

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 515 OF 2011

PEMWE SERVICE LIMITED.....APPELLANT

VERSUS

BENEDICT WOTE VINDU.....RESPONDENT

(Being an appeal arising from the Judgment and Decree of the Senior Resident Magistrate Court of Kenya at Nairobi (Hon. Mr. P. Ndikita) SRM dated 16th September, 2011 in Civil Suit No. 63600 in 2010)

JUDGMENT

The respondent brought a suit against the appellant following injuries he sustained in the course of his employment. He was employed as a night guard supervisor and on the night he was injured, he was performing duties assigned by the appellant. The brief facts are that, while in the course of performing his designated duties, he was attacked by thugs leading to injuries set out in the plaint. He blamed the appellant for breach of statutory duties or contract of employment and claimed damages as a result. The appellant denied the respondent's claim and instead blamed him for ignoring safety regulations and exposing himself to injury. He was further blamed for failure to use protective items and working contrary to instructions of the employer. The appellant further relied on the doctrine of *volenti non fit injuria*.

In a brief judgment, the trial court found the appellant 100% liable for reasons that, the appellant had a duty of providing safe working conditions but had not supplied the respondent with a helmet. Although he was supplied with a baton, the defendant knew that there was duty owed to the respondent. It is true that the lower court judgment was rather sketchy but the trial court correctly framed the most important issue for determination which he determined in favour of the respondent.

Having found the appellant liable, the trial court awarded Kshs. 130,000/= general damages, plus Kshs. 3,473/= special damages. The appellant was aggrieved by this judgment and lodged this appeal. In the Memorandum of Appeal the appellant complained that the court failed to consider the fact that apart from providing a baton, there were numerous protective measures which were in place for the benefit and safety of the respondent. In addition, even if the respondent had been provided with a helmet, that could only have prevented injury to the head alone.

The lower court was also faulted for failing to consider the differences in the P3 Form and notes from St.James Hospital regarding the injuries sustained by the respondent and also submissions and authorities cited. The lower court was also faulted for failing to give a reasoned judgment, and lastly that the damages awarded were grossly excessive in the circumstances.

Both parties filed the submissions which I have noted. Whereas it is true that taking up any job has its own risks, it was upon the appellant to ensure that there was sufficient provision to protect the respondent.

It cannot be said that the maxim *volenti non fit injuria* applies in this case. This is because such a principle applies when one has undertaken, invited or accented to an act being done towards him and the result suffers therefrom. That being the case, one cannot complain. I have found no blame that can be assigned to the respondent in the circumstances of this case.

On damages, the respondent produced a report prepared by Dr. Cyprianus Okoth Were. According to this report he suffered deep cuts on the right eye brow, blunt injury on the scalp, bruise on the left leg, blunt injury on both elbows and bruises on the back. The trial court listed the injuries in the judgment. One decision was cited in the judgment.

I have looked at the submissions before the lower court and in this appeal. Comparable injuries should attract comparable awards. The appellate court may not disturb the awards by the trial court unless they are inordinately high or low so as to reflect a wrong assessment or where the trial court applied wrong principles.

I am unable to find any wrong assessment going by the injuries sustained, the medical report and the cited authorities. My assessment of the evidence is that the trial court reached the correct decision both on liability and award of damages. This appeal is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE