REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 205 OF 2012

IQBAL MANJI

NORREN MANJI

JARIBU MOTORS LIMITED.....APPELLANT

V E R S U S

RICHARD KIPKOECH NGENO.....RESPONDENT

(Being an Appeal from the Decision of the Chief Magistrate's Court in Milimani CMCC number 12951 of 2006 - Hon. Oganyo)

JUDGMENT

This appeal arose from a judgment of the Chief Magistrate's Court in **CMCC 12951 OF 2006**. The appeal was filed on 24th April 2012 and challenges the award to the Respondent by the lower court. The claim in the lower court was based on the employer's common law liability for loss and damage to an employee as a result of injury sustained while in the course of employment.

The respondent filed a plaint dated 17th November, 2006 in which he sought general and special damages from the appellants. This followed injuries he suffered from dog bites in the course of his employment with the 3rd Appellant. His case was that he was on 27th September 2006 instructed by the 2nd Appellant to collect and drive the 1st and 2nd Appellants' daughter to the airport when he was attacked and bitten by the appellants' fierce dogs within the 1st and 2nd Appellants' residence and within the premises of the 3rd Defendant which caused the injuries. The injuries were on the scrotum, left leg, left wrist joint and scratch wounds on the left chest wall. The particulars of negligence included failing to provide a safe system of work; exposing the Plaintiff to the risk of attack by the dogs and injury; failing to provide him with any adequate safety gear and wear; failing to take adequate precautions for his safety; failing to warn him of the presence and ferociousness of the dogs and to keep them under restraint; acting recklessly without due care and attention.

The appellant filed a defence denying all these claims and sought that the suit be dismissed with costs. In the alternative, they claimed that if the said incident occurred and caused injury to the Respondent then the same was wholly caused or materially contributed to by his negligence. Particulars of negligence were enumerated. It was further averred that the Respondent with full knowledge and understanding of the anger from the risk of injury resulting from the acts and omissions complained of in carrying out the said work and consented to carry out the duties.

The Respondent testified and called witnesses to support his position**.** The trial court found both the

appellants and Respondent liable in negligence and apportioned liability at 90%: 10%. General damages were awarded in the sum of Kshs. 450,000/=, and special damages of Kshs. 2,000/= together with costs and interests all subject to the shared liability. The appellants were aggrieved by this decision and filed this appeal.

In the Memorandum of Appeal they claimed that they were found 90% liable for the injuries suffered contrary to the evidence before the Magistrate which did not support any negligence on their part; that the award of damages was inordinately high and amounted to an erroneous estimate having in mind the injuries sustained and comparable cases.

The parties filed written submissions. Basically counsel for the appellants argued that the case against his client had not been proved to the required standard while Counsel for the Respondents defended the decision of the trial court.

This Court is called upon to evaluate the evidence tendered before the trial court and draw its own conclusions thereon, while appreciating that that court had the advantage of seeing and hearing the witnesses who testified before it ***See*** **PETERS vs. SUNDAY POST LTD [1958] EA 424)**. On quantum, the principles to be observed in deciding whether to disturb the finding of the trial court are whether the court took into account an irrelevant factor or left out of account a relevant one, or that, short of that, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage **(KEMFRO AFRICA LIMITED t/a MERU EXPRESS SERVICES (1976) & ANOTHER vs. LUBIA & ANOTHER (NO. 2) [1987]KLR 30.**

The Respondent testified that he reported to work at 5.30 a.m. as he was supposed to drop the Appellants' daughter to the Airport. When he reached the gate, he knocked and the 2nd Appellant opened the gate then she got into the house. That is when she asked him to pick the keys from the verandah. As he proceeded to pick the keys, the dogs approached. It is at this time that he sensed danger and started retreating to the car, which was locked but as he thought of climbing on top of the car, the dogs surrounded him and continued mauling him. The 2nd Appellant appeared but even when she attempted to calm them down they did not oblige. She then opened the car and he got in while one dog was still holding on to him. He went to hospital where he was admitted for two days but after discharge he continued to attend dressing clinics. He thereafter reported the matter to the police and was issued with a P3 Form. Thereafter he was seen by PW1 who examined him and prepared a report.

PW 1 testified that he examined the Respondent on 4th October 2006. He had a history of an attack from dogs belonging to his employer. He had been attended at the Kenyatta National Hospital as inpatient for two days. The modes of treatment included surgical toilet with scrotal repair under general anaesthesia, tetanus toxoid injection, anti-rabies vaccine, analgesics and antibiotics. He also attended several dressing sessions. In his opinion, the injuries sustained by the Respondent were grevious.

The period of recovery was a time of added psychological, social, emotional and financial distress and temporary incapacitation. The scrotal injuries were severe, though the testicles were salvaged. His prognosis was that this would have grave implications as pertains to fertility with chronic scrotal pains and hydrocele formation as a result of neurovascular bundle injuries to the scrotal sac. He estimated the period of incapacity as six months but at the time, he required prolonged wound-care and continuous anti-rabies vaccine.

The appellants did not call or lead any evidence and so the evidence of the Respondent remains uncontroverted. All the evidence offered in support of his case, including his own testimony and the medical evidence, was totally in agreement with his case as pleaded in the plaint.

Halsbury's Laws of England Vol. 16 at Paragraph 560 it is stated, *inter alia* -

> **"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances...so as not to expose them to an unnecessary risk."**

Applying the above stated principles, the ***Court of Appeal*** in the case of **Mumende v Nyali Golf & Country Club [1991] KLR** held –

> **"1. It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger...but will not be responsible for the employee's own negligence in execution of such employment.**
>
> **2. The employer was aware of the danger that the employee was subjected to and it failed to do what was required of it and for that reason it was negligent.**
>
> **3. Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.**
>
> **4. In measuring the degree of care one must balance the risk against the measures necessary to eliminate the risk."**

It is common ground that the 1st and 2nd Appellants were resident in the premises where the Respondent was injured. There is no doubt that the 1st and 2nd Appellants exposed him to the risk of injury by not chaining the dogs well knowing that they had assigned him the duty to pick their daughter in the wee hours of the morning. His evidence was that the dogs did not heed even the call of the 2nd Appellant who was their owner and that he only escaped when the car was unlocked enabling him to go in.

In these circumstances, what reasonable measures and care for the safety of its employee did the appellants put in place to ensure such an employee is not exposed to unnecessary risk?

They knew they possessed dogs and would need his services during the night and early mornings.

The uncontroverted evidence before the court is that no special arrangement had been made to have the dogs kept away that night as the respondent was due to arrive earlier than usual at the request of his employer. The Appellants failed in their duty to make sure that the Respondent was safe when he performed those duties and thereby exposed him to danger. I concur with the learned Magistrate that there having been a notice of the presence of dogs in the compound, he should have waited for the 'clear' before getting into the compound. In the event, I am unable to fault the learned trial magistrate on liability.

On quantum, the award of Kshs. 450,000/- general damages was reasonable and I see no reason to upset the award. It is not sufficient that this Court would have probably awarded a slightly higher amount. The special damages were pleaded and strictly proved.

The end result is that this appeal is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 6th Day of April 2017.

A. MBOGHOLI MSAGHA

JUDGE