



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 120 of 2002

DWA ESTATE

LTD:.....APPELLANT

VERSUS

NELSON KAWEMBE MUSILI:.....

RESPONDENT

JUDGMENT

1. The present Appeal is limited to the issue of liability only and should I find that indeed the Appellant is liable fully or proportionally, then the quantum of damages of Kshs. 40,000/= is conceded.

2. In the Plaintiff dated 21/8/2001 the present Respondent who was the Plaintiff averred that on 19.10.1999, he was in the course of his employment in the Appellant's sisal farm at 4.00am when he was attacked and injured by a dog. It was his case that the injuries were sustained because the Appellant was negligent and in breach of its duty to him. The particulars of negligence at paragraph 7 of the Plaintiff are given as:-

- (a) Exposing the plaintiff to damage or injury which they knew or ought to have known
- (b) Failing to take any or any adequate precautions for the safety of the plaintiff while on duty
- (c) Failing to provide a safe and proper system of work for the plaintiff to work
- (d) Failing to instruct its driver to start the engine when all the passengers have safely landed.

3. The Respondent's evidence was that on 19.10.1999 while irrigating sisal at the Appellant's farm, a dog attacked him at 4.00 a.m and bit his right hand finger as he attempted to repulse the dog. He laid blame on the Appellant for failing to provide him with a torch and fire to scare away animals.

4. In the Statement of Defence dated 9.10.2001, the Appellant denied that it was in any negligent and contended that the Respondent was injured "*while on a frolic of his own*". That it was the Respondent who was negligent and the particulars of the negligence were given as being;

- (a) failing to take any or any adequate measures for his own safety;
- (b) failing to withdraw to safety in light of the presence of a dangerous dog.

(c) failing to heed known and specific instructions on safety.

5. In evidence on behalf of the Appellant, Isaac Ndambuki confirmed that as the officer in charge of night security at Dwa Sisal Estate he was aware that it was his duty and that of the night guards “to prevent animals from destroying sisal.” That on 19.10.1999, the Respondent was indeed on duty the whole night and he was given a torch to enable him chase wild pigs and to see his way around. He denied that the Respondent was entitled to any other means of ensuring his safety.

6. I have heard the submissions by Mr. Mulwa on behalf of the Appellant and I also note that the Respondent although served through his lawfully appointed advocate failed to appear.

7. It was admitted by the Appellant that it was aware that animals lurked in the sisal plantation at night. It is also admitted that the Respondent was indeed on duty and was not “a frolic of his own” as averred in the Statement of Defence. I see No evidence whatsoever that he acted in any way negligently when a dog out of the dark attacked him. As for the Appellant, surely a torch alone cannot be such an implement as can be used to ward off animals, wild or domestic. Granted, it is common knowledge that some animals may run when torchlight is focused on them but it was also foreseeable to it that others may not and in fact may turn violent. This is true of this case as was in the case of Eastern Produce (K) Ltd vs Ebby Khasoa, HCCA 82/2002 (Eldoret) where *Dulu, J.* held that:

“[The] foreseeability test as stated on page 218 of Salmond on Torts (19th edition) does not assist the appellant. In my view, the attack by a dog was foreseeable in the circumstances of this case... They should therefore have known of the probability of dogs veering into their farms and biting workers.”

8. The learned Judge’s holding is true in this case because the witness for the Appellant admitted that indeed he was aware of animals coming to the sisal farm during the day and at night. The Respondent was working at night and it is again a fact that danger always lurks at night. A torch given is no answer to the claim. Liability was properly proved in this case and I see no reason to apportion liability.

9. The Appeal having been conceded on quantum lacks merit and is dismissed with costs to the Respondent.

10. Orders accordingly.

Dated and delivered at Machakos this 14th day of October 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Makau h/b for Mr. Mulwa for Appellant

No appearance for Respondent

Isaac Lenaola

Judge