REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 76 of 2012

EASTERN PRODUCE (K) LTD (SAVANI ESTATE) .... APPELLANT

VERSUS

GILBERT MUHUNZI MAKOTSI .... RESPONDENT

(Being an appeal against the judgment and decree of Hon. B. N. MOSIRIA (Principal Magistrate) delivered on 12th July, 2012 in Kapsabet Principal Magistrate's Court Civil Case No. 109 of 2011)

JUDGMENT

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The Respondent in this appeal was the Plaintiff in the Principal Magistrate's Court suit at Kapsabet, being civil suit No. 109 of 2011 against the Appellant (the Defendant) in which he claimed:-

(a) Special damages of Kshs. 1,500/=
(b) General damages
(c) Costs of the suit

(d) Any other relief the Honourable Court may deem fit and just to grant.

He was an employee of the Appellant company at Savani Tea Estate. His claim arose out of injuries he sustained on the 13th June, 2008 at his place of work by way of a prick on the left foot by a tea stump. He attributed the injuries to the Appellant's negligence of breach of duty of care or contract to him. Such particulars of negligence or breach of duty of care and contract were particularized under paragraph six (6) of the plaint.

The particulars of injuries were stated in paragraph seven (7) of the plaint as follows:-

(a) A pricked wound on the left foot (dorsal aspect) which was tender.

(b) Severe pains incurred during and after the injury.

The learned Magistrate delivered her Judgment on 12th July, 2012 in which she awarded Ksh. 130,000/= as general damages, Ksh. 1,500/= special damages plus costs and interests. It is this judgment that the Appellant was dissatisfied with and has appealed against, citing the following grounds contained in the memorandum of appeal dated 25th July, 2012.

1. The learned trial Magistrate erred in law and fact in failing to hold that the Respondent did not prove his case on a balance of probability.

2. The learned trial Magistrate erred in failing to evaluate the evidence tendered judiciously.

3. The learned trial Magistrate erred on all points of fact and law in as far as the award of damages is concerned.

4. The learned trial Magistrate erred in law and in fact in failing apportion liability judiciously.

5. The learned trial Magistrate's award of damages was inordinately too high and manifestly excessive for the soft tissue injuries allegedly suffered.

6. The learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's case.

7. The learned trial Magistrate erred in law and in fact in disregarding the formidable defence evidence and/or submissions tendered.

The seven grounds of appeal may be summarized into three:-

(a) That the Respondent did not prove liability against the Appellant.

(b) That the learned Magistrate applied the wrong principles of law in assessing the damages.

(c) That the damages awarded were excessively too high in the circumstances.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions – see <u>**STANLEY MAORE -VS- GEOFFREY MWENDA – NYERI CIVIL APPEAL NO. 147 OF 2002**</u> – **“the duty of the Appellate court is to re-evaluate the evidence, assess it and make its own conclusion as if it has not seen or heard the witnesses.”**

<u>**LIABILITY**</u>

In considering whether the trial court properly arrived at a finding on liability, it must be borne in mind that an appeal court “**will not normally interfere with a finding of a fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles” -** <u>**EPHANTUS MWANGI AND GEOFFREY NGUYO NGATIA -VS- DUNCAN MWANGI WAMBUGU (1982-1988) 1 KLR, 278**</u>.

The Respondent testified as PW3. He stated that he was a casual worker and on the fateful day, he was assigned to pick tea on a field that had been prunned. That the prunned stumps had not been taken away and would be left on the ground as manure. He said that as he worked, he slipped on a hole which had a prunned branch which pricked his left foot on the upper side (dorsal). He blamed the Appellant for the injury in that there was no warning sign that there were open dug holes and that he had not been provided with gum boots or other protective foot wear that would have shielded him against the injury.

On cross-examination he re-stated that he ought to have been provided with protective foot wear, in particular gum boots.

The defence called two witnesses. DW1, Amos Nzebedi testified as the field supervisor. He confirmed

that the Respondent was on duty on the day he was injured and produced a work attendance register (D-Exhibit 1) in this respect. He however denied that the Respondent was injured while at work. He stated that when a worker is injured a note is written for him to go to the dispensary which then refers him to Nandi District Hospital. That in respect of the Respondent, no note was issued and so if he suffered any injuries, then the same were occasioned outside his work station.

On cross-examination, DW1 did confirm that the Respondent was on duty but added that he did not see him get injured. He admitted that the office kept an accident register which he failed to carry to court notwithstanding that he testified that the name of the Respondent was not in the register.

I would wish to point out that the typed proceedings contained in the record of appeal do not wholly cover the evidence in chief of DW 1 and of his cross-examination and re-examination. I have had to rely on the hand written proceedings of the lower court in this respect.

DW2, Irene Jelagat was the Savani Estate nurse. Her testimony was that she keeps a register of all persons/workers injured at work place and that on the 13th June, 2008 no one presented to her for treatment. She said it was Appellant's policy that every worker who got injured had to pass through the dispensary, not only for purposes of treatment but also to be issued with a referral note to go to Nandi District Hospital for further treatment where need be. She produced an injury register as D.Exhibit 2. Again this register is not in the bundle of exhibits contained in the record of appeal.

I have also gone through the physical file of the lower court. In the schedule of defence exhibits, this register is not named as one of the exhibits produced in court. Further, it does not form part of the exhibits in the said file. I do, in the circumstances arrive at a conclusion that DW2 did not produce any injury register that demonstrated that the Respondent was never treated at the estate dispensary.

In this respect, and giving emphasis to the evidence of DW2, only her evidence would have exonerated the Appellant. In the absence of the injury register, her evidence and that of DW1 to the effect that the Respondent was not treated at the dispensary and may have been injured outside the work place remain rhetoric. It would be crucial rebuttal evidence. Lack of it only vindicates the Respondent's evidence that he was treated at the dispensary on escort by DW1 soon after the injury.

I do accordingly conclude that the evidence of DW1 and DW2 did not in any negate the Respondent's evidence that he was injured at the work place. He could not provide treatment sheets from the dispensary because the latter did not issue them.

It is not disputes that the Respondent was an employee of the Appellant company and that on the fateful day he was in the field plucking tea. The work attendance register was produced as P.Ext.1 in which his name appears.

In the kind of chores the Respondent was performing, it is expected that not only is a safe working environment provided but also such protective gear as would prevent foreseable injuries. In this regard, it was the duty of the Appellant to give warning of any holes left gaping in the farm. The Respondent tripped into a hole that had a prunned stump that injured him. There was no sign that such a hole existed. Moreso, if he wore strong footwear, to wit, gum boots such injury would not have occurred.

No reason(s) was given by the Appellant on why protective devices were not provided to the Respondent. No evidence was also led to rebut the Respondent's assertion that the protective foot wear was not provided. In the circumstances I see no reason why the Respondent should shoulder any responsibility for the injuries he sustained. I do hold accordingly that the learned Magistrate applied the proper principles of law and gave regard to all evidence laid before her in arriving at her finding on liability.

The Appellant's counsel had, before the Magistrate enunciated what the '**duty of care'** encompasses citing **PARAGRAPH 562 VOLUME 16 OF THE 4TH EDITION – HALSBURY'S LAWS OF ENGLAND,** followed in **NAIROBI COURT OF APPEAL CIVIL APPEAL NO. 211 OF 2002**

ABDALA BAYA MWANYULE -VS- SWALAHADIN SAHID T/A JOMVU TOTAL PETROL STATION as;

"It is an implied term of a contract of employment at common law that an employee takes upon himself the risk necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer merely upon the ground of their relation, to compensate him for any injuries, which he may sustain in the cause of his employment in consequence of the dangerous character of the work upon which he's engaged …... The employer does not warrant conditions, nor is he an insurer of his employee' safety, the exercise of due care and skill suffices."

This observation must be interpreted depending on circumstances of each individual case. The duty to exercise due care and skill falls on the Defendant where the risk is foreseable or circumstances leading to the injury are within the knowledge of the Defendant.

In the instant case, it is rebutted by the Respondent that he was aware of the existence of the hole that had the stump. The duty to provide the warning of the existence of the hole squarely lay on the Appellant. It failed to execute such duty and so the Respondent cannot be held liable.

Consequently, I uphold the learned Magistrate's finding that the Appellant must shoulder liability at 100%.

QUANTUM

It is settled principle that "**an appellate court will not disturb an award unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that in arriving at the award the Judge (and I add Magistrate) proceeded on wrong principles or that he misapprehended the evidence in some material respect**" - see **KIMOTHO & OTHERS -VS- VESTERS AND ANOTHER CIVIL APPEAL NO. 4 OF 1984**.

The Respondent's counsel had submitted on an award of Ksh. 350,000/= as general damages for pain, suffering and loss of amenities. He cited the case of **CATHERINE WANJIRU KINGORI & 3 OTHERS -VS- GIBSON THEURI GICHUBI, NYERI HCCC. NO. 320 OF 1998** in which the first Plaintiff was awarded Ksh. 300,000/= general damages for injury on the left ankle, injuries to the legs and injuries to the chest.

The Appellant's counsel on the other hand submitted on an award of Ksh. 50,000/=. He cited the decision in **DAVID OKOLA ODERO -VS- KILINDINI TEA WAREHOUSES LTD (2008) e KLR**. This was a High Court appeal from a Magistrate's decision. The Appellant sustained severe personal injuries when a fellow employee crushed a sack load on him. The Magistrate dismissed the suit but on appeal, the High Court found for the Appellant, set aside the Magistrate's judgment and awarded Ksh. 40,000/= as general damages. In awarding such sum, the Judge noted that the Appellant had not suffered any permanent incapacity.

In this appeal the Appellant's counsel submits that a sum of Ksh. 30,000/= would be adequate compensation whereas counsel for the Respondent maintain that the trial court's award was proper and adequate compensation.

The Appellant's counsel has cited three other cases namely:-

1. **ROBERT NGARI GATERI -VS- MAINGO TRANSPORTERS (2015) e KLR** in which Ksh. 60,000/= for soft tissue injuries to the lower chest left elbow and right buttock.

2. **SOROKO SAW MILLS LTD -VS- GRACE NDUTA NDUNGU (2006) e KLR**. On appeal an award of Ksh. 80,000/= by the Magistrate's court was reduced from 80,000/= to 30,000/= for soft tissue injuries to the right hip joint and the back.

3. **PETER KAHUNGU & ANOTHER -VS- SARAH NORAH ONGARO (2004) e KLR**. Award of Ksh. 150,000/= by the Magistrate's court was reduced to 80,000/= for soft tissue injuries.

I agree with counsel for the Appellant that the Respondent suffered soft tissue injuries which have completely healed. They did not occasion him any permanent disability. They have not prevented him from performing any gainful employment. As such, the award given by the trial court, at the time, was inordinately high in the circumstances.

In consideration of the submissions made before me, and the medical report produced before the trial court, it is my considered view that an award of Ksh. 70,000/= would have adequately compensated the Respondent. I accordingly reduce the sum of Ksh. 130,000/= and substitute it with Ksh. 70,000/=.

In the result I allow the appeal, set aside the judgment of the learned Magistrate by substituting the sum of Ksh. 130,000/= awarded with Ksh. 70,000/= as general damages. Ksh. 1,500,000/= special damages remain as granted.

The Appellant shall pay costs of the lower court suit based on the award I have made. Since this appeal has partially succeeded, I order that each party bears its own costs.

DATED and **DELIVERED** at **ELDORET** this 2nd day of May, 2013.

G. W. NGENYE - MACHARIA
JUDGE
In the presence of:

No appearance for Mr. Kibichiy Advocate for the Appellant

Mr. Mwinamo holding brief for Yego Advocate for the Respondent