IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 241 OF 2010

KANTARA FARM LIMITED……..APPELLANT

VERSUS

RICHARD OCHORO OSIR……..…..RESPONDENT

JUDGMENT

This is an appeal by Kantara Farm Ltd (hereinafter referred to as the appellant (formerly the defendant) against the judgment of the Principal Magistrate, Naivasha, Hon. Mulwa in SPCC 185/09. The appellant was sued by Richard Ochoro Osir, the respondent (formerly plaintiff) for damages for injuries sustained in an industrial accident on 18/9/06 when the respondent was on duty at the appellant's premises. The trial magistrate entered judgment for the respondent against the appellant for Kshs.160,000/- in general damages and Kshs.13,000/- special damages. The appellant is dissatisfied with the trial court's findings both on liability and quantum and filed this appeal citing 7 grounds of appeal. The appellant prays that the appeal be allowed, the entire judgment of the trial court dated 19/8/2010 be set aside and the costs of the appeal be granted to the appellant. The counsel, Mr. Maloba, condensed the grounds into 4 and they are as follows:-

1. **That the trial court erred by finding the respondent fully liable;**

2. **That the court's decision was against the weight of the evidence;**

3. **Special damages of Kshs.13,000/- were not pleaded or proved;**

4. **The award of Kshs.160,000/- was excessive.**

Mr. Muturi, counsel for the respondent opposed the appeal. He submitted that the two witnesses called by the appellant claimed that the respondent was not on duty on the material date. He however, admitted that the entries in the master roll for the day had been tampered with and the court found that they intended to frustrate justice. On special damages, counsel urged that they were PW2's expenses and needed not be pleaded. As for damages, counsel submitted that no reason has been shown as to why the court should interfere with the trial court's exercise of discretion in awarding damages.

Briefly, the case before the trial court was as follows:- The respondent Richard Osir had been employed by the appellant on contract in support section, repairing and installing fences. He reported on duty on 18/9/06, was assigned to fence. At 11.00 a.m. the supervisor sent him for a stool, was asked to step on it so as to pull the pivot. It was wet and so was the stool. As he pulled the net, he slipped and fell and got injured. The nurse at the clinic referred him to Dr. Khan and his brother took him to Naivasha District

Hospital. He blamed the appellant for exposing him to risk at work and not equipping him with necessary gear like gum boots, safety belt.

PW2, Josephine Wanjiru Kibui of Records Department Naivasha District Hospital confirmed that the card Ex.2 emanated from that hospital and that Richard Osir was treated at the said hospital. PW3, Dr. Omuyoma told the court that he examined Richard Osir on 20/2/09 and found that he had sustained a sprain of the left hand, dislocation of the left wrist joint and soft tissue injures to the left hand. He classified the injuries as arm and prepared a report.

The appellant called two witnesses. DW1, Walter Wanyonyi, a supervisor recalled being on duty on 18/9/06. He recalled that on the morning of 18/9/06, the respondent went to work and asked for permission to go to hospital because he claimed to be sick. DW1 had the master roll which showed, the respondent had permission (P) and that on 19/8/06, he was present and they worked. DW2 Norbert Boniface Wabwire, an employee of the appellant said that he was involved in employing, accounts and marking the muster roll DEx.1. He said that it is computer generated; that the respondent reported to work on 18/9/2006 and got permission to go to hospital and that he reported to work on 19/9/06. When shown the copy of the muster roll he admitted that there were handwritten entries on his copy which were not on the photocopy and that he made the entries the year before and admitted that there may be a mistake.

The first question is whether the respondent was on duty on 18/9/2006. DW1 and DW2 admitted that the respondent reported to work on that date though according to them he got permission to go to hospital. When one reported on duty, it was entered in the must roll. DW2 admitted that there was additional handwritten information on the muster roll which was not on the copy shown to him. He said that he had made the alterations the year before he came to court. He did not explain why the alterations. He went on to admit that there may be a mistake in the muster roll. The muster roll was always in the custody of the appellant (officers). The only conclusion this court can reach is that the original muster roll was tampered with in order to defeat this claim. I totally agree with the trial court on this finding and arrive at the conclusion that the respondent was on duty at the appellant's premises on 18/9/06.

Having so found, and having found that the appellant attempted to conceal that fact by tampering with the muster roll, I do agree with the respondent that the reason for that concealment is because the respondent got injured on that date. The only question left is should liability be apportioned? The respondent's evidence on how he was injured was not controverted. Indeed if the respondent was told to climb on a stool and pull the net when he knew that the stool was wet and he did nothing about it, then he did not take any precautions to ensure that he was not injured. The respondent owed himself a duty of care to ensure that he was not injured. In their defence, at paragraph 6 thereof, the appellant had denied liability and in the alternative pleaded, that the respondent was solely responsible or contributed to the occurrence of the injuries to himself. It was upon the respondent to demonstrate that he took reasonable precaution to avert the risk to injury. The respondent had also complained that he was not supplied with the necessary gear like gumboots and safety belt. The appellant never controverted that evidence but on the other hand, the respondent did not tell the court whether he made any effort to procure them before taking up the task. Having failed to take the necessary precaution towards his safety he contributed to the injury that he sustained and the trial court should have apportioned liability. In my judgment, I will apportion liability at 15% as against the respondent while the appellant will bear 85% liability.

The respondent pleaded that he sustained a sprain on the left hand, dislocation of the wrist part of the left hand and soft tissue injuries to the let hand. He was treated at Naivasha District Hospital and was examined by Dr. Omuyoma who prepared a report Pex.2(a) in which he assessed the degree of injury to be harm. In my considered view, an award of Kshs.160,000/- for a sprain to the let hand, dislocation of the wrist joint and soft tissue injures to the left hand is excessive as the injuries were minor. I do take into consideration the principles laid down in the Court of Appeal decision of **Butler v Butler** (CA 49/1983) in guiding the appellate court whether or not to interfere with the award of damages of the lower court the same being an exercise of discretion.

The principles are:

1. **That the court acted on wrong principles;**

2. **That the award is so excessive or so little damages that no reasonable court would award;**

3. **That the court took into consideration irrelevant matters nor did not take into consideration relevant matters that it ought to have considered and as a result, arrived at the wrong decision.**

The appellant had relied on the decision of **Socfinaf Company Ltd v Joshua Ngugi Mwaura** CA 742/03 where in 2005 J Visram reduced the lower court's award from Kshs.70,000/- to Kshs.20,000/- for minor soft tissue injuries.

On the other hand, the respondent had relied on the decision of **Catherine Wanjiru Kingori v Gibson Theuri Gichubi** HCC 320/1998, where the plaintiff sustained soft tissue injuries and the court assessed general damaged between Kshs.100,000/- to Kshs.350,000/-. 2) HCC 4950/91, **John Chiriba Mutondo v Naftali Ogomdo Ogira** where the plaintiff suffered left ankle dislocation and was awarded Kshs.100,000/-.

I find that the comparable award is that of **John Chiriba Mutundo v Naftali** and considering the inflation trends, I hereby make an award of Kshs.80,000/- in general damages.

It is trite law that special damages must be specifically pleaded and strictly proved. The pleaded special damages were Kshs.1500/- in respect of the medical report. The receipt that was produced which was issued on 25/2/09 by Dr. Omuyoma was for Kshs.3000/-. The respondent counsel only be entitled to what he pleaded i.e. Kshs.1,500/-. The other receipt for 8/1/2010 is in respect of court attendance and could not have been pleaded. The respondent is entitled to recover that sum which is part of the expenses. In the end, the appeal is allowed on both liability and quantum. The respondent will have judgment for Kshs.80,000/- and special damages of Kshs.1,500/- and expenses of Kshs.10,000/- less contribution of 15%. In the end he will be entitled to judgment as follows:-

91500 x 85/100 = 77,775/-.

Costs in the lower court and on appeal will be apportioned on same ratio. It is so ordered.

DATED and DELIVERED this 14th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

N/A for the appellant

N/A for the respondent

Kennedy – Court Assistant