healed and there was no possibility of permanent disability.

The above cited case by the Appellant, **Robert Ngari Gateri -vs- Maingo Transporters [2015] eKLR,** is applicable in this case and is also in agreement with the trial magistrate's findings.

Therefore, this court does not find any reason why it should interfere with the findings of the trial magistrate, as the Appellant has not demonstrated that the trial magistrate acted on wrong principle or failed to consider factors applicable in awarding general damages. In addition, this court does not find that the award of Ksh.60,000/- was inordinately or manifestly high in the circumstances as to constitute a completely erroneous estimate of the assessed damages. It is the view of this court that the damages are commensurate with injuries sustained.

For the foregoing reasons, this court finds that the appeal herein is without any merit both on liability and on quantum. The same is hereby dismissed with costs to the Respondent. It is hereby so ordered.

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

L. KIMARU

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE