REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Appeal 61 of 2002

EASTERN PRODUCE (K) LIMITED ……..…….. APPELLANT

VERSUS

JOHN MUTUYA ANYONYI ……..…….. RESPONDENT

(Being an appeal from the judgment and decree in Kapsabet PMCC No. 17 of 2001 dated 6th June 2002 by F. Mabele Esq. (P.M.))

JUDGMENT

JOHN MUTUYA ANYONYI was employed by EASTERN PRODUCE (K) LIMITED as a shamba boy in September 1996. he was then assigned duties in the compounds of employees of Eastern Produce (K) Ltd., which I shall now refer to as 'the company'.

As he worked in one of the compounds on 3/9/1996, he was mauled by a dog, as a result of which he sustained injuries to his left leg, suffered severe pain and loss of blood.

He felt that his employer was liable for the injuries so sustained, and he instituted suit against it in January 2001, claiming that it was a term of employment contract between them that it would take reasonable measures to ensure his safety while at work and not to expose him to risk of injury, which it knew or ought to have known about; that it had caused him to work in a dangerous place without affording him adequate training; that it had failed to supply him with protective apparel and to provide a safe working environment

It was therefore his contention that the company had breached its statutory duty of care and that it was negligent.

After a full trial, the learned trial Magistrate found that the company was liable for the injuries so sustained and he awarded him K.Shs. 75,000/- as general damages and K. Shs 2,000/- as special damages as well as costs plus interest at court rates.

Being aggrieved by the said judgment the company has now preferred this appeal, which is based on the grounds inter alia that the learned trial Magistrate erred in law and fact in finding the company liable in negligence and in not apportioning liability on face of the overwhelming evidence to the contrary; in awarding inordinately excessive damages.

It is also its grounds that the burden of proof was shifted to it, and that its evidence and submissions were disregarded. It is of the view that not only was the claim time barred but that Anyonyi whom I shall now refer to as 'the respondent' did not prove his case to the expected standards.

Miss Konuche and Mr. Shivaji who appeared for the company urged the court to find that the

respondent had not proven that the company was negligent, when he was bitten by a dog whose ownership was never established and that in the circumstances the company could not owe him a duty of care, and that in any event, the company could not have reasonably anticipated the dog-bite so as to provide him with protective clothing. It was their submission that by stating that he did not know who owned the dog meant that the burden of proof was shifted to the company. They also urged the court to find since the respondent was not able to prove statutory negligence against the company his claim whose cause of action arose in 1996 and which thus founded on the tort of negligence was in the circumstances time barred.

Mr. Chepkwony was of a different view in that his client had sustained the said injuries while on duty and for which the company was fully liable. It was his view that the company, which did not initiate third party proceedings filed against owner of the dog, was liable and that the award was fair and should be upheld

As is expected of me, I have had to re-evaluate the evidence on record with a view to establishing whether the respondent was able to prove his case against the company on a balance of probability, bearing in mind that parties are bound by their pleadings.

It was the his evidence that he was bitten by a dog while working in the compound of one of the employees of the company. It was however clear from his evidence that the incident did not take place within the company's farm but it was in town, which fact was corroborated by a cook at the company's offices (DW1), and though he blamed the company for the injuries so sustained, he was unable to prove that the dog belonged to the company.

It cannot be gainsaid that at common law, for strict liability to lie, it must be established that the company owned the dog and that its behavior was predictable and hence foreseeable. There was no proof that the dog belonged to the company. The respondent conceded during cross-examination that the company does not breed dogs, and in my view the company could not have been expected to ensure a safer working environment than it had actually provided or even to provide him with protective gear as it could not have foreseen such an attack.

Be that as it may, it also transpired during the hearing that the dog actually belonged to a third party, who unfortunately was not a party to the proceedings. It was for the respondent to sue the right party. It was not for the company, nor would it have been expected that it would issue third party notices to the owner of the dog. It cannot therefore lie for the respondent to claim that the company was liable because it did not issue third party notices.

In my humble opinion, the respondent failed to prove that the company was liable for the injuries which he sustained.

Having found that he was not able to prove strict liability, it is clear that the case, which was otherwise based on the tort of negligence was filed five years after the date when the cause of action arose, was clearly time barred.

Based on the above, I find that the learned trial Magistrate erred in finding that the respondent had proved his case against the company.

I do in the circumstances, allow this appeal and set aside the judgment of the subordinate court. The respondent's suit against the company is dismissed with costs.

Each party shall however bear its costs of this appeal.

Dated and delivered at Eldoret this 7th day of June 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Shivaji for the appellant

No appearance for the respondent