



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO. 21 OF 2005

JAMES FINLAY (K) LTD.....APPELLANT

VERSUS

EKERO KALIPUSO LIPAMOE.....RESPONDENT

(From the Judgment of the Senior Resident Magistrate, Hon. A. G. Kibiru, delivered on 31st May, 2005 in PMCC NO. 206 of 2004 between Ekeru Kalipuso Lipamoe versus James Finlay (K) Ltd)

JUDGMENT

This Judgment is the outcome of the appeal against the decision of Hon. A.G.Kibiru, learned Senior Resident Magistrate vide **Kericho P.M.C.C. no. 206 of 2004 Ekeru Kalipuso Lipamoe -vs- James Finlay (K) Ltd** delivered on 31st May 2005. The brief background of this appeal is that on 3rd May 2002, **EKERO KALIPUSO LIPAMOE**, the Respondent was struck by lightning and injured while plucking tea belonging to **JAMES FINLAY (K) LTD**, the appellant herein. There was no doubt that the Respondent was under the employment of the Appellant. It is the evidence of the Respondent that on the fateful day he together with his fellow workers sought refuge at the Appellant's weighing house when it rained heavily. The Respondent suffered injuries on both eyes as a result. He filed a compensatory suit. The Appellant filed a defence to deny being the cause of the Respondent's injuries. In fact, the Appellant stated that lightning was an Act of God and the allegation that it was a cause was so remote. It also argued that lightning is not something one can control. The learned Senior Resident Magistrate considered the evidence from both sides and came to the conclusion that the Appellant was liable and gave the Respondent judgment.

The Appellant being dissatisfied filed this appeal. It put forward the following grounds in its Memorandum:

1. **The learned trial Magistrate erred in law and in fact in failing to hold that the alleged accident was an Act of God and that the Appellant owed no duty of care to the Respondent.**
2. **The learned trial Magistrate erred in law and in fact in holding the Appellant wholly and fully liable.**
3. **The learned Magistrate erred in applying wrong principles and failing to take into account material facts in arriving at the exaggerated award.**
4. **The learned Magistrate erred in law and in fact in disregarding the Appellant's submissions.**
5. **The learned trial Magistrate erred on all points of fact and law in as far as the holding on liability and award of damages is concerned.**
6. **The learned trial Magistrate erred in law and in fact in failing to dismiss the Plaintiff's suit for not having been proved on a balance of probability.**

When the appeal came up for hearing, learned counsels appearing in this appeal recorded a consent

order to have the appeal determined by written submissions. I have considered the rival submissions. It is the argument of the appellant that the learned Senior Resident Magistrate erred when he failed to rule that the accident was an Act of God and as such, it had not broken any duty of care to the Respondent. The appellant further argued that the trial Magistrate erred when it found that it was wholly to blame for the accident. The Respondent on the other hand was of the view that the appellant was duty bound to fix lightening arrestors on the roof of the weighing house. He also argued that the case was proved to the required standards i.e on a balance of probabilities.

This being the first appellate court, this court is enjoined to re-evaluate the evidence and reach at its conclusion of the matter. I have critically re-evaluated the evidence and there is no doubt that the Respondent was injured when the appellant's weighing house was struck by lightening while the Respondent was sheltering himself from rain. There is also no doubt that lightening is a natural occurrence which is prevalent in the area as evidenced by the number of buildings and structures fixed with lightening arrestors. It is the argument of the appellant that the occurrence of the accident was something not anticipated nor controlled. In other words, the appellant relied on the doctrine of *force majeure*. I do not agree with the appellant that the occurrence of lightening in the area is something which was not anticipated nor controlled. The same is a regular occurrence. The same can be scientifically controlled by the installation of lightening arrestors on buildings and structures. The appellant does not deny that it never installed on its weighing house a lightening arrestor. The appellant knew very well that this is the place where its workers go and weigh the tea leaves. It is also a place where the workers take shelter when it rains. It behoves upon the Appellant to fix lightening arrestors in such structures. Having found the appellant liable, perhaps the next question is whether it was wholly liable. The Respondent knew very well from the beginning that the weighing house had no lightening arrestors. There was an office block which was about 40 metres from the weighing house which had lightening arrestors. If the Respondent cared for his safety he should have moved to take shelter at the office block. Of course, it is a matter of common notoriety that the appellant has stringent rules on no-go zones by employees like the Respondent. In most cases they are restricted to the weighing house and no more. However, the Respondent did not give evidence showing he was barred from accessing the office block, hence I will make him shoulder 20% contributory negligence. Consequently, the Appellant is held 80% liable for failing to control the effect of lightening. The appeal as against liability succeeds to the extent stated herein-above.

The Appellant argued that the award of Kshs. 80,000/= as general damages for the Respondent's injuries is exaggerated. It proposed that a sum of Kshs. 40,000 was sufficient. I have looked at awards given by this court in recent times for near similar injuries. In similar cases it gave awards ranging between Kshs. 60,000 to Kshs. 200,000. In my view, I find the award of Kshs. 80,000 as general damages not exorbitant. Consequently, the appeal as against quantum is dismissed.

In the end, the appeal against liability partially succeeds, so that the appellant shoulders 80% liability and the Respondent 20%. For the avoidance of doubt the award of the trial court is adjusted downwards by 20% as follows:

(i) General damages	Kshs. 80,000
Less 20% i.e	Kshs. 16,000
Net General damages	Kshs. 64,000
(ii) Special Damages	Kshs. 4,500
Less 20% i.e	Kshs. 900
Net special damage	Kshs. 3,600

The total net figure for damages is Kshs.67,600

(iii)The Respondent to have costs assessed based on Kshs.67,500.

Dated, Signed and delivered this 22nd day of November,2013.

J.K.SERGON

JUDGE

In open court in the presence of

The counsel for the Appellant

N/A for Respondent

Mr. Korir- court clerk