



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL APPEAL NO. 69 of 2017**

**EVANS OKUKU KHADULI.....APPELLANT**

**VERSUS**

**DAROSS SECURITY FIRM.....RESPONDENT**

*(Being an Appeal from the Judgment and Decree Hon.W.K.Onkunya (SRM) in Kisumu CMCC NO.05 of 2016 delivered on 8th September, 2017)*

**JUDGMENT**

1. **EVANS OKUKU KHADULI** sued (*hereinafter referred to as appellant*) sued **DAROSS SECURITY FIRM**(*hereinafter referred to as respondent*) in the lower court claiming damages for injuries allegedly suffered on 16th October, 2015when he was assaulted by the respondent's agent and/or servant.
2. The defendant/respondent filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.
3. In a judgment delivered on **8th September, 2017**,the learned trial Magistratefound that the appellant had not proved his case and dismissed it with costs to the respondent.

**The Appeal**

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 15h September, 2017 filed the Memorandum of Appeal dated 1st September 2017 which sets out 6 grounds of appealwhich I have summarized into 3 grounds to wit:-

- 1) **The Learned Magistrateerred in law in not finding that there was liability on the part of the respondent**
- 2) **The Learned Magistrate erred in law in taking into account irrelevant issues**
- 3) **The Learned Magistrate failed to take into account the relevant**

**SUBMISSIONS BY THE PARTIES**

5. When the appeal came up for mention on 19.12.17; the partieswere directed to canvass it by way of written submission which they dutifully filed.

**Appellant's submissions**

6. Appellant holds the view that having proved that he was an employee of the respondent and assaulted by respondent's operations manager, respondent was vicariously liable. He relied on Josephat Aoko Odongo V Eldoret Steel Mills Ltd[2013] eKLR.

### Respondent's submissions

7. Respondent holds the view that respondent is not liable since appellant did not prove that he was an employee of the respondent, respondent cannot be vicariously liable.

### The evidence

8. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.*

9. The duty of the first appellate court was explained in the case of JABANE VS OLENJA [1986] KLR 661

*“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi - vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”*

10. Appellant testified that he was assaulted by the respondent's operations manager and he suffered injuries.

### Analysis and Determination

11. I have perused the entire record of appeal and considered the submissions by counsels for both parties.

12. Although the issue of capacity was not raised before the trial court and before this court, this court will have failed in its duty if it fails to address that issue in this judgment. The respondent is sued as a firm. It is trite law that a firm is not a person, either natural or artificial and it cannot sue or be sued in the firm name.

13. From the foregoing therefore, I find that this suit was a non-starter *ab initio*.

14. While it is the duty of advocates to cite relevant authorities to guide the trial court, no cases on assault by employees were cited by counsel. Josephat Aoko Odongo V Eldoret Steel Mills Ltd[2013] eKLR cited by the appellant is a case where the respondent was found vicariously liable for an injury on the plaintiff's foot suffered due to failure by the respondent to provide him with gumboots.

15. The learned trial magistrate looked up the meaning of Vicarious Liability which means:

***“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”***

16. The magistrate also looked at the textbook, **CLERK & LINDSELL ON TORTS** 18<sup>th</sup> Edition, (London sweet & Maxwell, 2000), where the authors stated:-

***“It is, in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of a discretion vested in the employee.....”***

17. In the English case of **WAREN –VS- HENLYS LTD (1948)** 2 All E.R .935, erroneously believing that the plaintiff had tried to drive away from the garage without paying or surrendering coupons for petrol which had been put into the tank of his car, a petrol pump attendant used violent language to him. The plaintiff paid his bill and gave up the necessary coupons, and after calling the police, told the pump attendant that he would report him to his employers. The pump attendant then assaulted and injured him. In an action for damages for personal injury by the plaintiff against the employers, it was held that the Defendants were not liable for the wrongful act of their employee, since that act was done of personal vengeance on the employee’s part and was not done in the course of his employment, it not being an act of a class which the employee was authorized to do or mode of doing an act within that class. The Judge referred to **SALMOND ON TORTS**, 10<sup>TH</sup> Edition p.89-90 in which it was stated:-

***“ A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.....if the unauthorized and wrongful act.....is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible:- for in such a case the servant is not acting in the course of his employment, but has gone outside of it.”***

18. There is no allegation or evidence that the assault was authorized by respondent and neither is use of any violence or assault a mode of carrying out the errand of answering a request for an advance pay. In my view, the duty of an employer is to take reasonable care for the safety of an employee and the evidence did not show any negligence on the part of the respondent.

19. From the foregoing, I find that the trial magistrate’s finding of fact that there was no evidence that the assault on the appellant was sanctioned by the respondent was well founded and judicious and there would be no justification in disturbing that finding.

20. In the result the appeal is found to have no merit and it is dismissed with costs to the respondent.

**DATED AND DELIVERED THIS 8TH DAY OF MARCH 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix & Carolyne**

**Appellant - N/A**

**Respondent - Mr Omondi/Adiso**