REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 86 OF 2004

EASTERN PRODUCE (K) LIMITED

KIBWARA TEA ESTATE)..... APPELLANT

VERSUS

SALOME CHEPTABUT CHEBANGU..... RESPONDENT

(Being an appeal against the Judgment of Hon. Francis A. Mabele (PM) in Kapsabet

Principal Magistrate's Court Civil Case No. 240 of 2001 delivered on 1st August, 2004)

JUDGMENT

The Respondent sued the Appellant in Kapsabet Senior Principal Magistrate's Court for general and special damages, costs of the suit, interest thereon and any other relief the court may deem fit and just to grant.

The Respondent averred that she was lawfully working for the Appellant and on 8th May, 2001 while engaged in her duty as a tea plucker slipped and fell down in a ditch as a result of which she sustained a fracture of the left fibula at the ankle joint. Her case was that, it was a term of contract of employment between herself and the Appellant while she was engaged on work not to expose her to risk of damages or injury of which the Appellant knew or ought to have known. She further averred that it was the Appellant's duty to ensure she carried out her work in safety and further take reasonable measures to ensure that where she worked was safe and that it was the Appellant's obligation to provide and maintain a safe and proper system of work.

In the defence filed by the Appellant on 7th November, 2001, it denied in toto that the Respondent was its employee and that she was injured on the material date. It further denied that it was liable for any negligence arising from any accident. Under paragraph 8 of the defence and on a without prejudice basis the Appellant averred that although the Respondent fell into a ditch, she substantially contributed to the accident. It particularizes contributory negligence as follows:-

(a) Failure to take any adequate precautions for her safety while engaged upon her work.

(b) Failing to follow the Defendant's guidelines vis-a-vis work.

(c) Going about her duties without the presence of his mind.

(d) Willfully and knowingly exposing herself to a risk of injury emanating from circumstances

under her control.

The Respondent filed a Reply to Defence on 12th November, 2001. She denied the particulars of negligence attributed to her by the Appellant and maintained that the Appellant was wholly liable for negligence.

In a Judgment delivered on 15th March, 2004, the trial court found the Appellant 100% liable and awarded a sum of Ksh. 70,000/= as general damages, Ksh. 1,500/= as special damages, costs of the suit plus interests thereon at court rates.

The Appellant was dissatisfied with the Judgment and has appealed to this court only as against liability. In a Memorandum of Appeal dated 20th September, 2004 and filed on 21st September, 2004, it has raised the following grounds of appeal:-

1. That the learned Magistrate erred in law and fact in awarding damages to the Respondent against the weight of evidence adduced.

2. The learned Magistrate erred in law and fact in failing to find that the Respondent had not proved her case on a balance of probability.

3. The learned Magistrate erred in law and fact in failing to consider the Appellant's submissions.

4. The learned Magistrate erred in law and fact by failing to apply the provisions of the Evidence Act in relation to the evidence tendered and the exhibits.

5. The learned Magistrate erred in law and fact by failing to take cognizance of the evidence tendered on behalf of the Appellant during the hearing of the defence case.

6. The learned Magistrate erred in law and fact in finding that the Appellant was 100% liable to blame for the accident.

In a nutshell, the Appellant has contested that the Respondent did prove her case on a balance of probability and urges this court to find that the trial court erred in holding the Appellant 100% liable for the accident. It is now the duty of this court to evaluate the entire evidence tendered before the lower court to determine whether the finding of the said court was based on no evidence, or that the trial court misapprehended the evidence or that the trial court acted on the wrong principles in reaching at its findings - See **SUMARIA & ANOTHER -VS- ALLIED INDUSTRIAL LIMITED (2007) 2 KLR** and **TOM MBOYA KOMBO -VS- NAIROBI FRAME INDSUTRIES (2008) e KLR**

EVIDENCE

The Plaintiff called three witnesses and she testified as PW1 on 8th May, 2001. Her evidence was that she was on duty plucking tea when she slipped into a ditch and got injured. She stated that she was taken to the dispensary and thereafter to Nandi Hills District Hospital where she was treated and discharged. She said an X-ray revealed she had sustained a fracture. At the time she testified she was using a walking stick. She said she blamed the Defendant (appellant) because it did not give him adequate treatment and for not covering the trench.

According to PW1 it was her first time to work for the Defendant and she had not been informed of the presence of the trench. PW2, Doctor Samuel Aluda testified that he examined PW1 and prepared her medical report which shows that the Plaintiff sustained a fracture of the left fibula at the ankle joint. He produced the medical report as P. Exhibit 2.

PW3, Doctor John C. Chumba of Nandi Hills District Hospital testified that on 8th May, 2001 he

examined PW1 and issued her with a treatment card which he produced as P. Exhibit 1 (a).

The defence also called three witnesses. DW1, Kimani Mwangi said he was a supervisor at Kibwari Tea Estate where he was employed in that capacity in 1985. He said that the work register (D. Exhibit 2) showed that PW1 was not on duty on the material date although she was treated at the dispensary. He said that PW1 was treated for an injury she sustained in August, 2000 for which she claimed damages vide Eldoret Chief Magistrate's Civil Case No. 241 of 2001.

But in cross-examination, DW1 confirmed that he had referred PW1 to the doctor on 8th May, 2001 for treatment using a daily work sheet for that day. He also confirmed that the employees have no access to the daily work sheet and do not also sign it. He further said that PW1 could not work on that day because she was injured. But in contradicting the latter statement, DW1 said that page 2 of the daily work register indicated that Salome was on duty on 8th May 2001 as worker No. 486 as a field attendant.

DW2, Samuel Lagat said he was a nurse at Kibwari Tea Estate Dispensary where he had worked for six (6) years. He testified that he attended to the Plaintiff on 8th May, 2001 as a return case for removal of bandage on her leg, He said he referred her for removal of bandage to Nandi Hills District Hospital. He produced the outpatient register as D. Exhibit 3. According to DW2, he attended to PW1 for an injury she sustained on 4th August, 2000 and produced the dispensary register of 4th August, 2000 as D. Exhibit 4.

In cross-examination, DW2 said that he did not make the entries of 4th August, 2000 in the register and that they were made by another nurse. He confirmed that it was not possible for a patient to remain with a bandage for one year and one month. He also stated that he could not tell why Dr. Chumba of Nandi Hills District Hospital did not refer to PW1's injuries as old injuries.

DW3, Caren Kurgat also a nurse at Kibwari Tea Estate said that on 8th May, 2001 she personally treated PW1 for a fracture of the leg and she identified D. Exhibit 3 (treatment register) in prove thereof. She said she referred PW1 to Nandi Hills District Hospital for X-ray and that PW1 did not return to her for further treatment.

DW3 also testified that on 11th January, 2001, PW1 went to the dispensary for removal of a plaster put on 4th August, 2000 and that after 11th January, 2001 she (PW1) did not return to the dispensary for any other treatment. She produced the outpatient register as D. Exhibit 5.

In cross-examination DW3 said that she did not indicate on D. Exhibit 5 that on 11th January, 2001, PW1 had gone to the dispensary for removal of a plaster. She said DW2 worked in the afternoon shift while she was in the morning shift when PW1 was treated. She said the register did not show what time PW1 was treated. She said DW2 lied by stating he attended to PW1.

In re-examination DW3 said that PW1 had gone to the dispensary for a review.

SUBMISSIONS

The Appellant's submissions are premised under three limbs. First, that the Respondent was not injured while on duty on 8th May, 2001, second, that the Respondent did not prove negligence and breach of statutory or contractual duty of care on the part of the Appellant and third, that if the accident occurred, it was as a result of natural causes and therefore beyond the control of the Appellant.

Under the first limb, Appellant submitted that the Respondent did not call any eye witness to corroborate her evidence. It states that the Respondent was only injured on 4th August, 2000 and not 8th May, 2001 and that the treatment accorded to her on 8th May, 2001 was a follow up medical review of the injury sustained on 4th August, 2000.

Appellant has submitted that the Respondent was, on the material date on sick off and not on duty.

Counsel of the Appellant submitted as follows:-

> ***"DW1 did not admit that the Plaintiff was on duty on 8th May, 2001. The witnesses stated that her name was captured and included in the daily attendance sheet and daily checklist with initials 'SCH' only in order that she is paid for sick off."***

Counsel relied on the cases of **NANDI TEA ESTATE -VS- EUNICE JACKSON WERE. ELDORET HIGH COURT CIVIL APPEAL NO. 66 OF 2004**. **TIMSALES KENYA LIMITED -VS- ENOCK NYAMBUCHI (2012) e KLR**, and **NYAMACHE TEA FACTORY CO. LTD -VS- CONVAS ONTOMWA BUGE. KISII HIGH COURT CIVIL APPEAL NO. 59 OF 2000**.

The gist of the above case law is that where an employee alleges he was injured while on duty and therefore treated for the injury, it was his/her duty to prove that on the material day he/she sustained the injury for which he/she was treated. The Appellant's case is that the Respondent did not meet this threshold.

Under the Second limb, the Appellant's counsel submitted that the Respondent's suit was based on breach of contractual and statutory duty of care and also on negligence and that from her testimony, the Plaintiff did not produce any contract to establish or prove any terms that were breached by the Appellant and further that she did not prove negligence on the part of the Appellant.

Counsel of the Appellant relied on the cases of **ABDALLA BAYA MWANYULE -VS- SWALAHADIN SAID T/A JOMVU TOTAL SERVICES STATION. NAIROBI CIVIL APPEAL NO. 211 OF 2002; TOMBE TEA FACTORY -VS- SAMUEL MOMANYI. KISII HIGH COURT CIVIL APPEAL NO. 300 OF 2009** and **EASTERN PRODUCE (K) LIMITED -VS SAMUEL PATRICK CHEGE MWANGI, ELDORET HIGH COURT CIVIL APPEAL NO. 94 OF 1997** to emphasize that it is the duty of the Plaintiff, if he/she pleads negligence on the part of the Defendant, to prove the same.

Under the third limb, Appellant argues that the Respondent did not prove that there was anything the Appellant would have done to prevent her from slipping. Its counsel submitted that the possibility of an employee slipping and falling while on duty is a natural act that could occur without the fault of any employer. To buttress the point the counsel cited the cases of **MUTHUKU -VS- KENYA CARGO HANDLING SERVICES LIMITED (1991) KLR. 464** and **NYANSIONGO TEA FACTORY -VS- GRACE NYABOKE, KISII HIGH COURT CIVIL APPEAL NO. 131 OF 2005**.

Counsel for the Respondent on the other hand, in submissions, urged the court not to interfere with the trial court's judgment as the same was arrived at after the evaluation of the evidence on record.

EVALUATION OF EVIDENCE

Was the Plaintiff/respondent on duty in the Appellant's Tea Estate and was she injured while on duty?

I note that the defence witnesses while trying to disprove the fact that the Respondent was injured while on lawful duty gave contradictory evidence. I am particularly concerned about the evidence of DW2, Samwel Lagat who appeared bent on demonstrating that PW1 was not injured on 8th May, 2001. His evidence was that he attended to PW1 on 8th May, 2001 for removal of a bandage but referred her to Nandi District Hospital for this purpose. He also said that he did not write for her a referral note because she had a treatment card.

But in rebutting the evidence of DW2, DW3, Caren Kurgat testified as follows:-

> ***"I recall on 8th May, 2001 I was on duty and I treated Salome Chebagut. She had a fracture/broken leg..... After treating her I sent her to Nandi District Hospital for X-tray. She***

did not come back for further treatment..... This outpatient register shows I was on duty..... I know Salome very well. It is not true she had come for other treatment and I have not made a record of that"

On cross-examination DW3 further said:-

"Samuel Lagat (referring to DW2) is a fellow nurse and my senior.

He was in the 2.00 p.m. Shift while I had been in the morning shift. The time Salome came is not indicated.... I am the one who was there in the morning and attended to her. If Samuel Lagat says he did he is lying ....."

The question that begs from the foregoing is; why would two nurses working for the Appellant give conflicting evidence? Why did DW2 insist he attended to PW1 on 8th May, 2001 while he knew very well that he was not on duty in the morning of this date? I hold that DW2 concocted evidence so as to fix PW1 and give favourable evidence for his employer. I am totally unable to believe him. And in any case, with regard to the injury of the year 2000, DW3 said as follows:-

"On 11th January, 2001 I was on duty and saw Salome. She had not come for treatment but for the removal of the plaster put on 4th August, 2000."

While DW2 on cross-examination said:-

"A bandage or plaster cannot remain for one (1) year and one (1) month."

which means that the injury of 4th August, 2000 was treated on 11th January, 2001 and not on 8th May, 2001.

DW1 on the other hand conceded in cross examination that employees have no access to daily work register and they neither sign it. He also candidly said he referred PW1 for treatment on 8th May, 2001 using the daily worksheet for that day. He did not elaborate further whether an employee can be entered into the daily work sheet when he/she has not reported on duty. In the premises, any back tracking against this statement is self conflicting and amounts to contradictory evidence. Further, amidst the evidence of DW3 that indeed PW1 presented herself to her for an injury sustained on 8th May, 2001 upon which she referred her for further treatment elsewhere, it leaves no doubt in my mind that PW1 was actually on duty on this date and did in fact get injured while on duty. It seems DW3 attempted to also back tract on her evidence in support of the Plaintiff after realizing she needed to give adverse evidence against her.

Moreso, PW3, Doctor Chumba of Nandi Hills District Hospital did not mention that he treated PW1 for old injuries. He said that ***"I had seen her with other injuries earlier on which got healed. This was around March, 2001"***. This ultimately meant that DW3 was treating fresh injuries and that the old injuries referred to by DWl and DW2 were long healed. And that fact was never dislodged by the defence witnesses as I have earlier observed elsewhere in this Judgment.

The cases of **NANDI TEA ESTATE -VS- EUNICE JACKSON WERE AND TIMSALES KENYA LIMITED -VS- ENOCK KEGO NYAMBUCHI** (Supra) suggest the need for the Plaintiff to produce "documentary evidence that he/she was on duty on the material date he/she alleges he/she was injured. However, it is my view that this may not always be the case. Where the Plaintiff is able to demonstrate by other evidence that he was on duty on the date that he was injured, and the court is convinced by that evidence, the court should not hesitate to find for the Plaintiff. This follows in instances where documentary evidence for prove of duty attendance is only in the hands of the Defendant. While it behoves the Plaintiff to seek the aid of the court to secure such documents, this may not always be case. So where the Plaintiff is able to convince the court that he got injured while on duty as an employee of the Defendant, there should be no reason why the court cannot uphold such evidence.

Each case, though, must be considered on its own circumstances as not all cases may be similar and also bearing in mind that he who alleges must prove.

Did the Appellant owe the Respondent a duty of care necessitating it to be held 100% liable? And was the accident avoidable?

The Respondent states the particulars of negligence and or breach of statutory duty of the Appellant or its servants or agents in paragraph 6 of the Plaint as follows:-

> ***(a) Failing to take any or any adequate precautions for the safety of the Plaintiff which he was engaged upon the said work.***
>
> ***(b) Exposing the Plaintiff to a risk of injury or damage to which he knew or ought to have known.***
>
> ***(c) Failing to provide or maintain a safe system of working or to instruct its workmen the Plaintiff to follow that system.***
>
> ***(d) Failing to provide a safe working place for the Plaintiff.***
>
> ***(e) Failing to warn the Plaintiff if the existence of any danger within the Plaintiff area on duty.***

At www.law.handbook.org.au as at 25th March, 2013, "Duty of Care" is defined as:-

> ***"An obligation, recognized by law, to avoid conduct fraught with reasonable risk of danger to others."***

There is however no clear cut formula of establishing when a duty of care is owed between individuals. **DONOGHUE -VS- STEVENSON (1932) AC 562** pointed two important factors giving rise to a duty of care, one, **reasonable foreseeability** and, two, **proximity**.

If the wrong doer knows:, or should have known, that his acts or omissions may cause injury or impairment of legal rights of another person who is not in a position to protect his or her own interests, then there exists a relationship of proximity giving rise to a duty of care (www.lawhandbook.org.au).

On the other hand, Black's Law Dictionary 7th Edition at page 183 defines *'breach of duty' as* ***"the violation of a legal or moral obligation, the failure to act as the law obligates one to act",***

while it defines *'negligence'* as follows:-

> ***"The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally wantonly or willfully disregardful of others" (At page 1056).***

The dictionary notes that;

> ***"Negligence in law ranges from inadvertance that is hardly more than accidental to sinful disregard of the safety of others."***

As was held in **MUTHUKU -VS- KENYA CARGO HANDLING SERVICES LTD, (1991) KLR. 464**, ***"Our law has not yet reached the stage of liability without fault'***, it is incumbent upon the Plaintiff to prove the fault (liability), while bearing in mind that the party alleged to be at fault must engage the Defendant in its affairs within standards of protection against any unforeseeable risks. In this case, I ask, was the risk the Plaintiff found herself in foreseeable?

How likely was it that harm would result from the Defendants conduct?

The following two cases closely answer the questions.

In **TIMSALES LTD -VS- WILLY NG'ANG'A WANJOHI (2006) e KLR**, Judge Kimaru quoted Musinga J, in **TIMSALES LTD -VS- STEPHEN GACHIE, NAKURU HIGH COURT CIVIL APPEAL NO. 79 OF 2000** where at page 9 he quoted with approval a passage found at page 203 in the legal treatise

"**Winfield and Jolowicz on Tort**' 13th Edition, which states as follows:-

"At common law the employer's duty is a duty of care and it follows that the burden of proving negligence rests with the Plaintiff workman throughout the case. It has even been said that if he alleges a failure to provide a reasonable safe system of working the Plaintiff must plead, and therefore prove, what the proper system was and in what relevant respect it was not observed. It is true that the severity of this particular burden has been somewhat reduced, but it remains clear that for a workman merely to prove the circumstances of his accident will normally be insufficient. Where a statutory duty applies, on the other hand, the employer's duty is often absolute, so that no question of negligence arises at all, and even where it is qualified by such words as "so far as reasonably practicable" it is for the employer to prove that it was not reasonably practicable to avoid the breach. It follows that the existence of relevant statutory duty will almost invariably ease the task of the workman in establishing his employer's liability."

In **STATPACK INDUSTRIES -VS- JAMES MBITHI MUNYAO NAIROBI HC. CIVIL APPEAL NO. 152 OF 2003** (unreported) Visram J, held at page 7 of his Judgment 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 conn ction 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."***

In the instant case, PW1 testified as follows:-

> ***"I blame the company because they did not give me adequate treatment. I also blame them for not covering the trench. I did not see it. I was not told that it was there. If I had been told I would not have fallen into it. I had not worked in that place before."***

In rejoinder, the Appellant's counsel submitted that ''***it is not reasonably foreseeable to require the employer to take any further precautions to prevent its occurrence. Slipping or falling is an inevitable incident***'.

From the foregoing analysis, I hold the Appellant liable on grounds that; one, the Appellant did not cover the trench, neither did it inform the Respondent of its existence. A simple act of say, placing a tape around the trench would have served as adequate notice. Such notice/warning was important bearing in mind that the Plaintiff had not worked around that place before. Two, by failing to place the aforesaid warning, it meant that the Appellant failed to provide a safe working environment for the Respondent. This then clearly distinguishes this case with those cited by the Appellant. Three, the Appellant ultimately cannot run away from the fault from which it is responsible. It ought to have foreseen the risks ensuing from not covering the trench that was the cause of the accident. Four, the Appellant pleaded ***"the Plaintiff willfully and knowingly exposed herself to a risk of injury"*** appearing to rely on the defence of volenti non fit injuria (consent to the injury), in my view. But this is not the case given that the Respondent was not aware of the existence of the trench and was also not informed of its existence. There is also no evidence that the Respondent had full knowledge of the risk of injury to herself, or had voluntarily assumed or undertaken the liability resulting from that risk the circumstances under which the defence of volenti non fit injury would cushion it. Five and finally, to_wrap up the above, the Appellant failed to demonstrate that the Respondent did any act of negligence that contributed to the damage she

sustained.

In the result and upon a careful evaluation of all evidence on record and the respective submissions, I am of the view that the trial court neither misapprehended the evidence tendered before it nor relied on the wrong principles in arriving at the findings. In the premises, it is also my finding that the Appellant must be held 100% liable and that the appeal must fail.

Since the Appellant did not appeal on quantum and the Respondent did not also cross appeal under this head, and further taking into account that the damages awarded were just reasonable at the time, I shall not disturb the same.

In the upshot, the appeal is dismissed with costs. The Appellant shall also pay the costs of the lower court suit.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 2nd day of April, 2014.

G.W.NGENYE – MACHARIA

JUDGE

In the presence of:-

No appearance for Kalya & Co. Advocates (duly served with Judgment Notice) for the Appellant

Ms. Kipseii Advocate for the Respondent