REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Appeal 183 of 2005

CRUATTI SERVICES LTD……..APPELLANT

VERSUS

PATRICK IPATARA ELIMO……..…….RESPONDENT

JUDGMENT

This judgment relates to an appeal by the Appellant *(original Defendant)* against the judgment of the lower court in Naivasha Senior Principal Magistrate's Court Civil Case No. 1216 of 2004 on the grounds following -

(1) the Learned Magistrate erred in fact and in law by failing to give a concise statement of the case the points of determination and reasons for his judgment pronounced on 7th October, 2005.

(2) the Learned Magistrate erred in fact and in law in disregarding that the burden of proof lay on the plaintiff to prove negligence and/or breach of Common Law and/or Contractual duties as well as particulars thereof as pleaded in the plaint and that the injury to the plaintiff was caused by such breach. The learned magistrate erred in fact and in law in failing to distinguish that on the evidence adduced the plaintiff's claim, if any, was under The Workman's Compensation Act, Chapter 236, Laws of Kenya and not under Common Law.

(3) the Learned Magistrate erred in disregarding and misinterpreting the defence evidence.

(4) the Learned Magistrate erred in his finding on the nature and extent of injury suffered by the Plaintiff and in finding that the Plaintiff sustained a "fracture of the left ankle joint" whereas the Plaintiff had only suffered as per Dr. M. S. Malik "an undisplaced, oblique, crack fracture of the lateral malleolus (lower end of the fibula)" and that there was no dislocation of the joint.

(5) the Learned Magistrate erred in law and in fact in disregarding and dismissing the defence submission and in particular on the issue of volenti non fit injuria and dismissing the authorities relied upon and cited by the defence.

(6) the Learned Magistrate erred in awarding contributory negligence of 10% only which was

unreasonable in the circumstances.

(7) the damages awarded by the Learned Magistrate are excessive and unrealistic.

And on the grounds thereof the Appellant sought orders that -

(a) that the appeal be allowed and the Judgment against the Appellant be set aside.

(b) alternatively, the damages awarded be reviewed and revised.

(c) costs of this appeal and the costs of the Senior Principal Court be granted to the Appellant.

(d) any other order this Honourable Court may deem fit to grant.

Although there were seven grounds of appeal, Mr. Mahida learned Counsel for the Appellant compressed the said grounds and urged them on two propositions.

Firstly that there was no proof either in negligence and/or breach of common law duty of care and as a result whereof the trial court did not consider contributory negligence pleaded in the Plaintiff's submissions.

Secondly, Counsel argued the evidence adduced by the Respondent as to the nature and extent of injury suffered by the Respondent was inconsistent with and contradicted his pleadings. For instance the Respondent had pleaded that he suffered a dislocated ankle whereas the x-ray report found that the Respondent had suffered a fracture of the ankle joint. A medical report by Dr. Kiamba confirmed the injury suffered.

Mr. Mahida also found a contradiction in the evidence of the Respondent as to whether he was pushed down by the dog or he fell down before the dog reached him, and that there was no contact between the Appellant and the dog, and that the Appellant said he did not know there was a hole in the field. Counsel also found fault with the Respondent's particulars of negligence on the part of the Appellant. The evidence showed that the Respondent was in fact provided with protective clothing.

On the common law duty of care, Counsel relied on the decision of Visram J. *(as he then was)* in the case of **STATRACK INDUSTRIES vs. JAMES MBITHI MUNYAO** Nairobi H.C.C. Appeal No. 152 of 2003 -

> "***that the employer's duty at common law is to take all reasonable steps to ensure that the employees safety, but he cannot baby-sit an employee. He is not expected to watch over the employee constantly.*** *(WOODS vs. DARBLE LTD [1953]2 ALL ER 391).*

On **"Causation"** of the injury Counsel also relied upon the same case where the learned judge said -

> ***"Coming to the more important question of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. The injury per se is not sufficient to hold someone liable for the same."***

Counsel also relied upon the decision of Hon. Justice L. K. Kimaru in **WILSON NYANGU MUSIGISI VS. SASINI TEA & COFFEE LTD** (Kericho HCCA No. 15 of 2003) where said Judge cited with approval the decision of Hon. Mr. Justice Waweru in **Mumias Sugar Co. Ltd. Vs. Samson Muyinda** (Kakamega HCCA No. 58 of 2000) (unreported) that -

> ***"where an employee is engaged in manual labour that does not require any exceptional skill and injures himself then such an employee cannot hold the employer liable under statute or common law and that where the use of a panga or a slasher for cutting cane or grass is within the power and control of an employee, he cannot hold his employer liable in negligence."***

Closely connected with this submission was the submission that the Appellant was not liable at common law because the Respondent agreed to be used as a decoy-thief in the training of the dogs - *volenti non fit injuria"* a volunteer cannot claim for his own injury.

I will dispose of this argument right away. In a country where there is massive unemployment, even finding a job as a watchman is a competitive exercise. Not many watchmen or guards want to be watchmen or guards. Those are the jobs available. Does that mean they are all volunteers, and employers have no duty towards them? Why would the Chief Officers of those companies take insurance? It is because of inherent risks at work. There are all manner of risks. A trained machinist may have his finger or one hand and fingers cut off in a machine room accident. Would the courts regard him as a volunteer to whom an employer owes no duty to ensure that the running machines are all properly fenced and all electrical parts insulated? I think the submission of "volenti non fit injuria" has no place and is totally misplaced in an employer and employee relationship and I reject the notion in its entirety.

On the other aspects of the Appellant's Counsel's submission, Mrs Munyua, Counsel for the Respondent argued ***firstly*** that there was proof of negligence. Counsel also argued ***secondly*** that the Appellant owed the Respondent a duty of care and that the Appellant failed in that duty. ***Thirdly,*** the Respondent also proved the injury suffered was not merely a dislocation but a fracture of the ankle joint, and that this injury was proved by the evidence of the reports by Drs. Kiamba and Malik respectively.

To determine the issues raised by the appeal herein, it is necessary as the first appellate court, for this court to review and evaluate the evidence before the trial court and draw its own conclusion and findings.

The facts in this case are not in dispute and are quite simple. The Respondent was employed by the Appellant as a security guard. The Respondent in his evidence testified that he was on the material day assigned duties to train with a dog trainer DW1. He was given a 15 kg suit and heavy boots and was told to run as a decoy thief, with the dog trainer running or chasing after him. The Respondent testified that the dog knocked him down and he fell. He was required to lie down quiet if the dog reached or caught him. The Respondent testified in his evidence in chief as follows -

> ***"I was not trained to handle dog duties. I was hit by the dog and I fell down in a hole. I had a fracture of the ankle joint. I was brought to Naivasha District Hospital. The European asked the Personnel Manager to bring me to the Hospital. At the Hospital I was x-rayed and found to have had a fracture of the ankle joint … I was treated on plaster of paris. I cannot walk long distances. I was seen by Dr. Kiamba. I paid him Shs 2,000/= I was seen by Dr. Malik. I blame the company for giving me a job I do not know. I ask for general and special damages costs of the suit and interest."***

In cross-examination by counsel for the Appellant, the Respondent stated that he agreed to act as the thief, because he

had no choice. He wanted to retain his job. DW1 testified that the Respondent was dressed up in a 15 kg suit and heavy boots. The dog was said weighed upto 40 kg. He testified that he saw the Respondent fall on his own before any dog reached him.

In those circumstances, did the Appellant owe the Respondent any duty of care at common law? As already indicated, Mr. Mahida learned counsel for the Appellant did not think that the Appellant owed any duty of care to the Respondent. I have already discussed his submission on the principle of ***volenti non fit injuria.*** I think for reasons following that the Appellant owed the Respondent a common law duty of care. In a passage relied upon by Ms Munyua, counsel for the Respondent, the authors of **Charlesworth & Percy on NEGLIGENCE 9th Edn. Chapter 10, para 10-04** refer to the decision of Parker L. J. in **WILSON vs. TYNESIDE WINDOW CLEANING CO. [1958] 2 Q.B. 110** at 123-124 -

> ***"I think this case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties …… It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories, but for myself, I prefer to consider the master's duty as one applicable in all the circumstances, namely, to take reasonable care for safety of his men …. Or, to take reasonable care to so carry out his operations as not to subject those employed by him to unnecessary risk."***

In **CAVANAGH VS. ULSTER WEAVING CO. LTD [1960] AC 145, at 165**, Lord Keith opined;

> ***"that ruling principle is that an employer is bound to take reasonable care/or the safety of his workmen, and all other rules or formulas must be taken subject to this principle."***

The authors of **Charles Worth & Percy ON NEGLIGENCE**, at p. 764 (para. 10-04) -

> ***"It follows from the above that the employer's duty is stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous"*** *(per Edward L.J. in Speed vs. Thomas Swift & Co. Ltd [1943] K. B. 557."*

I think the principle at common law today is that it is the duty of the master towards his servant to take reasonable care of the servant's safety in all the circumstances of the case.

The facts in this case are not in dispute. The Respondent was employed by the Appellant as a security guard. On the material day, he was assigned duties to train with the dog trainer, DWI. He was given 15 kg suit and heavy boots, and was told to run-acting the role of a thief while the dog chased him. DWI testified that the Respondent fell by himself before the dog reached him, and was to lie down if the dog reached him. Whether or not the dog knocked the Respondent down is both irrelevant and immaterial for purposes of liability of the Appellant. If the appellant was knocked down by the dog, the dog trainer might consider the exercise as being successful. If the dog caught up with the Respondent as the decoy thief, the exercise might still be successful. If in the course of the exercise the Respondent was injured whether by a knock by the dog, or fell down due to unkempt grounds/fields, liability attaches to the Appellant for failing to take care of his employee, the Respondent in all the circumstances, for unnecessary risks - **GATUNDU COFFEE GROWERS CO-OPERATIVE SOCIETY LIMITED vs. NJOKI NJOROGE.**

As to the nature of injury suffered by the Respondent, the Respondent did indeed plead that he suffered a dislocation of

his ankle. Medical evidence by both the Appellant's Doctor - Malik and Kiamba the Respondents Doctor showed that the Respondent did actually suffer a fracture of his ankle joint. Both doctors referred to it as *"fracture of the left lateral malleolus."* Mr. Mahida thought that evidence was a departure from the Respondent's pleading. It cannot be, the principle is one of injury, the nature of injury is a matter of evidence. It cannot be said to be a departure from pleading. That evidence was a matter of review by the Appellant's Dr. Malik. His report did not disclose a different injury other than a fracture of the ankle. The Respondent's testimony was clear, and for Appellant's "European Manager" to have ordered his Personnel Manager to take the Respondent to Naivasha District Hospital, showed that the Respondent had suffered serious injury and the management were concerned that he gets good treatment, that is to say, care in all the circumstances.

If a master or an employer subject's his young football team to play in a ploughed field with patches of grass, that would not be a football pitch as is known by soccer fans and FIFA. If the said lads or lasses were to break or dislocate their ankles, I would hold the Managers of such field liable. They owe the players a duty of care, not to expose the players to play in an uneven field. The game of football is required to be played in an even field. On the other hand if an employer decides to train his guard in his fields, and such training involves, like in football, running for whatever length of time, those fields be fit for the purpose, not some hilly spot as DW1 testified. Thieves would not run uphill where they will be short of breath, and be easily caught.

The negligence, and causal link for the injury suffered by the Respondent are the direct result of the Appellant's activities of training dog handlers in an area or field with hidden holes, of which the Appellant is responsible for maintenance. There is no question of baby-sitting the Respondent in this case. The Appellant failed in its common law duty.

For those reasons, I have no reason for interfering with the trial magistrate's finding. I confirm the same and dismiss the appeal herein with costs in this court and the lower court to the Respondent.

It is so ordered.

Dated, delivered and signed at Nakuru this 14th day of May 2010

M. J. ANYARA EMUKULE

JUDGE