REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 193 OF 2011

LEAVES (K) LIMITED..APPELLANT

VERSUS

PETER ONDIMU NYABWARI..................................DEFENDANT

(Appeal from the original ruling and order of Hon. A.R. Ireri delivered on 31st March, 2011 in Milimani Commercial Courts CMCC No. 8667 of 2006)

JUDGMENT

1. The Appellant has filed this appeal on four (4) grounds which can be summarised as follows:-

   i. That the Learned trial Magistrate erred in reversing and or altering her initial written and pronounced judgment dated 9th November, 2010 contrary to Order 21 Rule 3 (3) of the Civil Procedure Rules.
   ii. That the Learned trial Magistrate erred in her finding on liability.

2. The Respondent's claim was that he was at all times material to the suit employed with the Appellant as a security guard earning KShs.4,000/= per month. That it was a term of the contract of employment that the Appellant would take reasonable precautions towards his safety which the Appellant knew or ought to have known and to provide and maintain adequate and suitable appliances to enable him to carry out his work and to ensure safety and safe working system. It was the Respondent's case that while patrolling the Appellant's farm along a river on 14th October, 2005, he was chased by a hippo as a result of which he fell into a ditch and sustained a compound (open) fracture of the right tibia and an extensive wound on his right upper shin. The Respondent blamed the Appellant for not properly fencing the farm; exposing him to danger it knew or ought to have known; failure to provide him with adequate security device; failure to provide a safe working environment and failure to take any adequate precaution for his safety while he was engaged in his work.

3. The Appellant denied the Respondent's claim. The Appellant pleaded negligence on the part of the Respondent that; the Respondent exposed himself to the risk of damage he ought to have known for failure to take precaution for his own safety while engaged in his work; failure to wear protective gear; failure to blow the whistle to alert other watchmen; failure to run; failure to heed to express instructions as to the manner of handling wild animals; taking a job without appreciating its risks; walking along the river bank when he knew or ought to have known that it was dangerous to do so and provoking the hippo.

4. This being a first appeal, this court has to warn itself of its obligation to re-evaluate the facts afresh and come to its own independent findings and conclusions but in so doing have in mind that it did not see the witnesses testify. See **Selle v. Associated Motor Boat Company & Others (1968) E.A. 123**.

5. The Respondent testified that he was patrolling near the river on the material day at around 2:00 pm. On seeing a hippopotamus, he ran away and tried to call for help. While running, he fell and hurt his leg in a hole. His colleagues came to his aid. His supervisor Mr. Ongeri was called and he was taken to the dispensary where he received treatment for two (2) weeks and later taken to Machakos District Hospital for further treatment. He blamed the Appellant for the accident stating that he was not given protective gears and weapons to protect himself. He further stated that the land was not fenced and he was therefore exposed to danger. He stated that he run away and blew a whistle and denied having provoked the hippo.

6. Teresa Njoroge (DW1) who was the Appellant's Director and Manager confirmed that the Respondent was at the material time the Appellant's employee and was on duty but that she was informed that the Respondent had reported to work drunk. She stated that the Appellant issues its watchmen with a whistle, a thick coat, a bow and arrows. She stated that the Respondent was not seriously injured and was not out of work as a result of the injuries sustained on the material day. That the farm is fenced except at the river front. She expressed her doubt as to the presence of a hippo since the river had dried and stated that if there was one, the Respondent should have ran for his life. She denied that safety gears were not issued.

7. Mr. Ongeri Momanyi (DW2) who was the supervisor testified that he gave the watchmen employed by the Appellant guidelines on how to work. That there were two watchmen on the material day. He instructed one to man the administrative block while the other two began patrols in twos. He stated that he was woken up in the morning of 14th October, 2005 by Antony and Mr. Mboke who informed him that the Respondent had been injured in the leg. That he found the Respondent bleeding and took him to Athi River Dispensary where his wound was dressed. He denied having heard the whistle blown. He told the court that the river was dry and that therefore there could have been no hippo. He admitted that he had no evidence that the Respondent went to work up to April, 2006. He admitted that the order to 'pair on patrol' was necessary for a farm. He stated that the Respondent went to work on the evening of the date of the accident.

8. The trial magistrate having heard the matter entered judgment for the Respondent. She apportioned liability at the ratio of 70:30 between the Appellant and the Respondent and awarded the Respondent general damages of KShs. 150,000/= on 9th November, 2010. The trial magistrate later in her ruling of 28th February, 2011, made a clarification to her judgment stating that liability was at the ratio of 30:70 against the Respondent and the Appellant, respectively. he further awarded special damages of KShs. 7,000/=.

9. The Appellant contended that the amended portion of liability was improper and not supported by judicial reasoning and submitted that due to the aforesaid, it was irregular and unfair to the Appellant. It was argued that from the trial magistrate's reasoning on liability that the Respondent did not patrol in twos as instructed and that he returned to work after the accident it was clear that the Respondent was largely liable. It was further contended that the trial court considered that the Respondent fell into a hole while that was not pleaded as a ground of negligence and further that the Respondent did not prove the existence of a hippo that chased him. The Appellant on this point cited the case of **James Finley (K) Limited v. Evan Nyati Kisii HCCC No. 223 of 2006** where Sitati J held as follows:-

" ... It is now trite law that 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 manmade 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 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."

10. It was submitted that the Respondent failed to establish that he was chased by a hippo and that there was no nexus between the injuries suffered and the alleged hippo. It was further submitted that the Respondent admitted to being drunk on the material day and judicial notice of the consequences of being drunk ought to have been taken. The Appellant was of the view that the general damages awarded was inordinately high. The Appellant in this regard argued that injuries suffered by the Plaintiff in the case of **Peter Njangara v. George Wainaina & Another (2002) eKLR** relied on by the trial court were severe than those of the Respondent since that Plaintiff's injuries resulted into shortening of his leg, grafting of bones and mal-union and was awarded KShs. 100,000/=.

11. The Respondent on the other hand submitted that the words of the judgment were that judgment was entered for the Respondent which meant that it was entered in his favour thereby he could not be largely liable. It was submitted that the trial court took into consideration circumstances of the case. That the Appellant confirmed that there was no fence which would have protected the Respondent from the occurrence of the accident. It was submitted that in the circumstances, the Appellant was to blame for the accident. The Respondent cited **Nairobi HCCC No. 152 of 2003.,Starpack Industries v. James Mbithi Munyao** and argued that he produced evidence that connected his injuries to an act or omission on the part of the Appellant. On damages, the Respondent argued the case of Peter (supra) was accurate since the injuries were similar to his and the amount was reasonable since the trial court considered the inflation rates.

12. The Appellant took issue with the trial court's ruling amending the judgment. I have seen the ruling that the court made on 28/2/11. To my mind there was nothing wrong with that ruling. The court sought to clarify what it thought was a mistake. With or without the clarification, the judgment of 9/11/10 was clear that judgment was entered for, meaning in favour of, the Plaintiff for 70%. Had the wording of the Judgment been "against the Plaintiff:Defendant" 70:30 then it would have meant that the Plaintiff was to shoulder more liability. But in this case it meant the opposite, the Plaintiff had won 70% in his favour.

13. As regards of liability, my view is as follows:- While the Respondent testified that he was on the material day chased by a hippo whereby his leg got into a hole and sustained the alleged injuries, the Appellant contended that the Respondent's injuries were as a result of the Appellant's negligence and they were not as serious as pleaded. This notwithstanding, it is not in dispute that the Appellant admitted that part of the fence adjacent to the river had no fence; that although the Appellant claims that the Respondent was drunk on the material day, it has not furnished evidence to so proof. DW1 stated that she was informed that the Respondent was drunk on the material day but she did not disclose the name of the person who gave her that information. That was hearsay and inadmissible considering that the Respondent denied being drunk and the trial court believed him. There was no acceptable evidence to show that the Respondent was issued with any protective gear or weapons as alleged or that he was sent on patrol in company of another guard. The Respondent's evidence on lack of protective or weaponry was not challenged. Neither was his evidence of being chased by the hippo. The Appellant's defence was that the river was dry at the time and that there was no chances of having hippos around. This evidence was never put to the Respondent when he testified to test its veracity.

14. It was contended by the Appellant that the Respondent did not plead the existence of the hole as negligence on the part of the Appellant. With due respect, the Appellant has misconstrued the Respondent's claim. In my understanding, the Respondent laid blame on the Appellant for failing to take precaution considering that the area had wildlife in existence. It was therefore pleaded that as a result of the failure to secure the area, the Hippo had gained access and chased the Respondent who run for dear life. The existence of hippos was not denied per se rather it was stated that the hippos could not have been present while the river was dry. However, as I have already observed, the Appellant failed to establish that the river was dry to negate the existence of a hippo. An attack by wild animals was a foreseeable danger. In the circumstances, I find that the trial court did not misdirect itself in finding that the Respondent had proved on a balance of probability that he was chased by a hippo and that while running

away, hurt his leg in a hole. The Respondent never pleaded negligence on the basis of the existence of the hole rather on the failure by the Appellant to secure the farm. In this regard, the authority of **James Finley (K) Limited** (supra) relied on by the Appellant is irrelevant to the circumstances of this case.

15. In the case of ***Eaves versus Morris Motors [1961] 2 Q.B. 384 to 386*** *it was held as follows:-*

"…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."

16. In this regard, it is expected that an employer when assigning his employees to work in an environment where there is a potential risk of injury, it is prudent for him to provide proper appliances to safeguard the workmen. An employer should not lay blame on employees merely because they did not take the required precautions. The primary duty rests with the employer to prove that there were these precautions brought to the attention of the employee but the latter failed to adhere and deliberately put himself in harm's way.

17. In view of the aforegoing, I find that the Appellant was negligent for the Respondent's injury. In my considered opinion in measuring the duty care, one must balance the risk against the measures necessary to eliminate the risks. The Respondent knowing that he was patrolling on a dangerous place he too was under duty to be cautious while working. He too has to shoulder some liability. In the circumstances, I find that the liability as apportioned in by the trial court was reasonable and I do not disturb it.

18. On the issue of damages, I am guided by the case of **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C.A. No. 142 of 2003 (UR)**where it was held as follows:-

"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 or 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 Mariga – vs- Musila (1984) KLR 257.)

19. In the present case, I have carefully examined the decision of the trial court on quantum. I have also considered the authorities relied on by the parties I see nothing on record to show that the trial court considered an irrelevant matter or failed to consider any relevant matter. Further, I do not consider the award of Kshs.150,000/- to be inordinately high. In the circumstances I find the appeal to be without merit and the same is dismissed. The Respondent shall have the costs of the appeal.

Dated, Signed and Delivered at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE