



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 273 OF 2013

KENYA NUT COMPANY LTD.....APPELLANT

VERSUS

SAMUEL MAINA MUYA.....RESPONDENT

[An appeal from the judgment of T. Gesora, Principal Magistrate, in Kandara PMCC No. 161 of 2007 delivered on 12th November 2013]

JUDGMENT

1. The core issue is whether the respondent, who was employed as a watchman, was injured *in the course* of his employment when a fellow employee assaulted him.
2. The facts are fairly straightforward. The respondent was asked by his supervisor, *Mwalo*, to quell some commotion at the employees' camp. It was at night. He found a fellow watchman named *Shimenga* fighting with his wife. When he intervened, *Shimenga* assaulted him with an object that hit him on the right eye. The respondent blamed the company for not providing him with protective gear or a safe system of work.
3. The appellant on the other hand contended, among other things, that it cannot be liable for the criminal conduct of another employee.
4. The learned trial magistrate found that the appellant was liable at the ratio of 75:25. He assessed general damages at Kshs 130,000; special damages at Kshs 2,000; and the doctor's attendance fees of Kshs 8,000. The respondent was also granted costs and interest.
5. The memorandum of appeal was lodged on 11th December 2013. There are eight grounds which can be condensed into three. Firstly, that liability was not proved; secondly, that the submissions by the appellant were not taken into account; and, thirdly, that the award of damages was manifestly excessive.
6. I granted directions on 18th September 2018 that the appeal be canvassed through written submissions. The appellant filed submissions on 15th February 2019 while those by the respondents were lodged on 16th November 2020.
7. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.
8. In paragraph 5 of the plaint dated 2nd August 2007, the respondent (who was the plaintiff in the lower court) pleaded that that on 11th July 2007, he was guarding the stable and workers' camp "*when due to the defendant's negligence, breach of duty of care and contractual obligations one of the defendant's employees came and hit him as a result of which the plaintiff sustained serious injuries*" [underlining added].
9. At the trial, the respondent slightly departed from his pleadings and told the trial court that he had intervened in the domestic fight when *Shimenga* assaulted him. Although the appellant takes up cudgels on this issue, I find that it was a matter of poor draftsmanship by the respondent's counsel but which still conveyed the fact that a fellow employee assaulted him at work.
10. The legal burden of proving negligence or breach of any statutory duty of care fell squarely on the respondent's shoulders. See section 107 of the **Evidence Act**.

11. In its amended statement of defence dated 17th December 2007, the appellant *conceded* that the respondent was its employee. It also admitted at paragraph 4A that it was under a duty to “*provide the respondent with a safe working system*”.

12. The attack occurred on the night of the 11th July 2007. Although the appellant denies the incident, its sole witness Albert Njagi (DW1) freely conceded that “*there is an entry for Samuel Muya for an eye injury he was referred to Naidu Hospital, the injury is on the right eye. It is not indicated how the injury occurred*”. He insisted that the injury occurred on 12th July 2007. From my re-appraisal of the evidence, the incident occurred on the night of 11th July 2007. It is then not surprising that the company records were made the following morning when the clinic opened. What is material is that the appellant admits the injuries as pleaded by the respondent.

13. It is also clear that at the time of the attack, the respondent had no helmet but he had some bow and arrows. The appellant did not controvert the evidence by the respondent that he was instructed by his supervisor, *Mwalo*, to quell the commotion at the workers’ camp when he was assaulted by *Shimenga*. Had he volunteered to intervene in the domestic squabble the matter would be different. But he was following his employer’s instructions and got injured in the process.

14. I thus readily find that the respondent was injured in the course of his employment; and, that he had not been well kitted with a helmet. The liability of the appellant thus attaches. See *Makala Mailu Mumende v Nyali Golf Club*, Court of Appeal, Mombasa, Civil Appeal 16 of 1989 [1989] eKLR. Nevertheless, the respondent should have been a little more cautious and avoided some injury. It remained his *primary duty* to keep a safe look out. I thus concur with the learned trial magistrate that the respondent should shoulder contributory negligence of 25%.

15. I will now turn to quantum of damages. An appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. *Butt v Khan* [1982-88] KAR 1.

16. From the medical report by *Dr. Kiama Wangai* dated 22nd August 2007 (exhibit 5) the respondent suffered a cut wound, blood loss, pains and soft tissue *injuries* which had healed with no long-term disability. The treatment given comprised of antibiotics and analgesics. I thus find, with respect, that the general damages awarded by the lower court of Kshs 130,000 were too high as to disclose an error of principle.

17. In *Sokoro Saw Mills Limited v Grace Nduta Ndungu*, High Court, Nakuru, Civil Appeal 99 of 2000 [2004] eKLR the court found that general damages of Kshs 30,000 were adequate for soft tissue injuries. Granted the nature of the injuries in this case, the age of the above precedent and inflation, an award of Kshs 70,000 was more than sufficient. The special damages of Kshs 2,000 were specifically pleaded and strictly proved by the respondent. I also decline to interfere with the doctor’s attendance fees of Kshs 8,000.

18. The decree is hereby set aside. Instead, there shall be a total award of damages of Kshs 80,000 less 25% liability. The appellant shall thus pay the respondent Kshs 60,000.

19. Costs follow the event and are at the discretion of the court. I will grant the respondent costs and interest in the *lower court*. As the appeal has partially succeeded, each party shall bear its own costs in this *appeal*.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 25TH DAY OF MARCH 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant.

No appearance by counsel for the respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.