REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 109 OF 2014

NKARUARAU LEJUMURT.....APPELLANT

VERSUS

VEGPRO (K) LIMITED T/A KANTARA FARM.....RESPONDENT

(An appeal against the original judgment and decree of Hon. D.K. Karani (SPM) delivered on 28th May, 2014 in Yatta Principal Magistrate's Court Civil Case No. 8 of 2013)

JUDGMENT

The Appellant sued the Respondent in the original suit in Yatta Principal Magistrate's Court Civil Case No. 8 of 2013 seeking recovery of damages from an accident that was alleged to have occurred on 3rd September, 2012. He averred that he was on the material day lawfully in the course of his work, when the Respondent's supervisors negligently assigned him duties of guarding the Respondent's office. That while on duty, he was attacked by unknown thugs as a result of which he suffered traumatic injury to the right leg, blunt trauma to the right hand, deep cut right upper limb, traumatic mild head injury and multiple soft tissue injury.

The Appellant thereby sought general damages and special damages of Kshs 2,000/=. The learned trial magistrate in a judgment delivered on 28th July 2014 found that the Appellant had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the Respondents.

The Appellant being dissatisfied with the said judgment, filed a Memorandum of Appeal dated 27th June 2014 appealing against the judgment. The grounds of appeal are as follows:

i. The learned trial magistrate erred in law and in fact in dismissing the suit contrary to the weight of evidence before him.

ii. The learned trial magistrate erred in law and in fact by failing to appreciate that appellant discharged the duty of establishing that he was an employee of the respondent.

iii. That the learned trial magistrate erred in law and in fact in believing in whole testimony of the respondent and disregarding the appellant's testimony.

iv. That the learned magistrate failed to properly and or at all evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.

v. The learned trial magistrate erred in law and in fact in disregarding the appellant's submissions on both liability and quantum.

The Appellant is praying for orders that the appeal be allowed, and that the judgment delivered on 28th May 2014 be set aside, vacated and/or replaced with an order which this Court may deem fit.

The Facts

The Appellant in the Plaint dated 16th January 2013 filed in the trial Court averred that it was an implied term of his employment for the Respondent to take all reasonable precautions for his safety while he was engaged upon his work, not to expose him to risk of damage or injury of which the Respondent ought to have known, and to provide work safety.

The Appellant blamed the Respondent for the damage he suffered and stated that the Respondent breached their contract. The said breaches were particularized as follows:

a) Failure to instruct the Appellant as to dangers involved in the said work and precautions to be observed.

b) Failing to provide any and or adequate supervision.

c) Failing to provide any protective devices.

In his evidence during the hearing in the trial Court, the Appellant testified as PW1 and stated that he was employed as a watchman by Lavington Security and was on the material day on placement with the Respondent. That while on duty, he was attacked by robbers who assaulted him occasioning him injuries. He testified that he received treatment at Donyo Sabuk Nursing Home and was referred to hospital. He was later examined by Dr. Gitau who prepared a medical report to that effect. The Appellant produced the treatment notes and referral letter as his Exhibit 1 and 2 respectively.

On cross examination, he stated that he was guarding the office while others were guarding the gate. He stated that he had not been issued with a whistle and was taken to hospital by his co-workers. Further, that the Respondent paid his hospital bill but that he was later sacked from employment. He however stated that he was not issued with a letter of dismissal from work. The medical reports by Dr. Maina (D. Exhibit 1) and Gitau (P. Exhibit 3) were produced by consent.

The Respondent denied the Appellant's claim in its statement of defence dated 5th February, 2013. It was particularly denied that the appellant was in the course of his employment as a guard while he was attacked and that he was injured as alleged. The particulars of breach of the alleged contractual obligation were also denied.

Esther Wambui Maina (DW1) who was the Respondent's administration assistant admitted that the Appellant was on duty as a watchman on the material day. She stated that a report was made to the office that the Appellant had been attacked by robbers and admitted to Donyo Sabuk Nursing Home. She testified that she visited the Appellant and the Respondent paid the hospital dues. That upon discharge, the Appellant returned to work but stated that he had not fully recovered. He was given a referral to Donyo Sabuk Health Centre from where he was referred to Thika Level 5 Hospital. That he was given money for treatment but never returned to work. She stated that the Appellant was never fired from work.

On cross examination, DW1 admitted that the Appellant sustained injuries on 3rd September, 2012 while at work and was admitted in hospital from 3rd September, 2012 to 6th September, 2013.

Cleopas Odhiambo Ogalo (DW2) who is the maintenance co-ordinator and serves on the management team and is also a first aider and trainer for security personnel recounted that he was on the material day on duty till 5.00 pm. He confirmed that the Appellant was also at work on the material day and had been employed as a watchman. The witness testified that he received a report in the morning that one of the guards had been injured. He stated that the security guards were provided with uniform, whistle and torches and that there is also sufficient lighting. That it lights the area under guard to the extent of 100 meters. He also stated that the guards are trained to raise alarm in the event such a situation arises. He however stated that the guards are not supplied with weapons.

On cross examination, he stated that he was on night duty but that he cannot tell whether or not the appellant was in uniform. He also stated that he could not tell who was at the gate, and that he could not be able to see the attackers from the gate.

The Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, Orina & Co. Advocates, filed submissions dated 3rd February 2017, while the submissions filed by Respondent's Advocates, Mahida & Maina Company Advocates, are dated 3rd March 2017.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellant is contesting the findings of the trial Court on liability and quantum of damages. As the fact that the Appellant was in the employment of the Respondent when he was injured is not disputed, the issues before this Court for determination are firstly, whether the Respondent is liable for the injuries suffered by the Appellant, and secondly if so, whether the Appellant is entitled to any damages and if so, the quantum.

The Appellant's submissions on liability were that DW1 and DW2 affirmed that he was lawfully employed by the Respondent as a watchman and was at the material time working with the Respondent, and that his allegation of injury was proved. Further, that since the appellant could not see the attackers from the gate, the Respondent ought to have constructed a raised point from where the guard could view the premises and raise alarm. It was argued that DW2 did not mention that there was such a raised place.

The Appellant contended that the Respondent's premises were big and insecure to be guarded by one person, and that the Respondent failed to properly manage the appellant's work in the circumstances risking his life. The Appellant on the issue of failure of provision of safe working condition cited **Mumende vs Nyali Golf and County Club (1991) KLR 13**. It was also submitted that the medical reports by Dr. Gitau and Maina Ruga confirmed his pleaded injuries, and that the Appellant would adequately be compensated by general damages of Kshs 350,000/=.

The Respondent on the other hand submitted that it is not in dispute that the Appellant was its employee, and that he was injured at the Respondent's farm. That what is in dispute is whether or not the Respondent was to blame for the accident. Further, that it would be wrong to shift the burden to a Defendant to call witnesses to confirm assertions which a Plaintiff did not raise in examination in chief. In this regard, the Respondent cited **Kiptangich Tea Estates Limited vs John Kimitei Koros [2012] eKLR** and it was submitted that it was upon the Appellant to prove the negligence of the Respondent. The Respondent also relied on section 107 of the Evidence Act and the decision in **Zakayo Wanzala Makomere vs West Sugar Co. Ltd (2013) eKLR**.

According the Respondent, the Appellant failed to prove the negligence of the Respondent by stating in succinct terms how he thought the Respondent was liable for the injuries sustained. It was submitted in this respect that the Appellant was not only required to prove that he was an employee and was injured while on employment, but also that the Respondent breached his duty as an employer to safeguard his interests while he was on duty. The respondent cited various legal and judicial authorities in support of this assertion.

On quantum of damages, it was submitted that the trial court properly considered the submissions on quantum by both parties, and that the trial court's decision to reject the claim for special damages was in order since the said was not proved. It was further submitted that the claim for general damages should also be rejected, and that in the event this court finds it in favour for the Appellant an award of KShs. 100,000/= suffices.

The legal principles that regulate the relationship between an employer and employee as regards the duty to provide a safe working environment is described in **Halsbury's Laws of England 4th Edition, Vol.16 par.562**, as follows:

> **"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."**

The Court of Appeal in the case of **Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47** also held that that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.

Therefore, the Appellant needed to establish in the trial Court that the Respondent failed to exercise reasonable care for his safety against risks which were reasonably foreseeable. The Appellant in this respect testified that while at work he was attacked by the robbers, and that he screamed and was tied up. Further, that the Respondent did not provide him with a whistle. The Respondent on the other hand contended that that it provided the Appellant with a uniform, whistle, and torches.

The facts in my view speak for themselves, and the provision of the stated protective gear by the Respondent was also not only contested by the Appellant, and even if provided, was not adequate to protect the Appellant against the risk to which he was exposed to whilst responding to the attack by robbers. There was need for the Respondent to better address the risk of the Respondent having to deal with intruders who may be armed with dangerous weapons, by the very least providing him with some self-defence tools including a baton and communication gadgets in addition to a whistle.

In **Mumende vs Nyali Golf & Country Club, [1991] KLR at Page 20** the Court of Appeal had this to say on this requirement:

> **"Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measure of protection".**

I therefore find that the Respondent did not in the circumstances provide the Appellant with the necessary working tools to ensure his safety in the event of any eventual risk. Consequently, I do find that the trial court failed to properly evaluate the evidence, and apply the applicable legal principles on liability.

On the question of quantum of damages, it is not disputed that the Respondent suffered injuries from the attack by robbers. Two medical reports were produced as evidence on the injuries. The Appellant relied on the report by Daktari Gitau dated 8th January 2013 which noted that the Appellant suffered traumatic injury to the right leg, blunt trauma to the right hand, a deep cut in the right upper limb, a traumatic mild head injury and multiple soft tissue injuries. The report by Dr. Maina Ruga dated 7th October 2013 relied upon by the Respondent noted that the Appellant suffered mild head injury and soft tissue injuries to the harm which healed with no permanent incapacity.

The applicable legal principles on an award of damages in such circumstances, are that a sum should be awarded which is in its nature of a conventional award in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard **Kemp & Kemp on The Quantum of Damages, Volume 1** at paragraph 1-003. In my view to be comparable the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provisions for adjustment.

The Appellant proposed a quantum of Kshs 350,000/= as general damages, while the Respondent proposed Kshs 100,000/=. I also note that the authority relied on by the Respondent in the trial Court being **Kiwanjani Hardware Limited & Another vs Nicholas Mule Mutinda (2008) e KLR,** where damages of Kshs 150,000/= were awarded for similar injuries, is comparable. The trial Court found that it would have awarded Kshs 160,000/= as general damages. I therefore find that an award of Kshs. 200,000/= as general damages is reasonable in the circumstances. I however agree with the Respondent that no receipts were produced by the Appellant to prove the special damages claimed of Kshs 2,000/=.

The upshot of the foregoing is that the appeal herein is allowed as follows:

1. The judgment of the trial Court with respect to liability is set aside.

2. The Respondent is hereby found liable for the injuries suffered by the Appellant arising from an attack by robbers at the Respondent's premises on 3rd September, 2012.

3. General damages are awarded in favour of the Appellant as against the Respondent in the sum of Kshs 200,000/= with interest at court rates from the date of this judgment.

4. The Respondent shall meet the costs of the trial and of this appeal.

It is so ordered.

DATED AT MACHAKOS THIS 14TH DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE