IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.559 OF 2005

(An Appeal arising from Judgment by Hon. J.M. WERE –

RESIDENT MAGISTRATE – MILIMANI COMMERCIAL COURT NAIROBI PMCC. No. 2599 of 2004

Delivered on 23rd December 2004)

DWA ESTATE LIMITED…..……
APPELLANT

VERSUS

DANIEL ARIYO OSIEKO……..……..RESPONDENT

JUDGMENT

INTRODUCTION- APPEAL

The appeal arises from the Appellant/Defendant; DWA Estate Ltd. against the Respondent / Plaintiff; Daniel Arito Osieko in PMCC 2599 of 2004, the civil suit in the Magistrate's Court.

FACTS

The evidentiary facts that led to this suit in the Court of first instance are; the Respondent was an employee of the Appellant; as a sisal cutter in the appellant's estate. On 14th July, 2000 at 12 noon; while on duty in the course of employment with DWA Estate, Daniel fell in a hole and sustained serious bodily injuries.

Daniel was treated at the Estate's clinic and later visited Makindu Hospital for further treatment. Dr. A.O. Obiero (PW1) examined Daniel Ariyo on 25th September 2003 *(P.Exhibit 1)* and found that he who sustained trauma in the right arm and right hand; weakness of the arm reduced power of the grip. He complained of pain and there was tenderness in the joint and weakness in the right arm. The affected joints would lead to early osteoarthritis.

PLEADINGS, ORAL EVIDENCE & SUBMISSIONS

PLEADINGS

The procedural facts are as follows; the suit was filed on 16th March 2001. The Plaint disclosed the course of action as negligence on the part of the defendant as particularised in paragraph 6 of the Plaint. Daniel attributed the injuries to negligence and breach of statutory duty and breach of contract of employment by DWA Estate. He sought general and special damages costs, interest and any other relief.

The defence filed on 25th May 2004 and averred that the defendant maintained a safe and proper working environment for all its employees and denied the particulars of negligence outlined in paragraph 6 of the Plaint. In paragraph 8, the defendant attributed the accident and resultant injuries to the Plaintiff's negligence.

ORAL EVIDENCE

In evidence adduced in the lower Court, Daniel (PW2) testified he was cutting sisal and there was a lot of grass. As he carried sisal bundles, the grass entangled him and he fell and hurt his right hand. He reported to the Production Manager and the Supervisor. He went to the defendant's clinic for treatment.

Later, he visited Makindu Hospital for further treatment *(P.Exhibit 3).* Afterwards, the doctor (PW1) prepared the medical report *(P.Exhibit 1).* Daniel blamed the sisal estate for the accident. He attributed to the estate the fact that the grass was not cleared, it was at knee-length and walking was problematic. The long grass on the farm crossed his legs and he fell and injured his right arm. He claimed he was not working carelessly, in fact, he followed instructions.

The Defendant through the Clinical Officer (DW1) testified he attended to the Plaintiff who complained of pain in the right hand. He gave him painkillers but did not refer him to another hospital.

The Field Supervisor (DW2) testified that he knew the plaintiff as one of the employees of the defendant and was employed to cut sisal. He claimed the Plaintiff did not report any accident or injuries to him. He produced leaf register *(D.Exhibit 1)* to show the plaintiff worked on the days in question.

SUBMISSIONS

The Plaintiff submitted through Counsel, The estate used to clear the area, grass was cut very low and the bush removed to make way for the sisal cutters. The process was called bush control and was not done. As Daniel carried sisal the grass was so high to a dangerous level and it was utterly impossible for the Plaintiff to see what was beneath and he fell due to a hole, he could not see. These 2 factors contributed equally to his injuries and liability ought to be at 100% against the defendant.

The Defendant submitted through Counsel that the employer has a duty to take all necessary precaution towards safety of the employee while engaged in employment not to expose employees to any risk injury or damage. However, the duty does not extend to include unforeseen incidents caused by negligence of the employee himself. DWA Estate attributed the injuries Daniel sustained to negligence on his part. There was no hole on the ground but it was the general topography of the ground. DWA Estate pleaded '*volenti non fit injuria'* (facts speak for themselves). According to their records, Daniel was on duty on the day of the accident and subsequent days and continued to cut sisal at 140-150 sisal per day. The Injury stated was not permanent, was not a dislocation but pain in the right hand and weakness would be progressive not final. For these reasons, the defendant sought dismissal of the suit.

JUDGMENT OF THE COURT

The judgment was delivered on 23rd December 2004. The Learned Magistrate evaluated the evidence on record and outlined the issues for determination as follows:

a. Was the Plaintiff injured on the alleged date and place?
b. Did the Plaintiff attend the Makindu Hospital on his own?
c. What was the cause of pain?
d. Who was negligent?

In conclusion the Learned Magistrate found the Plaintiff was injured on the said date at his place of work and he went to Makindu hospital through the required procedure, by referral from the defendant clinic. The cause of pain on the right hand was not clear from the medical records. The evidence was not conclusive that the grass was not cut as alleged by the Plaintiff. The plaintiff was responsible for his own safety, he had a responsibility to be careful and work diligently. Liability was apportioned at 70%/30% in favour of the Plaintiff and an award of Ksh. 120,000/- general damages with costs and interest.

APPEAL

The procedural facts of appeal are the Defendant filed an appeal on 3rd August 2005. The record of appeal contained the memorandum of appeal, complete record of proceedings, exhibits and judgment of the Learned Magistrate's court.

The High Court served hearing notice for hearing of the appeal during the Civil Service week on 17th July 2014. The appellant served the respondent and filed the affidavit of service on 23rd July 2014. The appeal was heard in compliance with **Order 42 Rule (2) Civil Procedure Rules**, 2010 on 24th July 2014. The memorandum of appeal raised 4 grounds of appeal challenging the Learned Magistrate's decision.

FACTS

At the Hearing of the appeal, the appellant through learned Counsel filed list of authorities and written submissions. I heard submissions by Mr. Mburugu for the appellant. He highlighted the salient features as follows;

The evidence on record did not support the decision. The records produced did not show any injury arising from the workplace and the fact remains unconfirmed. The records show visit to appellant's clinic but no record of injury. The Respondent's pain in the right hand may have been caused by an injury obtained elsewhere as no documents indicated the injury was from the workplace in the course of employment.

The Plaintiff's injuries were caused by acts that could not have been foreseen by the defendant's control. The plaintiff worked in the plantation, knew the topography of the area. He worked for 30 years and knew his job and the inherent risk in the scope of employment and relying on the principle of *volenti non fit injuria* (your own actions caused injury).

The pleadings were at variance with the testimony. The Plaint paragraph 5, averred the Plaintiff fell into a hole and sustained serious injuries. When the Respondent testified, he told the Court, the grass made him trip.

The award of Kshs. 120,000/- did not take into account the 30% liability borne by the Plaintiff.

ISSUES

The issues to be determined by the appeal are;

1. Re –evaluation of the evidence on record and arrive at an independent decision; whether the Plaintiff was injured on the alleged date and place?
2. Was the accident properly reported and documented?
3. Were the Plaintiff's injuries caused by negligence by the employer?
4. Were the pleadings and evidence on record at variance?
5. Was the quantum of damages determined on the basis of the apportioned liability?

EVALUATION OF EVIDENCE

I have re-evaluated the evidence adduced by the appellant and considered the submissions filed and

submissions in the learned Magistrate's Court as follows;

1. **Re –evaluation of the evidence on record and arrive at an independent decision; whether the Plaintiff was injured on the alleged date and place**?

   The evidence on record is to the effect that Daniel Ariyo Obiero was an employee of DWA estate and on duty on 14th July 2000. He was cutting sisal and there was a lot of grass. As he carried the sisal, grass entangled him and he fell and hurt his right hand. He reported the matter to Henry Ongicho, the Supervisor and he was taken to the DWA clinic by the headman. He was treated as indicated by treatment note (pg.20 of record of appeal). Later he visited Makindu Hospital and was treated *(PW.Exhibit 3)* and later obtained a medical report by Dr. Wandugu *(PW.Exhibit 1)*

   The evidence on record confirms Daniel was injured while on duty on 14/7/2000 while cutting sisal on DWA estate.

2. **Was the accident properly reported and documented**? The defendant through the testimony of DWI claimed that the Plaintiff's injuries were not proved to be as a result of carrying out his employment duties on the defendant's estate. PW2 the clinical officer confirmed treating PW1 for pain on the right hand PWI did not disclose the pain was caused by injury in the course of his duties.

   In **Kakuzi Ltd vs Lucy Wanjiru Kigoro (2011) eKLR;** the court observed;

   > ***"Where a worker is injured and they fail to immediately report to their superiors and produce treatment notes, initially from the clinic, they should not be given any award nor should the employer be held liable."***

   In the instant case; the evidence on record discloses treatment for pain on the right hand but not the cause of pain; whether it was a natural cause, an unknown cause or one arising from injury while on duty; it was not clear.

   Secondly, apart from evidence of treatment at DWA Estate Clinic and Makindu Hospital, there is no evidence of a report of the accident at work that may have led to pain in the right hand.

   Thirdly, the Respondent in his testimony alluded to have reported to the Supervisor, Henry Ongicho and to unnamed headman who actually took him to the appellant's clinic. There are no reasons advanced as to why the witnesses were not called to testify by either the Plaintiff or the Defendant in the Learned Magistrate's Court. Therefore, the learned magistrate's finding holds true that on a balance of probability, it was not clear what caused pain in the right hand.

   For these reasons, it is difficult to visit liability on the appellant; though the respondent was injured at work, due to lack of evidence confirming report of the injury to the employer; the pain in the right hand cannot be attributed from the accident and accident alone.

3. **Were the Plaintiff's injuries caused by negligence by the employer**?

   The law on negligence is well settled; there must a duty of care, whose breach is the direct cause of damage, injury or loss to the claimant. In the following land mark cases;

1. **Donoghue vs Stevenson [1932] AC 562**
2. **Anns vs Merton London Borough Council [1978] AC 728**
3. **Caparo Industries vs Dickman [1990] 2 AC 605**

   Duty of care is owed where the following issues are established**;**

1. **It was reasonably foreseeable that the defendant's failure to take care could cause damage to**

the claimant; and

2. **There was a [sufficient] relationship of proximity, between the claimant and the defendant; and**

3. **It is fair, just and reasonable that the law should recognize a duty on the defendant to take reasonable care not to cause damage that damage to the claimant.**

In the instant case; the appellant and respondent had sufficient relationship of employer and employee. The appellant owed a duty of care not to cause foreseeable physical injury at work. The matter for determination is whether, the appellant was alleged to have breached the duty of care through outlined particulars of negligence in paragraph 6 of the Plaint.

Did the employer put any measures in place to provide safe and secure work environment and system of work, provide protective gear and not exposing the respondent to risk of injury or dangerous conditions?

Both PWI and DWI confirmed that the employer, the appellant used to prepare the place of work. DWI stated that grass was cut using tractors before sisal cutters came to the field. PWI stated the clearing of grass called bush control was not done and was the direct cause of the fall resulting in hand injury and pain. On a balance of probability it is not proved that bush control was or not done as it is PWI's word against DWI in the absence of any other independent evidence the fact of bush control is unconfirmed and non-verifiable.

DWI confirmed through testimony and Working Procedures & Safety Precautions (Pg 22 of record of appeal); paragraph 3 (b) of the Working Procedures which clearly states;

''While cutting each worker is expected to be in hand gloves''... This shows the employer provided all employees with hand gloves and the resultant injury could not be avoided by use of gloves.

The Employer warned employees on carrying cut sisal in the fields. Paragraph 3 (e) of the Working procedures states;

> ***''When carrying bundles, beware that fields are rough.... and carrying should be done as follows;....''***

The employer warned all staff on carrying cut sisal to take care in light of the rough fields.

In **Muthuku vs Kenya Cargo services Ltd** it was stated;

> ***"The appellant /Plaintiff must prove on a balance of probability; one of the forms of negligence alleged against an employer.***
>
> ***Kenyan Law has not yet reached the stage of liability without fault."***

In **Wilson Nyanyu Musigisi vs Sasini Tea & Coffee,** it was observed;

> ***"Injury complained of by the appellant was remote and unforeseeable where an employee embarks on litigation for compensation under Common Law negligence, then, the employee should prove culpability on the part of the employer. The employee ought to show the employer failed in its statutory or common law duty of care."***

In **Eastern Produce (K) Ltd vs Patrick Chege Mwangi;** the Court observed;

> ***"The employer is not an insurer of an employee. If an employee is injured on duty he is immediately entitled to Workmen Compensation Act. If an employee goes further and***

claims for general damages, then he has to prove negligence on the part of the employer."

In **Statpack Industries vs James Mbithi Munyao (Nbi. HCCA 152 of 2003)** Court held;

"The burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between some-one's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two maybe drawn. Not every injury is a result of someone's negligence. An injury perse is not enough to hold someone liable for the same."

The Defendant submitted through Counsel that the employer has a duty to take all necessary precaution towards safety of the employee while engaged in employment not to expose employees to any risk injury or damage. Was the respondent's fall due to breach of duty by the appellant reasonably foreseeable in the circumstances?

I think not, the employer provided safe and secure environment for employees. The employer provided gloves to employees and conducted bush control before employees went to the field to cut sisal. The employees were warned of rough field and instructed to carry limited load of cut sisal. If the Respondent's fall, injury and pain to the right hand was as a result of lack of bush control that time or to that particular field, the all employees were exposed to the same work environment and similar circumstances; carrying cut sisal. Yet it was only him who fell after being entangled or tripped by grass and there was a small hole filled with grass. Unless evidence is shown that the employer ought to have done something specifically to prevent such a fall, the employer cannot be held liable. There must be fault, specific act that ought to be carried out to provide safe and secure environment to all employees to protect them from falling in the field.

The employer provided working procedures and safety precautions, provided gloves, warned employees to be careful of the rough field when carrying cut sisal and how such sisal is to be carried, I do not see what else was legally required to be done as the fall though unfortunate, could not have been caused by the employer.

However, the duty does not extend to include unforeseen incidents caused by negligence of the employee himself.

4. **Were the pleadings and evidence on record at variance?**

Plaint paragraph 5; the plaintiff fell into a hole and sustained serious bodily injuries.

And in PWI's testimony, he was tripped by grass, there was a small hole filled with grass.

Submissions for plaintiff; he was carrying sisal bundles to the tractor and the grass on the farm crossed his legs and he fell. The grass was high to the knees, high to a dangerous level and it was utterly impossible for the Plaintiff to see what was beneath.

The Court cannot decipher whether the fall was attributed to long uncut grass, or a hole or both. Therefore to apportion liability to the employer, would be problematic as the Court has to determine fault. What is it that the defendant was to do to prevent the fall, cut the grass, there would have been the hole, seal the hole, then all holes in the estate, then the grass would have been a problem, taken care of both grass and holes, then it would amount to holding the appellant for indeterminate actions and omissions.

The cause of the fall would directly inform the fault principle in breach of duty, since it is not conclusive from the evidence what caused the fall, the apportionment of liability and determination of quantum would be premature.

CONCLUSION /JUDGMENT OF THE COURT

The Court finds the grounds of appeal as follows;

Ground 1

The learned Magistrate directed himself properly on the evidence on record, he found that the employee Daniel Pw1 was injured while on duty at the defendant's farm.

Ground 2

The Court on evaluation of the evidence on record finds that the Plaintiff's injuries; pain on the right hand could not be directly connected to the fact of injury at work.

No evidence of the report of the injury to the employer was made and documents produced did not indicate a report of the accident and injury resulting from the accident.

Ground 3

The pleadings and evidence were at variance; it is not clear from the evidence, the direct cause of the injury, was it the grass entangling the Plaintiff, or the hole with grass or both. It is therefore difficult to visit liability based on fault on the appellant. What is it that the defendant did not do that exposed the respondent to risky and dangerous working environment?

Ground 4

It is trite law that an appellate court can only interfere with an award of damage where the award was either based on the wrong principle or is so inordinately high or low as to be a wholly erroneous estimate.

The Court finds that in the absence of evidence to prove on a balance of probability the appellant's breach of duty that was the direct cause of the Respondent's injury, the Court has to vacate the award of general damages as set out.

If the general damages were to be awarded, it would be on the contributory negligence ratio the learned Magistrate found.

FINAL ORDERS

The appeal is allowed earlier orders vacated and costs to the appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2014

MARGARET MUIGAI

JUDGE

In the presence of:

Counsel for the Appellant.....

Counsel for the Respondent.....