



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 707 of 2006

TROIPI FLORA LTD.....APPELLANT

VERSUS

JOEL ODHIAMBO ODHIAMBO.....RESPONDENT

*(Appeal from the judgment of the Honourable M.W. Mwai,
Resident Magistrate dated and delivered on
26th September, 2006 in RMCC No.98 of 2006)*

J U D G M E N T

1. This is an appeal arising out of a suit which was filed by Joel Odhiambo Odhiambo (hereinafter referred to as the respondent), in the magistrate's court at Limuru. The respondent had sued Tropi Flora Ltd (hereinafter referred to as the appellant), seeking general and special damages for personal injuries suffered by him. The respondent claimed that he suffered injuries as a result of negligence and or breach of statutory duty, and or breach of contract of employment on the part of the appellant whom he claimed was his employer.

2. The appellant filed a defence denying the respondent's claim. In particular the appellant denied that there was any contract of employment between it and the respondent, or that the respondent was injured during the course of his employment or that the appellant was negligent or in breach of statutory duty and or breach of contract. In the alternative the appellant claimed that if the respondent was injured then he ought to have brought his claim under the Workmen's Compensation Act. The appellant further maintained that the respondent's suit was statute barred. During the trial three witnesses testified in support of the respondent's case. These were Dr. Okoth Okere, James Omboi Kiage and the respondent. Briefly, their evidence was as follows:

3. The respondent was employed by the appellant. His work was to harvest flowers. Apart from harvesting flowers the respondent also used to play in the appellant's football team. On the material day, the respondent was playing for the appellant's club in a match against another club when a member of the opponent team stepped on respondent's leg and it broke. The respondent suffered a fracture and had to be admitted at Nazareth Hospital for a period of 15 days. The respondent was later examined by Dr. Okoth Okere who confirmed that he suffered a fracture of the right tibia. Dr. Okere assessed the respondent's degree of permanent incapacity at 15%. The respondent blamed the appellant for the accident contending that he was not supplied with pads and stoppers for the legs, which would have protected him from injury.

4. The appellant testified through Kennedy Munyaru who is a storekeeper in the company. The witness testified that the respondent was the one who used to organize football matches. The respondent had to inform the company and get authority for the team to play. The witness contended that on the material day, the appellant did not give any authority for the match, nor had the appellant organized the match. Under cross-examination the witness conceded that the appellant used to pay medical charges for employees injured during the game. The witness also conceded that the appellant was not giving any protective clothing. The witness maintained that the pads would not have prevented injury of the nature of a fracture.

5. In her judgment, the trial magistrate found that the respondent was an employee of the appellant and that the respondent sustained a serious injury during a football match. The trial magistrate held that whilst playing football for the appellants' Club, the respondent was still under the employment of the appellant. The trial magistrate noted that the appellant failed to provide the respondent with necessary protective clothing. She apportioned liability at 70:30% in favour of the respondent. The trial magistrate further awarded a sum of Kshs.200,000/= as general damages in respect to the respondent's injuries and special damages of Kshs.1,500/=.

6. Being aggrieved by that judgment, the appellant has lodged this appeal citing 6 grounds as follows:

- (i) The learned magistrate erred in law and fact by failing to consider the defendant's defence and evidence that the plaintiff was not injured while in the course of his employment thereby arriving at an erroneous finding that the defendant was liable.
- (ii) There was no basis upon which the learned magistrate apportioned liability at 70:30 in favour of the plaintiff.
- (iii) The learned magistrate erred in law and fact when she failed to take into consideration the evidence of DW1 that at the time of the alleged accident, the defendant had no football team known as Tropi flora AFC
- (iv) The learned magistrate erred in law and fact when she failed to address her mind to the plaintiff's pleadings. In particular she failed to consider that the plaint did not disclose any cause of action against the defendant. It is nowhere in the plaint is disclosed as to what caused the injury, what the plaintiff was doing when he was allegedly injured and the nature of the injury.
- (v) The learned magistrate erred in law and fact by holding that the defendant was under statutory obligation to take precautions for the safety of the plaintiff while playing football match at no authority of the defendant.
- (vi) The learned magistrate erred in law by awarding general damages in excess of the authorities cited to her. The award is not commensurate to the injuries sustained by the plaintiff.

7. It was agreed by the parties that the appeal be disposed of by way of written submissions. The parties accordingly duly exchanged and filed written submissions. For the appellant, it was submitted that there was variance between the pleadings and the respondent's evidence. It was contended that the circumstances leading to the respondent's injury as testified to by the respondent was not pleaded anywhere in the plaint. It was submitted that the respondent's activity of playing football from which his injury arose was entirely different from the respondent's engagement with the appellant of harvesting flowers. It was further argued that the appellant did not have a football team and that the respondent played football to entertain himself without any authority from the appellant. It was submitted that there was contradiction between the letter of demand, which alleged that the respondent was injured in the appellant's premises, and the respondent's evidence which showed that he went to play football outside the appellant's premises. The court was urged to find that the evidence which was adduced in the trial court was not sufficient to support the respondent's claim.

8. For the respondent, it was submitted that the appellant's witness admitted that the appellant owned a football club, and that the respondent played for the company team, and would be paid even when engaged in playing football. It was therefore submitted that the appeal had no merit. It was maintained that the appellant assigned the respondent a risky duty, and failed to provide him with any protective clothing, thereby exposing the respondent to imminent danger. The court was therefore urged to dismiss the appeal as it was vexatious and a sham.

9. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower court. I have also given due consideration to the judgment of the trial court, the memorandum of appeal and the submissions of both parties. I do note that although the appellant in its defence denied having employed the respondent, it was conceded by the appellant's only witness that the respondent was at the material time employed by the appellant. The pertinent issue was whether the respondent was injured during the course of his employment, and if so, whether the injury was as a result of the appellant's negligence and or breach of statutory duty and or breach of contract of employment.

10. It is not disputed that the respondent was injured whilst playing football. The respondent was playing the game as a member of the appellant's football team. No evidence was adduced to show that the appellant was engaged in football as a professional business. It is apparent that "football" was a sport in which the appellant's employees engaged in voluntarily. The respondent did not therefore establish that he was injured during the course of his employment at the appellant's premises as alleged in paragraph 5 of his plaint.

11. Moreover, the respondent did not establish that the appellant was under any statutory or contractual duty to the respondent with regard to his engagement in the football game. The evidence shows clearly that the respondent was injured as a result of a hard tackle by an opponent during a football match. That was a risk which the respondent voluntarily assumed when he agreed to play the game. The respondent cannot shift the blame to the appellant. The question of the appellant providing a safe place or system of work or taking precaution for the respondent's safety did not arise as the respondent was not performing his official duty of flower harvesting. I find that the trial magistrate erred in failing to properly address the issues before her. Had she done so she would have found that the respondent's case was not proved to the required standard.

12. Accordingly, I allow this appeal, set aside the judgment of the lower court and substitute thereof an order dismissing the respondent's suit. In the circumstances of this case, I do not find it appropriate to award any costs. These shall be the orders of this court.

Dated and delivered this 20th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ohaga H/B for Kimondo for the appellant

Ongoto H/B for the respondent

Eric - Court clerk