REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 51B of 2001

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

VERSUS

MOSES M. MAIHENDO:.....RESPONDENT

JUDGEMENT

This is an appeal against the decision of the Principal Magistrate's Court at Kapsabet made on 22nd Nobvember,2000 in which the trial court awarded the Respondent a sum of Kshs.56,500/= being general and special damages and also costs of the suit.

In his suit the Respondent an employee of the Appellant as a tea plucker in the latter's tea estate claimed that while he was lawfully and in the course of his duties at the Appellant's premises on the 11th April,1995, he was bitten by a dog due to the negligence of the Appellant or that of its servants. At the hearing the Appellant withdrew the ground challenging the quantum of the award and prosecuted the grounds relating to liability.

The appellant through it's counsel Mr. Kuloba, submitted that the Learned Magistrate erred in law in holding the Appellant liable since the dog did not belong to it neither did it keep it. The dog actually belonged and was kept by one Mr. Carter, a manager of the Appellant who was housed by the Appellant in its tea Estate. This fact was not disputed and the plaintiff himself brought it out in his evidence. The Appellant contend that it was not shown that the dog was kept for the purposes of the Company and therefore the suit should not have been brought against it.

The Appellant further submitted that the fact that the Respondent was on duty when he was bitten by the dog was not by itself evidence of negligence. That negligence is not based on strict liability.

Another ground raised in the appeal was that the Respondent allegedly did not traverse the allegations of negligence and/or contributory negligence in the Defence. It was submitted that this was a fatal omission as it was deemed that the Respondent had admitted the said allegations.

In opposing the appeal, counsel for the Respondent, Mrs. Cheptinga, argued that the Respondent was on duty plucking tea when a dog emerged from the Manager's compound and bit him. The Manager was called a Mr. Carter. She added that the Respondent did not have any protective cover and in particular, gum boots. That the Respondent could not have been bitten if he was provided with gumboots.

The Respondent further argued that it was foreseeable in the circumstance that a dog could come and bite

a plucker at the Appellant's premises. The Respondent said he was not given a safe system of work and the dog was in its compound. It was claimed that it was a domestic dog and not a wild dog.

I have considered all the facts of the case. The record of proceedings, the memorandum of appeal and submissions by counsel. It is pertinent that I deal first with the point of law raised by the Appellant that the Respondent did not traverse the allegations of negligence and/or contributory negligence set out in the Defence. If this is correct, is it a fatal omission? Was it an admission of the said allegations on the part of the respondent? The Respondent relied on the Court of Appeal decision in **MOUNT ELGON HARDWARE –V- UNITED MILLERS LIMITED, CIVIL APPEAL NO. 19 OF 1996** (Unreported). In the said case the Court of Appeal held as follows:-

"**Furthermore the respondent denied any form of negligence on its part and in turn alleged negligence against the appellant. The respondent properly pleaded the particulars of such negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the respondent's defence. In those circumstances, the learned judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence, in terms of Order V. Rule 1 of the Civil Procedure Rules."**

In the case before this court, the plaintiff (Respondent) pleaded negligence against the Defendant and (Appellant) denied the alleged negligence and pleaded that it was the plaintiff who was the solely negligent and/or contributed to the same. The Defendant then set out the particulars of the plaintiff's negligence in the Defence. There was no Reply to the Defence and there was no express denial of the allegations of the Defence. However, the allegations of negligence against the Defendants in the plaint still stood. I do hereby hold that as a result there was a joinder of issues on the Defence. There was no need to specifically deny the allegations in the Defence when the very case of the plaintiff was based on negligence. The decision of the Court of Appeal is distinguishable since the plaintiff in the said case did not plead any particulars of negligence and yet the defence presented particulars of negligence against it.

This brings me to the question of remoteness and foresee ability. There can be no dispute that the dog did not belong to the Appellant. It belonged to a manager or an employee who had his house within the larger premises of the Appellant. The dog did not belong to the Appellant neither was it there for its own purposes.

The Respondent knew that the dog belonged to Mr. Carter. Mr. Carter was not enjoined as a party in this suit. The question here is whether the Appellant had a duty of care to the Respondent to ensure that Mr. Carter's dog did not wander into the tea plantation and bite the Respondent. The answer to this question in general terms is that, yes, the Appellant would have a duty of care to ensure that if it knew that Mr. Carter's dog was a danger to its employees in any manner to ensure that it was not on the premises or at the Respondent's work place.

For instance if the Appellant new or ought to have known that the Mr. Carter's dog was not an ordinary dog and that it was a dangerous dog that it was a threat to the safety of its workers, then it would be obliged to ensure that the dog was removed or did not enter the area where its workers usually worked.

The rules of remoteness in tort imposes a wider liability than that in contract. This is a case of negligence in contract. It is my opinion that it was the duty of the Respondent to show or demonstrate that Mr. Carter's dog was a dangerous dog that should not have been on the premises. That it was a dangerous dog, and a fact which ought to have been known by the Appellant. It is common ground that the dog was a domestic dog.

There is no evidence it was rabid or dangerous. It is not common that dogs go about biting people they come across. The Respondent had no duty or obligation to keep the dog in Mr. Carter's house. It could not reasonably foresee that it was a risk or harmful or that it would go and bite the Respondent. This was too remote in the circumstances.

The Respondent did not enjoin Mr. Carter in the suit or gave no good reasons for his failure. No evidence

has been laid before the court that the tools or attire of trade of a tea plucker must include gum boots. It was the duty of the Respondent to prove this and that it was a protective attire necessary in his job in any event. There was no such evidence.

In the premises, I find that the Learned Magistrate erred in law and fact in finding the Appellant liable. I do hereby set aside and quash the judgement herein and dismiss the suit with costs to the Defendant in the suit . The Appellant shall also have the cots of this appeal.

DATED AND DELIVERED AT ELDORET ON THIS 2ND DAY OF NOVEMBER.2006.

M. K. IBRAHIM

JUDGE