



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL DIVISION

CIVIL APPEAL NO 95 OF 2012

EASTERN PRODUCE (K) LTD

(SITOI TEA ESTATE).....APPELLANT

VERSUS

JOSEPH ATUNGULU NDERE.....RESPONDENT

(An Appeal arising out of the Judgment of Hon. G. Adhiambo (PM) delivered on 9th August, 2012 at Kapsabet Principal Magistrate's Court Civil Case No. 136 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. 136 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 9th August, 2012 held that the Respondent was able to prove to the required standard that the Appellant was 100% liable for the injuries sustained by the Respondent, and awarded the Respondent general damages amounting to Ksh.70,000 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 challenging the decision of the trial magistrate and raised several grounds of appeal challenging both liability and quantum. The Appellant faulted the trial magistrate for arriving at a finding on both quantum and liability which was not supported by evidence. The Appellant challenged the trial magistrate's findings by claiming they were based on irrelevant considerations. The Appellant was aggrieved by the trial magistrate's award of damages which, in its view, was excessive for minor soft tissue injuries allegedly sustained by Respondent. The Appellant was of the view that the Respondent's case was not proved to the required standard. Finally, the Appellant faulted the trial magistrate's findings on both liability and quantum, which in its opinion had no legal justification.

By consent of the parties, the appeal was canvassed by way of written submissions. Both parties filed their written submissions. During the hearing of the appeal, the Appellant, with regards to liability, submitted that the Respondent did not prove that he was injured while at work in the circumstance alleged. The Respondent did not produce the note he said he was given by the supervisor, Mr. Murunga, referring him to the company's dispensary. He also did not offer any reasons why he chose not to call Mr. Murunga as a witness in his case. The Appellant also submitted that the trial magistrate disregarded the evidence of the Appellant's witness DW1, Joseph Boem, who stated that the Respondent worked from morning to evening on the material day without any problem and even produced the respective attendance register to show that the Respondent worked up to 4.28pm.

The Appellant argued that DW2, Carolyn Rotich, who works at the Appellant's dispensary as a clinical officer, stated that she did not treat the Respondent. She also stated that the Respondent's alleged injury was not recorded in the injury book which is usually filled by the injured person as is practice at the company's dispensary. She stated that there were only two cases of injuries reported, that is on 8th November 2008 and another on 14th November 2008 and that the Respondent's injury was not listed among them. The Appellant submitted that in a negligence case the burden is always on the alleging party to prove his case. The Appellant argued that the trial magistrate shifted that burden to the Appellant by claiming that the Appellant did not call the supervisor Mr. Murunga to rebut the Respondent's evidence. The Appellant challenged the trial magistrate's decision in finding the Appellant 100% liable for the Respondent's injuries. The Respondent stated that he was pricked by a tea stem of a pruned plant while plucking tea and that the stem had been covered by tea bushes. The Appellant asserted that the Respondent ought to have been careful and diligent. The Appellant relied on the case of **Kipkebe Ltd -vs- James Ondima Nyambegera [2009] eKLR** where the court held that;

“At common law, an employee is under an obligation to undertake his duties diligently and must exercise due care for his own safety. The Appellant is not expected to comb an entire tea estate to ensure that there is no sharp stick that may injure any of

their workers. While the Appellant has a duty of care to her employees, such duty is only in respect of reasonable danger.”

The same principle was reiterated in the case of Purity Wambui Murithi -vs- Highlands Mineral Water Co. Ltd [2015] eKLR as well as Abdala Baya Mwanyule -vs- Swalahadin Sahid [2004] eKLR which the Appellant also relied on. The Appellant asserted that no particulars of negligence were proved against them. The Appellant also submitted that an award of Ksh.30,000/- would be adequate compensation for the injuries suffered by the Respondent and they relied on David Okoka Odero -vs- Kilindini Tea Warehouses Ltd [2008] eKLR should the court find it liable.

The Respondent, while opposing the appeal, stated that the Appellant was to blame for failing to remove the pruned tea stems from the farm. He also faulted the Appellant for failing to issue him with protective gear such as gumboots which would have given him a firm grip and prevented him from falling and being pricked by a tea stem of a pruned stump. He reiterated that the Appellant exposed him to the injuries sustained. The Respondent also submitted that the Appellant failed to avail the supervisor, Mr. Murunga, to rebut the Respondent's claim, despite the fact he was still an employee of the Appellant. He stated that DW1, Joseph Boem, admitted that the Respondent was on duty on the material day and that the record showed that he plucked 155.4 kilos of tea leaves. DW1, Joseph Boem, further admitted that the Respondent may have been assisted by a helper to pluck tea on that day and that a party is allowed to be assisted by up to three helpers.

The Respondent asserted that the fact that he plucked 155.4 kilos of tea leaves on the material day did not mean that he was not injured as his helpers could have assisted him attain that weight. The Respondent also argued that DW2, Carolyne Rotich, failed to avail the Respondent's clinical notes which would have revealed the entire medical history of the Respondent while on the Appellant's employment. The Respondent submitted that he has proved his case that he was injured at work due to the Appellant's negligence. He argued that the Appellant's evidence was not credible and was inconsistent. The Respondent finally submitted that the damages awarded were commensurate with the injury sustained and that the Appellant's appeal lacks merit and should be dismissed.

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 the first appeal, this Court is obligated to re-evaluate and re-appraise the evidence in order to arrive at its own independent conclusion. Further, the Court also has jurisdiction to delve into matters of fact and law. (See Selle -vs- Associated Motor Boat Company Ltd [1968] EA 123.)

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 the 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 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 **Section 6(1) of the Occupational Safety and Health Act, 2007** which 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. This Court notes in this respect that the Appellant did produce in evidence a pay slip dated 30th November, 2008 as his **Exhibit 1**. In addition DW1, Joseph Boem, confirmed that the Respondent reported to work on the material day and even produced an attendance register. Therefore there existed an employer-employee relationship between the Appellant and the Respondent 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 4th November, 2008 he was pricked by a tea stem of a pruned plant while plucking tea leaves at the Appellant's farm. He stated that he reported the incident to his immediate supervisor Mr. Murunga, who referred him to the company dispensary where he was treated and later referred to Nandi Hills District Hospital for further treatment. He also added that another tea plucker, Atieno, witnessed the incident. He produced a treatment card from Nandi Hills District Hospital dated 4th November 2008 which confirmed the pleaded injuries. This however, only proves that the Respondent was injured but not that he was injured while working at the Appellant's premises.

The Respondent failed to produce the referral note which was given to him to seek further treatment at Nandi Hills District Hospital. The Respondent also failed to call the said witness, Atieno, to corroborate his claim. He did not give any reasons as to why she was not available to testify. The Appellant's clinical officer, Carolyne Rotich (DW2), testified that she did not treat the Respondent on the material day of any injuries. She produced the company's dispensary outpatient records for the month of November. The Respondent was not among the patients

listed on 4th November 2008.

In the case of **Statpack industries -vs- James Mbithi Munyao Nairobi H.C Civil Appeal No. 1152 of 2003** (unreported) the court held that:-

“Coming now to the more important issue of ‘causation’, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence. An injury per se is not sufficient to hold someone liable”.

Section 107 of the **Evidence Act** is very clear that he who alleges must prove. In the present appeal, the Respondent proved that he was injured but he failed to prove that he was injured at the Appellant’s tea farm. The only people who could confirm that the Respondent was injured at work on the material day were the witness (Atieno), his supervisor and the clinical officer (DW2). It is not enough to prove that the Respondent sustained the injuries. An employer is not liable for all the injuries sustained by the employees while in the course of duty at their place of employment. It must be proved that the Respondent sustained the injuries while on duty working for Appellant. It must also be established that the employer breached the statutory duty of care or the common law duty of care owed to the Respondent as its employee.

In this case, I find that the Respondent failed to avail the witnesses who would have corroborated his evidence. He also failed to produce the referral note given to him by the Appellant to seek further medical assistance at Nandi Hills District Hospital. The Appellant provided the dispensary outpatient records to show that the Respondent was not treated there on the material day. Therefore the Respondent ought to have availed a witness to prove his claim that he was indeed injured at the Appellant’s tea farm. The Respondent was also required to adduce evidence to rebut the Appellant’s assertion that his failure to attend the company’s dispensary showed that he was injured while he was out of work. The Respondent should have given a reasonable explanation as to why he failed to include the referral note in his records. In **High Court Civil Appeal 183 of 2009 Timsales Limited -vs- Noel Agina Okello [2014] eKLR** the court held that:

“When therefore a name of a litigant who claims to have been a casual or even permanent employee, who is required to have his name entered in the Muster Roll, or an Accident Register (in the event of an accident), does not appear in either the Muster Roll or Accident Register, the degree of proof of probability of having worked, or having had an accident on a particular day becomes much higher.”

This court is not certain that the Respondent sustained the injuries in the course of performing his duties at the Appellant’s tea farm as the same has not been proved.

It is for this reason that this court find that the Appellant cannot be held liable for the said injuries and further do find that the Respondent cannot be said to be entitled to damages.

It is therefore for these reasons that this court finds that this appeal is merited. The same is consequently allowed. This court hereby sets aside the judgment and decree of the trial court and substitutes it with the judgment of this court dismissing the Respondent’s suit with costs. The Appellant shall have the costs of this 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 6TH DAY OF DECEMBER 2018

HELLEN OMONDI

JUDGE