**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 40 of 2004**

**EASTERN PRODUCE (K) LIMITED.....APPELLANT**

**VERSUS**

**GEORGE OTIENO MATARA.....RESPONDENT**

**(Appeal from the Judgment of Principal Magistrates Court at Kapsabet, the Hon. F.A. Mabele (PM),**

**PMCC No. 342 of 2002 dated on 5th January 2004)**

**JUDGMENT**

This is an appeal arising from the Judgment and decree of the Principal Magistrate's Court. The Appellant has filed a Memorandum of Appeal with six grounds all questioning the holding in the judgement delivered by the learned Magistrate.

The Respondent herein was the Plaintiff in the Subordinate Court. He was employed by the Appellant/Defendant as a tea pruner. On the 21st June 1999 he was on duty pruning tea when he was cut on his left thumb with a pruning knife.

He testified before the Learned Magistrate that he was employed to pick tea and that was his first time to prune tea. It was his testimony that before pruning, other workers would be instructed to remove the dry tea stems or stumps. On the fateful day, he was handed a knife for the exercise despite the fact that he was only trained to pick tea and did not know how to prune.

He testified that he told this to his Supervisor who still asked him to carry out the exercise. He asked his fellow workers to show him how that was done before he embarked on the exercise.

He testified that about $2^1/_2$ hours later, "the knife hit against a dry tea stem and jumped and cut me on the left hand thumb." On cross-examination he maintained that the dry stems that caused this are ordinarily removed from the field before pruning, which was not the case.

It was his case before the trial court that he was not given hand gloves which would have protected him from the injury and finally that his employer also failed to give him rubber bands to tie around the knife handle for grip. The magistrate after closing of the case delivered judgement in which he stated inter alia:

"I**n view of the foregoing, I find that an award of Ksh. 85,000/- would be adequate compemsation in general damages. However, this will be less Ksh. ,148/- already paid (i.e ksh. 80,852/-) I accordingly do enter judgement for the Plaintiff as follows:**

**(a)General damages – Ksh.80,852/=**

**(b)Special damages - Ksh. 1,500/=**

**Total - Ksh. 82,352**

(c) **Costs of this suit plus interest at the court rate**"

It is this judgment that prompted the present Appeal. The Appellant asserted in his Memorandum of Appeal dated 16th February 2004 as follows:-

**1. That the learned Trial Magistrate erred in failing to find that there was no cause of action disclosed in the Plaint**

**2. That the learned Trial Magistrate erred in law and in fact in holding the appellant was liable in negligence at all without any or sufficient evidence in that regard.**

**3. That the learned Trial magistrate law in failing to arrive at the finding that the plaintiff was not injured while in the course of his employment.**

**4. The Learned Trial Magistrate erred in law and in fact in failing to arrive at the finding that the evidence adduced was irrelevant and insufficient to prove the claim on a balance of probabilities.**

**5. The learned trial magistrate erred in law and in fact in awarding the Respondent damages that were excessive in view of the injuries allegedly sustained.**

6. **That the Learned Trial Magistrate erred in law and in fact in arrive at a decision against the weight of evidence on record.**

When the matter came up for hearing, Mr. Kuloba, learned Counsel for the Appellant informed the Court that he was only submitting on grounds 1, 2, 3, 4 and 6 on the issue of liability and abandoned ground 5 which challenged the quantum issued by the Learned Magistrate. The Appellant's Counsel submitted that a knife was the ordinary tool used for pruning tea. That the injuries suffered by the Respondent were due to his negligence or a pure work related accident. In his submissions, he urged the court to find that the Appellant would not be held 100% liable in such instances. In his view, there was no negligence on the part of the Appellant and the duty of care did not require any special training. Further, he urged the court to allow the appeal as the Respondent has already been compensated under Workmen's Compensation Act.

The Appeal is opposed. Mrs. Kittony, learned Counsel for the Respondent supported the Judgment fully. She submitted that the particulars of negligence in paragraph 6 of the Plaint were proved. She reiterated the particulars set out by the Respondent that I have already highlighted above.

I have considered Counsels' submissions together with the proceedings in the lower court. I have also considered the pleadings and the exhibits on record. The Plaintiff testified under oath and blamed the Defendant (Appellant) for the injury. Their relationship is not disputed and the incident is also not in dispute.

The role of this court in appeal matters is limited to interfere with decisions from the lower courts where the court is satisfied that the trial court failed to do justice or to do justice sufficiently between the parties by applying wrong principles of law, misdirection, taking into account irrelevant factors, failing to take into account relevant factors etc. Matters determined by the lower courts will not be whimsically interfered with by this court.

I appreciate that the Defence did not call any witness. However the facts are clear. The Plaintiff was

injured while pruning tea. He was using a knife provided by the employer. It is my view that pruning is a simple act of cutting and there is no specialized training required. The process involves the physical act and movement of the pruner. He has control of the knife and the work. It is a simple operation which does not require the Appellant supervision. I agree with decision of Justice Waweru in **H.C.C.A 58 of 2000 – MUMIAS SUGAR CO. LTD –VS- SAMSON MUYINDA.**

Having said that the Defence ought to have called a witness to clarify whether or not gloves are necessary protection during pruning and whether it is a required protective gear. In the absence of such evidence, I would apportion liability of 50:50 between the parties.

I therefore partially allow the appeal on liability and quantum. The award of Kshs.85,000/- in general damages is reduced by one half and so is the Special Damages. I set aside the Judgment and decree and enter one for Kshs.41,176/- together with costs. Each party to bear their respective costs in this appeal.

The upshot is that this Appeal is dismissed with costs to the Respondent. Orders accordingly.

Dated AND signed at Nairobi on this 22ND day of AUGUST 2012.

**M. K. Ibrahim**
**Judge**

DATED AND Delivered at Eldoret on this 10TH day of OCTOBER 2012.

**F. AZANGALALA**
**Judge**

In the presence of: Mr. Anditi for the appellant and Mr. Songok h/b for Ms Kipseii for the respondent.