



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL 289 OF 2006

DWA ESTATE LTD APPELLANT

VERSUS

MUSEE MUSYA RESPONDENT

(An Appeal from the Judgment delivered by the Honourable Mrs. Owino, Senior Resident Magistrate on the 16th May, 2002)

JUDGMENT

By a Plaintiff dated 17th September, 2001, the Respondent (Plaintiff in the Lower Court) claimed general and special damages for injuries sustained by him allegedly from “dog bites” in the course of his employment with the Appellant.

He alleged in the Plaintiff that on 22nd February, 1999 while on patrol in the course of his duties at the Appellant’s premises in Kibwezi he was attacked and bitten by a dog, and he suffered severe injuries arising from the same. He stated in his evidence before the Lower Court that he attended the Appellant’s clinic on the material day, and continued receiving treatment for one week thereafter. He relied on the treatment card (exhibit 4) and L.D.104 Form (exhibit 5), and on a further medical report prepared some 19 months after the event by Dr. Okore.

The Appellant’s two witnesses, on the other hand, stated categorically in their evidence that there were no dogs in the premises patrolled by the Respondent, that the Respondent had actually been treated for bee stings on the material date, and that he attended work daily following the day of his alleged attack. Despite these huge inconsistencies in the evidence before the Lower Court, the learned Magistrate found for the Respondent and awarded him Shs.66,500/= for general and special damages.

It is against that ruling and award that the Appellant has appealed to this Court, citing the following four grounds of appeal:

- “1. The Learned Magistrate erred in fact and in law in finding the Defendant negligent for the alleged accident in face of the nature of the evidence before her.***
- 2. The Learned Magistrate erred in fact and in law in finding that the Plaintiff had proved on a balance of probabilities negligence against the Defendant in light of the evidence adduced before her.***
- 3. The Learned Magistrate erred in fact and in law in finding that the Plaintiff sustained the pleaded injuries that were inconsistent with the evidence tendered to the Court.***

4. *The Learned Magistrate erred in fact and in law in making an award for damages and/or awarding an excessive sum of general damages for pain suffering and loss of amenities in the face of the evidence adduced and submissions made by Defence Counsel.*

In her submissions before this Court, Ms. V. Mulwa, representing the Appellant, stated that the Respondent had not discharged the burden of proving that he was indeed attacked and injured by a dog within the Appellant's premises; that he was actually treated for a dog bite; or that he suffered any injury at all from a dog bite on the material day. Ms. Mulwa argued that the Respondent had failed to produce original treatment notes to prove his injury, and that Dr. Okore's medical report was based on what the Respondent told him, and not on any treatment notes, and finally that the L.D. 104 Form was incomplete and unsigned. She relied on the cases of *Eastern Produce (K) Limited v James Kipketer Ngetich* (CA. No. 85 of 2002 – Eldoret) and *Dirisa Musisi & 5 Ors v Sietco (U) Ltd & Onor* (HCC. 25 of 1989) in urging this Court to set aside the Judgment of the Lower Court.

The Respondent chose not to be present at the hearing of this Appeal.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion.

Having re-evaluated the evidence before the Lower Court, I am satisfied that the Learned trial Magistrate erred in finding that the Respondent had proved his case on a balance of probabilities. The Respondent failed to produce the original and initial treatment notes to show that he had indeed been injured by a dog bite, and that he had been treated for the same for one week as alleged. The evidence before the Lower Court was exactly the opposite: that the Respondent had been stung by a bee or bees, and treated for that purpose on the material day; that indeed there were no dogs in the Applicant's premises; that the Respondent had indeed not missed work on any day, for the whole week that he said he was under treatment. The LD 104 Form produced by the Respondent was incomplete and neither dated nor signed, and is, therefore, not reliable. Similarly, Dr. Okore's medical report, prepared some 19 months after the event, was based only on what the Respondent told him and not on any official records, and, at best, is hearsay, and unreliable.

Accordingly, I find that the Respondent's case was not proved on a balance of probability and that he was not entitled to the Judgment that was handed down in his favour. I allow this Appeal, with costs to the Appellant, and set aside the Judgment of the Lower Court, and in its place dismiss the Respondent's case with costs to the Appellant.

Dated and delivered at Nairobi this 16th day of May, 2007.

ALNASHIR VISRAM

JUDGE