



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 128 OF 2010**

**NANDI TEA ESTATES LIMITED.....APPELLANT**

**VERSUS**

**ALFONSE DERA AINEA.....RESPONDENT**

***(Being an appeal from the original decree and judgment of J. M. Njoroge, Principal Magistrate, in Kapsabet PMCC No. 428 of 2002 delivered on 29<sup>th</sup> June 2010)***

**JUDGMENT**

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 29<sup>th</sup> June 2010. The appellant was the defendant in the lower court. The respondent had filed a suit against the appellant claiming special and general damages for negligence. The respondent had pleaded that while on duty on 3<sup>rd</sup> December 2001 he fell into an unmarked ditch; and, dislocated his left leg. The appellant denied the claim *in toto*.
2. After considering the evidence, the learned trial Magistrate entered liability at 90% against the appellant. He assessed general damages at Kshs 100,000; and, special damages at Kshs 1,500. The net award was thus Kshs 91,500 or thereabouts. The respondent was also granted interest and costs.
3. The appellant was dissatisfied with the findings. It lodged a memorandum of appeal dated 6<sup>th</sup> July 2010. There are nine grounds of appeal. They can be condensed into *four*: First, that the trial court erred by holding that the respondent was injured at work; secondly, that there was no proof that the appellant was negligent; thirdly, that the respondent did not prove his case on a balance of probabilities; and, fourthly, that the learned trial magistrate applied erroneous principles in assessment of damages.
4. On 15<sup>th</sup> March 2016 I heard brief oral arguments from learned counsels for the parties. In a synopsis, the appellant submitted that the impugned decision found little support in the evidence or the law. The respondent on the other hand submitted that the appellant failed to provide a safe working environment; and, that as a consequence, the respondent was injured at work. I was implored by the respondent to find that the judgment of the lower court was sound.
5. 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.
6. On 10<sup>th</sup> June 2014, the parties agreed; and, the court directed that the appeal be determined by written submissions to be filed and exchanged within thirty days. The appellant filed its submissions on 1<sup>st</sup> July 2014. As late as 15<sup>th</sup> March 2016, nearly *one year and seven months* later, the respondent's counsel had not yet replied. When the matter came up for mention on 15<sup>th</sup> March 2016 and for reasons on the record, I directed the parties to argue the appeal orally. This was in

- furtherance of the court's overriding objective to expedite the hearing of this old appeal.
7. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions by learned counsel for both parties.
  8. I am satisfied that the respondent was employed by the appellant to pick tea on its estate. He had worked for the company since 1991. Doubt is removed completely by the *contract form* (exhibit 1). The crux of the appeal is whether respondent was injured *at work*; and, whether the appellant was *negligent*. In his testimony, the respondent claimed that on 3<sup>rd</sup> December 2001, he fell into an unmarked hole. He said the hole was covered by tea leaves and he could not detect it. He blamed the appellant for not erecting a sign to warn him. As a result, he dislocated his left leg; and, was injured by a tree stump. He said that a supervisor named John Oloo was present and witnessed the accident. He claimed that the supervisor gave him a note (exhibit 2) to go to the dispensary. The appellant said he was attended at the company's dispensary; and, later at the Nandi Hills District Hospital.
  9. That version of events was contested by the appellant. For example, DW1, Loius Obilo, the appellant's supervisor, denied the respondent was injured at work. He confirmed that the respondent was at work on the material day but left duty at 4:00 p.m. He had picked fifteen and a half kilos of tea. DW1 denied getting an accident report relating to the respondent. He also said that the name of the respondent did not appear on the open register for the dispensary. DW2 was a nurse at the dispensary. She said there was no referral sheet on the register or any record showing that the respondent was treated at the company's dispensary on that date.
  10. Quite obviously, one of the parties was *not* telling the truth. I accept that the respondent was on duty on the material date. The appellant's witness conceded he was there, picked tea and left at four. As there is no clear record of the *actual* time the respondent left duty, I am prepared to accept that the respondent was at work when he claims to have been injured. I concur with the trial court that the appellant should have called *John Oloo*, the supervisor referred to by the respondent, to *rebut* the allegations by the respondent. It is also not lost on me that DW1 and DW2 were employees of the appellant and their evidence naturally tallied with the defence set up by the appellant.
  11. At paragraph 6 of the plaint, the respondent blamed the appellant for negligence; breach of contract of employment; and, breach of statutory or common law duties of care. The particulars of negligence or breach of duty of care were pleaded as follows: Failing to provide the respondent with protective clothing; and, knowingly exposing the respondent to danger. The appellant's case in the lower court was on a three-strand: first, that the respondent was not injured while on duty; secondly, that the appellant was not negligent or in breach of any statutory or common law duties of care; and, thirdly, that the appellant did not suffer the injuries claimed.
  12. I have already found that the respondent proved on a balance of probabilities that he was on duty when the alleged accident occurred. The key question then is whether the appellant was *negligent*. The respondent's case was that on 3<sup>rd</sup> December 2001, he fell into an unmarked ditch or hole. He said the hole was covered by tea leaves and he could not detect it. He blamed the appellant for not erecting a sign to warn him. As a result, he dislocated his left leg; and, was injured by a tree stump.
  13. For starters, the legal burden of proof fell squarely on the respondent's shoulders. See section 107 of the Evidence Act. Secondly, I do not see what the employer could have *reasonably* done to ensure the appellant never slipped into an unmarked ditch while *walking*. The respondent stated that the company should have erected a sign to warn him of the danger. There was an implied term of the contract that the appellant took the risks *incidental* to his contract. The respondent had worked for the company since 1991. He knew the terrain. He had been injured before on his other leg and sued the company in a separate suit number 429 of 2002. It was then the respondent's *primary duty* to keep a safe look out. Thirdly, no evidence was led on the kind of *clothing* that could have been supplied to the respondent to avoid the type of injuries he sustained. I thus, with respect, *disagree* with the learned trial Magistrate that negligence or breach of any statutory duty of care was established.
  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* 4<sup>th</sup> 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. I am in the end *not* satisfied that the appellant was negligent or failed to provide a safe working environment. See particularly *John Karanja v Eastern Produce (K) Limited*, Eldoret, High Court Civil Appeal 35 of 2013 [2014] eKLR whose facts were on all fours with this case. It follows as a corollary that the respondent failed to establish liability against the appellant on a balance of probabilities.
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 PW2 (Dr. Samuel Aluda) and PW4, Tom Kilel (a clinical officer at Nandi District Hospital), the respondent suffered soft tissue injuries: slight tenderness on the left leg and ankle; and, a scar on the same leg. The treatment given comprised of an injection for tetanus; dressing of the wound; and; prescription of antibiotics and analgesics. Clearly, the appellant suffered minor soft tissue injuries which have completely healed. 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. I would not in the circumstances have interfered with the *discretion* of the learned trial magistrate. But that now is all water under the bridge.
18. The appellant having failed to establish his case on liability, this appeal must succeed. I set aside the judgment and decree of the lower court dated 29<sup>th</sup> June 2010. I substitute it with an order dismissing the respondent's case in the lower court. Costs follow the event and are at the discretion of the court. I will grant the appellant costs in the lower court; and, also in this appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 12<sup>th</sup> day of April 2016.**

**GEORGE KANYI KIMONDO**

**JUDGE**

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

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Mr. J. Kemboi, Court clerk.