**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 55 OF 2008**

**OL JOGI LIMITED..........................................................................................................APPELLANT**

**Versus**

**NCHENE KAIGWIRA.......................................................................................................RESPONDENT**

***(ARISING FROM THE JUDGMENT OF THE SENIOR PRINCIPAL MAGISTRATE DELIVERED ON 14TH MAY 2008 IN***

***NANYUKI S.P.M.'S CIVIL CASE NO. 88 OF 2004)***

**JUDGMENT**

Nchene Kaigwara, the Respondent herein, filed an action against OL Jogi Ltd, the appellant before the Nanyuki Senior Resident Magistrate's court by way of the plaint dated 24th June 2004 in which he sought for judgment in the following terms.

***(i) General damages for pain and suffering and for wrongful dismissal from employment.***

***(ii) Kshs. 21,090 being special damages***

***(iii) Costs of the suit.***

***(iv) Interest on (i) and (ii) above.***

The Appellant filed a defence to deny the Respondent's claim. The suit was heard and determined in favour of the Respondent in the following manner.

***(i) claim for wrongful dismissal dismissed.***

***(ii) Kshs. 120,000/= general damages for pain and suffering at the ratio of 70% liability***

***(iii) Kshs. 3,500/- representing special damages***

***(iv) Costs of the suit.***

The Appellant was aggrieved hence this appeal.

On appeal the Appellant put forward the following grounds in its memorandum of appeal.

***1. The learned Principal Magistrate erred in law and in fact by entering judgment in favour of the plaintiff while the plaintiff had totally failed to prove any negligence or any wrong doing on the part of the defendant.***

***2. The learned Principal Magistrate erred in law and in fact by assuming, speculating and imagining that the plaintiff had suffered soft tissue injuries and awarding him damages as a result of those injuries while in his pleadings the plaintiff had not pleaded any such injuries.***

***3. The learned Principal Magistrate erred in law in putting any weight or believing the doctor's medical report, which the magistrate described as unfortunate, confusing and a mess.***

***4. The learned Principal Magistrate erred in law and in fact by holding that although the plaintiff was provided by the defendant with all the relevant protective gear the working environment was not safe and that the plaintiff was exposed to the risk, danger and injuries which the defendant knew or ought to have known while no evidence was adduced to show that the environment the plaintiff was working in was not safe.***

***5. Taking into account the circumstances of this case the learned Senior Principal magistrate erred in Law by not holding that an employee takes upon himself risks necessarily incidental to his employment and apart from the employer's duty to take reasonable care, an employee can not call upon his employer , merely upon the ground of their relationship of the employer and employee to compensate him for any injury and thereafter dismiss the plaintiff's claim.***

***6. The learned Senior Principal Magistrate erred in law by completely ignoring the defendant's written submissions together with the authorities in support.***

***7. The learned Principal Magistrate erred in law in apportioning the appellant 70% contributory negligence without any evidence of any nature to support that finding.***

***8. The learned Principal Magistrate erred in law in awarding Kshs. 500/= as doctor's court attendance fees while the same was not pleaded.***

***9. The learned senior Principal magistrate erred in law by refusing to award any costs to the defendant on the part of the plaintiff's claim which was dismissed.***

When the appeal came up for hearing, this court directed the parties to file written submission upon the application of Mr. Wanjohi, learned advocate for the Appellant. I have considered the written submissions filed by learned counsels from both sides. Before considering the merits or otherwise of the appeal let me set out in brief the case that was before the trial court. The Respondent's case was supported by the evidence of two witnesses. The Respondent tendered evidence showing that he was employed by the appellant on 3rd July 2002 as a casual labourer and later confirmed on a permanent basis. He started with a salary of Kshs. 3000/= per month. The salary was increased in progression until it reached Kshs.

6,030/= per month. He said that on 2nd August 2001 he fell down while riding a horse going round the Appellant's shamba. As a result, he claimed he sustained fractures on the ribs and soft tissue injuries on the back and on the head. He was admitted to Cottage Hospital for six days. Upon his discharge the Respondent claimed he was summarily dismissed because he was unable to ride on a horse any more. He blamed the appellant for allowing him to ride on a horse without the protective gears like a safety belt. He also complained that his dismissal was illegal because he got injured while in the employment of the Appellant. The Respondent summoned the evidence of Dr. Waihenya Mwangi (P.W.2) who in turn produced the medical report he prepared on the Respondent. In his report P.W.2 indicated that the Respondent sustained lower back injuries and that he had difficulties in breathing, and that he was nose bleeding while coughing out blood. P.W.2 also noted in the medical report that the Respondent fractured the 6th and 7th ribs of the left side of the chest. The Appellant summoned the evidence of three witnesses to support its defence. Riiba Ndirangu (D.W.1) said the Appellant always supplied the Respondent with riding gears which must be worn while riding a horse to wit: saddle, reigns for the horse, helmet, gloves chap and ship for the horse. D.W.1 claimed that the Respondent was in fact the head of the all the equipments for the horses. D.W.1 confirmed that the Respondent was employed as a casual labourer and made permanent and pensionable on February 2002. D.W.1 alleged that the Respondent employment in 2004 after he was found stealing horse fodder and was subsequently sacked. D.W.1 said the Respondent opted to leave employment with his terminal benefits to avoid being arrested by police. He was paid Kshs. 3,100/= for 19 leave days, Kshs. 4,280 for due leave days, Kshs. 391/= for overtime and the equivalent of one month's basic salary of Kshs. 6,360/=. The Respondent is said to have received a net sum of Kshs. 13,330/= after which he signed a clearance letter. Peter Muthee (D.W.2) told the trial court that on 2nd August 2001 he and the Respondent rode horses. D.W.2 claimed the horse rode by the Respondent had all the gears required in horse riding. He said he was a head of the Respondent. Suddenly, D.W.2 said, he found the plaintiff had fallen off the horse but the Respondent did not tell him the reasons which made him fall. The learned trial Senior Principal Magistrate considered the evidence from both sides. She came to the conclusion that the Respondent was an employee of the Appellant. He was employed as a horse rider. She also concluded that on 2nd August 2001 the Respondent fell down while riding a horse on duty. The trial magistrate also believed that the Appellant had provided the Respondent with protective gears. Despite concluding that the Appellant proved that it had provided the protective gears, the learned magistrate concluded that irrespective of the provisions of protective gears the working environment was not safe and hence the Respondent was exposed to the risk of danger and injury which the Appellant knew or ought to have known. She concluded that the Appellant was liable by strict by the principle of strict liability for 70%. The learned magistrate went ahead to consider the quantum of damages. She however dismissed the claim for wrongful dismissal.

Having given the brief history of the case leading to this appeal, let me now turn my attention to the merits or otherwise of the appeal. Though the appellant raised 9 grounds of appeal, the main ground which will dispose of the appeal is the question of liability. It is the submission of the appellant that there was no proof that the Appellant was negligent. The Respondent on the other hand is of the view that he tendered evidence establishing negligence on the Appellant's part. I have carefully perused the plaint and it is clear that the Respondent had given the particulars of negligence to include **inter alia**:

***(i) Failing to provide a safe working environment.***

***(ii) Failing to provide adequate working implements.***

***(iii) Failing to provide protective attire.***

(iv) ***Failing to provide safe system of working***

I have re-evaluated the evidence and it clear that the Appellant gave evidence showing that the Respondent was supplied with the necessary protective gear for a horse rider. The Respondent did not controvert the Appellant's evidence. The learned trial Senior Principal Magistrate also appreciated that fact. The trial magistrate found the Appellant liable on the doctrine of strict liability. She came to the conclusion that the working environment was not safe thus the Respondent was exposed to danger of injury which the Appellant is alleged to have known or ought to have known. I have carefully looked at the evidence of the Respondent. In an attempt to prove liability on the part of the Appellant, the Respondent alleged that the company did not give him gears worn by horse riders to wit: safety belts and ridding gears. The appellant summoned Riiba Ndirangu (D.W.1) to testify. D.W.1 was able to show that the Respondent was given all the ridding gears which included a saddle, reigns, helmet, gloves, chap and ship for the horse. It was also alleged that the Respondent was in charge of the store holding all implements for horses. A careful consideration of the Respondent's evidence will reveal that apart from pleading that he worked in a dangerous environment he did not give evidence to support his allegation. I have already stated that the trial magistrate found the Appellant liable the on basis of the doctrine of strict liability. It is trite law that the doctrine of strict liability implies that liability lies regardless of fault, for damage done by an animal dangerous by nature and for damages caused by a tame or harmless animal in consequence of its mischievous propensity of which the owners know or ought to be aware.

There is no evidence to show that the horse in question was dangerous or mischievous. There is also no evidence to show that the environment where the Respondent worked was dangerous. The Respondent stated in his evidence that he was a horse trainer. He did not deny that the implements for horses were in his custody. In the circumstances of this case it would appear the Respondent chose to ride a horse without the requisite protective gear. He has himself to blame and on one else. With great respect, I must state that the learned Senior Principal Magistrate fell into error when she found the Appellant liable on the basis of the doctrine of strict liability. The conditions and the evidence necessary to apply the doctrine did not manifest themselves from the testimonies given. It was wrong to find the Appellant liable.

I must comment the learned Senior Principal Magistrate for dismissing the Respondent's claim for damages for wrongful dismissal. There was evidence which was not controverted that the Respondent was actually dismissed for having stolen horse fodder. The respondent has not even deemed it fit to file a cross-appeal over that dismissal order.

The main ground argued on appeal is the one relating to quantum vis-a vis the medical evidence tendered. The Appellant complained that the Respondent was warded Kshs. 500/= as a special damage yet the same was not pleaded. With respect, I agree with the Appellant. An award on special damages must be pleaded and strictly proved. There was therefore no justification for the award. There is a submission by the Appellant that the medical report produced by the Respondent was in respect of injuries sustained in two different dates. i.e. on 2$^{nd}$ August 2001 and on 2$^{nd}$ December 2002. It is said that it was difficult to decipher which of those injuries were used to base the quantum. With due respect, the Appellant should not be heard to challenge production of the medical reports on appeal yet there is no evidence that it objected to the production of the same before the trial court. In fact the trial magistrate should be commended in the manner she dealt with the medical report. I have reconsidered the awards made in comparable cases and I think the trial court gave a reasonable award on quantum for near similar injuries.

The end result is that the appeal is allowed. The judgment of the trial court is set aside and is substituted with an order dismissing the suit. The appellant is given costs of the appeal and those of the suit.

Dated and delivered this 8th day of April 2011.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Wanjohi the Appellant and N/A for Bwonong'a for Respondent.

J.K. SERGON

JUDGE