



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

**CIVIL APPEAL NO. 16 OF 2013**

**JOSHUA KIPCHIRCHIR KURGAT ..... APPELLANT**

**VERSUS**

**EASTERN PRODUCE (K) LTD ..... RESPONDENT**

**(CHEMOMI TEA ESTATE)**

***(An Appeal from the Judgment and Decree of the Resident Magistrate Honourable G. Adhiambo (RM), in Kapsabet CMCC No. 7 of 2012, dated and delivered on 8.2.2011)***

**JUDGMENT**

1. This appeal arises from the judgment and decree of the Principal Magistrate court at Kapsabet in Civil Suit No. 7 of 2012. The appellant was the plaintiff in that suit while the respondent was the defendant.
2. In his plaint dated 21<sup>st</sup> November 2011, the appellant had sued the respondent claiming general and special damages for injuries sustained on or about 10<sup>th</sup> September, 2011 while in the course of his employment with the respondent. It was the appellant's case that on the material date, he was pricked by a tea stick while plucking tea as a result of which he sustained serious injuries; that the injuries occurred as a result of the respondent's and/or its servants or agents negligence or breach of his contract of employment or statutory duty.
3. The particulars of negligence or breach of contract of employment or statutory duties were pleaded in paragraph 6 as the respondent's failure to provide the appellant with gloves, apparel, gumboots, masks, goggles or other protective gear; failing to provide a proper system of working; failing to warn the appellant of impending danger or failing to prevent him from sustaining the injuries; instructing the appellant to work in unsafe conditions or environment and exposing him to risk of harm or injury.
4. In its statement of defence dated 24<sup>th</sup> February 2012, the respondent denied all the allegations made against it in the plaint and put the appellant to strict proof thereof. The respondent specifically denied that the appellant was injured on 10<sup>th</sup> September, 2011 while in the course of his employment. In the alternative, on a without prejudice basis, the respondent contended that if the appellant sustained any injuries as alleged, the same were wholly or substantially contributed to by his negligence in the manner in which he conducted himself at the material time. The particulars of the appellant's contributory negligence were pleaded in paragraph 7 of the defence.
5. After a full hearing, the learned trial magistrate in a judgment delivered on 14<sup>th</sup> February, 2013 found that the appellant had failed to prove his case against the respondent and dismissed the suit with costs to the respondent.
6. Being dissatisfied with the decision of the trial court, the appellant proffered the instant appeal to

the High Court relying on the following grounds:-

1. ***That the learned trial magistrate erred in dismissing the Plaintiff's case in favour of the defendant without any legal basis.***
2. ***The learned trial magistrate erred in failing to appreciate the overwhelming evidence in favour of the Appellant.***
3. ***The learned trial magistrate erred in failing to appreciate the plaintiff's written submissions.***
4. ***The learned trial magistrate erred in failing to hold that the plaintiff had proved his case on a balance of probability.***
5. ***The learned trial magistrate erred in failing to hold that the defendant had failed to rebut the plaintiff's case.***
6. ***The learned trial magistrate erred both in law and in fact in failing to find in favour of the Appellant.***

7. The appeal was prosecuted by way of written submissions; those of the appellant were filed on 25<sup>th</sup> March, 2015 while those of the respondent were filed on 20<sup>th</sup> April, 2015.
8. This is a first appeal to the High Court. In the premises, it is an appeal on both facts and the law. I am well aware of the duty of the first appellate court which is to revisit the evidence adduced before the trial court, re-evaluate it in order to draw my own independent conclusions while bearing in mind that unlike the trial court, i did not have the advantage of seeing or hearing the witnesses.

See: ***Peters V Sunday Posts ltd (1958) EA 424; Selle Associated Motor Boat company ltd [1968] EA 123.***

9. I have carefully considered the grounds of appeal, the evidence tendered before the trial court; the judgment of the learned trial magistrate and the rival submissions by the parties.

Having done so, i find that this is basically an appeal against the trial court's finding on liability on grounds that the learned trial magistrate erred in failing to find that the appellant had proved his case on a balance of probabilities given the evidence adduced before the trial court in support of his case.

10. The appellant testified as PW2. He stated that on 10<sup>th</sup> September 2011, he was on duty plucking tea in the respondent's plantation when he was pricked by a tea stem on the right index finger. He reported the injury to his supervisor *Lawrence Arusei* and he was referred to the Dispensary for treatment. He also attended Chewoi dispensary and Nandi Hills District hospital. His treatment

record at Nandi District Hospital was produced in evidence by PW3 as Pexhibit 2. It confirmed that the appellant was treated in the hospital on 10<sup>th</sup> September, 2011 for a wound on his right index finger. He was subsequently examined by PW1 *Dr. D.S Aluda* on 14<sup>th</sup> November 2011 who, relying on the treatment notes from Nandi District Hospital prepared a medical report which he produced as Pexbt 1.

11. The respondent on its part called two witnesses to rebut the appellant's case. The first witness was *Lameck Arusei* the appellant's supervisor who denied that the appellant was on duty on 10<sup>th</sup> September, 2011 when he claims he had sustained an injury in the course of his employment. He produced an attendance checklist in support of his claim.

DW2 was the clinical officer at Kapsigak dispensary. She produced records confirming that the appellant was treated at the dispensary on the material date but for abdominal pains, headache and heartburn.

12. After analysing the evidence adduced before the court by both the appellant and the respondent, the learned trial magistrate stated at page 61 from line 24 as follows:-

***“I will reiterate that it is not disputed that the plaintiff was an employee of the defendant on 10<sup>th</sup> September, 2011 what is disputed is that he was on duty working for the defendant on 10<sup>th</sup> September, 2011 that he sustained an injury while working for the defendant on the aforesaid date. He said that his supervisor was Lameck Arusei and that as he was tipping tea leaves he was pricked by a tea stem. He did not avail any of his colleagues with whom he was allegedly working on that material day to corroborate his testimony. He did not even tender a satisfactory explanation as to why he did not avail any of this colleagues to corroborate his testimony. He didn’t avail any documentary prove to show that he was on duty on the material day. I am of the considered view that his payslip of the month of September, 2011 produced as PExhibit 3 is not sufficient prove that he was on duty working for the defendant on 10<sup>th</sup> September, 2011.***

***The supervisor who was supervising the workers on 10<sup>th</sup> September, 2011 and whom plaintiff admitted was a supervisor at the defendant’s tea farm on 10<sup>th</sup> September, 2011 appeared before court as DW1 and rebutted the plaintiff’s testimony. DW1 who confirmed that he was the supervisor at the defendant’s farm stated that he was on duty and that on 10<sup>th</sup> September 2011 the plaintiff was not on duty. In a bid to prove his averments the attendance check list for the period running from 6<sup>th</sup> September, 2011 to 13<sup>th</sup> September, 2011 as D.Exhibit 1 and the court observed that on the records of 10<sup>th</sup> September, 2011 the plaintiff who was employee number 107633 was absent.***

***Even though during cross examination it became evident that the said DW1 was not the maker of the said attendance checklist.***

***DW1 further rebutted the evidence of the plaintiff by stating that he never wrote any referral note for the plaintiff on 10<sup>th</sup> September 2011 as the plaintiff was not on duty. Save for the word of mouth, the plaintiff had nothing to prove that he was on duty working for the defendant...”***

13. I have taken the trouble to reproduce in detail the relevant passage of the trial court’s judgment to make the point that the learned trial magistrate was aware of what issue was in dispute before him and that he properly evaluated the evidence before him before arriving at the conclusion that the appellant had failed to adduce sufficient evidence to prove his claim that he was on duty on 10<sup>th</sup> September, 2011 in the respondent’s premises and that he had been injured in the course of his employment.
14. It is trite law as codified in **Section 107 and 108** of the **Evidence Act** that he who alleges must prove and it was therefore incumbent upon the appellant to prove on a balance of probabilities that he had indeed been injured on the material date in the course of his employment. Whereas the appellant may not have been expected to have possession of attendance checklists or the muster roll in order to produce them as exhibits in support of his case, he ought to have availed at least one of the workers he was on duty with on that day to confirm that he was indeed on duty when he sustained the injuries in question.

As correctly observed by the learned trial magistrate, the appellant’s oral testimony which was not substantiated by any other evidence was not sufficient to found liability against the respondent when juxtaposed with the evidence in rebuttal availed by the respondent.

The evidence adduced by PW3 was in my view not quite useful to the appellant’s case since it only established that the appellant had been treated for a wound on his finger but it did not prove that he had been injured in the course of his employment. It is also interesting to note that the appellant claimed in his evidence that he sought treatment at two of the respondent’s dispensaries before proceeding to Nandi Hills District Hospital on the same date. The appellant did not explain why he needed to seek treatment from three different health institutions only for a prick wound on his finger.

15. In view of the foregoing, I am satisfied that the trial magistrate properly analysed all the evidence that was tendered before him and arrived at the correct conclusion that the appellant had not proved his case against the respondent on a balance of probabilities. In the circumstances, I do not find merit in this appeal. I consequently dismiss it with costs to the respondent.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 5<sup>th</sup> day of November, 2015**

In the presence of:

Mr. Kagunza for Mr. Onyinkwa for the respondent

No appearance for the Appellant

Mr. Lesinge Court clerk