REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 205 OF 2009

OL- NJOROWA LIMITED.....APPELLANT

VERSUS

TITUS CHEMIATI.....RESPONDENT

(Appeal from the judgment of Hon. N.N. Njagi, Principal Magistrate dated 23rd day of September, 2009 in Naivasha Principal Magistrate's Court Civil Case No. 930 of 2006)

JUDGMENT

The Respondent was an employee of the appellant as a herdsman. He was taxed with the duty of milking cows in the appellant's farm. On 27th October, 2005 while in the process of milking the third cow, having milked two, the two returned disturbed the one he was milking causing it to hit him with his leg. He sustained a blunt injury on the chest. It was about 5.30 a.m. He took painkillers but on the 29th October, 2005 two days after the injury, he went for treatment at the Naivasha District Hospital where he was treated and given a treatment card. He continued to work. Later he lodged the primary suit against the appellant and sought damages for pain and suffering. He attributed negligence upon the appellant and stated particulars of breach of statutory duty, negligence and breach of contract in his Plaint dated 22nd December 2006.

The defendant denied the claims and that the respondent was its employee. All particulars of breach of statutory duty negligence and contract were too denied in its statement of defence.

After a full hearing of the case, the court held the appellant 90% to blame and warded him KShs.130,000/= general damages for pain and suffering and KShs. 3,000/= in special damages. The appellant appealed against both liability and quantum.

The grounds upon which the appeal are based are five, but may be paraphrased and summarised into three thus:

1. That the Learned Magistrate erred in law and fact in disregarding that the burden of proof lay upon the respondent to prove injury, breach of contract and negligence against the appellant.

2. That the Learned Trial Magistrate erred in law and fact in failing to evaluate the evidence tendered in court and thus held the appellant appellant 90% to blame.

3. That the damages awarded to the Respondent were excessive and unrealistic.

The appellant urges the court to set aside the trial courts judgment and in the alternative to increase the contributory negligence attributed to the respondent and review the damages awarded for pain and suffering.

The Respondent in cross examination stated that the appellant was negligent by allowing him to work or milk the cows alone, that there was a special place for milking and that there was nobody to prevent the other cows from coming back to the milking area and that he could not do anything to avoid being hit by the cow. He blamed the appellant for allowing him to work alone.

The Appellant on its part through its Personnel Manager – DW1- admitted that the respondent was its employee and that the cows belonged to the company and that the respondent used to report to him as his supervisor. He denied that the respondent was injured on the 27th October, 2005 and produced the Muster roll to prove that the respondent was on duty on the 27th October, 2005, and that there was no day he was sick. He also produced the sick sheet and injury book to show that the respondent was not injured. It was his testimony that the respondent was not treated at the company clinic and that he was not aware of the accident as he would have referred him to the hospital. He was not the maker of any of the documents referred to; He however admitted that the respondent was working alone to milk five cows and stated that the milking area was safe, and therefore the appellant should not have been blamed for the accident.

In his analysis of the evidence, the trial Magistrate found that the documents produced by the appellants witness, the Administrative Manager were of no evidential value as he did not know anything about them as he was not the maker. He doubted the witness that he, Timothy Ngolo was an Administrative Manager having not produced any document to prove that, and how he could also be doing supervisory duties as a manager.

The trial court found that the appellant did not provide a safe working environment and did not provide any protective gear to protect the respondent from any accident. He further stated that likewise the respondent had a duty to protect himself from injury by properly tethering the cow and to ensure that the other cows were far away from the milking shade. To that extent, the trial court held the respondent negligent to the extend of 10%.

The appellant in its written submissions on the appeal stated that the respondent did not prove any breach of statutory duty or contract or any negligence in his evidence, that he did not state what duty of care was owed to him by the appellant. It was his submission, that the respondent was solely in charge of the milking cows in a special place of milking hence the appellant had provided a safe working environment and could therefore not be in breach of contract or statutory duty. It was further stated that in milking there was no need of any protective gear nor was evidence adduced that he was not given such gear. That he should have foreseen that the other cows could come back and could therefore have protected them from coming back. This court has been urged that this is a classic case where an employer is not expected to baby-sit an employee and referred to the case of **HCCA No 152 of 2003**. **Statpack Industries -vs- James Mbithi**

where the court held:

> ***"An employer's duty at common law is to take all reasonable steps to ensure the employees safety. But he cannot baby-sit an employee. He is not expected to watch the employee constantly."***

The Respondent in his written submissions submitted that the appellant failed to put in place suitable appliances and measures when the respondent was milking. It was his suggestion that a proper milk shed, enclosed, would have prevented the cow's kicks from hitting him, and further that other person should have been there to wade off the milked cows hence the appellant failed to provide a safe working environment and in that manner, states that the trial magistrate was right to hold the appellant 90% to blame. Several authorities have been tendered by both counsel in support of the rival submissions. I have considered them.

In the case **Eastern Produce (K) Ltd -vs- Christopher Atiado Osiro (2006) KLR** , it was held that it is trite that the onus of proof is on who alleges and in matters of negligence, the position was well laid in the case **Kiema Kituku -vs- Kenya Cargo (1991) 2 KAR 258** that:

> ***"there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."***(emphasis mine)

In the same case, it was explained that negligence means more than needless or careless conduct whether in omission or commission, and properly connotes the complex concept of duty, breach and damage suffered by the person the duty is owing.

Going by the above, did the respondent prove some negligence by the appellant? Did the appellant owe a duty of care to the Respondent while he was performing his milking duties? Did the Respondent take care of his own safety in the circumstances? Did the appellant take reasonable steps to ensure the respondent safety as he performed his duties?

In the case **Amalgamated Saw Mills Limited -vs- Stephen Muturinguru HCA No. 75 of 2005**, it was held that a plaintiff must prove a casual link between someone's negligence and his injury. He must adduce evidence from which, on a balance of probability a connection between the two may be drawn. An injury alone is not proof of negligence.

I have considered the evidence tendered in its totality. The respondent in his evidence was able to prove a link between the negligence of the appellant and his injury. He stated that he was left alone to milk the cows with nobody to wade off the milked cows, hence the incident that caused his injury. To that extent, the respondent did prove some negligence. It was submitted that had the milking shed been enclosed, the cow kicks would not have injured him. It is my finding that in the circumstances, the appellant owed a duty of care to the respondent, but the respondent too owed himself an equal duty to take care of himself – and did not expect to be baby-sitted to milk. I personally do not see whether provision of protective gear were necessary in the circumstances, and even if they were provided, whether they would have prevented the respondent from injury as stated by the trial Magistrate. The injury alone is not sufficient to hold the appellant liable. On its part the appellant took some reasonable steps towards its duty to the milkman by providing a special place for milking. But that was not enough. Nothing was done to prevent foreseeable danger to the milkman all alone with no other to wade other cows away and provision of a safe and enclosed milking shade. In ts totality, I am satisfied that the respondent proved some negligence and breach of statutory duty by the appellant on a balance of probability. To that extent, I shall set aside the trial courts finding on liability, and find that both the appellant and the Respondent were equally to blame and apportion liability on 50:50 basis.

The trial court awarded a sum of KShs.130,000/= to the Respondent being general damages for pain and suffering. That was in the year 2009, September.

From the medical records the only injury that the respondent sustained was a blunt injury to the anterior chest wall and he had fully recovered with no disabilities. Relying on authorities produced by the parties, the trial court found KShs.130,000/= to be reasonable.

An appellate court will only interfere with the trial courts discretion in awarding damages in rare circumstances when it is satisfied that either the trial court took into account irrelevant factor or left out a relevant factor, or the amount awarded is too low or excessive to be a wholly erroneous estimate of damage.

I have considered the injury sustained and the award. I find the award to be on the higher side. In the year 2009, and being very generous, an award on a blunt injury to the chest wall would not have been more than KShs.80,000/=. I shall therefore set aside the award of KShs.130,000/= and substitute it with KShs.80,000/= in general damages for pain and suffering.

The appellant submitted that failure by the Respondent to produce the treatment card was fatal to the respondents case in proving the injury. I have analysed the evidence that the respondent was given the treatment card from the Naivasha District Hospital. It was tendered by the plaintiff and marked for identification but it was not formally produced as an exhibit.

Dr. Obed Omuyoma testified, and told the court that he relied fully on the treatment card to prepare the medical report that he produced in court, in support of the Responden't injury. He had the benefit of the seeing the treatment card. The Respondent and the Doctor were cross examined on the treatment card by the appellant. It therefore formed part of the court record. There are various and differing holdings by the courts on the issue of treatment cards. My view and firm opinion is that a treatment card or record is the property of the patient, the reason why the hospitals give them to the patients. That being so, the patient as plaintiff is the right person who should produce the treatment card as an exhibit in court. It follows therefore that if a doctor relies on the treatment notes or card to prepare his medical report, and the medical report is accepted by the court as an exhibit, then, the treatment card ought to be accepted too. See the case of **Timsales Ltd -vs- Stanley Njihia Macharia C.A 148 of 2005** and **Comply Industries Ltd -vs- Mburu Simon C.A. 121 of 2005** where the courts have held that failure to produce treatment cards as exhibits having been marked for identification is not fatal.

In conclusion, it is my finding that the appeal succeeds in part in all the grounds as stated. The trial courts judgment is set aside and substituted in the following terms:

1. That liability is apportioned equally between the Appellant and the Respondent on 50:50 basis.

2. That the award of General damages to the respondent is set aside and substituted with an award of Kshs.80,000/=.

3. That each party shall bear its own costs on the appeal, but the appellant shall pay costs in the lower court to the Respondent.

Dated, signed and delivered in open court this 25th day of June 2015.

JANET MULWA

JUDGE

In the presence of:

Ms. Tarus holding brief for Mahinda for Appellant

Ms. Kirach holding brief for Ombae for Respondent

Court clerk – Linah.