



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 144 OF 2012

STEPHEN KHARAGWA KEREMA APPELLANT

VERSUS

EASTERN PRODUCE (K) LTD

(KAPSUMBEIWA TEA ESTATE) RESPONDENT

***(An Appeal from the Judgment and Decree of the Ag. Principal Magistrate Honourable R. KOECH
(Ag.PM) in Kapsabet PMCC No. 189 of 2011 dated 19.12.2012)***

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrate's court at Kapsabet dated 19th December 2012. The appellant was the plaintiff in the lower court. He sued the respondent seeking special and general damages for injuries allegedly sustained on 5th February 2009 in the course of his employment with the respondent.
2. In his plaint dated 11th May, 2011, the appellant pleaded that at the material time, he had been employed by the respondent as a tea plucker and that owing to the respondents and or its servant's negligence; breach of contract of employment and or statutory duty, he suffered a dislocation of his left shoulder joint when he slipped and fell into an unmarked ditch/hole in the respondent's tea plantation.
3. The respondent in its defence dated 27th May, 2011 denied the appellant's claim *in toto* and put him to strict proof thereof. In particular, the respondent denied that it had employed the appellant as a tea plucker and that he was injured in the course of his employment as alleged. In the alternative, the respondent averred that if an accident in which the appellant was injured occurred, then the same was solely or substantially contributed to by the negligence of the plaintiff in his manner and style of working.
4. After a full trial, the learned trial magistrate found that the appellant had failed to prove to the required standard that he was injured on 5th February, 2009 in the course of his employment with the respondent. He therefore dismissed his suit with costs.
5. The appellant was dissatisfied with those findings hence this appeal. In his memorandum of appeal dated 21st December, 2012, the appellant raised six grounds of appeal which can be condensed into three main grounds namely; that the learned trial magistrate erred in law and fact in holding that the appellant had not proved his case on a balance of probabilities; that the learned trial magistrate failed to appreciate and hold that the respondent did not rebut the appellant's case and lastly that the impugned decision lacked any legal basis.

6. The appeal was prosecuted by way of written submissions which were briefly highlighted before me on 14th June, 2016. Learned Counsel *Mr. Yego* instructed by *Z.K Yego Law offices* argued the appeal on behalf of the appellant while learned Counsel *Ms Sitienei* instructed by *Kibichiy & Company advocates* represented the respondent.

7. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, it is my duty to revisit and re-evaluate the evidence presented before the lower court and to draw my own independent conclusions on the soundness or otherwise of the trial court's decision. In undertaking that task, I must remember that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

8. The duty of the first appellate court has been enunciated in many judicial pronouncements which also spell out the scope of the appellate court's jurisdiction to interfere with findings of fact made by the lower court: See: **Sumaria & Another V Allied Industries Limited [2007] 2 KLR 1; Makube V Nyamoro [1983] KLR 403; Kiruga V Kiruga & Another [1988] KLR 348.** The principles that can be distilled from the said authorities are that an appellate court should be slow to reverse or alter the findings of fact made by the lower court. It should only intervene if it is demonstrated that the findings were not based on any evidence or were based on a misrepresentation of the evidence or that in reaching its decision, the trial court considered extraneous matters or applied the wrong legal principles.

9. The rationale for the need for caution in the exercise of the appellate court's mandate was provided by the predecessor of our Court of Appeal in **Peters V Sunday Post Limited [1958] EA 424** where O'Connor P stated at Page 429 that;

"It is a strong thing for an appellate court to differ from the finding on a question of fact of a Judge who tried the case and who had the advantage of seeing and hearing the witness."

10. In this appeal, the court is being urged to interfere with the trial court's finding on liability and award of damages. I have carefully considered the respondent's grounds of appeal, the evidence on record and the judgment of the trial court. I have also considered both the written and oral submissions made on behalf of the parties and the authorities cited.

The appellant relied on the case of **Peter Wafula Juma and two others V Republic Bungoma Criminal Appeal No. 144 of 2011** for the proposition that the appellant had successfully discharged its evidential burden of proof by establishing that he was injured on the date in question while working for the respondent as a result of the respondent's negligence and that this shifted the evidential burden of proof to the respondent to rebut the appellant's case which the respondent failed to do and that therefore, the trial court erred in dismissing the appellant's suit with costs instead of finding in his favour.

11. The respondent on the other hand urged the court to find that the appellant had failed to prove his case on a balance of probabilities as he had failed to establish a causal link between his injuries and the respondent's negligence. In support of their submissions, the respondent relied on the cases of **Amalgamated Saw Mills Ltd V Stephen Mutunguru HCCA No. 75 of 2005** and **Stat Pack Industries V James Mbithi Munyo (2005) eKLR.**

12. After examining the evidence on record and considering the submissions made by the parties, I find that it is not disputed that the appellant was employed by the respondent as a tea plucker and that he was on duty on 5th February 2009. What is hotly contested is his allegation that he was injured on that date while in the course of his employment.

13. In his evidence before the trial court, the appellant testified that he reported on duty as usual on 5th February, 2009 and started plucking tea under the supervision of a *Mr. Oyugi* (DW1). At around 9 a.m, as he was walking, he slipped and fell into an unmarked hole. He sustained an injury on the left shoulder. He was referred to the respondent's dispensary for treatment by a *Mr. Onyango*. He was treated by a *Mr. Towett* who gave him painkillers and told him to continue working but he decided to seek further treatment from Nandi Hills District hospital.

14. He produced treatment notes from Nandi Hills District Hospital as Pexhibit 2 and a medical report from *Dr. Aluda* as PExhibit 3(a). He blamed the respondent for the accident for failing to mark the hole and for failing to issue him with gumboots, an overall and gloves. Contrary to what is stated in the appellant's submissions, the appellant relied on his own testimony in support of his case. He did not call any witness.

15. To counter the appellant's case, the respondent called two witnesses. DW1 was the appellant's supervisor *Mr. Charles Oyugi Ochoo*. He testified that the appellant reported on duty on 5th February, 2009 at 7 a.m and worked till 5 p.m. He picked 71 kilograms of tea on that day. He produced an attendance check list to confirm that position (DExhbit 1). He denied that the appellant was injured on that day as alleged. DW2 was a nurse at Kapsombeiywo tea dispensary but he was not the nurse on duty on 5th February, 2009. He produced the dispensary's outpatient register (DExhbit 2) which showed that the appellant was not among the four patients who were treated in the dispensary on the date of the alleged accident.

16. After evaluating the evidence tendered by both parties, the learned trial magistrate in finding that the appellant had failed to prove his claim against the respondent stated inter alia as follows;

".....I do agree with the defendant that the plaintiff did not get injured on 5th February, 2009 as alleged. If indeed the plaintiff was injured at 9 a.m as he claims he could not in all probability have been able to pick 70.9 kgs of tea leaves. The plaintiff told this court that he was attended to at the defendant's dispensary on 5th February, 2009 before going to Nandi Hills district hospital for further treatment. But the defendant's outpatient register supports the defendant's assertion that the plaintiff did not go for any treatment as alleged. If I were to believe that the plaintiff had sustained a dislocation on his shoulder joint on 5th February, 2009 which in the opinion of Dr. S.I Aluda was a severe injury he could not have reported back for work on 6 February, 2009...."

17. It is settled law that the burden of proof in any case lies on the person who alleges the existence of certain facts or the person whose case would fail if no evidence was given. This is the import of *Section 107* and *Section 108* of the *Evidence Act*. The standard of proof in civil cases is on a balance of probabilities.

18. In order to prove his claim, the appellant needed to adduce evidence which proved on a balance of probabilities that he indeed slipped and fell into an unmarked hole while on duty in the respondent's plantation on the date alleged as a result of which he sustained the injuries pleaded; that the accident would not have occurred had it not been for the respondent's negligence or breach of contract of employment or statutory duty.

19. On my evaluation of the evidence on record, I find that the appellant's case had several serious gaps. Apart from the appellant's own testimony, no other evidence was availed to the trial court to support his contention that he sustained a dislocation of his left shoulder after falling into an unmarked hole while working for the respondent. It is pertinent to note that though the appellant stated in his evidence that he was working under the supervision of DW1, he also stated that when the accident occurred, he got a referral note for treatment in the respondent's dispensary from a *Mr. Onyango*. He did not report the alleged accident to his immediate supervisor *Mr. Oyugi*.

He did not explain why he chose to report the matter to a *Mr. Onyango* instead of his immediate supervisor. The dispensary in which he claims to have received the initial treatment or first aid had no record of his attendance. Further, the said *Mr. Onyango* was not called as a witness to support his claim that he had indeed been injured on that day as alleged.

20. In contesting the appellant's claim, the respondent adduced both oral and documentary evidence in its bid to rebut the appellant's case. This was through the testimony of DW1 and the attendance checklist for the month of February 2009. The respondent's case was that the appellant worked the whole day of 5th

February, 2009 from 7 a.m to 5 p.m without any incident. It is important to note that the appellant did not challenge the authenticity of the entries made in the attendance checklist or dispute DW1's claim that he plucked 71 kilograms of tea on that day and less amounts on the previous days. And as what is not disputed is deemed to be admitted, I accept the respondent's evidence as did the learned trial magistrate that the appellant plucked 71 kilograms of tea on that day

21. That now brings me to the question that has constantly lingered in my mind when evaluating the evidence adduced in this case in its totality. The question was also alluded to by the learned trial magistrate in his judgment. If indeed the appellant was injured on 5th February, 2009 at 9 a.m and he immediately left the farm to go and seek treatment, how is it possible that in two hours between 7 a.m and 9 a.m he plucked 71 kilos of tea while two days previously when he worked the whole day he only managed to pluck under 60 kilos of tea?

22. In his submissions, learned counsel *Mr. Yego* argued that it was possible for the appellant to have plucked 71 kilos of tea that day even if he had been injured because DW1 had admitted that employees could be assisted by their family members to pluck tea. That may well be the case but in this case, the appellant did not claim or even suggest that he had been assisted by anyone to pluck the tea attributed to him on that day. The evidence regarding the amount of tea the appellant plucked on the material date which as I have noted earlier was not disputed by the appellant casts doubt on his claim that he was injured at 9 a.m on the material date and lends credence to the respondent's claim that he was not injured during working hours.

23. Having said that, it is not lost on me that the appellant had produced medical evidence to prove his claim that he sustained injuries on that day. There were treatment notes from Nandi Hills District hospital and a medical report by *Dr. S.I Aluda* dated 4th May, 2011. It is worth noting that the medical report was prepared over two years after the alleged accident. The report did not indicate that the doctor in compiling it had made reference to any treatment notes. The doctor appears to have relied on the history provided by the appellant which dilutes the credibility of the report.

24. The treatment notes from Nandi District Hospital showed that the appellant had sustained a dislocation on his left shoulder on the date in question but this did not amount to prove that the injury was sustained in the course of the respondent's employment.

25. Having carefully evaluated the evidence on record, I am unable to fault the finding of the learned trial magistrate that the appellant had failed to prove his case on a balance of probabilities. It is my finding that the trial court properly interrogated and weighed the evidence adduced before it before arriving at its decision. The decision was based on the evidence on record and was not premised on any wrong legal principle.

26. In view of the foregoing, I do not find any merit in this appeal. It is accordingly dismissed with costs to the respondent.

It is so ordered

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 1st day of September, 2016

In the presence of:

Naomi Chonde – Court clerk

No appearance by both parties though duly notified.