REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

APPEAL NO.12 OF 2018

[Formerly Nakuru High Court Appeal No.148 of 2007]

KIPKEBE LIMITED ……..……..…APPELLANT

VERSUS

JOSEPH ONDARI MOSOMI …… RESPONDENT

(Being appeal from the judgement and decree of Hon. A.G. Kibiru, Senior Resident Magistrate Sotik delivered on 19th July, 2007 in Sotik SRMCC No.178 of 2004).

JUDGEMENT

The appeal herein was filed on 10th March, 2007 and the record of appeal filed on 17th July, 2009. On 29th October, 2013 hearing directions were issued and parties agreed to file written submissions. Such directions were reissued on 4th November, 2014. The parties complied.

On 21st June, 2018 the High Court transferred the matter to this court.

The parties agreed to have judgement based on the filed written submissions.

The facts leading to the appeal the appeal follows the judgement and decree delivered on 19th July, 2007 in Sotik SRMCC No.178 of 2004. On 11th December, 1999 the respondent who was the plaintiff before the trial court pleaded that while at work with the appellant and while plucking tea, he stepped into a hole and fell where he got injured following the accident. He was taken to hospital and treated for the injuries. The respondent suffered soft tissue injuries which healed and caused no permanent disability. That the appellant is liable in negligence.

The appellant pleaded that the respondent was a tea plucker and on 11th December, 1999 he worked the whole day and was not injured and no injury was record that day. The check roll for the day show the respondent plucked 39kg of tea. The appellant also called evidence that the respondent had been supplied with gumboots, cap, bag and a foot stick and a check roll for his duties. There was no negligence or any accident and where such arose, the respondent I sorely to blame.

The trial court heard the parties and in judgement made a finding that the respondent had been injured on 11th December, 1999 while working for the appellant, the appellant was liable for the injuries sustained and liability apportioned at 20:80%. General damages were assessed and the respondent awarded Ksh.50,000.00 reduced at 20%.

the appellant aggrieved filed 6 grounds of appeal which substantively addressed relates to the challenge that the trial court erred by failing to find that the respondent as the plaintiff had not proved his case that he was injured while eon duty at the appellant's premises on 11th December, 1999; the trial court erred by shifting the burden of proof with regard to the occurrence of the accident ton the appellant and filing to give due consideration to the evidence that there was no accident on the alleged date; the trial court erred in fading on liability against the appellant where no case of negligence had been established and based on matters not pleaded and thus seeking to have the judgement and decree reviewed and or set aside with costs.

In submissions, the appellants case is that the trial court failed to apply the provisions of section 107(1) of the Evidence Act, he who asserts must prove and as held in **Wareham t/a Wareham & 2 Others versus Kenya Post Office Savings Bank [2004] eKLR.** The respondent did not prove that he was injured while working for the appellant on 11th December, 1999 as alleged. To thus find the appellant negligent without evidence was in error. Had such matter been put into account, the court would have arrived at a different finding of fact and the law as held in **Statpack Industries versus James Mbithi Munyao, Civil Appeal No.152 of 2003.** The evidence on record is that the respondent informed his supervisor upon his injury but such supervisor had retired on 28th August, 1998 and therefore cannot have received any such report. The fact of the accident was challenged, no accident was reported or recorded by the appellant and therefore to make a finding that there was sufficient material evidence was in error.

The appellant also submits that the trial court made an award of Ksh.50,000.00 as general damages despite the fact that the injuries sustained were soft tissue in nature and such should have been addressed with an award of Ksh.30,000.00 considering the circumstances.

In response, the respondent submits that upon injury at work his supervisor allowed him time to attend hospital and where he was treated. Dr Ajuoka treated him at Kericho District Hospital and the report by the Doctor was not challenged in evidence. The case was proved on a balance of probability as held in **Ogembo Tea Factory Co. Ltd versus Evans Nyabuto Bichanga [2017] eKLR.**

The respondent also submits that the trial court correctly made a finding on negligence and liability and such should not be disturbed. The appellant is wholly to blame for the accident by placing the respondent in an unsafe work environment as held in **Makala Mailu Mumende virus Nyali Golf Club [1991] KLR.**

In addressing the appeal, the court is guided by the case of **Sielle versus Associated Motor Boat Company Ltd [1968] EA** with regard to the fact that the court did not hear the parties or see the witnesses who testified in support of the claims. however the court is guided by the principles laid down in the case of **Abdul Hammed Sarif versus Ali Mohammed Solan [1955] 22 EACA** the court being appellant Is not bound by the findings of the trial court but where it is clear that there was failure on some point to take into account a particular matter which was materially relevant, then such can be addressed by this court.

In this case, the case was premised on the facts that the respondent was employed by the appellant as a Tea Plucker and on 11th December, 1999 while respondent was on duty he sustained an injury to his right leg due to the negligence of the appellant in failing to keep a safe work environment, failing to keep and provide safe working equipment, failing to provide and maintain sae access to the work place and as a result he suffered loss and damage.

In response, the appellant denied the allegations made and that where the respondent was injured such did not occur in its premises and any injury to the respondent was caused by his own making. Where the respondent was injured as alleged such arose out of his own negligence by failing to have due regard to his own safety, failing to take care and attention or follow given instructions while at work and thus exposing himself to danger.

In his evidence before the trial court, the respondent testified that;

> .....*I recall 11.12.1999. I was at Magura Estate plucking tea. I injured my left leg. I slipped and fell into a hole. … when I got injured, my supervisor wrote me a letter to go to the dispensary. I was treated there. …I went to Kericho District hospital. It was the right leg (between the knee & the foot). There was a stump inside that hole that pricked me. It was a trench that had been dug at the time they were removing the stumps. …*

Upon cross-examination the respondent testified that;

> *I have worked with Kipkebe since 1996. The accident occurred after three years of working there. We were sent thee from another area. We were strangers in that field. It was my first day there. The hole as inside the tea bushes. The tea bushes are planted in rows but the bushes are covered. It was not a trench but a hole. The hole did not have any tea plant… it was inside the tea bushes …they had uprooted stumps there but had not refilled it. Usually you look at what you are plucking and not where you are stepping. …*
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> *My supervisor that day was Mr Nyambongi. The company used to record the kilogrammes one plucked. …*

The respondent also called Dr Ajuoga who examined him on 14th July, 2004 and wrote a report and noted that the respondent had suffered soft tissue injury which had healed and there was no disability.

In defence, the respondent called Ben Mauti Onsongo the Check Roll Clerk and who testified that on 11th December, 1999 the respondent was at work the whole day and was not injured. He plucked 39kgs of tea leaves and Mr Nyabongi who is alleged to have given him permission to attend hospital had since left employment on retirement on 28th August, 1998 and therefore he could not have received such information. All employees before start of work must wear gumboots, overall, cap, bag and a foot stick. The witness had to sign upon the return of the issued items.

The work record by the appellant note the respondent was on duty on 11th December, 1999. There is also a check list noting that the respondent was issued with gumboots, overall, cap and bag. Such evidence is not challenged in any material way.

Was the respondent then injured while at work with the appellant?

From the respondent's evidence, he was put in a new area and this was his first day. He alleges to have fallen into a hole where stumps were being removed and the place was covered by tea bushes, he could see what he was plucking but not where he was stepping.

This picture is clearly captured in the respondent's testimony. The canopy of tea bushes prevented him from knowing where he was stepping. He alleged to have fallen into a hole that a tea bush/stump had been removed.

The respondent also alleges that he got injured and the supervisor Mr Nyabongi issued him with a note to go to the hospital. He produced the treatment chit from Kericho District Hospital and the medical report by Dr. Ajuogi.

The treatment Chit was issued on 12th December, 1999. The medical report was done following examination of the respondent on 14th July,

2004.

in **Nakuru Civil Appeal No.148 of 2005 Timsales Ltd versus Stanley Njehia Macharia** that;

> *.....failure to produce treatment cards does not always lead to the dismissal of injury claims. where the doctor who examines him several days or months later makes reference to the treatment card, unless otherwise proved, that should suffice and the production of treatment card is not necessary. …*

In this case the respondent produced the treatment chit issued to him just a day after the alleged accident and injury. This placed him at the respondent premises and where he testified he was injured and given time to attend hospital by his supervisor.

The defence by the appellant before the trial court is that the respondent was at work the whole day and he picked 39kgs of tea leaves. That the alleged supervisor Mr Nyabongi had retired on 28th August, 1998 and could not have given him permission. However, the details to the alleged retirement of this officer were without any evidential support.

For the appellant, Ben Mauti Onsongo testified that on the check roll the claimant was at work on 11th December, 1999 and produced the record. On the evidence that

Mr Nyabongi the supervisor to the respondent had retired on 28th August, 1998 was without any support.

On the award of general damages said to be too high, I find the trial court applied the requisite threshold, there was a breach of the duty bestowed on the appellant as the employer to ensure a safe work environment and thus liable for the work injury occasioned to the respondent. the trial court further made a finding that the respondent contributed to the injury and apportioned liability accordingly.

In **Mumias Sugar Company Ltd Versus Charles Namatiti CA 151/87** the Court of Appeal held that;

> *An employer is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee.*

In the circumstances therefore, having carefully considered the submissions made in this appeal, and re-evaluating the evidence adduced in the proceedings before the learned magistrate, the court finds no material to justify disturbing the judgement and decree.

The assessment of quantum and damages awarded are thus fair and reasonable. The trial magistrate did not act on any wrong principle of the law based on facts before the court. The award of damages is justified.

For these reasons, I find no merit in this appeal and hereby dismiss it in its entirety. Noting the obvious delays in addressing the appeal through no fault of either party, each party shall bear own costs.

Delivered at Nakuru and dated this 17th day of January, 2019.

M. MBARU

JUDGE

In the presence of: …….....……..

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