



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 590 OF 2006

MERU SOUTH FARMERS CO-OPERATIVE UNION LIMITED.....APPELLANT

VERSUS

MOSES OTANDO MUNAKA1ST RESPONDENT

VERA PROPERTIES.....2ND RESPONDENT

(Appeal from the original judgment and decree of Miss. Hon. E.N. Maina (PM) in Milimani Commercial Courts, SRMC No. 3474 of 2003 delivered on 4th August 2006)

JUDGEMENT

1. The 1st Respondent, **Moses Otando**, sued **Vera Properties**, 2nd Respondent and **Meru South Farmers Co-operative Union Limited**, the Appellant, seeking, for workman's compensation following injuries he suffered on 11th December 2002 when he was attacked by thugs while on duty as a night watchman at the Appellant's premises in Meru South Estate where he was assigned to guard the rear side of the estate. The claim is based on an employers' breach of common law contractual duties towards his employee which led to the injuries suffered by the employee while in the course of duty. The 1st Respondent averred that Vera properties recruits staff, collects rent and lets property on behalf of the Appellant. It is in its course of duty that the 2nd Respondent recruited the 1st Respondent as a night guard for the Meru South Estate in Ruraka. The dispute was heard by the trial court which observed that: "**The Appellant was a client of the 2nd Respondent by virtue of an agreement between the parties that was produced in court. The 2nd Respondent amongst other duties hired employees for the Appellant.**" The court held the Appellant 100% liable for the misfortune that befell the 1st Respondent. The trial court noted that no medical reports were produced by the 1st Respondent but regardless of that it awarded the 1st Respondent general damages amounting to Kshs 80,000/=.
2. The Appellant, aggrieved by the decision filed this appeal in which it put forward the following grounds:
 - a. ***The Learned Magistrate erred in law and in fact in finding that the Appellant was liable to pay damages and costs of the suit yet there was no contract between it and the 1st Respondent;***
 - b. ***The Learned Magistrate erred in law and in fact by misconstruing a contract document of account settlement between the appellant and a third party and entirely relying on it to enter judgement against the Appellant;***
 - c. ***The Learned Magistrate erred in law and in fact in making a finding that the appellant was***

liable to pay damages and costs of the suit whereas there was no negligence directly or otherwise attributed to the third party suit;

d. The Learned Magistrate erred in law and in fact by admitting a document which was objected to without calling the maker;

e. The Learned Magistrate erred in law and in fact by relying on document that contradicted the pleadings in arriving into the award of damages;

f. The award was excessive.

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held inter alia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

3. The Appellant's case was that, there was no contractual relationship between it and the 1st Respondent. It is also argued that the trial court erred in holding it liable for the injuries the 1st Respondent suffered. The Appellant also argued that there was lack of credible medical evidence to prove that the 1st Respondent suffered any injuries.
4. The 1st Respondent's case was that, on 11th December 2002 while he was working as a night guard he was assaulted by unknown persons wherein he sustained serious injuries. He stated that Vera properties was his employer having employed him on 15th August 2001 as a security guard. He said he was on duty guarding the rear gate of the Appellant's estate when he was attacked by thugs. He suffered injuries on the head, left eye and at the back. He was taken to hospital at Ngumba Medical by the care taker who testified to that effect. He averred that the compound was not well fenced and anyone could go through. The 1st Respondent claimed he was not given a torch, a hat, gloves nor was he provided with a sentry box.
5. The 2nd Respondent's case is that the Appellant is their client. They had an agreement between themselves dated 31st December 2001 where the 2nd Respondent was required to generally manage the Appellant's property. Amongst its duties, were to collect rent for the Appellant, let premises and employ staff on the Appellant's behalf. On the recruitment of staff, it called for applications and carried out interviews and paid workers from the rent collected. It is allegedly employed the 1st Respondent on behalf of the Appellant. The 1st Respondent is said to have been attacked by thugs in the course of duty. The 2nd Respondent argued that all the workers were employees of the Appellant and the Appellant should therefore be held liable for the assault on the 1st Respondent.
6. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. In the first and second ground of appeal, the appellant has complained that learned magistrate erred in finding that it liable to pay damages yet there was no contract between it and the 2nd respondent. It argued that the contract relied on was a contract document of account settlement and the same could not be relied on to enter judgement.
7. Looking at the court record, it is not in dispute that the 1st Respondent was attacked by thugs while manning the Appellant's property. The witnesses called to give evidence cemented that fact. What is in dispute however, is who between the Appellant and the 2nd Respondent should be held liable. The Appellant argues that the 2nd Respondent should be held liable as there was no evidence to prove that there existed a relationship between the Appellant and the 1st Respondent. The 2nd Respondent on the other hand argues that its duties according to the contract between the parties was limited to the employment of the personnel for the Appellant and any liability arising

thereafter should solely be borne by the Appellant. The 2nd respondent adduced the agreement that stipulated the duties and obligations of each party. I have looked at the agreement between the two parties. The agreement stipulates that the Appellant has contracted the 2nd Respondent to manage and let out the complex during its management period. The 2nd Respondents main duty is to obtain suitable tenants for the complex and to collect rent from the premises which it is required to pay the balance to the owner after necessary deductions including expenditures. It was also implied that the manger would hire employees on behalf of the Appellant as stipulated under paragraph 3 (1). The 2nd Respondent was further required to take out an insurance policy with an insurance company approved by the Appellant to indemnify the owner and cover the workers under the Workmen Compensation Act. There is an obligation placed on the 2nd Respondent to employ or cater for the needs of the employees of the Appellant. The 2nd Respondent may have carried out duties such as the employment of the workers of the Appellant as it admitted during the trial but that did not absolve the Appellant of his duties as the employer of the 1st Respondent. The 1st Respondent was not paid by the Vera properties from their own kitty but was paid by them from the employer's monies that were collected. It was upon the employer to ensure that all the needs of his employees were taken care of, including providing the necessary gear that was needed for the employees to effectively perform their duties.

8. Consequently, the argument advanced by the Appellant that there is no direct contract between it and the 1st Respondent cannot hold water. The relationship that applies in Workmen compensation Act is that of an employer - employee relationship. The services rendered by the 1st Respondent were for the benefit of the Appellant, which paid for such services. The management company may have done the recruitment but the Appellant was required to provide the employee with the necessary gears to aid him in his place of work. The Appellant is not denying the fact that the 1st Respondent worked for it. I agree with the 1st Respondent's argument that the employer, here being the Appellant owed its employees a duty of care, in which it failed. It cannot transfer its obligations under the law to its manager. The Appellant ought to have been in control of its business including taking care of its employees. After considering the material placed before me, I am convinced that the trial court rightly held the Appellant liable.
9. I have already outlined the arguments of the parties. On the third ground the Appellant is complaining that, the trial court erred in holding it liable yet there was no negligence directly or otherwise attributed to it. There are three main issues to be considered in a workmen compensation suit; Firstly, whether an employee was injured at the employers place of work. Secondly, whether the employer was negligent. Thirdly, if so, what is the quantum of damages payable? The relationship between the employer and employee is crucial as the employer owes a duty of care to his employee. The common law position in regard to the relationship of employer - employee is succinctly stated in **Halsbury's Laws of England, 4th Edition vol. 16 Para 560** as follows:

“At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances..... so as not to expose them to an unnecessary risk.”

10. I have re-evaluated the evidence on record to establish whether the appellant can be held liable for the injuries suffered by the 1st Respondent. The 1st Respondent argued, that he was not provided with a torch, hat, gloves nor was he provided with a sentry box. The 2nd Respondent, on the other hand argued that the 1st Respondent was indeed provided with the necessary gear to effectively perform his duties. It was the word of the 1st Respondent against that of the 2nd Respondent. No proof was tendered to convince the court that the 2nd Respondent did not provide the 1st Respondent with the necessary gear. The 1st respondent should have called a witness to corroborate his evidence of lack of protective clothing. Merely stating that he was not provided with the essential gear is not enough. He should have proved his case on a balance of probability, which he did not. There was also the issue of a porous fence which is alleged, the thugs used to access the Appellant's premises. In the circumstances, I don't find the Appellant liable for the injuries that may have been suffered by the 1st Respondent.
11. On the fourth and fifth grounds, the appellant claims that the trial court relied on a document whose maker was not called to produce it as evidence and which document contradicted the pleadings in arriving into the award of damages. It is clear from the court record, that the 1st

Respondent only produced his medical card and no further documentation was produced in court to show the extent of injuries suffered. The 1st Respondent called a witness to corroborate his evidence that he was injured and taken to hospital. Indeed, the 2nd Respondent's witness **John Koigi** testified indicating that the 1st Respondent was injured during the incident. However, the Appellant is aggrieved by the fact that the medical card was admitted as evidence and used to assess damages in the trial court yet the same was not produced by the maker hence not sufficient to prove the nature of injuries the 1st Respondent suffered. The Appellant argues that, there was no P3 form produced and no doctor was summoned to testify. I have perused the trial court's judgement: the magistrate held that:

"The plaintiff did not produce medical report . Is that fatal to his case. My finding is that it is not. I m fortified in my finding by the decision of the Hon Ringera, Judge as he then was in Stephen Kagoivo vs Joeseph Waithaka & 3 Others, HCCC 4089 of 1988."

In that case the learned judge held that if the court believes the plaintiff's evidence , then it must assess damages on that basis and lack of medical evidence is not fatal to the plaintiff's case claim in civil proceedings. In this appeal, damages can only be assessed based on the injuries suffered. It is therefore difficult to quantify the amount. Failure to tender medical showing the kind of injuries sustained is fatal unlike the authority cited by the trial magistrate. Damages are awarded purely not only on the injuries suffered but on the extent or seriousness of such injuries. The damages awarded are pegged on such injuries. Without the evidence, it is impossible to assess the damages. With respect, the trial magistrate fell into error. There was no credible medical evidence to prove the injuries suffered by the 1st Respondent. There was therefore no basis to award damages. In the case of **George Kebaso Mabbeya V Crown Industries Limited [2012] eKLR** the court held that:

"...The above quotation shows the importance of the connection between an event causing injury, the injury itself and the treatment of it. For the court to satisfy itself as to the nature of the injury, the severity of the same, and how and when it emanated, and the prognosis on recovery, the expert's report must be explicit and make explicit connections with an alleged accident. Thus, the importance of the treating doctor's notes, report or evidence".

12. In the final analysis it is apparent that though the Appellant is found to owe a duty of care to the 1st Respondent, the 1st Respondent failed to discharge the burden of proof to show how the Appellant breached the duty of care. Even if he had tendered evidence to prove that the Appellant breached the duty of care, he failed to present credible medical evidence to prove the nature of injuries he suffered in the course of performing his duties of a night guard. The trial magistrate therefore fell into error when she found the Appellant liable.
13. In the end, the appeal is allowed. The order entering judgement in favour of the 1st respondent is set aside and is substituted with an order dismissing the suit with costs to the appellant. The appellant is given costs of the appeal.

Dated and delivered in open court this 28th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

Ondieki H/b Gitonga Muriuki for the Appellant

Gichohi H/b Onguti for the Respondent