



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Appeal 48 of 2009

KAPCHORWA TEA CO. LTD :::
APPELLANT

AND

PETER KIPYEGON MELLY :::
RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate Hon. W.N. Njoroge, dated 14th April, 2009 at Kapsabet in PMCC No. 157 of 2005)

JUDGMENT

I have before me an appeal by **Kapchorua Tea Company Limited**, the defendant in the original action, from the judgment and decree of the Senior Resident Magistrate (Hon. **W.N. Njoroge**) in Kapsabet SPMCC No. 157 of 2005 (**Peter Kipyegon Melly =vrs= Kapchorua Tea Co. Ltd**). In that action, the learned trial magistrate apportioned liability as between the appellant and the respondent at 80% and 20% respectively and awarded Kshs 96,000/= general damages and Kshs 3,000/= special damages to the respondent.

The respondent brought his action in the lower court by way of a plaint dated 26th April, 2005, in which he pleaded, inter alia, that on or about 29th November, 2003, he was injured while engaged as an employee of the appellant. He blamed the appellant for those injuries particulars whereof he enumerated.

The appellant delivered its defence on 27th May, 2005, in which it denied employing the respondent and the negligence alleged against it. It further blamed the respondent and / or alleged substantial contribution by the respondent.

At the trial, the respondent gave evidence and called two witnesses. The respondent in his testimony stated that on the material date, as he guarded the appellant's Sirwo office, he fell into a dirt pit hole and was injured on the left shoulder, back and left knee. He went to the appellant's dispensary and then to Nandi Hills District Hospital where he was treated and discharged. He blamed the appellant because he failed to inform him of the dirt hole and also failed to provide him with working tools such as batteries.

Philip Terer (P.W.2), the respondent's first witness, testified that the respondent was treated at Nandi

Hills District Hospital for chest and shoulder pains which injuries were classified as soft tissue injuries. **Dr. Stephen Oketch**, (P.W.3) also testified that on examining the respondent, he found that he had sustained soft tissue injuries on the back and right forearm. He prepared a medical report of those injuries which report he produced at the trial.

The appellant called two witnesses. **Mark Matera Barasa** (D.W.1) and **Betty Chepkurui** (D.W.2). The latter was then a nurse at the appellant's dispensary. She denied treating the respondent on the material date. The former was then the appellant's security supervisor. He testified that the respondent was the appellant's watchman at the material time but did not report any accident. He denied that there was any hole where the respondent was guarding which place, according to him was well lit, in addition to the appellant's supplying respondent with batteries.

On the conclusion of the evidence, the learned trial magistrate found that the appellant was largely to blame and apportioned liability as already stated. That decision provoked this appeal. The appellant has put up four (4) grounds of appeal. Those grounds revolve around the findings of the learned trial magistrate on liability and the assessment of damages.

This is a first appeal. The court is therefore duty bound to reconsider the evidence adduced before the lower court and make its own evaluation and draw its own conclusions. In doing so, the court should bear in mind that it has not had the advantage of seeing and hearing the witnesses testify and should give allowance for that (See **Selle and Another –vrs- Associated Motor Boat Company Limited and others [1968] E.A. . 123**). It is also trite that I am not necessarily bound to follow the trial court's findings of fact if it appears either that the court failed to take into account particular pertinent circumstances or if the impression based upon the demeanor of witnesses is inconsistent with the evidence adduced (See **Abdul Hassan Saif –vrs- Ali Mohamed Shoven [1955] E.A. & A 270**).

I also keep in mind the principles enunciated in the decision of the Court of Appeal in **Peters –vrs- Sunday Post Limited [1958] E.A. 424**, which was expressed as follows at page 1429:-

“ It is a strong thing for an appellate court

to differ from the finding on fact of a judge who tried the case and who has had the

advantage of seeing and hearing the witnesses.

But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself

have come to a different conclusion.”

On the above principles, this court can only interfere with the trial court's findings of fact if the findings were based on no evidence or on a misapprehension of the evidence or if it is shown clearly that the trial court acted on wrong principles in reaching its findings (See **Ephantus Mwangi & Another –vrs- Wambugu [1983] & 1984] 2 K.E.A. 100**).

Applying the above principles, I ask myself whether there is basis for interfering with the findings of the learned Senior Resident Magistrate. Was negligence proved against the appellant on a balance of probability? The respondent alleged inter alia, the following particulars against the appellant:-

- (a) Failing to take any or any adequate precautions for the safety of the respondent;
- (b) Failing to make and /or keep safe the plaintiff's place of work;
- (c) Failing to provide the plaintiff with any adequate protective apparel;

(d) Failing to provide and maintain a safe and proper system of work;

The appellant's evidence at the trial with respect to negligence stated that:-

“ I fell in a dirt hole, and I fell down and stepped into it. I did not know of the hole. I had not worked there before. My torch battery (ies) were low and expired. I had a torch, but no battery, I blame the defendant for failure to inform me of the hole and failure to provide me with working tools (battery).”

The learned trial magistrate found that the respondent demonstrated satisfactorily that the batteries he was supplied with were low and that there were no security lights and further that the appellants had not warned or notified the respondent of the presence of the hole which were **“signs of negligence on the part of the defendant.”**

It is plain therefore that there was basis, for the learned Senior Resident Magistrate's findings on negligence. The findings were founded on the pleadings on record and the testimony adduced before him. These findings were findings of fact and I can only interfere with such findings if there was no basis for the findings or if the trial magistrate misapprehended the evidence. That is not the case. In the premises, I cannot disturb the learned Senior Resident Magistrate's findings that the appellant was largely to blame for the incident. The learned trial magistrate fully appreciated the weight and bearing of the evidence adduced before him. The appeal against apportionment of liability is therefore without merit and is dismissed.

With regard to the quantum of damages awarded by the learned Senior Resident Magistrate, I can only interfere on settled principles. Those principles were expressed in **Butler –vrs- Butler [C.A. No. 49 of 1983] (UR)** as follows:-

- (a) If the lower court acted on wrong principles;
- (b) If that court has awarded damages which are so excessive or so low as to represent an erroneous estimate of the damages;
- (c) If the lower court has taken into consideration matters it ought not to have considered, or not taken into consideration matters it ought to have considered and in the result arrived at a wrong decision.

Taking those principles into account and based on the evidence which was adduced before the learned Senior Resident Magistrate, I have come to the conclusion that the award of Kshs 120,000/= as general damages should be interfered with. I have come to that conclusion because the learned Senior Resident Magistrate's award was excessive in view of the injuries suffered by the respondent. The respondent testified that he was injured on the left shoulder, back and chest. He was treated and discharged on the same day. **Dr. Stephen Oketch**, in his report, opined that the respondent sustained serious soft tissue injuries which healed without leaving any permanent incapacity. In awarding damages, comparable injuries and awards should always be taken into account. In **Ziphorah Wambui Wambura & 17 Others –vrs- Gachuru Kiogora & 2 Others [Nairobi C.A. No. 10 of 2004] (UR)**, the Court of Appeal allowed an appeal against awards of Kshs 5,000/= made by the High Court in respect of soft tissue injuries. It

substituted that figure with awards of Kshs 50,000/= for soft tissue injuries. Those awards were made on 17th December, 2004, just a few months before the respondent filed his suit in the Lower Court.

In view of the foregoing, I allow the appeal against the assessment of general damages of Kshs 120,000/=. That assessment is hereby set aside and I substitute therefore an award of Kshs 70,000/= as proposed by counsel for the appellant. After subjecting the same to the apportionment determined by the learned Senior Resident Magistrate, the net award to the respondent as general damages for pain, suffering and loss of amenities is Kshs 56,000/=.

There is no appeal against the award of special damages. The same is therefore undisturbed.

Since the appellant has succeeded to a limited extent, in my judgment, each party should bear its own costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT ELDORET

THIS 3RD DAY OF JULY, 2012.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Kirwa for the appellant.

**F. AZANGALALA
JUDGE
3/7/2012.**