



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 125 OF 2009**

**JOHN KOSGEI ..... 1ST APPELLANT**

**KIPKABUS TEA FARM ..... 2ND APPELLANT**

**VERSUS**

**DUNCAN KIPLAGAT ..... RESPONDENT**

***(Being an appeal from the Judgment of the Resident Magistrate Hon. Ms. B. Mosiria in Iten Resident Magistrate's Civil Case No. 25 of 2006 delivered on 15<sup>th</sup> July, 2009)***

**JUDGMENT**

The claim before the trial court arose out of injuries the Respondent sustained at the 2nd Appellant's premises when he (Respondent) went to claim his money from the 1st Appellant. According to the Respondent, he had gone to claim his money upon rendering services at the instructions of the 1st Appellant on behalf of the 2nd Appellant.

The Respondent sustained the following injuries:-

1. Blunt scalp was swollen and tender.
2. Blunt trauma to the right ear which was tender and could not hear clearly.
3. Neck swollen and tender.
4. Both arms swollen and tender.
5. Knees swollen and tender.
6. Fracture of the left Platella.

The Respondent averred that the assault was occasioned solely due to the negligent, unlawful and illegal acts and breach of statutory duty of care of the 1st Appellant who was at all times the employee of the 2nd Appellant hence vicariously responsible.

The Appellants who were Defendants on their part denied any responsibility and that they were liable to compensate the Respondent in any manner. They also denied that they breached any statutory duty as alleged by the Respondent.

On liability the learned magistrate found the 1st Appellant a 100% to blame and his employer, 2nd Appellant vicariously liable. She awarded general damages in the sum of Ksh. 250,000/= and special damages of Ksh. 1,500/= against the Appellants jointly and severally.

It is this Judgment that the Appellants were dissatisfied with and filed an appeal against. The Memorandum of Appeal was filed on 14th August, 2009 and it lists the following grounds:-

1. That the learned trial Magistrate erred in law and fact in failing to hold that the evidence tendered was insufficient to prove the Plaintiff's case.
2. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent was not assaulted by the 1st Appellant or at all on 16th September, 2003.
3. That the learned Trial Magistrate erred both in law and in fact in holding the Appellants 100% for an assault that was never proved to have occurred.
4. That without prejudice to the foregoing the learned Trial Magistrate erred in law and in fact in failing to hold the Respondent wholly or substantially liable in provocation.
5. That the learned trial Magistrate erred in law and in fact in basing the Judgment on extraneous matters which were not pleaded by the Plaintiff.
6. That the learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's claim with costs.
7. Without prejudice to the foregoing and in the alternative, the trial Magistrate erred in law and in fact in applying the wrong principles in the assessment of damages such that the amount awarded was excessive and not commensurate with the extent of loss suffered if any.

The above grounds of appeal may be summarized as follows:-

- That the suit was not proved on a balance of probabilities.
- That the trial court erred in holding the Appellants liable.
- That the trial court in finding for the Respondent considered factors which she ought not to have considered.
- That the damages awarded were excessive in the circumstances.

This being a first appellate court, its duty is to reconsider and re-evaluate the evidence adduced before the trial court and come up with its own findings, but bear in mind that it has not seen or heard the witnesses. See case of **SELLER & ANOTHER VS. ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS (1968) E.A, 126.**

Further "**a Court of Appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching his conclusions**" - **KAHUNGU & ANOTHER -VS- ONGORO (2004) e KLR.**

### **LIABILITY**

The Respondent testified as PW1. He said he was a self-employed electrician. That on the material date the 1st Appellant who worked for the 2nd Appellant as a Manager went to the 2nd Appellant's premises to repair a compressor which had an electrical fault. That he charged Ksh. 1,000/= for the work. He said that when he went to demand for his money for the work done, the Manager (Respondent) assaulted him

on the knees and cheek. That he (Respondent) then invited the security guards who also assaulted him on the head, hands and knees as he sat on sad. That the guards also forced him to work on his knees to the Respondent's office, a distance of about 50 metres. That thereafter the Respondent paid him Ksh. 1,000/= and ordered him never to return to the premises again.

PW1 further testified that he was treated at Kamosor Health Centre and Eldoret District Hospital. He also reported the matter to the police and was issued with a P3 form.

It was the Respondent's further testimony that the matter was discussed by village elders. That he embraced reconciliation upon which the elders ordered the 1st Appellant to compensate him to the tune of Ksh. 20,000/=. The agreement was reduced into writing vide two agreements dated 15th December, 2003 and 15th January, 2004 and produced as P. Exhibits 8 and 9 respectively. He also stated that photographs were taken during the elders meeting.

PW2, Joseph Limo wholly corroborated the evidence of the Respondent. He stated that he was the Secretary of the Council of elders that discussed the reconciliation between the Respondent and the 1st Appellant. According to him, the 1st Appellant sought forgiveness for injuring the Respondent and promised to pay him Ksh. 20,000/= within 21 days. He produced the proceedings of the meeting as P. Exhibit 5.

PW3, Joseph Kipchumba a career photographer testified that he was called to take pictures of the elders' meeting and the 1st Appellant and the Respondent participating in the meeting. He produced the pictorial evidence as P. Exhibits 10 (a) - (c) respectively.

PW4, Cheboi Tuitoek testified in his capacity as a Village elder. He confirmed that in the village elders' meeting of 15th December, 2003, the 1st Appellant asked for forgiveness for assaulting the Respondent and agreed to voluntarily compensate him (Respondent) to the tune of Ksh. 20,000/=.

The 1st Appellant testified as DW1. He confirmed that he was the manager of the 2nd Appellant's farm and that the Respondent went to him on 13th September, 2003 to demand money as payment for a machine he had repaired. He stated that he paid the Respondent Ksh. 1,500/= for the work done. That it is only after some weeks he heard rumours that the Respondent was alleging he had been injured at the farm. That he called a meeting and inquired into the issue but found out that no one had injured the Respondent within the factory's premises.

DW1 further testified that he was called into an elders' meeting to discuss the matter. He said that in the meeting, he was not allowed to give his side of the story as the elders kept shutting him down. He said it is the elders who decided on the figure he should pay the Respondent.

DW1 denied signing the agreement in which he purportedly agreed to pay the compensation to the Respondent. He also denied he assaulted the Respondent or that the Respondent was assaulted at the 2nd Respondent's farm.

DW2 and DW3 were both security guards employed at the 2nd Appellant's farm. DW2 said that the Respondent had gone to the 2nd Appellant's office to collect some money but denied that anyone beat him. DW3 corroborated the testimony of DW2.

From the testimonies of the Plaintiff's witnesses it clear that it the 1st Appellant who assaulted the Respondent. The Respondent had twice visited the 2nd Appellant's premises seeking to be paid his dues after repairing a compressor. On the two visits he made he could not secure the attention of the 1st Appellant. On the third visit the 1st Appellant assaulted him and also instructed the guards at the gate to assault him further in his office.

From the trial court record the out-patient treatment cards, the P.3 form and the X-ray films were never produced as exhibits. They were only marked for identification. They are also not contained in the original lower court record.

Be that as it may, the 1st Appellant fully participated in the elders' meeting. There is no good basis why the proceedings of the elders meeting which were produced as an exhibit should be overlooked. It is in this meeting that the 1st Appellant agreed to compensate the Respondent in monetary terms for the injuries he occasioned to him. Although the 1st Appellant denied having signed the agreement, I am minded that the burden of prove in this case is on a balance of probabilities. Pictures were taken showing the proceedings going on. It is not clear why counsel for the Appellants failed to include the photographs which were produced before the trial court as P. Exhibits 10 (a), (b) and (c) respectively in the Record of Appeal. They are persuasive evidence that indeed the 1st Appellant was a participant in the Elders' meeting and that his assertion that he did not concede to compensate the Respondent is a mere denial. And even if he did not concede to the payment, the meeting was called in accordance with the parties' culture. The decision of the elders arising therefrom bound the parties. The decision is not legal in nature. But in this case it persuades me to believe that the meeting arose because a dispute needed be deliberated. This dispute is the subject of this appeal.

I am accordingly convinced that the 1st Appellant assaulted the Respondent and should shoulder the responsibility at 100%.

The learned trial magistrate found the 2nd Appellant vicariously liable by virtue of the 1st Appellant being an employee of the 2nd Appellant. But the learned Magistrate failed to address herself on the guiding principles to be considered if vicarious liability must obtain. In the instant case, it was imperative that the Respondent demonstrated that the 1st Appellant assaulted him with the full instructions of the 2nd Appellant who was his employer.

I am particularly persuaded by the decision of JOEL MUTEKI KIRANGU -VS- SAIKO LEKERESIE & ANOTHER (2012) e KLR of my brother Emukule J., in which he stated as follows:-

**"The third question then is when is a master vicariously responsible for the acts of the servant?. The Judicature Act, (Cap 8, Laws of Kenya), imports the common law of England, to be applied in Kenya subject always to the Constitution, and our written laws. The common law of England as learned from Standard Reference Books as Halsbury Laws of England, 3rd Edition Vol. 22, Page 225 - 230 paragraphs 403 - 409, and Text Books such as SALMOND ON TORTS say -**

**"..... 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."**

And SALMOND at p. 90 when dealing with same topic says -

**".... 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 it."**

I wish to adopt the words of Halbury J in WARREN -VS- HENRYS [1948] 2 ALL E.R. 955 at 938  
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**"Without multiplying the ways in which this matter has been expressed and Judges have sought to mark the limitations or bounds within which a master is to be held liable. I may use one more quotation. It is from SCRUTTON, L.J. IN POLLARD -VS- JOHN PARR & SONS [1927] 1 K.B. 243 -**

**"To make an employer liable for the act of a person alleged to be his servant the act must be one of a class of acts which the person was authorized or employed to do. If the act is one of that class the**

**employer is liable, though the act is one negligently or in some cases, even if it is done with excessive violence. But the excess may be so great as to take the act out of the class of acts which the person is authorized or employed to do."**

In the instant case, although the 1st Appellant did not produce any employment card, it is not doubted that he was an employee of the 2nd Appellant. But there is not the least iota of evidence that he assaulted the Respondent with the express instructions of the 2nd Appellant. Moreover, the 1st Appellant was not employed or hired to provide the services of the acts he meted against the Respondent. It has also not been demonstrated that any of the representatives of the 2nd Appellant were aware of the acts of the 1st Appellant and had any links with the assault.

In this regard, it was erroneous of the learned trial Magistrate to hold the 2nd Appellant vicariously liable.

The Appellants were not express on what extraneous matter the Respondent relied on. But they did indicate that the matter ought to have been treated as a criminal case as the Respondent had reported the same to the police. My considered view is that, the Respondent had the liberty to chose which remedy to pursue, either to file a civil case or pursue criminal prosecution against the 1st Appellant. Based on the agreements made before the Council of Elders, a civil suit is properly before the court. Moreso, compensation in the form of general and civil damages can only be pursued in a civil suit. The Respondent cannot therefore be faulted for filing the civil suit.

### **QUANTUM**

The injuries the Respondent suffered were soft tissue in nature save for a fracture of the left patella. PW5, Doctor Samuel Aluda who examined the Respondent produced the medical report as P. Exhibit 4 (a). He did not explain what a patella is but it is defined in Concise Oxford English Dictionary, 12th Edition as "**the knee cap**".

It must be noted that court would interfere with amount of general damages awarded only if the same is ordinally too high or too low as to represent an erroneous figure. Further award of general damages is purely an exercise of discretion of the court. It must be based on decided precedents and regard must be given to the prevailing economic environment as any award made is passed back to the public.

The trial court made an award of Ksh. 250,000/=. Before the lower court the Respondent had submitted on an award of Ksh. 250,000/= while relying on the following case law:-

**1. HABIBA ABOI MOHAMED -VS- PETER MALEVE HCCC. NO.950 OF 1998**  
**(the place of suing not indicated).**

Plaintiff's counsel submitted that the Plaintiff was awarded Ksh.400,000/= in general damages for injuries on her face, head and left arm.

**2. JANE WAIRIMU MUNGAI -VS- JOSEPH N. NJUGUNA - HCCC.NO. 155 OF 1995**  
**(again place of suing not indicated).**

it was submitted that the Plaintiff was awarded Ksh. 460,000/= for unspecified injuries.

May I point out that none of the above case law was compiled in the Record of Appeal. It has therefore been difficult for me to make a good comparison of the injuries. The Appellants' counsel did not also compile the Defendants' submissions in the Record of Appeal.

Be that as it may, as I have already pointed out, that a court will generally assess general damages based on comparable injuries in decided cases - See **STANLEY MAORE -VS- GEOFFREY MWENDA - NYERI CIVIL APPEAL NO. 147 OF 2002.**

In the case of **SAFARI KYALO -VS- MAURICE MULA MUASYA - NAIROBI HCCA. NO. 159 OF 2001**, a sum of Ksh. 70,000/= was awarded as general damages on 4th May, 2005 in which the Appellant suffered injuries to the nose, blunt fracture to the eye and bruises on the face.

In this regard, considering the respective submissions made, the inflationary trends and the injuries the Respondent suffered, it is my view that a sum of Ksh. 160,000/= would suffice as general damages for pain, suffering and loss of amenities.

Special damages remain as awarded as the same were proved.

### **CONCLUSION**

With regard to Judgment on liability, I find that the trial Magistrate found the 2nd Appellant vicariously liable based on a misapprehension of the applicable law.

In the result, I partially allow the appeal, set aside the Judgment as against the 2nd Appellant and find that only the 1st Appellant was solely liable at 100%.

I accordingly enter Judgment against the 1st Appellant as follows:-

- |                     |   |                      |
|---------------------|---|----------------------|
| (a) General damages | - | Kshs. 160,000/=      |
| (b) Special damages | - | <u>Kshs. 2,750/=</u> |

**TOTAL PAYABLE - KSHS. 162,750/=**

The first Appellant shall pay costs of the lower court suit based on general damages awarded. And since this appeal has partially succeeded, the 1st Appellant shall only pay half the costs of this appeal.

It is so ordered.

**DATED and DELIVERED at ELDORET this 8th day of August, 2013.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

Miss Kipseii Advocate for the Appellants

Mr. Limo Advocate for the Respondent