Case Number:	Civil Appeal 62 of 2001
Date Delivered:	10 Oct 2012
Case Class:	Civil
Court:	High Court at Eldoret
Case Action:	Judgment
Judge:	Mohammed Khadhar Ibrahim
Citation:	EASTERN PRODUCE (K) LIMITED V GRACE CHEMELI KIBOR[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 62 of 2001

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

VERSUS

GRACE CHEMELI KIBOR…….....RESPONDENT

(Appeal from the Judgment of Principal Magistrates Court at Kapsabet, the Hon. F.A. Mabele (PM), PMCC No. 195 of 1999 dated on 29th March 2001)

JUDGMENT

This is an appeal arising from the Judgement and decree of the Principal Magistrate's court, Kapsabet in Civil Case No. 195 of 1999.

Grace Chemeli Kibor (the Respondent) instituted a civil suit in the Principal Magistrate's Court at Kapsabet, Civil Case No. 195 of 1999 against Eastern Produce (K) Ltd (the Appellant) seeking general and special damages arising from an accident which occurred while she was on duty on 28th May 1999. It was her case that she fell into a hole while on duty plucking tea and held the Respondent (her employer) responsible for it. Her claim was based on negligence.

In judgment delivered on 5th April 2001 the Trial Magistrate Mr. Mabele held the Respondent liable and awarded her Kshs. 77,000/= plus costs which were assessed at Kshs. 21,925/= making a total award of Kshs. 98,925/=. Being dissatisfied with that judgment and the award of damages, the appellant filed this appeal seeking that the said judgment be set aside in its entirety and substitute an order dismissing the suit with costs.

Soon thereafter the appellant filed an application for stay of execution under Order 41 Rule 4 of the Civil Procedure Rules and offered to deposit the entire Decretal sum in a joint interest earning account in the joint names of the advocates on record pending the hearing and determination of the appeal.

The Principal Magistrate Kapsabet did not grant a stay sought by the appellant, who then approached this court under the same Order 41Rule 4.

The Appellant argued before the Justice Etyang J, on 2nd November 2001 that the offer to deposit the entire Decretal sum into an interest earning joint bank account is good security. Mr. Kuloba learned Counsel for the Appellant relied on the decision of **Kenindia Assurance Ltd v Patrick Muturi C.A. No. 103 of 1993**.

The application was opposed by the Respondent. The Learned Judge granted the application and ordered stay of execution of the decree in the PMCC No. 195 of 1999 do issue as prayed provided that Kshs. 98,925/= is deposited into a joint interest earning account in the joint names of M/s Nyairo&

Co. Advocates and M/s Kitiwa& Co. Advocates which deposit must be made within 30 days from 16th November 2001.

The Appellant made in his Memorandum of Appeal dated 4th May 2001 as follows:

1. That the learned Trial Magistrate erred in law and in fact in holding the defendant negligent without any evidence having being adduced.

2. That the learned Trial Magistrate erred in disregarding the evidence adduced by the Appellant.

3. That the learned Trial magistrate erred in holding that the Respondent was injured contrary to thye evidence on record.

4. The Learned Trial Magistrate erred in awarding damages that were not commensurate with the alleged injury.

5. **That the Learned Trial Magistrate erred in law and in fact in arriving at a decision against the weight of evidence adduced.**

When the hearing started, Mr. Kuloba, Learned Counsel for the Appellant informed the Court that he was submitting on grounds 1, 2, 3 and 5 on the issue of liability. He abandoned ground 4 which challenged the quantum issued by the Learned Trial Magistrate.

The brief facts of the case before the Trial Magistrate was that the Respondent herein was the Plaintiff in the case *PMCC No. 195 of 1999*. She was employed by the Appellant/Defendant as a tea picker. On 28th May 1999 she was on duty picking tea when she stepped into a hole, her legs sprained and got injured.

She testified before the Learned Trial Magistrate that she was employed to pick tea and was picking tea on the material date. It was her testimony that she got injured when she stepped into a hole that had been dug to plant tea to replace one that had died. On that material date, she did not see the hole because of the hole was covered by overgrown weeds and grass. She had testified that when holes are dug tea plants are immediately planted therein but on this case that did not happen.

It was her case before the Trial Court that she was not given gumboots which would have protected her from the injury. Several witnesses testified before the Trial Magistrate. The Learned Principal Magistrate found that:-

"Looking at the evidence adduced, it is plain that there is no denial that the Plaintiff was on duty and got injured on the material date. Even though the defence witnesses have denied having witnessed what happened, they have in unison said that the Plaintiff complained of pain. Among them the only person who appeared truthful is DW3. He only brought the MV [motor vehicle] and escorted the Plaintiff to hospital. He does not know what happened".

The trial court further held that:-

"*The evidence of DW1, DW2 and DW4 is such that I will call "doctored". I say this because if you look at [the evidence of] DW4 it is plain she has not spoken the truth. The question is, how would one treat a patient and then refer him/her to another hospital if that person has, no*

***problem of injury" This is malicious*.”**

Counsel for the Appellant submitted before me that the Respondent had not pleaded negligence against the Appellant. He stated that the Respondent had a history of cellulites and had no proof of a sprained ankle, arguing that the Respondent suffered a disease and not a physical injury.

He further submitted that there was no common law duty to provide gumboots and urged the court to allow the appeal.

The appeal was opposed by Mr. Kitiwa, Learned Counsel for the Respondent who supported the Judgment of the lower court. He submitted that the liability of the Appellant was clear. She was on contract and was on duty that fateful day. The Appellant was duty bound to provide safety wear for its employees which are statutory requirements. The Appellant dug a hole in the field where the Respondent was working and was negligent not to put warning signs or cover the hole.

I have heard the Counsels and read the pleadings and I am not persuaded by the argument given by the Appellant. The Plaintiff testified under oath and blamed the Defendant/Appellant for the injury. She was referred from the Appellant’s health clinic to Nandi Hill Hospital for further treatment. Their relationship is not disputed and occurrence of the incident is on the balance of probability proved.

The Appellant did not adduce any evidence to rebut the evidence of the Respondent. It was for the Appellant to produce evidence to show that the necessary tools as gumboots were either provided or not required.

The Appellant did not. Further there was no evidence to show that the Respondent suffered a disease and not physical injury. The Defendant’s evidence that a tree was uprooted to plant tea was unchallenged.

The trial court had considered and evaluated the evidence of the witnesses, and correctly apportioned liability.

The upshot is that this appeal is dismissed with costs to the Respondent. I also order that the deposited funds with interest earned thereof be released to the Respondent. Orders accordingly.

Dated & signed at Nairobi on this 24th 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

Ms Nyamwega for the respondent.