REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 87 OF 2015

KAIMOSI TEA ESTATE.....APPELLANT

-VERSUS-

STEPHEN MIHESO.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Kapsabet in Kapsabet PMCC No. 58 of 2014 delivered on 8 July 2015 by Hon. B. Kiptoo, RM)

JUDGMENT

[1] The Appellant herein, **Kaimosi Tea Estate**, was the Defendant before the lower court in **Kapsabet PMCC No. 158 of 2014: Stephen Miheso vs. Kaimosi Tea Estate,** from which this appeal arises**.** In that suit, the Respondent, **Stephen Miheso**, had sued the Appellant claiming General and Special Damages for pain, suffering and loss of amenities in respect of injuries allegedly sustained by him on **13 December 2012** while working for the Appellant as its employee. The Respondent had alleged that it was on account of the negligence of the Respondent or breach of its statutory duties that he suffered the injuries, namely a cut wound on the left index finger and a dislocation of the left ankle joint.

[2] Upon hearing the case, the Learned Trial Magistrate found for the Respondent and entered Judgment in his favour in the sum of **Kshs. 72,000/=** together with interest and costs. Being aggrieved by that decision, the Appellant filed this appeal, raising the following Grounds of Appeal:

> **[a]** That the Learned Trial Magistrate erred in law and fact in holding the Appellant 70% liable or at all in view of the evidence adduced.
>
> **[b]** That the Learned Trial Magistrate erred in law and fact in failing to hold that the Respondent had not proved his case on a balance of probability.
>
> **[c]** That the Learned Trial Magistrate erred in law and fact in failing to hold that the Respondent was not on duty on the alleged date of the accident.
>
> **[d]** That the Learned Trial Magistrate erred in law and fact in attributing blame to the Appellant notwithstanding the Appellant's strong contention and evidence that no injuries were sustained in the course of the Respondent's employment and that the Respondent was treated for a natural ailment, not an injury.
>
> **[e]** That the Learned Trial Magistrate erred in law and fact in awarding damages against the Appellant in view of the foregoing.

Accordingly, the Appellant prayed that the appeal be allowed and that the Judgment of the Learned Trial Magistrate be set aside and substituted with an order dismissing the Respondent's suit with costs.

[3] The appeal was urged by way of written submissions. Hence, the Appellant's written submissions were filed on **13 March 2018,** while the Respondent's written submissions were filed on **18 June 2018**. In the Appellant's written submissions, Learned Counsel **Ms. Wesonga**, consolidated the five Grounds of Appeal and argued them as one since they all relate to the issue of liability. She reiterated the contention of the Appellant that the Respondent was not on duty on **13 December 2012** and that he therefore could not have sustained any injuries in the course of work on that date as alleged or at all. It was therefore the submission of Learned Counsel that, the Respondent having failed to prove before the lower court that he was on duty on **13 December 2012**, or that he sustained any injuries in the course of his employment with the Defendant, or that the Appellant was in any way negligent towards him, the appeal should be allowed with costs and the lower court Judgment be set aside and substituted with an order dismissing the Respondent's case with costs.

[4] On behalf of the Respondent, it was the submission of **Ms. Karuga** that sufficient evidence was placed before the lower court to warrant the conclusions that the court came to. She was of the view that the conviction that the Respondent sufficiently demonstrated by way of oral and documentary evidence that he was on duty on **13 December 2012** at the Appellant's farm as a tea plucker when the accident occurred and caused him bodily harm; and that the accident was not only inevitable but also unforeseeable. According to **Ms. Karuga**, the Respondent was able to demonstrate that he took reasonable precaution in the circumstances and that the Appellant was to blame for failing to provide a safe and conducive working environment as well as protective gear. She accordingly urged for the dismissal of the appeal with costs.

[5] 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..."**

[6] Accordingly, I have carefully perused and considered the lower court record, particularly the evidence adduced before the lower court with a view of ascertaining the correctness or otherwise of the decision reached by the lower court. That record shows that the Respondent testified as **PW1** before the lower court. His evidence was that he had been working for the Appellant for 11 years before the accident in question occurred; and that on the **13 December 2012**, he reported for work as usual and was plucking tea using a tea-plucking machine when he accidentally slipped into a ditch and sustained a dislocation of his left leg. He stated that he was taken to the company clinic by his supervisor, one **David Ngetich**. That he was attended to and referred to **Kapsabet District Hospital.** He produced before the lower court copies of his letter of appointment dated **1 April 2006**, Pay slip for **November 2012**, a copy of his National Social Security Fund **(NSSF)** statement as well as medical chits and report as exhibits, among other pertinent documents. **PW1** concluded his evidence by blaming the Appellant for not erecting a notice to warn workers of the presence of the ditch, and for not providing him with protective gear, namely, gum boots and gloves, which would have otherwise protected him from harm.

[7] To augment his case, the Respondent called **Danson Gichangi (PW2)**, a Clinical Officer at **Kapsabet District Hospital** before the lower court; and **Dr. Samwel Aluda**, **PW3. PW2** testified that the Respondent visited their hospital on **13 December 2012** for treatment and that he presented a history of having fallen into a ditch at **Kaimosi Tea Estate** and sustaining injuries on the left ankle joint. According to **PW2**, the Respondent was in a lot of pain and had a cut wound on the left index finger. His evidence was that he treated him for those injuries. He identified and produced the treatment notes he made on the **13 December 2012**. On his part, **Dr. Aluda** told the lower court that he examined the Respondent on **8 March 2014**, by which time his injuries had healed. He then prepared a medical report which he produced as **Exhibit No. 6(a)** before the lower court along with a receipt **(Exhibit No. 6(b)** for the fees charged by him for his services.

[8] On behalf of the Appellant, **David Kipkurui Ng'etich** testified before the lower court as **DW1** and confirmed that the was, at the material time, working for the Appellant as a supervisor. His evidence regarding the **13 December 2012** was that he was on duty and that nobody reported any injury to him. He confirmed that the Respondent was an employee of the Appellant and that he was working under his supervision. He provided the Respondent's employment number as **2868** and told the court that it was a requirement that all injuries be reported to the supervisor for referral. He produced the company records, namely the leaf weighing sheet and the mechanical harvesting leaf allocation sheet for **13 December 2012** as well as the Register to demonstrate that the Respondent was not on duty on that date; and therefore did not suffer any work-related injuries as alleged or at all.

[9] The Appellant also called **Brigid Namunze Lichinga (DW2),** a nurse at its clinic who testified that she was on duty on **13 December 2012** when the Respondent called in for treatment; and that he complained of a painful left shoulder; pain that he had experienced for over one week. According to **DW2**, the Respondent denied having had any injury. She added that in her opinion the pain was related to muscle inflammation, a condition known in medical parlance as *myalgia*; for which the Respondent was accordingly treated. She produced the hospital records for the day to support her evidence.

[10] Thus, on the basis of the foregoing evidence, the lower court was satisfied that the Respondent was indeed on duty on the date in question, and that he was injured as alleged; but that, whereas the Appellant was to blame for the injury, the Respondent shared the blame for not being careful. Here is how the Learned Trial Magistrate concluded her analysis and determination:

> **"On liability, I find that in as much as an employer is supposed to prove [provide] a safe working environment, in the present case, the plaintiff failed to prove that the accident was foreseeable and that the employer knew of the existence of a ditch. The plaintiff contributed to the accident by failing to be cautious while carrying out his daily duties. I place his contribution to 30%.**
>
> **The Plaintiff proved the use of Kshs. 2000/= in paying for medical report. The effect then is that judgment entered in favour of the plaintiff in the following terms:-**
>
> **a) Special damages Ksh. 2000/=**
>
> **b) General damages 100,000/=**
>
> **Less 30% contributory negligence Ksh. 70,000/=**
>
> **c) Costs of the suit."**

[11] From a review of the evidence adduced before the lower court, there appears to be no dispute that the Respondent was, at all times

material to the suit, an employee of the Respondent. He was engaged as a tea plucker in the Appellant's tea plantation; and it is common ground that he was then working under the supervision of **David Ng'etich (DW1)**. There is also no dispute that on the **13 December 2012**, the Respondent went to the Appellant's dispensary for treatment. However, the parties were of divergent standpoints as to whether the Respondent was on duty on that date; whether he got injured while on duty, and whether he was treated for work-related injuries. These therefore are the pertinent issues for determination in this appeal.

On Whether the Respondent was on duty on 13 December 2012

[12] The evidence presented before the lower court by the Respondent was that, as an employee of the Appellant, he was on duty on the date in question. He produced his letter of appointment, pay slip for **November 2012** as well as the NSSF Statement of Account for the year **2012.** However, as rightly pointed out by Counsel for the Appellant, the purport of these documents was simply to affirm that the Respondent was indeed an employee of the Appellant, and nothing more; and although Counsel for the Appellant faulted the production of **November 2012** pay slip, the Respondent explained before the lower court that he was sacked after **13 December 2012** and therefore did not receive his pay slip for that month; and this assertion was not refuted by the Appellant.

[13] On the other hand, the Appellant adduced evidence to show that the Respondent did not report for duty on that date, but was instead seen at its dispensary and treated for *myalgia* and given sick off, but opted to desert duty thereafter. The Appellant's evidence in this connection was backed by the day's mechanical harvesting leaf allocation sheet, leaf weighting sheet and the register. Indeed, the court acknowledged at page 17 of the Judgment that the mechanical harvesting leaf allocation sheet dated **13 December 2012 "...does not indicate that the plaintiff worked..."** The question to pose then is, on what evidence did the Learned Trial Magistrate predicate the conclusion that the Respondent was on duty on **13 December 2012**? The only evidence appears to be the Leaf Weighing sheet that was exhibited by the Defendant before the lower court. In its Judgment, the lower court was of the view that:

> **"...the leaf weighing sheet dated the same date indicates 2668 weighed leaves up to 45.6 as at 1643 pm of that date. The issues of whether he was or was not on duty is settled by this document..."**

[14] The problem with that conclusion is that, firstly, there was unrebutted evidence on the record of the lower court to show that the Respondent's employment number was not **2668** but **2868**. This is the number that appears on the Respondent's letter of employment which he produced as his **Exhibit No. 1.** as well as the treatment chit issued to him at the Appellant's dispensary on **13 December 2017**. Secondly, at page 14 of the lower court judgment, the lower court acknowledged the evidence pointing to **2868** as the Respondent's payroll number. It was therefore a serious misdirection on the part of the trial court to have taken **No. 2668** to be the Respondent's number. Since neither the Respondent's name nor number appears in the critical documents that were exhibited by the Defendant the conclusion to be drawn from the evidence is that the Respondent was not on duty on the **13 December 2017.**

On Whether the Respondent got injured

[15] The Respondent produced a chit, marked **Plaintiff's Exhibit No. 4,** to show that he was injured and went to the Appellant's dispensary for treatment. That document does confirm that it was issued by the Appellant's dispensary on **13 December 2012**. Indeed, the Appellant's nurse, (**DW2** before the lower court), conceded that she issued the chit. Her evidence however was that the Respondent had been there with a complaint of muscle pains and not any work-related injuries; and that she treated him for *myalgia*. On the other hand the Respondent called a Clinical Officer who produced treatment chits issued to the Respondent at **Kapsabet District Hospital** on **13 December 2012**. It was therefore the duty of the lower court to weigh each party's case to determine where the truth lay.

[16] Having evaluated the evidence, and having noted the misdirection aforementioned in connection with the findings of the Learned Trial Magistrate as to the Respondent's employment number, I would come to that conclusion that he was not injured while on duty on the **13 December 2012.** There is incontrovertible evidence that the set procedure to be followed in work-related injuries, namely, that the supervisor would have to be notified for purposes of preparation of a formal referral to the Appellant's dispensary, was not followed. Secondly, the Daily Sick Register produced before the lower court by the Defendant does show that the Respondent, **No. 2868,** was treated for *myalgia* and according to **DW2,** the chit aforementioned was given to him for purposes of being given sick off. Thus, whereas the Respondent may have sustained a cut of his index finger and a dislocation of the left ankle joint as alleged by him and **PW2**, it was not established that the injuries were sustained while the Respondent was working at the Appellant's tea estate.

[17] The burden of proof was on the Respondent to establish all aspects of its claim on a balance of probabilities because **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** stipulates that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

[18] Similarly, **Sections 109** and **112** of the **Evidence *Act*** *state thus:*

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[19] Accordingly, in **Halsbury's Laws of England, 4th Edition**, it is opined at paragraph 662 (page 476 that:

> **"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 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**."

[20] On the basis of the evidence that was placed before the lower court, and given the misdirection by the Learned Trial Magistrate with regard to the Respondent's Pay Roll No., it cannot be said that the Respondent discharged the burden of proving that he was injured while on duty on the **13 December 2012**, or that the Appellant was to blame in any way for his injuries. I would not have disturbed the quantum of damages awarded by the lower court, had I found for the Respondent on the issue of liability.

[21] In the premises, I would allow this appeal, which I hereby do; and set aside the Judgment and Decree of the lower court and substitute the same with an order dismissing the Plaintiff's case. Granted the nature of this appeal, and the fact that the Respondent is no longer in the employ of the Appellant, I would order that each party shall bear own costs of this appeal and of the lower court matter.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF DECEMBER 2018

OLGA SEWE

JUDGE