



IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 182 OF 2010

TOBIAS ODHIAMBO ODIRA.....APPELLANT

VERSUS

MINI BAKERIES LTD.....RESPONDENT

J U D G M E N T

1). The appellant filed suit against the respondent seeking general damages as a result of the injuries occasioned by thugs or robbers who attacked him on 14-6-2007 while he was working for the respondent. He told the court that they were attacked while ferrying bread and cash along Kendu Bay road at a junction called Kanyadhiang. As a consequence of the said incident he sustained injuries on the chest, head and whole body. After hearing the matter the trial court did not find the suit meritorious and dismissed it hence this appeal.

2). This appeal is premised on the following grounds inter alia:

- i. **The learned trial magistrate erred in law and fact by failing to find and hold that the appellant proved, on a balance of probabilities that he was attacked and injured while on duty for the respondent company.**
- ii. **The respondent failed to provide any security for the appellant while on duty.**
- iii. **The learned trial magistrate failed to assess quantum of damages irrespective of her finding on liability.**

3). The appellant testified that he had been employed as a cash collector which was usually collected upon delivery of bread to customers. He said that he had worked for the respondent from September 2005 to July 2007. He blamed the company for not providing them with the necessary protection like security. He called PW2 who testified that he went to the scene where he found the appellant being treated at Kosele Dispensary. He also went to Kendu Bay police station where the vehicle had been taken. The respondent did not offer any evidence.

4). The issue to determined first of all is whether the appellant was an employee of the respondent. The documents produced in court answers this question in the affirmative. Exhibit P1, P2 and P3 shows that he was employed as a turn boy.

5). Did the incident occur? The evidence of the appellant as well as his witness PW2 seemed to suggest so. PW2 however was not at the scene and his testimony was based on hearsay information.

The driver of the vehicle was not called to testify neither did the other two persons. Of great significance also is the fact that no P3 form was produced by the appellant. The robbery that took place I presume was a criminal offence and ordinarily the police ought to be involved. In case of injuries it is common

knowledge that a P3 form is usually issued by the said police. Even if there was no such form, there was no evidence that the incident was reported. No occurrence book was produced by the appellant and neither did he see it fit to call any police officer as a witness. On this score therefore it is very unlikely that the robbery took place.

6). Equally, the appellant has blamed the respondent who according to him failed to provide the necessary security. Infact PW2 said that the respondent ought to have provided an armoured car like those of G4S. It is true that it is the duty of an employer to take reasonable care for the safety of its employees under all circumstances and to ensure that they are not exposed to any risk. In the case at hand however, I do not see how the respondent failed in its responsibility. People do carry out their business everyday involving money, regardless of the amount. It is inconceivable that every merchant ought to be provided with armed escort at all times. What is necessary though is to show that reasonable protection is undertaken by the employer. The appellant did not establish that in the cause of his work there was such probability that thugs would strike. In any case as found above there was insufficient evidence to show that indeed such an attack took place.

7). Section 107 of the Evidence Act Chapter 80 Laws of Kenya states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

Sub section 2 thereof requires that person to prove the facts. All in all I do not find that the trial court misdirected itself on the matter. There was no sufficient evidence to sustain the case.

8). On quantum however the trial magistrate ought to have proceeded to asses the same. It was held in **Kisumu C.A No. 2 of 2003- Owayo -VS-Aduda [2007]2 KLR** that:

“The law required the Judge even if he was minded to dismiss the suit, to consider the quantum of damages he would have awarded, had he made a finding on liability in favour of the appellant. He did not do so and did not even make an attempt to do so. He was, in our view in error”.

9). I have perused the authorities relied on by both the appellant and the respondent during trial **viz a viz** the nature of injuries sustained. The plaint indicates injury to the denture but Dr. Otieno's medical report does not indicate this. I find that the injuries complained of were soft in nature. An amount of Kshs. 100,000/= would have been appropriate in the circumstances.

This appeal is otherwise dismissed for reasons adduced above namely that no liability was proved against the appellant neither did the appellant establish an occurrence of the thuggery incident . The costs of this appeal shall be to the respondent.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

**H.K.
JUDGE**

CHEMITEI

