REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
(CORAM: GICHERU, TUNOI & SHAH, JJ.A.)
CIVIL APPEAL NO. 260 OF 1997
BETWEEN

KABOSWA TEA ESTATE ..... APPELLANT
AND
MOSES LUDENYO AMBWERE .....RESPONDENT

(Appeal from the Judgment & Decree of the High Court of Kenya at Eldoret (Lady Justice R. N. Nambuye) given on 20th March, 1997

in
H.C.C.C. NO. 82 OF 1995)
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JUDGMENT OF THE COURT

This is a second appeal and one from a decision of the superior court (Nambuye, J.) given at Eldoret on 20th March, 1997. The learned judge dismissed with costs the first appeal of Kaboswa Tea Estate (the appellant) from a judgment of 9th June, 1995 of the then Senior Principal Magistrate in favour of Moses Ludenyo Ambwere (the respondent).

The litigation between the parties began in July, 1994 when the respondent filed a suit against the appellant in the Senior Principal Magistrate's Court at Eldoret claiming damages for injuries suffered by him whilst playing football when he collided with a member of the opposing team. In his examination-in-chief the respondent said that the accident occurred as his opponent did "hand touch hitting on me". In cross-examination he said that there was foul play by his opponent.

It is not in dispute that the respondent was employed by the appellant as a lawn mower operator and that on days off the appellant facilitated the playing of football by its employees. It had provided football boots, clothes and socks for use at such football games. It is also not in dispute that the respondent's opponent ran into the appellant and injured him. It is also not in dispute that the foul was on the part of the other player (the opponent). The respondent suffered injuries as a result of the sports accident. He had fracture of the left tibia and left fibula for which he was hospitalized for 3 days and discharged after a plaster of paris had been applied on the injured leg. The injuries healed with some mild deformity of the left leg. The respondent is still in the employment of the appellant.

The main and perhaps the only issue before the two courts below was whether or not an employer is liable for the tort of a member of the opposing team. The learned magistrate who heard the case said:

> "DW1 readily admitted that they are provided with uniform and transport by the company. DW2 readily admitted that the company has a budget for such leisure activities. Consequently the company must provide for any risks that arise during such activities. So long as the company budgets for the uniform, and transport during such leisure activities any employee engaged in such activity is entitled to be compensated for any injuries occasioned to him

during such activities."

With respect, this statement by the learned magistrate went too wide. Sports injuries are not the kind of injuries which occur, normally, as a result of tortious acts although it may seem, in this particular case, that the foul on the part of the respondent's opponent caused injuries.

The learned magistrate failed to consider the fact that the game of football was not being played for the benefit of the appellant. It was a normal sunday pass time for fun and enjoyment of the players. The appellant could not have had any interest in the result of the game. Even if it had a foul on the part of an opposing player causing injury to its employee, does not saddle the appellant with any liability. Such liability is too far-fetched and amounts to stretching too far the doctrine of duty of care.

In the case of CAMBIN VS. BISHOP AND ANOTHER [1941] 2 ALL E.R. 713 it was held that when the plaintiff, a schoolboy of fourteen years, was injured by a clod of earth thrown by another boy whilst they were "ragging" when helping a local farmer on a halfholiday, the defendant (headmaster) escaped liability. Scott L.J., said:-

> "The reality of the whole position was that the boys volunteered for the work (assist in harvesting), that the farmers were glad to have them, and did not ask for masters to supervise them, that the boys knew that they were to be under the farmer's orders, and that, in general, they gave satisfaction. No duty at common law of the kind ever arose."

If every employer were to take precautions to see that there is never any injury at football matches being played by its employees, an impossible or rather a very difficult situation may arise and such employers would start facing actions for all kinds of injuries suffered by the players. Every sportsman knows that he does take some risk of injury whilst actively engaged in sports. Even a jogger takes such risks.

The learned judge also fell in the same error as the learned magistrate. She erred in saying:-

> "Such an employee is also to assume responsibility of injuries sustained in the cause (sic) of such activities as its part of the welfare of the employee in the cause (sic) of his employment."

For these reasons we would allow this appeal, set aside the judgment and decree of the High Court as well as that of the Senior Principal Magistrate's Court and dismiss Eldoret Principal Magistrate Court Civil Case No. 1019 of 1994 with costs. The appellant will have the costs of its appeal here as well as in the superior court. These are our orders.

Dated and delivered at Nakuru this 24th day of February, 1999.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR