



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 294 OF 2010

GARTON LIMITED APPELLANT

VERSUS

NANCY NJERI NYOIKERESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable Ms Boke Resident Magistrate in Kandara RM CC No. 214 of 2009 delivered on 1st July 2010 allowing the respondent/plaintiff's claim against the appellant/defendant and awarding her the sum of kshs 160,000/- general damages less 20% contribution together with costs.
2. The respondent's suit against the appellant in the lower court is that on or about the 23rd December, 2008 the respondent **NANCY NJERI NYOIKE** who was employed by the appellant **GARTON LIMITED** as casual labourer was collecting coffee on the appellant's farm when an antelope hit her leg and escaped leaving her with injuries. She claimed for damages for pain and suffering.
3. The appellant filed defence on 15th June 2010 denying the respondent's claim and averring that the claim by the respondent was fraudulent and lacked proof.
4. In her judgment delivered on 1st July 2010 the trial magistrate found the appellant liable at 80% and apportioned 20% liability to the respondent. She awarded the respondent kshs 160,000/- costs and interest.
5. Being dissatisfied with the judgment and decree of the lower court, the appellant herein lodged this appeal on 27th July 2010 setting out 9 grounds of appeal namely:
 1. The Learned magistrate erred in law in failing to appreciate that the court lacked jurisdiction to hear the suit and grant the orders sought on the grounds that the work Injury Benefits Act was the applicable law, in regard to injuries sustained at the work place, at the time of the alleged accident.
 2. The Learned Magistrate erred in law in failing to appreciate that a claim for injury by a wild animal ought to have been under Section 62 of the Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya.
 3. The Learned Magistrate erred in law in failing to appreciate that the respondent had not proved her case on a balance of probabilities as required by law.
 4. The Learned Magistrate erred in law in holding that the appellant was 80% liable for the alleged claim despite there being no evidence before her to support the alleged liability.
 5. The Learned Magistrate erred in law in failing to take into account the fact that the respondent's evidence was inconsistent and that she had lied to the court.

6. The Learned Magistrate erred in law by making a manifestly excessive award for general damages in light of the minor nature of the injuries.
7. The Learned Magistrate erred in law by shifting the burden of proof to the appellant.
8. The Learned Magistrate erred in fact and law by failing to appreciate that the appellant does not rear antelopes on its farm and has no control over wild animals .
9. The Learned Magistrate erred in awarding costs to the respondent.

6. The appellant prayed that the appeal be allowed dismissing the respondent's suit with costs to be paid by the respondent.
7. This being the first appeal, this court is mandated under Section 78 of the Civil Procedure Act to reassess, re-evaluate and re-examine the evidence in the lower court and make its own findings and arrive at its independent conclusion, bearing in mind the fact that it never heard and or saw the witnesses as they testified. (see **Sielle Vs Associated Motor boat Company Ltd[1968] EA 123** where Sir Clement De le Stang stated that:

“ This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .

However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).

8. Applying the above principles of law as established, the respondent testified as PW1 and stated that she was a casual labourer in coffee picking and that on the material day of 23rd December, 2008 she had gone to pick coffee at the appellant's farm which had a nearby bush. An antelope emerged from the bush and hit her on the leg and it ran away as she fell down. She was taken to Naidu Hospital where she was admitted and discharged on 26th December 2008 she produced a copy of discharge summary as exhibit. Later she went to Kandara Hospital in 2009 over the same leg which was paining and she went to Muruka dispensary and Kandara Health Centre on 16th January 2009 for further treatment. She also visited Dr. Karanja who examined her and prepared her a medical report which she produced as an exhibit. She also produced a receipt for kshs 3000/- being the doctor's charges. She blamed the appellant for the injury because the farm was not fenced and the appellant did not provide her with protective gears or watchman or security officer to watch over her as she worked near the bush which had wild animals like the antelope that hit her on her left foot. She prayed for damages, costs of the suit and expenses incurred.
9. In cross examination the respondent maintained that the entire farm was not fenced. She also responded that there was a bush nearby hence wild animals were there; that she was not alone when she was injured. She stated that she was 34 years old but when she went to Prime Medical Centre in 2009 she was confused and could not recall her age which she gave as 28 years. She stated that she was injured on 23rd November 2008 and that she went to that hospital in November 2009 and stated that the doctor must have recorded her age from her initial treatment notes. She confirmed her name and that she knew Simon Ndichu Warachi. She stated that she went to Muruka Dispensary later and confirmed knowing how an antelope looked like a goat and that it emerged from the bush.
10. In re-examination, the respondent stated that she was illiterate and therefore could not tell what the doctor wrote but that she took to him treatment notes from Naidu Hospital. She further stated that she was unconscious when she was taken to Naidu Hospital.
11. The plaintiff closed her case without calling any other witnesses. The defence called 2 witnesses. DW1 Freda Machuya testified on oath that she was a field supervisor for the appellant and that on the material day she was in the field with the respondent and 25 others when she was called that someone had fallen down. That the other workers said they did not see any wild animal and that the appellant did not rear wild animals. She also stated that the

- farm was fenced with Kayapple fence and no one could enter through the fence. That the farm had a gate and no animal could enter through the fence. She stated that she had worked for the appellant for 12 years and had never heard of a wild animal. That she took the respondent to the office where she was given money to escort her to Naidu Hospital and that the respondent was walking on her own not unconscious.
12. On being cross examined, DW1 confirmed being a supervisor for 17 years and that on the material day she was on the farm with the respondent. She stated that she was called, went and found the respondent had fallen down, and that she did not witness the incident as she was supervising 25 people. She confirmed that the farm had a barbed wire and kayapple fence but not the wire with small holes. In re-examination DW1 maintained that if the wild animal had hit the respondent then other workers could have seen it.
 13. DW2 Kennedy Kibisu testified on oath and stated that he was the appellant's field clerk, responsible for recording of names of workers and paying them in the evening their daily wages. He confirmed that the respondent was a casual worker picking coffee and on the material date, the respondent was taken to the office by her supervisor alleging that she had been hit by an antelope. DW2 gave her first aid and she was taken to Naidu hospital. He stated that whenever one was injured in the course of duty, they had to administer first aid before taking them to hospital and in the case of minor injury first aid would be sufficient. He stated that it was the appellant who catered for the bills incurred by the respondent in hospital.
 14. According to DW2, the appellant grew coffee and not rearing of wild animals and that they had 30 watchmen/guards who watched over the farm patrolling the farm which was fenced with barbed wire to avoid their products being stolen and there was only one gate and no one would enter without a gate pass. He further stated that animals could not enter the farm as it was fenced and there was tight security. He stated that after being discharged from hospital, the respondent went back to work and that coffee picking was not a skilled art requiring any training.
 15. In re-examination DW2 confirmed that the respondent was injured in the course of duty and therefore it was the appellant's responsibility to take her to hospital. He also stated that an antelope was an intruder and that it could access the farm by jumping. In re-examination DW2 maintained that there were no wild animals near the farm and that according to investigations carried out by the appellant, no one saw the antelope enter the farm.
 16. In their submissions in the lower court the respondent's counsels maintained that it was the negligence of the appellant that led to the injury in that the appellant breached statutory/contractual duty by failing to ensure that the area where the respondent worked was safe; that they exposed her to danger; failed to erect a high wall to ward off stray wild animals in an area which was prone to wild animals. She attacked the defence by the appellant that it never proved that there was a fence. On quantum, it was submitted that kshs 200,000 would adequately compensate the respondent for the injury sustained relying on **Nyeri HCC 320/1998 Catherine Wanjiku Kingori & 3 Others V Gibson Theuri**. She also prayed for shs 3000/- as pleaded with costs.
 17. In their submissions the appellant's counsels maintained that the court had no jurisdiction to grant the orders sought and they relied on work Injury Benefits Act of 2007 Section 16 therefore which they contended expressly ousted the jurisdiction of the court. The appellant further submitted that the claim by the respondent did not lie against the appellant as the appellant was not responsible for rearing of wild animals and that therefore the claim if any would only be against the Kenya Wildlife Service pursuant to Section 62 of the Wildlife Conservation and Management Act) Cap 376 Laws of Kenya, through the District Committee. Further, that the injury by a wild animal was not reasonably foreseen since as an employer the appellant had no control over wildlife and since it did not rear antelopes on its farm. Further, it was submitted that the respondent failed to call any witness to corroborate her allegation of being attacked by a wild animal yet she never worked alone at the material time hence she did not prove her case. It was further submitted that the respondent was a serial liar to the effect that she testified that the farm was not fenced; the farm had no gate or security guards; that her documents were forgeries especially the medical report which had inconsistencies on age and the receipt exhibit 3 which was issued to a stranger and prepared well after the accident; that her oral and documentary evidence was fabricated and not credible (relying on **Abudi Ali Mahadhi V Ramadhani Saidi & Another CA 212[1998]**). The appellant

- further submitted that no evidence was led to prove the claim which was founded on negligence/ breach of statutory duty and breach of contract. That the particulars of negligence pleaded could not have prevented the injuries in the circumstances as claimed in that the attack was caused by circumstances beyond the appellant/defendants control. Further, that it was absurd to blame the appellant following on attack by a wild antelope hence the claim was unsustainable—relying on **Charles Worth & Percy on negligence 7th Edition page 782-783 paragraph 12-26**. The appellant further submitted that not even apportionment of liability lay and that the fact of injury alone was not sufficient to impute negligence by the appellant relying on **Lakhamshi V Attorney General [1971] EA at page 121** and **Muthuku V Kenya Cargo Handling Ltd [1990] LLR 4375 (CAK) page 3**. The appellant maintained that it fenced the farm and provided security patrols and therefore ensured the safety of all its workers and hence the injury was not foreseeable. It also relied on Volenti non fit Injuria doctrine.
18. On quantum, the appellant proposed sum of shs 30,000/- general damages based on **Sokoro Saw Mills Ltd V Grace Nduta Ndungu [2006] e KLR** and **Evanson Babu Njiru V Paul Nyamotenyi HCC 778 of 1991** (unreported). The appellants urged the trial court to dismiss the respondent's suit with costs.
 19. In her detailed judgment delivered on 1st July 2010, the trial magistrate found that the respondent had proved her case against the appellant on a balance of probabilities that she was knocked down by a speeding antelope. Further, that the appellant had failed to rebut the claim that the farm where the respondent worked was not fenced at the material time. She held the appellant 80% liable for not installing a secure fence to protect the workers from wild animals. She also blamed the plaintiff for failing to take an avoiding act after seeing the animal going towards her. The trial magistrate awarded the respondent shs 160,000 general damages for pain and suffering, costs and interest at court rates.
 20. It is that judgment that the appellant has challenged before this court. This court notes that upon the filing of this appeal, Honourable Angawa J did on 13th October 2011 direct that the matter of the jurisdiction of the court to hear and determine the suit, which issue though raised by the defence had not been considered by the trial court, be referred back to the trial court for trial and determination. That issue was heard by Mr Gesora Principal Magistrate after it turned out that the trial magistrate had by then been transferred from the station.
 21. In his ruling made on 19th October 2012 Honourable T.M. Gesora Principal Magistrate held that the preliminary objection raised challenging the jurisdiction of the court to hear and determine any case brought by an employee against an employer for injuries sustained while at work or in the course of employment was misconceived as that Section 16 of the Work Injury Benefits Act had been declared by Honourable Ojwang J in **Petition No. 185/2008 Law Society of Kenya V Attorney General & 3 Others [2009] e KLR page 29 and 30** as being unconstitutional, which declaration had been made prior to the decision of the subordinate court from which the Deputy Chief Justice's practice Note and Gazette Notice No. 9243 of 2011 only served to reinforce the judgment in the aforesaid petition. He also held that the magistrate's court had the jurisdiction to hear and determine claims related to work injuries.
 22. In the appellant's submissions in support of this appeal, the appellant still maintains that the trial court had no jurisdiction to hear and determine the claim which was barred by Section 16 of the Work Injury Benefits Act, 2007. Secondly, that the respondent was not entitled to claim from the appellant as the latter did not rear wild animals but that instead the claim should have been made against the Kenya Wildlife Service pursuant to Section 62 of Wildlife (Conservation and Management) Act which makes provision for compensation for injuries caused by wild animals.
 23. On the burden of proof, it was submitted by the appellant's counsel that the respondent's claim that she was hit by an antelope was not proved as she never called any witnesses to corroborate that fact and that the trial magistrate's finding that the appellant ought to have trailed the footmarks to confirm whether indeed there was an antelope was erroneous as she was shifting the burden of proof from the respondent to the appellant. The appellant also faulted the trial magistrate's finding that an antelope can jump over a fence, however thick that fence might be and that by so holding she shifted the burden of proof since the respondent had testified that there was no fence contrary to Section 107(1) of the Evidence Act.
 24. It was also submitted that the trial magistrate failed to appreciate that the respondent had not

- proved her case on a balance of probabilities as required by law for the respondent never called any other person who was on the farm at the material time to corroborate her claim that she was indeed hit by an antelope; that she never called anyone to confirm that there was no fence or security personnel manning the farm; that the trial magistrate erred in failing to find that the respondent was not truthful.
25. On whether the respondent was entitled to the sums awarded it was submitted that the award of damages was manifestly excessive and outside the confines of reasonableness compared to the cited authorities. The last issue is that the trial magistrate misdirected herself in law and reached a conclusion of issues not before the court by raising the issues of light and age of the fence and placing reliance on those issues, and that in her determination, the trial magistrate made a determination on issues that were not placed before her. The appellant relied on **IEBC & Another V Stephen Mutinda Mule & 3 Others [2014] e KLR** wherein it was held that the parties are bound by their pleadings, which in turn limits the issues upon which a trial court may pronounce and that a court should only determine a matter on the basis of matters properly before it.
 26. The respondent was unrepresented in this appeal. She filed her own submissions on 4th November 2015 which submissions nonetheless appear to have been drafted with the aid of an advocate, opposing the appeal and maintaining that the appeal lacked merit, was frivolous and an abuse of court process.
 27. On the first ground raised by the appellant that the court had no jurisdiction as per Section 16 of the Work Injury Benefit Act to hear and determine the claim, the respondent submitted that the ground was baseless and a waste of the court's time as the relevant Sections of the Act including Section 16 of the Work Injury Benefits Act were declared unconstitutional, null and void by a constitutional court in the **Law Society of Kenya V Attorney General & another (supra)**.
 28. On ground 2 that the claim did not lie against the appellant but against Kenya Wildlife Service under Section 62 of the Wildlife (Conservation and Management Act) Cap 376 Laws of Kenya, it was submitted that the respondent was injured in the confines of her working premises- a coffee farm belonging to the appellant which fact was not denied and that the respondent blamed the appellant under Work Injury Benefit Act hence the claim was outside the Wildlife Conservation and Management Act. Further, that Section 62 of the Wildlife Conservation and Management Act does not preclude a court action. Further, that the issue thereof was not pleaded in the defence.
 29. On grounds 3,4,5,7,8,9, 9 and 10 it was submitted by the respondent that the lower court correctly analyzed evidence and found the respondent's evidence more probable and unshaken by the defence evidence.
 30. On ground 6 that damages awarded were excessive, it was submitted that the award of shs160,000 was well within the jurisdiction of the court.
 31. The respondent urged the court to dismiss the appeal and order release to her of the decretal sum held in the joint interest earning account of the advocates.

Determination

32. I have carefully considered this appeal, submissions by both parties and the entire lower court decision, pleadings, evidence and submissions together with the judicial decisions relied on by each of the parties to this appeal. In my view, the grounds of appeal raise the following key issues for determination
1. Whether the trial court had the necessary jurisdiction to hear and determine the suit subject matter of this appeal.
 2. Whether the claim by the respondent against the appellant was sustainable.
 3. Whether the respondent discharged the burden of proving the liability of the appellant to the required standard.
 4. Whether the trial magistrate made a determination on issues not before the court.
 5. Whether the quantum of damages awarded was excessively high in the circumstances.
 6. What orders should this court make

7. Who should bear the costs of the appeal and the court below?

33. On the **first issue** of whether the trial court had the necessary jurisdiction to hear and determine the suit, the appellant's contention is that the trial court was expressly barred by the provisions of Section 16 of the Work Injury Benefits Act, 2007 which was applicable at the material time. That Section enacts:

“ No action shall be by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of disablement or death.”

34. The appellant maintained even after the trial court made a ruling to the effect that the Section had been declared unconstitutional by the High Court in **Law Society of Kenya V Attorney General HCC Petition No. 185 of 2008** that the provisions of the said Act (Work Injury Benefits Act) ousted the jurisdiction of the court. With utmost respect to the appellant's counsel who must be living elsewhere, the decision in the above constitutional court case settled the issue of Section 16 of the Work Injury Benefits Act. The Section having been rendered unconstitutional is void *ab initio* and can never be cited in any court of law or tribunal. To that extend, I find and hold that the ground of appeal was from the onset a non starter and the same is dismissed . I uphold the finding and holding by the trial court that it had jurisdiction to hear and determine the suit therein as between the respondent and appellant. Since the decision of the Constitutional Court was rendered on 4th March 2009 and which decision has never been challenged or overturned by the Court of Appeal.

35. I shall determine the next issue No. 2 and 3 together that is whether the respondent's claim lay against the appellant and whether the respondent discharged the burden of proving the negligence/breach of statutory duty as against the appellant. The appellant contended that it was not responsible for rearing of wild animals and therefore the claim against it was unsustainable. It further contended that such a claim could only lie with the Kenya Wildlife Service pursuant to Section 62 of the Wildlife (Conservation and Management Act Cap 376 Laws of Kenya which provides that:

“ where any person suffers any bodily injury from or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependent upon him at the date of his death may make application to a District Committee established by this Section for the award of compensation for the injury or death...”

36. On the other hand the respondent maintains that that ground was an afterthought since the issue thereof was not pleaded in the defence and that in any event, no provision in the Cap 376 bars the respondent from instituting claims in court as opposed to the District Committee. Further, that such a provision that ousts the jurisdiction of the court to deny her rights under the law is unconstitutional and hence this court should not hesitate to so declare it unconstitutional. Finally that the cause of action/injury occurred while the respondent was engaged upon her work as an employee of the appellant and in appellant's premises hence her claim fell under Work Injury Benefits Act (WIBA) and not any other statute.

37. What the appellant has done is to shift the claim to Kenya Wildlife Service where a person is injured or dies as a result of intrusion by a wild animal. In my view, that argument seriously diverts the attention of the court to other issues which were never pleaded. Nonetheless that is a point of law which could have been raised before the trial court for trial and determination on merits and not through submissions thereby not according the respondent a fair trial on that issue of whether the claim lay against the appellant or Kenya Wildlife Service through the District Committee. Issues of jurisdiction must be thrashed by the court of first instance before they are lifted on appeal. That notwithstanding this court finds the submission that since the appellant never kept or reared wild animals or antelopes then the claim could not lie against it quite misplaced. The injury occurred in the premises of the appellant while the respondent

was engaged upon her duties, she sued her employer for negligence and or breach of statutory duty of care. What the appellant appears to be suggesting is that it was wrongly sued and therefore the suit ought to have been dismissed on that ground because the claim could only be brought against another entity. The answer lies in Order 1 Rule 9 of the Civil Procedure Rules which enact that:

“ No suit shall be defeated by reason of misjoinder or non joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

38. Misjoinder or non joinder of parties are technical objections and in my view irregularities which do not go to the root or substance of the matter. The court faced with the issue of misjoinder is entitled to deal with parties before it and determine issues between those parties actually before it. In this case, the respondent's claim was predicated on breach of statutory duty of care by the appellant/employer. If the appellant believed that the Kenya Wildlife Service bore the blame, then it was upon the appellant to enjoin the Kenya Wildlife Service as a third party and seek for directions before the trial commenced to transfer the liability to the third party should the court find that the appellant was to blame. To state that because it never kept wild animals and therefore no liability could attach to it is an argument that this court does not buy, in view of the clear provisions of the law that non joinder of parties does not defeat a suit. In my humble view, the trial court had jurisdiction to deal with the claim before it as between the parties before it and to determine those parties' rights and interests as it did in this case
39. In this case I find that the respondent had the option of instituting suit against the appellant for negligence/breach of statutory duty of care and or the Kenya Wildlife Service through the District Committee. In the former case, she, however, must prove acts of negligence or the alleged breach of statutory duty of care whereas in the latter case she would not be required to prove negligence since she was not to be found in the wild animal's kingdom where antelopes are reared, but on her employer's premises and it was therefore the duty of her employer the appellant to ensure that she was protected while engaged upon her duties.
40. The next question therefore is, was the appellant liable for the injury that was occasioned to the respondent when she was hit by a straying antelope? The trial magistrate's finding that there must have been indeed an antelope that hit the respondent is not disputed or challenged. The dispute is over whether in the circumstances of this case, the appellant should be held liable. The appellant referred this court to the persuasive case of **Eastern Produce (K) Limited V Ezekiel Kipchoge Tabut [2014] e KLR** where an employee was bitten by a snake while at work. The court found that the employer was not liable and noted that:

“ A part from the employer's duty to take reasonable care, an employee cannot call upon his employer merely upon the ground of relation of employer and employee to compensate him for any injury which he may sustain in the work upon which he is engaged..” all the respondent needed to demonstrate was that the snake bite was foreseeable by the appellant and in that case the appellant failed to provide him with reasonable care.”

41. The appellant submitted that the trial court was in error on failing to establish that an injury by an antelope was foreseeable as the appellant did not rear antelopes. The burden of proof lay with the respondent to prove that the injury she suffered when an antelope hit her was foreseeable. She pleaded and testified that the appellant did not fence the coffee farm and that there was no watchman/guard to protect her from invasion by the wild animal. The appellant maintained that the farm was fenced and that it had watchmen who watched over the farm. In **James Finlay (K) Ltd V Evan Nyati Kisii HCC 223/2006** Sitati J Held:

“ It is now trite law that the where work is being undertaken in the field especially in a tea plantation if an injury occurs from events whose occurrence is too remote an employer should not be held liable. In this instant case the hole which the respondent allegedly fell into is not a man made hole it is a hole whose existence was too remote for the appellant to have knowledge about. It is therefore against this background that even assuming that

indeed there was a duty of care owed to the respondent the claim by the respondent would not fall as part of those the appellant would be held liable for breach of duty of care because existence and possibility of causing injury was too remote. It is worth noting that it is not under all circumstances that an employee is injured while on duty and the employer is held liable in negligence or under common law. In the instant case, the respondent's case is that while he picked tea, he fell into a ditch, thereby sustaining injuries to his foot and shoulders. The question that this court must ask itself is what the appellant could have done to prevent the respondent from injuring himself. It would be unreasonable to expect that the appellant would ensure that there were no holes/ditches in the tea plantation. It is possible, as it often happens that holes in a tea plantation could be dug by wild animals over which the appellant had no control. In my view therefore, it would be unreasonable to hold the appellant liable for the respondent's injuries in the circumstances."

42. From the above persuasive decision, this court is not able to establish what law exists concerning injury to employees in the field especially in the tea plantation. I would therefore decide this appeal having regard to the evidence adduced and its own circumstances. The question, is was the invasion by the antelope too remote to have been foreseen by the appellant? In the instant case, the respondent pleaded and testified that she was picking coffee when the antelope which she identified emerged, hit her and it ran away. She blamed the appellant for failing to fence the farm to keep away wild animals thereby exposing her to danger it knew or ought to have known and failure to ensure the safety condition to the respondent while engaged at work. In my view, the respondent did prove that the farm was not fenced fool proof to keep away wild animals and the appellant's witness conceded that the only fence was kayapple plants and barbed wire not chain link. In my view, barbed wire fencing with kayapple cannot prevent wild animals from accessing the farm hence the admission by DW2 that the an antelope as an intruder could get in through anywhere because it could even jump. I am in agreement with the trial court that the appellant's argument that there was no antelope simply because no one else saw it apart from the respondent does not hold since the plaintiff was clear that the antelope was running.
43. This court accepts the evidence by the respondent as believed and analyzed by the trial magistrate who had the opportunity to see and hear her testify. In my view, the intrusion by wild animals was a foreseeable danger that the appellant knew of ought to have known. If that were not to be the case, there is no reason why the appellant maintained that it fenced the farm to ward off any wild animals and that it had watchmen to watch over the workers as they picked coffee. In **Eaves V Morris Motors [1961] 2 QB 384-386** it was held:

".....that the requirement that the fencing be secure does not mean that it must protect the workman against every injury as there is a duty to guard against an unforeseeable danger such as might be caused by a machine going in a wrong way which could be reasonably anticipated."

44. The Court of Appeal in the case of **Makala Mailu Mumende Vs Nyali Golf County Club [1991] KLR 13** stated thus:

"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee. It is the employer's responsibility to ensure a safe working place for its employees."

45. In this regard, it is expected that the appellant employer when assigning its employees to work in an environment where there is potential risk of injury through invasion of wild animals then it is prudent for them to provide proper appliances to safeguard the workers. The primary duty rests with the employer to prove that there were precautions put in place and brought to the attention of the employee but the employee failed to adhere and deliberately put himself in harm's way.
46. Albeit the employer appellant was not expected to baby sit its employee/respondent, in this case, it

was not shown that the respondent was solely responsible for the injury that she sustained. In **Halsbury's Laws of England 3rd Edition VOL 28 Paragraph 28** it is stated thus:-

“ where the relationship of master and servant exists, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employee.”

47. Section 112 of the Evidence Act is clear that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him. In this case, the appellant claimed that the farm was well fenced and that there was security to protect workers from any invasion. But they did not call any evidence to prove that assertion and to controvert the respondent's testimony that there was no fence and that wild animals accessed the farm.
48. In this case I find that the appellant owed a common law duty of care to ensure the safety of the respondent while she was engaged upon her duties in the appellant's employment. Albeit the appellant contended that it fenced the farm, and that it provided guards, the respondent's evidence that there was a nearby bush from which the antelope emerged and hit her and that there were other wild animals in the said bush and that she was not provided with any protective gears was not rebutted to the satisfaction of the court. For example, had the respondent been provided with a head gear and boots, she could not have injured her head on falling down and or the leg on being hit by an antelope. Further, albeit it was alleged that the farm was fenced and there were guards, none of those guards were called upon to testify to the effect that at the material time they were present and prevented the entry of the wild animal into the coffee farm. The supervisor DW1 and a field clerk DW2 were not guards and conceded that neither were they on the farm during the incident. In addition, although the appellant was shifting blame if any to Kenya Wildlife Service, without even enjoining it to the suit herein. Furthermore, section 31 of the Wildlife Management and Conservation Act provides that :

“Notwithstanding anything to the contrary in this Act any occupier of land or his servant or any owner of crops or stock or his servant, may, if necessary for the protection of his land, crops or stock, kill any game animal which is causing material damage or loss to his land or to any crop or stock thereon.”

49. In other words, I find that in the circumstances of this case, the appellant was entitled to protect its crops from damage by wild animals and could have in the circumstances done what was reasonable in the circumstances to prevent them from accessing the coffee farm, without contravening the above Act.
50. DW2's evidence that the respondent's colleagues told him that they did not see or hear any wild animal is hearsay evidence. Even the evidence that there is a gate and no one could enter without clearance is neither here nor there as wild animals do not require clearance to access places especially where it is clear that they could gain access through other areas other than the gate, by for example, jumping over the kayapple and barbed wire fence, whose height was unknown. Whereas it may not be possible to prevent the animal from jumping over into the farm, it is and was possible to provide the respondent with protective gears such as gumboots and a helmet while working in the farm. Furthermore, there was no evidence that the antelope could only have accessed the farm by jumping over the fence.
51. In this case, albeit the other workers on the farm did not testify to corroborate the plaintiff's testimony, this court like the trial court believes her testimony. It is also common knowledge that fellow employees may fear testifying against their employer for fear of reprisals which may involve losing their employment. The appellant was in an advantageous position. It could simply have called those employees to testify to the fact of not seeing any antelope in the farm, assuming they were close to the respondent.
52. The appellant's counsel submitted that the respondent was not credible for giving different age

- to the doctor who examined stating she was 25 years; to the hospital where she was treated as 28 years and to court where she stated she was 34 years. This court believes the respondent's explanation and evidence that when she went to hospital she was confused and gave her age as 28 years. Furthermore, this court finds that the matter of the age of the respondent was not in issue and neither was it material to the determination of the claim. It is not disputed that the respondent was an adult and was taken to Naidu Hospital by the appellant's staff, who should have had and presented records of her correct age. How the age of respondent could have affected or influenced the outcome of this case is not clear. It cannot be that the contradictions in her age could give the court reason to infer that she was a liar. I reject that proposition as it is not in dispute that the respondent was an adult of sound mind.
53. The trial magistrate apportioned liability at 80:20 in favour of the respondent. In doing so, the trial court measured the duty of care and balanced the risk against the measures necessary to eliminate those risks. From the respondent's own evidence, one would infer that she knew that there were wild animals in the nearby bushes. She therefore had knowledge of the dangers that were attendant and she too was under duty to be vigilant while working. The contribution of 80:20 in my view as apportioned by the trial court was in exercise of her discretion. I see no reason why I should interfere with that discretion. It was reasonable and therefore I shall not disturb it.
54. I must mention that the appellant has focused on lack of proof of negligence in all their submissions. However, in a claim of this nature, the respondent was in order claiming under common law duty of care and therefore the principles in negligence stated in **Charles Worth & Rucy on Negligence 7th Edition page 782-783 paragraph 12-26** though applicable in claims purely based on negligence, are not strictly applicable to this case where the respondent/claimant was an employee and based her claim on breach of statutory duty of care.
55. The allegation that the respondent was responsible for what befell her under the doctrine of ***Volenti non fit injuria*** in my view was farfetched and inapplicable as it was not shown how she, on her own volition inflicted injuries on herself or asked the antelope to enter into the coffee farm and hit her. In the end I find that the trial magistrate did not err when she found the appellant liable for breach of statutory duty of care to its employee the appellant to the extent that she found.
56. On the issue of whether the trial magistrate relied on matters that were not before her in determining the suit, the appellant submitted that in raising the issues of the height and age of the fence and proceeding to place reliance on these issues in making her determination, the trial court erred. I have perused the record by the trial magistrate. The trial court's reference to the height and age of the fence is not in my humble view, extraneous. Courts are expected to make inferences on the circumstances of the case as they make their determination. In this case, it was not in dispute that the appellant owed a duty of care to the respondent while the latter was engaged upon her work. That duty in my view included the duty to provide a safe working environment and to investigate any accident involving the respondent as reported. In this case, there was no evidence that the accident involving the invasion by the antelope was ever investigated for future remedial measures to be put in place. The appellant simply put forth witnesses who denied that any such incident occurred or that any of the workers on the farm at the material time saw the antelope hit the respondent. They also stated that there was a barbed wire and kayapple fence. The trial magistrate in finding that the height or age of the fence was not disclosed did not detour as this was a relevant fact to the evidence adduced by the respondent's witnesses that the antelope could have jumped over the fence anyway. Indeed, there was no evidence that the fence was high or thick enough that an animal like an antelope could not jump over or through to access the coffee farm. The appellant did not demonstrate what reasonable care it took to ensure the safety of the respondent while she was engaged upon her work in the coffee farm. As was succinctly stated in **Halsbury's Laws of England, 4th Edition vol. 16 Para 560:**

“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.”

57. **In Winfield and Jolowicz on Tort by WWH Rogers, 14th Edition, London Sweet & Maxwell at page 213,** it is stated as follows inter alia:

“If a worker is injured just because no one has taken the trouble to provide him an obviously necessary safety devise, it is sufficient and in general, satisfactory to say that the employer has not fulfilled its duty.”

58. In my view, the conclusions reached by the trial court were reasonable and relevant in the circumstances and did not in any way amount to importation of new evidence or matters which were neither canvassed nor pleaded by the parties. I therefore dismiss the assertion by the appellant that the trial court arrived at a conclusion based on extraneous matters.

59. On whether quantum of damages as awarded by the trial court was manifestly excessive, I am guided by the decision in **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003** (unreported) where the Court of Appeal held that:

“ We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga V Musila [1984] KLR 257).”

60. In **Butt v Khan (1982-1988) KAR 1**, the Court of Appeal stated that:

“an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

61. In this case I have carefully considered the decision and award of the trial court on quantum and the authorities cited by the appellant and respondent’s counsels. I find nothing on record to show that the trial court considered irrelevant matter or failed to consider any relevant matter. The trial magistrate in her judgment considered the submissions of both parties’ advocates. In those submissions were authorities relied on which formed part and parcel of the submissions. She also considered the injuries sustained by the respondent which were soft tissue injury of the left leg and head injury which necessitated her admission in hospital for 4 days. She was unable to perform her duties for two weeks and was left with recurrent headaches. In my view, KShs 160,000 general damage was not an excessively high award, which award is subject to a reduction by 20% contribution.

62. Accordingly, I refuse to interfere with that award and uphold it. In the end, I find this appeal to be without merit and the same is dismissed. I uphold the judgment of the trial magistrate. The respondent filed this appeal through an advocate but ended up prosecuting it *pro se*.

63. It is not clear under what circumstances her advocate abandoned her or she abandoned her advocate. Costs follow the event and are in the discretion of the court. They are awarded to the successful party unless there is good cause why the court should not award costs. I award costs of this appeal to the respondent.

Dated, signed and delivered in open court at Nairobi this 9th day of March 2016.

R.E. ABURILI

JUDGE