



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

ELRC APPEAL NO. 257 OF 2018

(Before D.K.N. Marete)

NANDI TEA ESTATES.....APPELLANT

VERSUS

JAMES OTATE MIGUNA.....RESPONDENT

(being an appeal from the judgment and decree of the learned Principal Magistrate (Mabele, F.A.) in Kapsabet PMCC No. 258 of 2001 dated and delivered 23rd January, 2004.)

JUDGMENT

This matter has originated by way of memorandum of appeal dated 20/02/2003. It comes out at follows;

1. *That the learned trial Magistrate erred in law and fact in holding the Appellant liable without any evidence to that effect and contrary to the evidence on record.*
2. *That the learned trial Magistrate erred in fact and law in failing to dismiss the Respondent's claim*
3. *That the learned trial Magistrate erred in awarding damages which were, in any event, excessive in the circumstances*
4. *That the learned trial Magistrate erred in law and fact in arriving at decision against the weight of the evidence on record.*

The appellant in conclusion prays the judgement and decree aforesaid be set aside and the respondent's claim be dismissed with costs.

The respondent in his submission dated 19th October, 2018 opens his defence and prays the appeal be dismissed with costs to himself.

The appellant in her written submissions dated 6th September 2013 opens her case by an analysis of the respective cases of the parties in the lower court. It is her submission that Doctor Alunda the first witness testified that he examined the respondent on 8th September 2001 and prepared a report to that effect. The respondent as PW2 testified that he was assigned work by Aloyce and Kokeyo. He blamed the respondent for the injury sustained. It is his further submission that he was not warned of the evidence of the existence of the trenches which in any event were dug by the appellants. There was, however, no evidence of the appellant's digging of the trenches.

It was the respondent's contention that the accident was as a result of the negligence on the part of the appellant who owed him a statutory duty of providing safe working conditions. The respondent, however, did not adduce any evidence in prove of such negligence. She further submits as follows: -

For an claim of negligence, a plaintiff is obliged to allege and has the burden of proving that the accident in question was caused by the defendant's negligence. The Respondent failed to establish negligence on the part of the Appellant to warrant the finding. No evidence was adduced to that effect that the Appellant who dug the said trenches. There is no liability without fault in the Kenyan Legal system and a plaintiff basing his or her claim on negligence has a duty and the burden to prove negligence on balance of probabilities. This was the courts holding in Martin v Shamash Brothers Limited (1995-1998) EA 179. The Respondent also failed to prove that the Appellant was aware of the trench and failed to act and never reported to the authority about the said trench yet the learned Magistrate went ahead to find the Appellant liable without the Respondent proving it was indeed the Appellants negligence that led to his misfortunes. Section 107 of the Evidence Act provides for Burden of proof,

Which state that;

1. *Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he*

asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The appellant therefore submits that the respondent failed to support and prove a case for negligence and therefore the learned magistrate erred in finding in his favour.

The appellant further submits that the respondents case was based on a falsification of the evidence and therefore ought to have been dismissed from the onset. At the trial, she submits, she ably demonstrated that no injury occurred on 16th February, 2001 while in the course of employment as alleged and therefore the issue of negligence did not arise.

The appellants witnesses testified that the respondent was bitten by a snake and was treated for such. There was also testimony by the Master Roll clerk, Tecla Chepkoech (DW3) to the extend that the respondent was not on duty on the material date. This is besides further testimony by Obadiah Sang (DW2)- the clinical officer that the respondent was on paid sick off as from 10th February, 2001 to 23rd February 2001 as a result of a chameleon bite. What does this say of the respondent's case?

The evidence of the parties during the trial at the lower court is all telling. The respondent case was not sustainable for lack of evidence. He did not proof a case of negligence and liability on a balance probability. It was therefore not sound and apt for the learned magistrate to make a finding in his favor. The case was always material for dismissal in the circumstances. I agree with appellant that it lacks merit and it is not worthy of any consideration, or at all.

I am therefore inclined to allow the appeal with orders that each part bears their cost of the same.

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

D.K. Njagi Marete

JUDGE

Appearances

1. Mr. Kipruto instructed by instructed by Nyairo & Company Advocate for the appellant.
2. Mr. Babu holding brief for Chepkwony instructed by Chepkwony & Co. Advocates for the respondent.