REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 503 OF 2006

DEL MONTE (K) LTD.....….....APPELLANT

VERSUS

FRANCIS MAINA MIIGU ….....RESPONDENT

(Appeal from the original judgment and decree of Mr. A. Lorot. (SRM) in Gatundu Courts, SRCC No. 336 of 2005 delivered on 11th July 2006)

JUDGMENT

1. The appellant **Del Monte (K) Ltd** was sued by the respondent **Francis Maina Miigu**, seeking compensation following an accident which occurred on 9th July 2002 when the respondent was working for the appellant. After a full hearing in which the respondent and the doctor were the only witness, while the defence declined to call any evidence, the learned trial magistrate, found the appellant 100% liable. The magistrate further, held that on the issue of quantum, an award of Ksh.180,000 as general damages and kshs.48,500/= as special damages inclusive of future medical costs for permanent denture for kshs 40,000/= and kshs 7,000/= plus kshs 5,000/= being doctors attendance fee and costs of the medical report together with cost of the suit and interest rates.
2. Being dissatisfied with the trial court's judgment, the appellant has preferred this appeal on the following grounds, where pertinent that:

a. ***The Learned Magistrate erred in law and in fact in failing to find that the respondent had not produced original notes hence filed to prove his injuries;***
b. ***The Learned Magistrate erred in law and fact by failing to appreciate that the respondent had not proved future medical expenses to the degree required of special damages:***
c. ***The Learned Magistrate erred in law and fact by awarding special damages of kshs 7,000/= in doctor's court attendance fees while the same had not been specifically pleaded in the plaint:***
d. ***The Learned Magistrate erred in law and fact by awarding excessive general damages for pain and suffering loss amenities and awarding damages that had not been proved:***
e. ***That the Learned Magistrate erred in law and fact in ignoring the fees guidelines in the medical practioners and Dentists (Forms and Fees Amendment) Rules 2005 while awarding the doctors court attendance fees.***
f. ***That the Learned Magistrate erred in law and fact in relying extraneous evidence in arriving at the decision on general damages;***
g. ***He prayed that the appeal be allowed and the quantum be assessed downwards***

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at Pg. 429**)

4. The respondent's case was that, he was an employee of the appellant where he was tasked with irrigation of the pineapples at the del monte farm. On 9th July 2002, at 11:30 a.m, he was on duty and it was foggy. He could not see ahead. There were portable sprinkler pipes on the lines, he was at the place where there was mainline key which he went to open. He was suddenly hit from behind on the back, he turned to confront his assailant and was hit on the mouth. He fell down as one tooth fell out too. His upper lip was also injured. The two people who hit him were thugs as he was not offered security. The portable pipes are haven for thieves and they require security. The nearest security was 5 kms away from the respondent and could not see the thieves. He was taken to hospital and admitted, he produced the treatment card as pexh 4. He was later sent to Doctor P.C Nguhiu, a dental surgeon, the card issued therein was marked as pexh 5. The company replaced his tooth. He still experiences pain on his back. In cross examination he said he was hit with sugar cane sticks. He screamed and was heard by one Elijah. The thieves did not steal anything because he screamed.

7. The respondent called **Dr. Moses Kinuthia,** who testified that he examined the respondent on 26th August 2003. He had a deep cut wound on the upper hip. He lost his lateral incisor tooth, a mobile upper left central left incisor tooth. He was seen at del monte clinic, central memorial hospital and referred for dental management at the Arade dental clinic. Modes of treatment included dental splintage for the mobile upper incisor tooth. The cut wound was stitched. He also had a deformed upper lip with an oblique scar. The injuries were of grievous harm. The tooth had limited his dietary options and he would require replacement of the permanent denture between kshs 30,000/= to kshs 50,000/=. He produced his report as pexh 1 which he charged Kshs 1,500/= for the report and court attendance at kshs 7,000/= , whose receipts marked as exhibit 2 and 3.
8. The appellant submitted on the issue of liability and quantum on liability, the appellant stated that the trial court found it 100% liable yet he did not produce any treatment notes but only a card from the hospital which did not disclose the respondent's injuries. This omission casts doubt as to whether the respondent was injured or treated for alleged injuries. On the other issue of quantum, the appellant submitted that the award of kshs 40,000 being the replacement of the lost tooth was not proved by physical examination or receipts. It was an estimate by the doctor who testified that the same could range between 30,000/= and - 50,000/=.
9. The respondent submitted that the appellant did not call any evidence to deny the fact that the respondent was injured while at his place of work. He owed him a duty of care by ensuring that the there were enough guards to ensure adequate security in the field despite knowing that there was insecurity in the field due to numerous attacks in the past. The appellant should be held 100% liable. The sum of kshs 40,000/= awarded to the respondent for replacement of the tooth was captured in the doctors medical report and the appellants did not offer evidence to the contrary by calling the doctor to counter the same.
10. I have considered the submissions and the law. Issues of determination include:

i. *Whether the appellant was liable for the attack,*
ii. *If liable; whether the damages awarded were reasonable in the circumstances.*

11. The main issues that arises in this case as an industrial matter is; Firstly, whether the respondent was injured at the employers place of work? Secondly, was the employer negligent? Thirdly, if so, what is the favorable quantum of damage? The relationship between the employer and employee is crucial as the employer owes a duty of care to his employee.
12. In this case, the appellant claims that the case should be dismissed since the respondent did not prove his case to the required standard under sections 107, 108 and 109 of the Evidence Act. The appellant cannot be said to have been negligent. He argues that the respondent did not prove liability on the part of the appellant especially given that he did not produce treatment notes from the hospitals only a card that does not disclose the injuries suffered. On the other hand, the respondent over the same issues argues that the liability is well covered since PW1 produced report that highlighted the injuries that the respondent suffered as well as other medical cards from various hospitals.
13. The first issue to be addressed that qualifies this matter as an industrial matter as stated earlier is

whether the respondent was injured at the employers place of work and whether the employer was negligent. It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of **Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258,** where it was held that "*there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence"*.

14. The book of **Salmond and Heuston on The Law of Torts 19th Edn. defined negligence as "***the omission to do something much as a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."* Negligence means careless conduct; that connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing. According to the court record, it is evident that normally security was provided. Infact, the respondent claimed that there were security guards only that they were 5 kilometers away. He also stated that it was foggy and that is why he did not see the thieves approaching. Had the guards been there, would they have spotted the thieves in the fog? I don't think so. How then can the appellant be held responsible for thieves attacking the respondent that they did not see coming? The whole claim of a porous fence and frequent thievery attacks at the farm was not proved only alleged. I fail to see how the respondent can be held liable for injuries incurred due to an invasion by thugs yet security was present only not near. There is nothing in the evidence before the lower court to show how the appellant breached that duty of care with regard to the incident that caused personal injury to the Appellant. In the case of ***David Ngotho Mugunga vs Mungomoini Estate (HCCC 2366 of 1989),*** Shah J. noted as follows:

> ***"I do not see how a defendant can be liable for acts of robbers even if the employee had no implements of defence. It would be very simple for a gang of robbers to overwhelm one or two guards and take away all such implements and beat them up. This is where I think the doctrine of violent non-fit injuria comes in. ..... The employer in my view cannot be liable for criminal acts committed by trespassers (or thieves or robbers which result in injuries to the employees. I would entirely agree with what Lord Herschell said in Smith vs Baker & Sons (1891) 325 360."***

15. While from the evidence of the respondent he suffered loss of tooth and a cut on his hip, I find that he did not prove that the same was due to any negligence or breach of statutory duty on the part of the appellant. Not every industrial injury is caused by the negligence of an employer and unless a relevant statute imputes strict liability on the part of an employer, claimants must know that they must plead their cases properly and prove negligence and/or breach of statutory duty on the part of the employer sufficiently. A court of law will not just award damages to a litigant because it is sympathetic to him due to an injury which he may have received in his place of work and in the course of duty if he was under an obligation to prove negligence and/or breach of statutory duty and he failed to do so.

16. In my view, the learned trial Magistrate erred when he found the appellant liable yet the respondent had not proved the allegations of negligence against the appellant on a balance of probabilities. I find that the respondent failed to prove his case to the required standard in civil matters.

17. The appeal be and is hereby allowed with the costs to the appellant.

Consequently the judgement and a decree of the trial court is set aside and is substituted with an order dismissing the suit with costs to the Defendant.

Dated, Signed and Delivered in open court this 9th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent