REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 505 OF 2007

KARIRANA TEA ESTATE LTD ……..…....APPELLANT

VERSUS

JAMES MASSEA ORWARU ……...RESPONDENT

(*Being an appeal from the judgment of Hon. Aming'a, Resident Magistrate in Limuru RMCC No. 468 of 2005 deliveed on 12th June, 2007)*

JUDGMENT

The respondent was employed by the appellant as a tea picker. According to his pleadings in the lower court, while in the course of his employment, he suffered injuries for which he blamed the appellant. The appellant denied the claim but after the trial both the appellant and the respondent were found equally liable for the injuries sustained and the court proceeded to award the respondent a sum of Kshs. 150,000/= general damages, Kshs. 1500/= special damages, costs and interest.

The award was subject to 50% contributory negligence on the part of the respondent leaving a balance of Kshs. 75,750/=. The appellant was aggrieved by the said judgment and filed this appeal.

In the memorandum of appeal the appellant faulted the lower court for finding that the appellant was in breach of its statutory duty and was thus liable. The lower court was also faulted for finding that the appellant was to blame for the accident and failing to appreciate the evidentiary value of the appellant's witnesses.

The appellant also complained that the lower court did not consider and appreciate its submissions thereby arriving at an entirely erroneous award. It is the appellant's prayer that the appeal be allowed.

Upon an order made by Onyancha J on 30th June, 2015 for parties to file submissions, only the respondent complied despite a similar order by Aburili J on 20th April, 2016. As the appellate court, it is my duty to evaluate the evidence adduced before the lower court with the view to arriving at independent conclusions.

In the pleadings the respondent blamed the appellant for failing to provide suitable appliances and any protective devices while carrying out his duties. He also blamed the appellant for allowing him to prune tea, a duty he had no knowledge of and also being reckless for exposing him to danger.

The plaintiff testified and told the court that while on duty picking tea, he slipped on a trench in the tea fam as he attempted to cross it. He was injured on the right leg and informed the supervisor who however did not offer any assistance. The company nurse by the name of Monica told him to go to Tigoni

Hospital for treatment.

He produced two medical reports by Doctor Jacinta Maina and Doctor Joab Bodo dated 21st October, 2005 and 26th January, 2006 respectively. Both reports confirmed injury to the right ankle joint. The appellant called three witnesses and disputed the circumstances and injury sustained by the respondent. Instead they alleged that that the respondent was injured following a bar brawl with a fellow employee.

In his judgment the trial magistrate doubted the evidence of the defence witnesses. He however considered the evidence of DW3 to be the nearest direct evidence under what circumstances the plaintiff was injured. He proceeded to observe however that, under cross-examination DW 3 said he did not notice the plaintiff being injured during a confrontation in a bar as alleged.

In particular the court said as follows,

> ***"This witness mentioned that several other people witnessed the incident yet none has been called to support his version. In particular he mentions a watchman one Mulwa who is the one who allegedly informed him about the plaintiff's injury on the following day. The bar in question is within the defendant's premises and I would suppose those drinking there were fellow employees. How comes none of them has been called as witness? DW. 3's evidence is clearly a concoction and full of hearsay. I would disregard it."***

The court then appreciated that the respondent had a duty to prove his case on a balance of probabilities, concluding that owing to the rival claim by the appellant, and having disbelieved its witnesses, the plaintiff had proved his case on a balance of probabilities that he was injured at his place of work in the course of employment.

The respondent confirmed that he had been issued with gumboots but the court observed that the environment was not entirely safe for the workers. He also observed that the respondent was apparently aware of the trench which he attempted to cross and in the circumstances assessed contributory negligence at 50%. With respect, the trial court was correct in the circumstances of the case. I say so because; the respondent had worked for the appellant for more than 15 years. He must have known the environment well including the trench where this injury took place. He also ought to have known that it was dangerous to attempt crossing the trench which led to his injuries. Blame cannot be attributed to the appellant alone.

On the injuries the two medical reports are instructive. The first one by Doctor Jacinta Maina was prepared two months and ten days after the injury. The 2nd one by Doctor Joab Bodo was prepared five and half months after the injury. The latest report is therefore most reliable in the circumstances. In the opinion of Doctor Joab Bodo, the fracture sustained by the respondent was well united and since it did not involve the ankle joint, there was no possibility of late osteoarthritis. The respondent had no permanent disability as a result of this injury.

On quantum comparable injuries should attract comparable awards. The cases cited in the judgment of the lower court were a good guide in arriving at the award made in terms of general damages. The appellate court may interfere with the award made by the lower court if the same is inordinately high or too low so as to present an erroneous estimate.

Going by the medical reports produced in evidence and the cases relied upon by the lower court in this case, I do not consider the award to be out of place in relation to the respondent's injuries. There is no reason therefore to disturb the same.

The end result is that this appeal must fail and is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 2nd Day of March, 2017.

A. MBOGHOLI MSAGHA

JUDGE