N THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 278 OF 2004

JAMES CARTWRIGHT…….....……APPELLANT
VERSUS
JOHN NAMJAA LEKIPIRI…….....……RESPONDENT

(Appeal from the judgment of the Resident Magistrate dated 11th November, 2004 in Nakuru Chief Magistrate's Court Civil Case No. 1909 of 1999)

JUDGMENT

This appeal arises from the judgment of A. Mongare, Resident Magistrate, Nakuru, in CMCC 1909 of 1999. In the trail court, John Namjaa Lekipiri (the respondent) sued James Cartwright (the appellant) for damages arising from an accident involving the respondent and the appellant's horse. In the amended plaint dated 9/2/2001, the respondent stated that on 23/2/1999, he was on duty, riding a horse, on the instructions of the appellant, when the horse suddenly jumped, threw the respondent off, stepped on his right leg, causing him serious injuries. He attributes the injuries to the negligence of the appellant for exposing him to injury which he ought to have known, failing to provide the plaintiff with a safe and proper work system, permitted the horse to injure the respondent. In the alternative, he pleaded that the appellant was in breach of the contract of employment in that he exposed the respondent to injury and damage which he knew to be imminent and failed to provide a safe working system. As a result he suffered serious injuries.

In the statement of defence, the respondent denied that the respondent was at work on 23/2/1999 or that he was negligent or in breach of any terms of any contract. In the alternative, the appellant stated that if the respondent was injured, he solely caused injury to himself by his own negligence by exceeding the scope of his employment, failing to take adequate care or was careless and disregarded his own safety.

The respondent (PW1) testified in support of his claim and called two other witnesses. The respondent testified that on 23/2/99, while working for the appellant, his duty was to exercise and train the horses. He sat on the horse without a cushion. He said that he fell off the horse while bracing the horse. He denied having been given shoes. He stated that if the horse had a cushion, he would not have been injured. At the suggestion that the respondent was lame, he denied the allegation and said that he could not have been employed if he was lame. He said that the appellant was present when he was injured.

The other two witnesses were (PW2) Dr. Malik and Dr. Omuyoma (PW3). Dr. Malik is a Radiologist by profession. He recalled that on 3/3/1999 he had a patient referred to him by Dr. Khan. She found that the respondent had a fracture on the base of the foot, but had no treatment records. The doctor also found that the fracture was not fresh and that it was a simple fracture that would heal within 4-6 weeks.

Dr. Omuyoma, (PW3) recalled that he examined the respondent on 28/6/1999. He found that the respondent sustained a severe fracture of the right foot, severe soft tissue injuries on the same foot, plaster of paris had been removed and an X-ray report showed a fracture of a small enclosed bone tissue on the

right foot toes. The doctor used notes from Kijabe Creater Clinic.

The appellant called Dr. Mohamed Shabbir Malik as a witness (DW1). He examined the respondent on 21/12/2000 and found that he had sustained an injury to the ankle of the right foot and had treatment notes from DIC Kijabe Hospital, an X-ray of the left foot, had cramp foot and was limping. He denied that he saw an X-ray for the right ankle. That he examined the right leg and fist and that X-ray was for the left foot. He found no fractures fresh or old.

The trial court apportioned liability at 90:10. Quantum was assessed at Kshs.100,000/- less contribution of 10%. The appellant was aggrieved by both liability and quantum, and filed this appeal based on the following grounds:-

1. That the trial court failed to summarise the case, analyse the evidence and give reasons for her decision;

2. That the trial court misdirected itself by failing to find that the case was not proved;

3. That the trial Magistrate erred in her findings as to the extent/nature of the injuries;

4. That the court disregarded the evidence of Dr. S. Malik;

5. That the trial court disregarded the defence evidence;

6. That the award of damages was excessive;

7. That the award on contributory negligence was unreasonable.

The appellant therefore prays that the judgment be set aside or that liability be apportioned, reversed; damages be reviewed and revised.

As the first appellate court, it is required of me to re-evaluate and analyse the facts afresh and arrive at my own findings and conclusions. On the question of liability, although the appellant denied that the respondent was his employee, the respondent filed a reply to the defence joining issue with the appellant. The appellant never called any evidence to rebut the respondent's evidence that he was an employee of the appellant.

The respondent stated that he was employed to train horses, a job he had done for two years. During that time, he had not been issued with any saddle seat and shoes (boots). The appellant did not adduce any evidence to controvert that evidence. The appellant had a duty to provide the respondent with all the necessary equipment for the performance of his duties. Failure to do so exposed the respondent to risk of injury. The respondent said that he did not ask for the said equipment during the two years he had worked for the appellant and therefore exposed himself to injury. By taking up the job of training horses, the respondent exposed himself to risk of injury and he could not blame the appellant for being wholly to blame. Blame cannot be placed on the appellant alone. In my considered view I would apportion liability at 70% against the appellant for failing to provide the necessary equipment and safe working atmosphere. Under the **Workers Compensation Act**, failure to provide the necessary working gear attracts strict liability.

The respondent testified that he was injured on the right foot. PW2, Dr. Malik who is a radiologist recalled that Dr. Khan referred the respondent to him on 3/3/1999. She found that the respondent had a simple fracture at the base of the foot. The doctor denied that the respondent had a cramp foot. Dr. Omuyoma examined the respondent on 28/6/99 and found that he sustained a fracture of the right foot and soft tissue injuries to the same foot. The plaster of paris had been removed and there was a small enclosed bone on the right foot. He assessed the degree of injury as grievous harm. Doctor Omuyoma corrected his report to read that the injury was to his right foot not right fist. The respondent was also examined by the appellant, is (DW1) Dr. Mohamed Shabbir. He saw the respondent on 21/12/2001. That was after about

2½ years. He found no scar or fracture to the right foot of the respondent. The fact that a plaster of paris had been cast on the respondent's foot supports the fact that there had been a fracture. I doubt that PW2 and PW3 were wrong in what they saw. They both said it was a simple fracture that would heal without leaving a trace. DW1 also said that if it was a simple fracture then it heals within 6 weeks. The report that DW3 based his findings on was not produced in evidence. I am satisfied that the respondent was injured while at work and sustained a simple fracture in accordance with the findings of PW2 and PW3.

The respondent's counsel suggested an award of Kshs.180,000/- and relied on the case of **Lily Becher Baily v. Kirima Kamau, HCC 2037/88**. In that case, the plaintiff sustained a crush injury to his left foot resulting in fractures of the 3rd, 4th, 5th and 1st metatarsal bones of the left foot, mild concussion, bruises on left knee and lumber spine. The plaintiff underwent an operation to correct the left foot. I find that the injuries suffered by the plaintiff in the cited case were much more serious than what the respondent sustained. The defence suggested an award of Kshs.30,000/-. Having considered the submissions on quantum, I come to the conclusion that an award of Kshs.100,000/- as general damages was not excessive in the circumstances. I would uphold the same figure of Kshs.100,000/-. The respondent will therefore be entitled to an award of Kshs.100,000/- less contribution of 30% (100,000 x $^{30}/_{100}$ = 30,000). The respondent will therefore be entitled to Kshs.70,000/- in damages. Having partially succeeded on appeal, the appellant will have half the costs of the appeal. The respondent will also have half the costs of the lower court too. It is so ordered.

DATED and DELIVERED this 2nd day of March, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Nyaribo holding brief for Jones & Jones for the appellant.

N/A for the respondent.
Kennedy – Court Clerk.