**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 54 OF 2012**

**EASTERN PRODUCE (K) LIMITED…….…….....APPELLANT**

**VERSUS**

**SAMWEL KOSGEI……..…….....…..RESPONDENT**

***[An appeal from the original decree and judgment of G. Adhiambo, Resident***

***Magistrate, in Kapsabet RMCC No. 308 of 2010 delivered on 24th April 2012]***

**JUDGMENT**

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 24th April 2012.

2. The appellant was the defendant in the lower court. The respondent claimed special and general damages for negligence. He pleaded that on 17th December 2007 he was picking tea at the appellant's *Sitoi Tea Estate*. As he carried tea to the weighing centre, he fell into an *unmarked* ditch. He suffered an injury to his left ankle; and, a wound on his left knee. By a statement of defence dated 21st January 2011, the appellant denied the claim *in toto*.

3. The learned trial Magistrate found that the appellant was wholly to blame. She assessed general damages at Kshs 80,000; and, special damages at Kshs 1,500. The respondent was also granted interest and costs.

4. The appellant lodged an appeal on 21st May 2012. There are *ten* grounds of appeal. They can be condensed into *six*: First, that the trial court erred by holding that the appellant was 100% liable for the accident; secondly, that the trial court erred by finding that the respondent was injured at work; thirdly, that the respondent did not prove his case on a balance of probabilities; fourthly, that the judgment violated the provisions of Order 21 Rule 4 of the Civil Procedure Rules; and, fifthly, that the learned trial magistrate applied erroneous principles of the law of evidence.

5. The appeal is contested. The appellant filed submissions on 1st December 2015. The respondent filed his on 4th November 2015. On 13th December 2016 learned counsel for both parties addressed me on those submissions. The appellant's learned counsel, *Mr. Isiji*, submitted that the there was no evidence establishing negligence on the part of the appellant. He submitted that the respondent was negligent. In his view, the injuries were bogus because the employee reported for duty the following morning. The respondent's counsel retorted that the injuries were not severe; that the appellant failed to provide safety gear like gumboots; that the ditches were unmarked; and, that they were concealed by tea bushes.

6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.

7. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court, the precedents and the submissions by learned counsel.

8. The respondent (PW2) testified that he was employed by the appellant. He produced his *pay slip* for December 2007 (exhibit 4). Paragraph 2 of the defence *denied* that the respondent was employed by the appellant. In the absence of evidence in rebuttal; or, any meaningful cross-examination on that aspect, I concur with the learned trial magistrate that the respondent was an *employee* of the appellant.

9. The duties of the respondent were to pick tea. The crux of the appeal is whether respondent was injured *at* work; and, whether the appellant was *negligent*. A related issue is whether the respondent was guilty of *contributory negligence*. In his testimony, the respondent claimed that on 17th December 2007, he reported to work at 7:10 a.m. In the course of his duties, he fell into an unmarked ditch. He said the ditches were dug by the appellant to prevent soil erosion. He testified that the hole was covered by tea bushes; and, he could not detect it. At paragraph 6 of the plaint, he blamed the appellant for not providing a safe working environment or equipment; failing to provide supervision; and, breaching the contract of employment. In particular, he faulted the company for failing to provide him with gumboots or other protective gear; and, failing to mark the ditches.

10. I have studied the record very carefully. Regarding negligence, the respondent told the court that he *"could not see the ditch because of the thickness of tea bushes"…I was pricked by a stem…my left ankle was sprained and began swelling"*. In cross-examination, he answered further that he *"fell because [he] slid into the ditch. It had drizzled…I was not provided with gum boots. They would have prevented me from sliding. I was careful. If the company had not sunk [sic] the ditches, I would not have been injured"*.

11. The appellant's witness Joseph Boen confirmed he was *not* the supervisor on the material day. It was Kennedy Binai. The witness could not tell if the respondent reported the injury to the supervisor. He testified that the respondent could not have reported to work the next day if he had suffered injury. As I will discuss shortly, the injuries were superficial and minor. Fundamentally, he acknowledged that the respondent harvested 34 kilos of tea on 17th December 2007; and, 20 more kilos on 18th December 2007.

12. DW2, Carolyne Rotich, was the duty nurse at the company's clinic on the material day. She testified that the respondent did *not* attend the dispensary. The respondent testified that he was given a note by the supervisor to attend the dispensary; and, that his wound was cleaned at the dispensary. Obviously, one of the parties was *not* telling the *truth*. DW2 did not produce the *original* outpatient register in court. But to be fair to the respondent, he sought further treatment at Nandi Hills District Hospital. He produced the treatment notes (exhibit 3). My conclusion is that the respondent suffered injuries at work on 17th December 2007.

13. The next key question then is whether the employer was *liable* for the injuries; or, for not marking the ditch. Paraphrased, was the appellant *negligent* or in breach of statutory duty or common law duties of care? I have already found that the respondent proved on a balance of probabilities that he was on duty when the alleged accident occurred. For starters, the legal burden of proving *negligence*; or, *breach* of any statutory duty of care fell squarely on the respondent's shoulders. See section 107 of the Evidence Act.

14. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR, *John Karanja v Eastern Produce (K) Limited*, Eldoret, High Court Civil Appeal 35 of 2013 [2014] eKLR.

15. In this case, the respondent *proved* that the company dug up the ditches to arrest soil erosion. The ditches were concealed by the tea bushes. Although the respondent was *not* a new employee, he could *not* see the ditch. He testified that he was alert. But it had also *rained*. Without a pair of gumboots, he easily slid into the hole. I disagree with the appellant that this was an *unforeseeable* accident. I am alive that there was an implied term of the contract that the appellant took the risks *incidental* to his contract of employment. The respondent did not say he was a *new* employee in the company or that he did not know the terrain. It was the respondent's *primary duty* to keep a safe look out. I thus find that the respondent partially *contributed* to the accident. Granted those circumstances, I find that both parties should share *equal liability* for the accident.

16. I will now turn to quantum of damages. 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. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Akamba Public Road Services Ltd v Omambia* Court of Appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

17. From the evidence of PW1 (Dr. Samuel Aluda), the respondent had a swollen and tender left ankle; and, a prick wound on the left knee. They were *soft tissue injuries* which had *healed*. There was *no* permanent injury. The general damages awarded by the lower court were neither too high nor too low. In *Peter Kahugu & another v Ongaro*, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR an award of Kshs 80,000 was given for soft tissue injuries. The special damages of Kshs 1,500 were specifically pleaded and strictly proved by the respondent. The damages awarded in the present case *may* seem a little high. But I cannot say the award is *exorbitant* or founded on *wrong principles*. I thus decline to disturb the award.

18. In the result, the appeal succeeds in part. The judgment of the lower court dated 24th April 2012 is hereby *set aside*. Judgment is now entered in favour of the respondent against the appellant as follows-

a) Liability is apportioned equally between the appellant and respondent at 50% to 50%.

b) General and special damages are assessed at Kshs 81,500 *less 50% contributory negligence* which is to say *Kshs 40,750.*

c) Each party shall bear its own costs in the lower court and in this appeal.

It is so ordered.

**DATED, SIGNED** and **DELIVERED** at **ELDORET** this 19th day of January 2017.

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:-***

Ms. Odwa for the appellant instructed by Nyairo & Company Advocates.

Mr. Yego for the respondent instructed by Z. K. Yego & Company Advocates.

Mr. J. Kemboi, Court Clerk.