REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.39 of 2012

(Appeal from the Judgment and Decree of Hon. Senior Resident Magistrate Mr. S. R. Rotich

in Sotik SRM Civil Case No.206 of 2004 dated and delivered on 30th July 2009)

SOTIK HIGHLANDS COMPANY LIMITED.....PPELLANT

VERSUS

THOMAS OMBUI ISABOKE.....RESPONDENT

JUDGMENT

Thomas Ombui Isaboke, the Respondent herein, in a plaint dated 18th August 2004 sued Sotik Highlands Company Limited, the Appellant herein, claiming damages for the injuries he suffered in the course of the employment with the Appellant as a tea plucker on 4th September 1998. The Respondent alleged that he was pricked by a tea bush while plucking tea. He accused the Appellant of failing to provide and maintain a safe system of work and for failing to provide and maintain proper plant equipment. The Appellant filed a defence to deny the Respondent's claim. The Appellant stated that the Respondent was not on duty the day he was allegedly injured. It also alleged that the Respondent was negligent himself because he did not follow the laid down procedure and supervision and also failed to utilize the mean of access to his place of work.

The case was partly heard by Hon. A. G. Kibiru learned Principal Magistrate and was concluded by Hon. S. R. Rotich, learned Principal Magistrate. Two witnesses testified from each side. At the conclusion of the trial, the learned Principal Magistrate came to the conclusion that both the Plaintiff and the Defendant were to blame for the accident. The trial Principal Magistrate apportioned the Appellant and the Respondent 20% liability respectively. An award of Ksh.102,000/= as damages was made. The Appellant being aggrieved filed this appeal.

On appeal, the Appellant put forward the following grounds:

1. THAT the Learned Trial Magistrate erred in law and in fact in making a finding on liability at 80% against the Defendant/Appellant when the Plaintiff had failed to discharge his burden of proof on a balance of probability.

2. THAT the Learned Trial Magistrate erred in law and in fact in putting more weight to the Plaintiff's evidence while disregarding the Defendant's/Appellant's evidence, thus arriving at a wrong decision.

3. THAT the award was inordinately high considering the entire circumstances of the case. The

same was arrived at in total disregard to the Defendant/Appellant's submissions.

4. THAT the Learned Trial Magistrate erred in law and in fact in making an award that was neither supported by facts nor precedent in related case law.

5. THAT the Learned Trial Magistrate exercised wrong principles in awarding damages so widely different from awards given in comparable cases as to be an erroneous estimate of the damages to which the Respondent was entitled.

Learned counsels appearing in this appeal recorded a consent order to have the appeal determined by written submissions.

I have, as enjoined by law being the first appellate court, re-evaluated the case that was before the trial court. I have further considered the rival submissions. In the first ground of appeal, it is argued that the trial Principal Magistrate erred when he apportioned the Appellant 80% liability whereas the Respondent had failed to discharge the burden of proof. It is stated that the Respondent had failed to show that he was injured in the course of duty. The Appellant further argued that the Respondent had failed to produce the referral chit he was given by his supervisor to go for treatment at the Appellant's dispensary. It is also argued that the Respondent's name was not in the check-roll register for 4th September 1998. The Respondent submitted that he tendered cogent evidence to show that he was injured in the course of employment and as a result of failure by the Appellant to provide him with gumboots and gloves. I have on my part re-evaluated the evidence tendered. Two witnesses testified in support of the Respondent's case. It is the evidence of Thomas Ombui (PW1) the Respondent that on the material day i.e. 4th September 1998 he was assigned the work of picking tea in the Appellant's Tea Estate by Mr. Atai, his supervisor. He said he fell into a hole while plucking tea in a new block and in the process he pricked his left leg and left eye. PW1 said he reported to his supervisor who in turn gave him a referral chit to seek for treatment at the Appellant's dispensary. The Respondent stated that he left the referral chit in the dispensary. The Respondent later visited Kericho District Hospital to seek for further medical treatment the following day. In cross-examination the Respondent stated that he worked with the Appellant as a tea plucker from 1996 until 1998 when he left upon getting injured and has never gone back for employment. The Respondent confirmed in cross-examination that his name was not in the dispensary record for the month of September 1998. It was the evidence of the Respondent that he was not on duty the whole month of September 1998. PW1 denied having worked in the same tea estate in the month of October 1998. The Respondent summoned Dr.Oketch (PW2) to present the medical report. PW.2 stated that he examined the Respondent in 2004, 6 years after he was injured. PW2 produced a report which he said he prepared based on the history, and treatment notes from Kericho District Hospital. In cross-examination the Respondent stated that he was not examined by Dr. Oketch the doctor but heavily relied on his story in writing the report. The Appellant tendered the evidence of its pay roll clerk Charles Abuga (DW1). This witness produced records on the Appellants workers containing information about leave, plucking of tea and weeding. He produced the daily check-roll. DW1 stated that on 4th September 1998 the Respondent was on duty plucking tea but was absent on 5th September 1998 but was back on duty on 7th September 1998. At the end of the month of September 1998 it is said, the Respondent received Ksh.6,875/= for 1,262 Kgs of the tea he plucked. On the particular day when it is alleged the Respondent got injured it is said he plucked 10 Kgs of tea leaves. Dorcas Nyambati (DW.2), the Appellant's nurse, produced the patients records kept at the Appellant's dispensary for the month of September 1998. DW.2 said she did not attend to the Respondent at the Appellant's dispensary on 4th September 1998. She further stated that no injuries were reported on 4th and 5th September 1998. DW.2 produced the injury record book showing the Respondent did not attend the dispensary on that date. DW.2 confirmed that a Clinical Officer by the name Alice used to work for the Appellant in the same dispensary. DW2 further confirmed in cross-examination that the entries made in the dispensary records were confidential and hence not accessible to the patient.

The question is whether the Respondent was injured while in the course of duty? The evidence tendered appears to have created more confusion than answering the question. In paragraph 5 of the plaint the Respondent expressly stated that he was injured while he was on duty on 4th September 1998.

In paragraph 4 of its defence the Appellant denied the allegation. The evidence tendered by both sides however agree that the Respondent was on duty on 4th September 1998 to pluck tea. The second limb is whether he was injured in the process. The Respondent clearly stated that he fell into a hole and got injured. He said thereafter visited the Appellant's clinic where he was treated by the Appellant's clinical officer known as Alice. DW.2 confirmed in her evidence that Alice was employed as a Clinical Offier in the Appellant's dispensary at the time of the alleged injury. The Respondent stated that he was presented with a referral chit to present to the dispensary but the same was never given back to him. The Appellant did not deny the averment that Alice was on duty on 4th September 1998. It did not also controvert the allegation that the referral chit given to the Respondent may have been retained by their nurse. The Appellant was bound to tender evidence to prove otherwise. In her evidence in cross-examination DW.2 admitted that the patients records kept at the Appellant's dispensary were confidential. Those records are prepared by the nurse and the clinical staff from the Appellant's dispensary and are kept as confidential and not accessible to the patient. In my humble view, those records may easily be tailor made to suit the Appellant's case. After critically re-examining the evidence, I am convinced that the Respondent was injured while in the course of the employment of the Appellant. I find the first ground to be without merit. Though the trial Principal Magistrate did not analyze the evidence, nevertheless he came to the correct conclusion that the Respondent had proved his case to the required standards in civil cases.

The second ground which was ably argued is to the effect that there was no proof that the Appellant was negligent. The Respondent tendered evidence showing that he was taken to a new block which whose terrain he was not familiar with. He stated in his evidence that he fell into a hole whereof he injured his left leg and eye. He claimed he was not given gumboots nor goggles. He also stated that the Appellant did not make prior arrangements to check on holes before letting him go plucking tea. The Appellant did not deny that it never supplied goggles and gumboots. It did not also deny the allegation that it never sent an advance team to survey on the existence of holes in the tea plantation. The Respondent alleged that they were not briefed of the dangers of the existence of holes in the field. In my humble view and on the basis of the evidence, the Appellant cannot escape from blame. Of course the Respondent was also enjoined to be more vigilant. The learned Principal Magistrate found the Respondent 20% liable. With respect, I do not think the trial magistrate can be faulted on this. Again this ground must fail.

The Appellant in his third ground has complained that the learned Principal Magistrate ignored the Appellant's evidence in form of the check-roll. It is clear the trial magistrate did not analyze the evidence. However, I have already re-evaluated the evidence and found that the check-roll produced by the Appellant clearly indicated that the Respondent was on duty on the material date. I have also raised doubt on the veracity and reliability of the medical records kept by the Appellant. Those records being solely prepared by the Appellant's staff may easily be manipulated to buttress the Appellant's case. In my assessment, I find the Appellant's documentary evidence not to have displaced the Respondent's case.

The final ground argued on appeal is to the effect that the award on damages is inordinately high. The medical evidence presented shows that the Respondent suffered deep cut wound on the left leg shin and a cut wound on the left eye. The learned Principal Magistrate awarded Ksh.100,000/= as general damages and Ksh.2,000/= as special damages. The gross total is Ksh.102,000/= less 20% making the net total of Ksh.81,600/=. I have carefully considered the authorities supplied on appeal and before the trial court and I find the awards not exorbitant but commensurate with the injuries suffered.

In the end I see no merit in this appeal. The same is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 4th day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

Mrs. Bett for Appellant

Mr. Nyaingiri for Orina for Respondent