REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.68 OF 2009

SABAN AKELLO OGANY……APPELLANT
VERSUS
J.R.S. GROUP LIMITED……RESPONDENT

[Appeal from Original Judgement from Winam SRM's Court: P.C. Biwott

in
Civil Case No.92 of 2006
****

J U D G E M E N T

This is an appeal from the judgment of Senior Resident Magistrate in **Winam SRMCC No.92 of 2006** delivered on 16th December, 2008. Being dissatisfied with the judgement the appellant **Saban Akello Ongany** preferred this appeal against **J.R.S. Group Limited** on the following grounds:

1. That the learned trial magistrate erred in law and fact by failing to find and hold that the appellant was injured in the course of his usual duties.

2. That the learned trial magistrate erred in law and fact by failing to find and hold that by seeking to separate the two fighting colleagues the appellant was discharging his duties to the respondent.

3. That the learned trial magistrate erred in law and fact by failing to find and hold that maintaining law and order was part of the appellant's duties at the respondent's work place.

4. That the learned trial magistrate erred in law by failing to critically analyse the evidence on record and thereby arrived at a wrong conclusion.

5. That the learned trial magistrate in his haste to arrive at the unsupportable conclusion that he did failed to find and hold that the respondent and its other employees were negligent in permitting its employees to engage in a physical combat thereby endangering the safety of its other employees including the appellant;

6. That the learned trial magistrate erred in law by finding that intervening in the fighting of two of the plaintiff's workmates was not the respondent's work this notwithstanding that the appellant was employed as a guard.

7. That the learned trial magistrate erred in law by failing to clearly set out the issues falling

for determination in his judgment as by law required thereby falling into error on his way to arriving at the wrong findings.

Based on the above the appellant sought for:

(i) reversing of the learned trial magistrate's finding of dismissal and allowing the appeal.
(ii) An award of damages.

The background to the case is that, in a plaint dated 3rd march, 2006, the appellant **SABAN AKELLO OGANY** filed suit against **JRS Group Limited** urging that it was a term of his employment contract between him and the respondent and/or it was the respondent's duty to take reasonable precaution for the safety of the appellant while he was engaged in his work, not to expose him to a risk or damage or injury of which it knew or ought to have known, to provide suitable and adequate plant to ensure the place was safe and generally to prove and maintain a safe and proper system of work. He claimed that the respondent failed in its statutory and common law duties. The appellant gave particulars of breach of statutory and/or common duty.

He sought for:

(a) general damages;
(b) special damages of Kshs.2,000/=;
(c) costs;

A defence dated 12th April, 2006 was filed. The respondent generally denied the alleged breach of statutory and/or common law duty as alleged, further there was denial that the appellant was hurt while in the course of his duty, in the alternative the respondent contended that if at all the appellant was injured he was negligent or he substantially contributed to the same. Particulars of the appellant's negligence were listed in the defence and further the respondent pleaded that the circumstances under which injury if any were suffered were such that the respondent could not have reasonably foreseen the same. A reply to the defence was filed on 2/5/06 wherein the appellant denied the allegations of negligence attributed to him and denied that the doctrine of **volenti non fit injuria** applies in the circumstances of this case.

This is the first appellate court and has a duty to re-consider the evidence, examine and analyse the same a fresh in order to arrive at an independent opinion. See **Sella and Another versus Associated Motor Boat Limited and Another (1968) E.A.** at **123 & Peters versus Sunday Post (1958) E.A.** at **424.**

The evidence before court may be summarized as follows:

PW1 – Saban Akello Ogany – the appellant stated that:-

- **He worked for the respondent between 30th November, 2003 and 30th November, 2005.**
- **He was base commander**
- **On 12/6/2005 he witnessed Kennedy and John Ayoga fighting. John had a stick;**
- **He went to restrain them but John hit him with a stick on his left hand where he sustained injuries.**
- **He reported the matter to the police. He went to Kisumu District Hospital and he was treated;**
- **He blamed the defendant for injuries, sustained as he was injured while on duty;**
- **He was in charge and under a duty to separate those fighting;**
- **He was injured by the respondent's employee.**

In cross-examination he stated that his assailant was charged with a criminal offence. He further stated that he blamed the respondent for employing arrogant employees.

PW2 Joseph Ongilo a clinical officer at Kisumu District Hospital classified injuries sustained as harm. **PW3 Dr. D. Olima Onyango** produced the report by **Dr**. **Nyamogo** a colleague as part of plaintiff's

exhibits.

The defence did not adduce any evidence.

From the record there is no dispute that the appellant worked for the respondent at the material time and further that he received injuries as a result of a fight between his colleagues. The above facts have not been controverted despite denials by the defence which in the absence of evidence in support remain as mere denial.

Having stated as above it is trite law that he who alleges a fact must prove the same. The appellant alleged breach of statutory and common law duty by an employer to an employee.

It is also trite law- both statutory and common law that an employer owes a duty of care.

Halsbury's Laws of England, 4th Edition, Vol.15 at paragraph 560 provides:

"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to an unnecessary risk."

It is my view that the reasonable duty of care is not wide open. It is a duty of care within what would be foreseeable situations and circumstances.

The appellant holds the respondent liable due to a fight amongst employees and for employing **"arrogant employees."** He however failed to show on a balance of probabilities that the said circumstances were foreseeable and in what way the respondent was negligent.

In his judgment the learned trial magistrate stated:

> **"the fighting of the two of the plaintiff's work-mates was not the defendant's work in my mind. It was an affray or assault."**

"I concur with the defence counsel that for the injuries suffered by the plaintiff it cannot be held liable…….the defendant has no responsibility for injuries suffered by the plaintiff. I find plaintiff's claim not proved."

The conclusion of the learned trial magistrate is that no claim was proved. For the reasons I stated above I concur with said the finding.

I do not see therefore any justification to upset the trial court's finding. I accordingly dismiss the appeal. I make no order as to costs.

Dated and delivered this 19th day of October 2011

ALI-ARONI
J U D G E
In the presence of:
…….counsel for appellant
…….counsel for respodnent