Case Number:	Civil Appeal 5 of 2008
Date Delivered:	21 Dec 2012
Case Class:	Civil
Court:	High Court at Malindi
Case Action:	-
Judge:	
Citation:	REA VIPINGO PLANTATIONS LTD V POLA KAINGU[2012]eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

High Court at Malindi

Civil Appeal 5 of 2008

REA VIPINGO PLANTATIONS LTD …….....APPELLANT

-VERSUS-

POLA KAINGU .....RESPONDENT

JUDGMENT

1. The Respondent did not file submissions in respect of the appeal. The appeal arose from the judgment of the lower court awarding the plaintiff in the original suit a sum of shs. 300,000/- against the Defendant, her employer, for injuries sustained while on duty. It was the Appellant's contention that the injuries were not sustained while the said plaintiff was on duty, and secondly, that the award of shs. 300,000/- as general damages was excessive.

2. The main issue in this appeal is whether, the respondent was injured on 12th June, 2006 while on duty. During the trial the issue was contested. The respondent stated that she slipped, fell and was injured while going about her duties and that she informed her supervisor, one Dorcas, as per procedure. She was later treated in the appellant's health facility. Dorcas testified as DW1. She denied any such incident occurred and asserted that on the material date the Respondent worked the entire day and signed off without reporting any untoward incident. In the course of her evidence, the Respondent had tendered treatment notes that were on the face of it never produced as exhibits. The appellant on their part adduced evidence through DW2 that the Respondent's name did not appear on the record of patient's received at their health facility on 12th June, 2006.

3. The doctor who examined the plaintiff saw her almost two years later. In my considered view the respondent had the onus of proving that she was injured while working for the appellant. In this regard, initial treatment notes would have helped to prove her injuries at the place and on the date alleged. Her failure to produce such notes dealt a fatal blow to her case, which was further put to doubt by the Appellant's witnesses. With respect, the learned magistrate also overlooked the fact, brought out in the appellant's submission at end of the trial that the plaint did not particularize a sprain to the knee among the injuries pleaded. Yet Dr. Njiri's report included this and severe back pain in his evidence. He also confirmed a degenerative condition (arthritis) preexisting in respect of the respondent.

4. Disease of the spinal cord is given as the cause of the respondent's backpain, which eventually resulted in her retirement. In her evidence the respondent did not explicitly refer to an ankle sprain but emphasized back pain. I think that in the circumstances of this case it was especially acute for the respondent to demonstrate that;

a) she fell while on duty

b) she was injured and;

c) the injuries were the proximate cause of or worsened her back problems.

5. Upon reviewing the evidence of the trial I am obligated to do on a first appeal (see **Salim V Kitana [1989] KLR 534)**, I am not satisfied that the Respondent discharged her burden of proof to the required standard.

The lower court's findings to the contrary were with respect, without factual basis and erroneous. I will therefore allow the appeal; set aside the judgment and decree of the Lower Court and substitute therefor an order dismissing the Respondent's suit. In light of the pre-existing relationship between the parties and the fact that the respondent is now retired, I order that each party bears its own costs.

I regret that this judgment has been delayed since October, 2012 due to pressure of work.

Delivered and signed this **21st** day of **December, 2012** in the absence of the parties.

C. W. Meoli

JUDGE