



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 294 OF 2010

**GARTON LIMITED APPELLANT/
ORIGINAL DEFENDANT**

VERSUS

**NANCY NJERI NYOIKE RESPONDENT/
ORIGINAL PLAINTIFF**

*(Being an appeal from the Judgment of the Hon. E. Boke Esq Resident Magistrate at Kandara Law
Courts in CMCC No. 214 of 2009 delivered on 1st July 2010)*

RULING

I. INTRODUCTION

1. Nancy Njeri Nyoike was a casual employee with the then

M/s Garton Limited in their coffee farm. On the 23rd December 2008, the employee was picking coffee beans when out of the bush, an antelope suddenly ran out and as it sped by, knocked her down. She sustained injuries to her left leg and head.

2. A report was immediately made to her superior and she was rushed to the hospital where she was admitted for four days. An X-ray was made but found to have no injuries to her head. Her left leg was said to be hurting and in pain. As of the year 2009 when the medical report was drawn up, she had fully recovered.

3. On the 20th August 2009, the employee filed suit against her employer in damages. She sought damages for pain and suffering and special damages of Ksh. 3,000/=.

4. After hearing the trial of the parties, the trial magistrate found that the employer was liable in negligence at 80% and the employee was to bear 20% contributing negligence.

5. She gave an award for general damages, pain and suffering at Ksh. 160,000/=. The special damage claim having not been proved for Ksh. 3,000/= was dismissed. The net award was given at

Ksh. 128,000/=

6. Being dissatisfied with this award, the employer appealed to this High Court.

II APPEAL

7. The appellant, employer appealed against the whole judgment on the grounds that the learned magistrate erred in law:

7.1 ... in failing to appreciate that the court lacked jurisdiction to hear the suit and grant the orders sought on the grounds that the Work Injury Benefits Act was the applicable law in regards to injuries sustained at the work place, at the time of the alleged accident.

7.2 ... to appreciate that a claim for injury would award sought to have been addressed under Section 62 of the Wildlife Conservation and Management Act Cap 376 of the Laws of Kenya.

7.3 ... to appreciate that the respondent had not proved her case on a balance of probabilities as required by law.

7.4 ... in holding that the appellant was 80% liable for the alleged claim despite there being no evidence before her to purport the alleged liability.

7.5 ... by failing to take into account the fact that the respondent's evidence was inconsistent and that she had lied to the court.

7.6 ... by making a manifestly excessive award for general damages in light of the minor nature of the injuries.

7.7 ... by shifting the burden of proof to the appellant.

7.8 ... by failing to appreciate that the appellant does not rear antelopes on its farm and has no control over wild animals.

7.9 ... misdirected herself in law and reached conclusions based on matters not before the court.

7.10 ... erred in awarding costs to the defendant.

8. In conclusion, the appellant employer sought this court's orders to allow their appeal and have the employees' suit in the Senior Resident Magistrate's Court dismissed with costs. That the judgment of the Hon. Magistrate be set aside. They prayed for their costs.

i) Arguments By Appellant

9. The argument in the appeal was that proof of negligence on the part of the employee was not established against the employer. That the employee claimed to have been "attacked" by an antelope whilst picking coffee. That this was due to the negligence and breaches of the statutory duties that the employer had towards the employee. The injuries suffered must be as a result of an act or omission.

10. The incident was not foreseeable. It was up to the employee to prove that the employer was negligent. This was not established.

11. The liability was apportionment. The law is trite that the court must have regard to causation and blame worthiness.

12. The award was excessive similar injuries were awarded in other cases at not more than 35,000/=.

13. Compensation should have been from the Wildlife Conservation and Management Act Cap 376.
14. The magistrate lacked jurisdiction to hear the suit.

ii) In Reply

15. The advocate for the respondent argued that the issue of jurisdiction was not raised in the subordinate court.
16. There was no dispute that the relationship between the parties was employee/employer. A contract existed between the said parties.
17. The matter is also tortious and particulars of negligence being specifically pleaded. The witness for the employer admitted the injury was sustained.
18. The judgment was therefore fair in the circumstances.
19. As to the quantum, the award given was not excessive. The case law of:
Catherine Wanjiru Kingori – Vs – Gibson Theuri
Mombasa HCC 320/1998
(Khaminwa J)
Showed global awards of between Ksh. 300,000/= and Ksh. 100,000/= between the parties.

III OPINION

20. The employee asked that the appeal be dismissed.
21. It is clear law that the relationship between an employer/employee has its cause in contract and where injury occurs in TORT.
22. In the case before the trial magistrate, the employee stated she sustained injuries. She then sued in the magistrate's court for damages. So that she be awarded for the pain and suffering.
23. Although the employer's advocate dealt with the issue of jurisdiction last, it is important to determine this issue. Jurisdiction goes to the root of any case. See the case of MV Lilian (Mombasa).
24. The employee argued that the issue of jurisdiction had never been raised. The witnesses never spoke of the issue of jurisdiction. The defence though did state the following:-

“Para 10

The defendant avers that the plaintiff's suit is incompetent, bad in law and shall at the appropriate time raise a preliminary objection to the same. Notice is hereby given.”

“Para 11

The jurisdiction of this Honourable Court is denied.”

25. The next stage the issue was addressed was through the written submissions by the employer as part of the issue being:

“Does the court have jurisdiction to grant the orders sought herein?”

26. The employer submitted that the court had no jurisdiction to grant the orders sought ... *“on the date of the alleged accident the Work Injury Benefits Act of 2007 was applicable as law as regards*

injuries sustained at the work place.” The reasons being that “*Section 16 ousted the jurisdiction of the court.*” As the provision of the Act was in effect the court was bound to comply. The suit should in this regard be dismissed.

27. The submission on this point did not appear to have been addressed by the employee. It is possible that the respondent employee may not have ever seen or read the submission by the appellant employer in the subordinate court.

28. In the trial magistrate’s judgment, the issue as to whether she had jurisdiction to determine the case was never addressed in the main judgment.

29. Under the Civil Procedure Act Section 5, it is stated that,

“any court shall, subject to the provisions herein contained have jurisdiction to try all suits of a civil nature except in suits of which it cognizance is either expressly or impliedly barred.”

30. Under the rules, this appeal court notes the power of the court to produce additional evidence on condition:

“The parties to an appeal shall not be entitled to produce additional evidence, whether oral, or documentary, in the court to which the appeal is preferred;

But if:

a).....

or

b)

The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pursue judgment or FOR ANY OTHER SUBSTANTIAL CAUSE.
(Emphasis supplied.)

The court to which the appeal is preferred shall specify the point to which the evidence is to be confirmed and record on its proceedings the point specified.”

31. The point herein specified by this court being

“Does the subordinate court have jurisdiction to hear and determine the suit?”

32. That the parties are to submit before the trial magistrate (and or the successor if the trial magistrate may not be in service) and a finding be determined filed to this court within 120 days.

33. There will be costs in the appeal.

DATED THIS 13TH DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG’AWA
JUDGE