**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION AT ELDORET**

**ELRC APPEAL NO. 262 OF 2018**

**KAIMOSI TEA ESTATE CO. LTD.....APPELLANT**

**VERSUS**

**JOSEPHAT MAINA MURAI.....RESPONDENT**

**JUDGMENT**

This matter is originated by way of an Appeal dated 3rd March, 2016. it comes out as

follows: -

*1. That the learned trial magistrate erred in law and in fact in holding the Appellant 80% liable in negligence.*

*2. That the learned trial magistrate erred in law and fact in holding the Appellant negligent as no negligence was established and proved against the appellant entitling the respondent to the award received.*

*3. That the learned trial magistrate erred in law and in fact in failing to hold that the Respondent was not injured while on duty.*

*4. That the learned trial magistrate erred in law and in fact in shifting the Burden of Proof to the Appellant.*

*5. That the learned trial magistrate erred in law and fact in failing to hold that the Respondent did not avail any evidence in support of any injury (if at all) sustained on the alleged date of accident while in the course of duty with the appellant.*

*6. That the learned trial magistrate erred in law and in fact by failing to hold that what the respondent was suffering from was a natural ailment and not an injury.*

*7. That the learned trial magistrate erred in law and in fact by failing to consider the evidence produced by the Appellant.*

*8. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the Appellant.*

*9. That the learned trial magistrate erred in law and fact in awarding damages that were excessive in view of the injuries allegedly sustained by the respondent.*

*10. That the learned trial magistrate erred in law and in fact by holding that the Respondent had proved his case on a balance of probability as against the Appellant.*

She prays that the appeal be allowed and the lower court's judgment be set aside and the suit be dismissed with costs to the Appellant.

The respondent in his submission dated 26th October, 2018 opens its defence and prays the appeal be dismissed with costs to himself.

The appellants in her written submissions dated 15th October, 2018 opens with a reliance on the celebrated authority of **Selle vs Associated Motor Boat Company Ltd,1986……**

**where the Court of Appeal pointed out and observed as follows: -**

*· There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is found and to come to its own conclusion.*

· *The first appellant court can also review the trial court's evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against.*

· *It is the duty of the first appellate court to marshall the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against.*

· *The appellate court is competent to reverse the decision of the trial court depending on the material in question"*

The appellant's further submissions is that the respondent did not adduce evidence that he was injured at the work place. Further, he did not adduce evidence that he indeed was treated for any injuries whatsoever. The evidence of Pexh 3- the respondents supervisor was that at around 900hrs the respondent went to him complaining of a headache and sort permission to go the dispensary for treatment. It is on this basis that the supervisor's treatment note was issued.

The evidence of DW 1-David Ngetich, the respondents supervisor was that in the event of sickness or injury at the work place, the employee would have to be issued with a supervisors note for treatment at the dispensary.

DW2, the estate nurse in evidence testified having issued the respondent with a treatment note. She further testified that the respondent attended the dispensary before reporting to work and was diagnosed as having typhoid- she produced the daily sick register Dexh2 in support of her evidence. The respondent was treated and released back to work after a finding that he was fit to return to work.

The appellant submits that there is no contradiction in the evidence of the defence witnesses at the lower court. However, this shows discrepancy in the testimony of the whole matter. There is clearly something which makes the evidence not add up and therefore the fallacy of the learned magistrates in accepting the evidence hook and sinker. The learned magistrate should have sensed and realised the incongruencey of the evidence of the respondent vis-a vis that of the appellant's witnesses. The two sets of evidence refuse to agree and this should have been construed against the respondent. This was not the case and therefore the erroneous finding which is now complained of.

The appellant further faults the respondents case in that despite glaring evidence that four (4) workers used the plucking machine, the respondents did not call any of them to testify on his injuries. Further, the treatment chit from Kapsabet District Hospital was disputed by the appellant who deemed and submitted that it was a forgery. Despite this, the learned magistrate found in favour of the document. This, she submits, is unacceptable in circumstances.

The respondent in her written submission also dated 26th October, 2018 submits a case in support of the findings of the lower court. He prays for a dismiss of the appeal with costs to himself. In reiteration of her case, she in conclusion submits that the appellants allegations that the learned trial magistrate realised on extraneous matters is totally unfounded and should be treated with the disdained it deserves. He further submits as follows;

"… *The respondent in support of the trial courts quest to establish who was to be blamed and to what extend for the accident, we submit that like a three legged stool establishment of liability in such matters as hereinabove is pegged on three pillars which are:- existence of employment relationship, duty of care and breach thereof. As it has already been established there existed an employment relationship between the Respondent and the Appellant and therefore there existed an automatic duty of care by the Appellant to the Respondent."*

The appellant's case is the more appealing of the two. It is even the more convincing. She establishes a case of a contradiction and lack of clarity in the evidence and case of the respondent. This is by the nuance of him not having tabled evidence clarifying the place and course of his injury, if at all. Secondly, the respondent did not get out of his way to rebut the appellants case of no injury at the work place or even treatment for injuries sustained at the work place, or at all.

Further, respondent's evidence did not address or controvert the appellants testimony on the procedure for treatment at the work place in the event of sickness or injury. The issue of the treatment chits from Kapsabet District Hospital also arose and was not addressed by the respondent. This is besides the single testimony of the injury and treatment by the claimant alone. He chose not to call any witnesses to back his evidence and care.

Its therefore feasible to allow this appeal. The learned magistrate in coming up with the finding in favour of respondent failed to address the weight of the respective cases of the parties. If this was properly done, the trial magistrate would have come out with a finding that the respondent had not proved his case on a balance of probabilities or even preponderance of evidence.

I am therefore inclined to allow the appeal and set aside the lower court's Judgment with costs to the appellant. The respondent shall also bear the costs at the lower court.

**Delivered, dated and signed this 20th day of December 2018**

**D.K. Njagi Marete**

**Appearances**

1. Miss Wesongo for the appellant instructed by Mr. Onyinkwa & Company for the appellants.

2. Mr. Kirwa holding brief for D.K Korir & Associates for the respondent.