**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 29 OF 2010**

**EQUATOR BOTTLERS LTD……………………………………APPELLANT**

**VERSUS**

**ODWORI AOLU ONGOMA……………………………………RESPONDENT**

**(Appeal arising from the judgment and decree of Njagi, R.M. in Busia Chief Magistrate's Court P.M.C.C. No. 113 of 2007 delivered on 12th May, 2010*)***

# JUDGMENT

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Busia by Odwori Aolu Ongoma, hereinafter referred to as the Respondent against Equator Bottlers Ltd, hereinafter referred to as the Appellant.

2. The Appellant dissatisfied with the decision, filed an appeal and in it raised the following grounds:

> **"1. That the learned trial magistrate erred in law and in fact in entertaining and or allowing the respondent's claim yet the same was filed out of time, was statute barred and incompetent as the respondent did not tender any or any legally acceptable grounds for the delay in the institution of this suit as envisaged in the Limitation of Actions Act.**
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> **2. That the learned trial magistrate erred in law in allowing the respondent's claim yet the respondent had failed to prove that he was injured while on duty or in the scope of the appellant's employment or in the appellant's premises and the trial magistrate further erred by finding the appellant liable for the criminal acts of third parties or strangers to the appellant which were unforeseeable and the magistrate shifted the burden of proof.**
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> **3. That the trial magistrate erred in law and in fact in finding in favour of the respondent yet his testimony that he was injured while on duty as a guard sharply contradicted his pleadings which were that he was injured in a road accident and the trial magistrate ought to have held that the respondent was bound by his pleading and dismissed his case with costs.**
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> **4. That the trial magistrate erred and failed to find that the respondent failed to take any or any reasonable measures to avoid the mishap and that the respondent being the sole author of his own misfortune was entirely liable for the same and that the appellant did not cause or contribute to the incident and the trial magistrate ought to have found the respondent wholly liable and totally absolved the appellant.**
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> **5. That the learned trial magistrate erred in law and fact in finding that the appellant was 100% liable in negligence when the respondent had not proved negligence against the**

**appellant or established his case on a balance of probability as required by the law or at all.**

**6. That the learned trial magistrate erred in law by failing to invoke the applicability of the doctrine of *volenti non fit injuria* when both the circumstances of the case and the respondent's testimony pointed to the relevance of the doctrine in this matter.**

**7. That the learned trial magistrate erred in law in awarding the respondent general damages of Kshs. 90,000/= which award is inordinately high, erroneous, too excessive and unjustifiable in the circumstances considering the nature of the injuries allegedly suffered by the respondent and comparable awards and she did not apply the correct principles in determining quantum.**

**8. That the trial magistrate erred by admitting and relying on the purported receipts or documents which were inadmissible in law as they did not bear revenue stamps as required by the stamp duty act hereby erroneously making an award on account of special damages which sum had not been specifically pleaded and strictly proved as required by law or at all.**

**9. That the learned trial magistrate failed to identify and or determine the correct issues or at all and her judgment was arrived at in a cursory and perfunctory manner and the judgment and all the orders were unfair, improper, biased, erroneous and indefensible and have occasioned a serious miscarriage of justice."**

3. A duty is placed upon a first appellate court to re-evaluate the facts afresh, assess them and make an independent conclusion noting that it did not have an opportunity to see or hear the witnesses testify first-hand. It is not bound to follow the trial court's findings of fact if it appears that the trial court failed to take into account particular circumstances-see **Selle & another v Associated Motor Boat Company Ltd and others [1968] E.A.123.**

4. The Respondent alleges that at the material time of the incident, he was employed by the Appellant as a security guard. He sued the Appellant for general and special damages arising from injuries suffered by him on or about 1st April, 2000, during the course of his employment with the Appellant. The Respondent's case was that he suffered the injuries as a result of the Appellant's negligence and or breach of duty.

5. The Appellant filed a defence to the Respondent's claim. It denied the claim contending that it never owned motor vehicle registration number KAJ 391K or that the Respondent was injured in the course of his employment. The Appellant pleaded that the injuries were a result of negligence on the part of the Respondent. The Appellant further relied on the doctrine of *volenti non fit injuria* contending that it cannot be held liable for the criminal acts of strangers and or third parties.

6. During the trial, the Respondent testified that on 1stApril, 2000, whilst at Kisumu, the Appellant's bus picked him up at around 9.30p.m. from his house to take him to work. On the way one of the tyres of the bus burst. The driver left stating that he was going to get another vehicle to ferry them. He was in the company of one Erastus Obonyo. This was not the case because at midnight the driver had not returned. It was during this time that thugs descended on them and beat them up. The Respondent claimed that had the driver of the company not left them there, they would not have been attacked.

7. The Appellant on the other hand called one witness, a transport superintendent in charge of transportation and the workshop. His evidence was that the Respondent was illegally in the company vehicle as those who are entitled to transportation are the permanent personnel. Upon cross-examination he confirmed that he was not present when the incident occurred and neither did he know the Respondent nor did he know if he was on contractual or permanent terms.

8. Both parties filed written submissions in arguing this appeal, each side urging the Court to find in their favour.

9. The Appellant began by submitting that the plaint in itself was a non-starter as the verifying affidavit had material contradictions to it. Secondly, that the claim was filed out of time and no adequate reasons were given for the delay in institution of the suit as is required by sections 27, 28 and 30 of the Limitation of Actions Act, Cap. 22 (LAA). Lastly, the Appellant submitted that even if the Respondent's claim had been competent, it was not proved to the standard required in law or at all. According to the Appellant, the Respondent failed to prove that he was an employee of the company and did not exhibit an employment contract. Further, that if the Respondent was indeed an employee, his work was limited to guarding the premises and not the bus.

10. The Respondent on the other hand through his written submissions answered by saying that the purpose of a verifying affidavit is to verify the correctness of the averments contained in a plaint pursuant to the provisions of Order 4 Rule 1(1) (f) of the Civil Procedure Rules, 2010 (CPR). The Respondent asserts that the Appellant's argument therefore goes against the spirit of the Constitution as conveyed by Article 159(2)(d) which requires that justice be administered without undue regard to procedural technicalities.

11. On the issue that the suit filed was time-barred, the Respondent stated that extension of time was allowed by the Court in conformity with the requirements of sections 27 and 28 as read together with Section 30 of the LAA. The Respondent contends that the Appellant had an opportunity to raise the issue during trial but withdrew his objection to limitation.

12. In my view, the appeal can be consolidated into the following four issues:

(a) Did an employer-employee relationship exist between the Respondent and the Appellant?

(b) Was the Respondent injured during the course of his employment?

(c) Did the Appellant owe a duty of care to the Respondent?

(d) Was the decision to allow the Respondent to file his claim out of time legally sound?

13. Before proceeding to consider the identified issues, I will consider the question as to whether there was a proper plaint before the trial court. The Appellant contends that the Respondent had in his verifying affidavit in support of his plaint averred that he was involved in a road traffic accident but in the plaint he had stated that he was guarding a staff bus that had broken down. It is the Appellant's case that the affidavit does not verify the correctness of the contents of the plaint. The Respondent asserted that this was a typographical error that occurred in the office of his counsel.

14. Order 4 Rule 2 of the CPR provides that:

> **"The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above."**

Rule 1(1)(f) states that:

> **"(1) The plaint shall contain the following particulars-**
>
> **(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint."**

15. The verifying affidavit of the Respondent sworn on 22$^{nd}$ March, 2007 fully complied with the requirements of Order 4 Rule 2 which only requires a plaintiff to depose that there has never been any other proceedings over the same subject matter between the parties and that the suit relates to the plaintiff named in the plaint. The Respondent's averment as to how the cause of action arose was a superfluous statement which cannot be used to deny him justice. The particulars of the cause of action are found in

the plaint. The Respondent clearly stated in the pliant that he was attacked and injured while guarding the Appellant's bus which had stalled.

16. Turning to the substantive grounds of appeal, I note that the Appellant submitted that there existed no employment relationship with the Respondent. It further claimed that there was no contract of employment at the time the attack occurred. In his testimony the Respondent told the trial court that he was working for the Appellant as a security officer. The Appellant did not adduce any evidence to controvert the Respondent's case. The Appellant never produced any list of those who worked for it at the material time. It is also noted that the only witness (DW1 Michael Ochieng Opiyo) called by the Appellant was not in its employment in the year 2000, when the attack occurred. His evidence could not be used to dislodge the Respondent's assertion that he was an employee of the Appellant at the time the incident occurred.

17. The trial court considered the question as to whether the Respondent was an employee of the Appellant and correctly concluded that he was. In reaching that decision the Court found that:

> "**Although DW1 denied that the plaintiff was an employee of the defendant at the material time, the defence did not deny having executed exhibit 3 herein, a notice by employer of accident causing injury to or death of workman. The same shows it was filled and signed by the personnel manager of the defendant. It lists the defendant as the employer and the plaintiff as the workman as a security guard as at the date of the date herein question 1/4/2000 more so DW1 in cross examination testified that he was not in a position to dispute employment of the plaintiff then as at 1/4/2000, he was working for the defendant as a security guard."**

18. The Appellant denied the incident ever occurring. The Respondent on the other hand produced documentation to show that he was involved in the attack on the material date.The Respondent's case was supported by a document prepared by the Appellant showing that the Respondent who was an employee of the Appellant had been injured when guarding the Appellant's bus on the material night. Exhibit P3 proves that he was injured during the course of his employment.

19. Having taken care of the first two issues, I now move to the third issue. In **Mwanyule v Said t/a Jomvu Total Service Station[2004] 1KLR 47**the Court of Appeal held that an employer owes no absolute duty to an employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which could be prevented by taking reasonable precaution. In the matter before this Court the Respondent then had to establish that the Appellant failed to exercise reasonable care for his safety against risks which were reasonably foreseeable.

20. The Respondent was employed as a guard by the Appellant. On the material date of the incident, he was picked up from his home by the company vehicle which was to ferry him to work. Along the way, the bus had a tyre burst and the driver requested that the Respondent and a colleague stay guard in the vehicle as it did not have a spare wheel until he got another bus or a spare wheel. Particulars of negligence were specifically pleaded in the plaint.

21. The bulwark of the Appellant's case was that it was not liable for the Respondent's injuries as the same were as a result of unlawful and criminal activity on the part of strangers, or negligence on the part of the Respondent or a risk assumed by the Respondent.

22. From the evidence given in the trial court, it is clear that the Respondent, though given a uniform, club and a whistle as his working gear, his tools of trade were left at work at the end of duty. The attack occurred during travel to work. There was no evidence led to show that the Respondent put himself in a dangerous situation so as to support the Appellant's allegation of negligence on the part of the Respondent.

23. The duty of a watchman is to guard the property of the employer against theft or destruction. The Respondent was attacked while executing his duty and it was reasonably foreseeable that he could be

attacked while performing his duty. It is part of an employer's duty to ensure that once employees board its vehicle to work, they arrive at work safely. Given the threat that the breakdown caused to the Respondent, it cannot be said that the attack was unforeseeable. The Appellant ought to have ensured that the vehicle had a spare tyre. The attackers' action must be looked at in the context of the Appellant's duty to protect its' employees whilst being ferried to work. The decision of the Court of Appeal in the cited **Mwanyule** case is thus not applicable to the facts of this case as in that case a petrol station attendant was attacked at his work station and the employer had demonstrated that it had done all what it could do in order to secure the work environment. In the case at hand there is no evidence on record to show that the Appellant did anything in order to evacuate the Respondent from where the bus had broken down.

24. Lastly, the Appellant challenged the decision of the trial court on the issue of extension of time to file suit. On that issue the learned magistrate held that:

> **"However, the record shows that on 22/8/07, the plaintiff's application dated 1/6/07 praying for leave to file this suit out of time was allowed…. However I find that once the leave was granted, the same became a court order that cannot be legally challenged by way of submissions. I thus find the lifetime within which the plaintiff could file his suit was duly extended. The suit is therefore properly in court."**

The trial court was stating that once leave is granted to file suit out of time the same could not be challenged thereafter.

25. The law applicable to the issue that was placed before the trial court was expounded by Gachuhi, JA in **Oruta & another v Nyamato [1988] eKLR** thus:

> "**The respondent having obtained leave to file action as required by the Law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an order *ex-parte* will be rendered nugatory. In my view O'Kubasu J was right in refusing the appellant's application to discharge the *ex-parte* order. Likewise I would refuse the appellant's appeal. The appellant can raise the objection at the trial and the trial Judge will have to deal with the matter on the evidence to be adduced at the trial**."

The principle laid down in the above case is that once leave is granted to file suit out of time the same can only be upset during the trial.

26. It is noted that at paragraph 3 of the statement of defence dated 11thOctober, 2007, the Appellant had contended that **"this suit is incurably defective, statute barred, a non-starter, incompetent, unmaintainable and or untenable in law and it ought to be struck out and or dismissed with costs."**

27. The issue of the suit having been filed out of time was raised as a defence. In fact the Respondent had in a reply to the defence dated 15th November, 2007 stated that "**the issue of statute-barrement, if any was cured by legal extension."**

28. This was a live issue before the trial court and there was need to look at the evidence adduced in support of the application for extension of time vis-à-vis the arguments of the Appellant against the decision of the court to extend the time for filing suit. In my view, the trial magistrate therefore erred in holding that the limitation question could not be addressed.

29. The trial magistrate was under a duty to consider whether the Respondent had given sufficient reasons to warrant the extension of time. As per Section 27(2) of the LAA it was necessary for the Respondent to prove that material facts relating to the cause of action were or included facts of a decisive character which were at all times outside his knowledge (actual or constructive).

30. This court has had the opportunity of looking at the ex-parte chamber summons application dated 18th June, 2007together with the supporting affidavit thereof, which gave life to the suit. A reproduction of

paragraphs 4, 5 and 6of the supporting affidavit is necessary:

> “4. **That I presented the P3 Form to my employer for purposes of having it filled by the Company Medical Practitioner for compensation under the Workman’s Compensation Act but the same forcefully retained it and it was not until 4.5.2006 that they released it on the intervention of my Advocates.**
>
> **5. That the P3 Form included facts of a decisive nature including the assessment and degree of injury which were not within my knowledge unless filled.**
>
> **6. That I could not file my claim without the said document.”**

31. The Respondent relied on the fact that the he could not file suit without the P3 form, whose contents he was not aware of. Ordinarily, leave to file suit out of time will not be granted unless an applicant proves that material facts relating to his cause of action were at all times outside his knowledge.

32. In this case, the contents of the P3 were outside the Respondent’s knowledge. According to him, it took the intervention of his counsel to have the P3 form released to him. He could therefore seek refuge under the provisions of Section 30 of the LAA, as he needed the opinion of a professional on the nature of injuries sustained before he could make his move. In any case his allegation that the Appellant held onto his P3 form was not dislodged and it would have been unjust to allow the Appellant to benefit out of its unfair act of denying the Respondent the P3 form.

33. Furthermore, the Appellant did not adduce evidence at the hearing to rebut what the Respondent had told the court at the time of seeking extension of time. The magistrate therefore had no material upon which to find that the extension of time to bring the claim was not proper. The trial court in granting leave to file suit out of time cannot be faulted. It relied on the facts deposed in the supporting affidavit which were not in any way challenged at the hearing of the suit.

34. The Appellant alleged that the Respondent produced documents for which no stamp duty had been paid. This is a matter that was not taken up before the trial court. The Appellant has not identified the documents for which no stamp duty had been paid. This ground of appeal also fails.

35. Another issue raised by the Appellant is that the sum of Kshs. 90,000 awarded as general damages was inordinately high, excessive, erroneous and unjustifiable considering the nature of injuries sustained by the Respondent. The magistrate gave reasons for arriving at the figure in question and the Appellant has not convinced this court that the award was based on wrong principles of the law or that the same was indeed excessive. There is therefore no good reason warranting interference by this court with that award.

36. The summary of it all is that this appeal has no merit. The same fails and is dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 13th day of October, 2016.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**