



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 38 OF 2014

(Being an appeal arising from Judgment and Decree in Kapsabet Principal Magistrate's Court Civil case No. 108 of 2011 delivered by Hon. P. Mosiria Principal Magistrate, on 27/2/2014)

EASTERN PRODUCT (K) LIMITED

(SAVANI TEA ESTATE).....APPELLANT

VERSUS

FRANNCIS ASUNA MARU.....RESPONDENT

J U D G M E N T

1. The Respondent from the records of the pleadings herein worked for the appellant as a tea plucker. According to him, on 4/12/2010 he slipped and fell into an unmarked ditch/hole and sustained injuries namely blunt trauma to the chest which was tender and a swollen knee which was tender. He attributed negligence on the appellant who did not provide him with working implements including gumboots interalia.
2. The appellant did file statements of defence denying the same and attributing negligence on the respondent. One of the contention was that the respondent infact was not on duty that day.
3. The matter then proceeded to full trial where the court found the appellant culpable and negligent and awarded the respondent general damages of Kshs 100,000/- together with special damages. The appellant was dissatisfied and has filed this appeal citing several grounds.
4. Substantively, the grounds can be reduced into two namely, whether the respondent proved his case on a balance of probability and whether negligence was established against it.
5. The court has perused the evidence as presented during trial and particularly the witnesses oral evidence on both side. The court has equally perused the documentary evidence as presented by both parties . Equally, the written submissions by the parties together with the attendant authorities have been perused.
6. Essentially and as indicated in the opening remarks above, there was no doubt that the respondent had been employed by the appellant. The said conclusion is evidence by the payslip produced as well as the same being not contested.
7. The question however is whether the respondent was on duty on 4/12/2010 and whether he was actually injured on that day while on duty.
8. The evidence as presented by the respondent is that he was on duty plucking tea when he was injured. Save on his own evidence, he did not call any other colleague or friend he was working with.
9. The appellant on the other hand stated that according to their records, the respondent was not on duty that day. They did produce their daily attendance checklist or register which showed that on that particular day, he was not on duty. The said list was not contested by the respondent.
10. He however argued that he worked on that day and he produced the December 2010 payslip to buttress that evidence.
11. PW3, The officer from Nandi Hills hospital produced the treatment booklet which indicated that he was treated at the said hospital that day.
12. What was before the trial court therefore was oral and written evidence. If the respondent worked on that particular day, why was his

name missing on Exhibit D1? The appellant stated that the appellant worked for 18 days that month, a fact attested by the pay slip produced.

Is it possible that the appellant was on duty on 4/12/2010 and his name missed on the check list? If so, why is he appearing in the other 18 days?

13. The checklist infact contain all the names of the appellant's employees. Is it possible that the same was "cooked" by the appellant for the expediency of this case? I do not think so. The respondent did not dispute the same. The record contains other names of the appellant's employees and in my view very authentic.

14. It only leads therefore to an irresistAble conclusion that the respondent was not on duty that day. The injuries he sustained could as well have been sustained elsewhere. The treatment he got from Nandi Hills hospital if true, did not necessarily meant that he sustained the injuries while working for the appellant.

15. If indeed he sustained the same, then it appears from the defence evidence especially DW1 his supervisor that the proper protocol established by the company is to have a reference note from the supervisor to the relevant company clinic. The record from the clinic does not show that he attended on that day. He instead went directly to Nandi Hills hospital. Why did he breach the laid down procedure?

16. What was the hurry of going to Nandi Hills hospital yet the clinic of the company was available. Infact the records from the Nandi Hills hospital were disputed by DW3 who stated that the name of the respondent did not feature anywhere.

17. This court would have been prepared to contest the hospital record as PW3 and DW3 came from the same hospital. However considering the fact that the respondent was not infact on duty that day, then I shall grant the benefit of doubt to the appellant and hold that the respondent did not attend Nandi Hills hospital that day.

18. For the above reason alone, this appeal succeeds. It would be academic to venture into the question of negligence for now.

19. Suffice to state that the authorities of *Eastern Produce (K) Limited Vs John Lumumba Mukosero (2008) eKLR* and *Eastern Produce (K) Limited Vs Kimaiyo Chepsiror 2008 eKLR* as well as *Nyamache Tea factory Vs Convas Otomwa (2010) eKLR* are all in four with this matter.

20. The appeal is hereby dismissed with costs both at the lower court and the High court to the appellant.

Orders accordingly.

Delivered, signed and dated on this 3rd day of December,2018.

H.K. CHEMITEI

JUDGE

Dated and delivered at Eldoret on this 6th day of December, 2018 by;

HELLEN OMONDI

JUDGE

6/12/18