



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL 179 OF 2007**

**NINI LIMITED.....**  
**APPELLANT**

**VERSUS**

**LANGAT JOEL KIBET.....**  
**RESPONDENT**

[An appeal from the Judgment/Decree in Naivasha P.M.C.C.NO.477 of 2006 by Hon. N. N.. Njagi,  
Principal Magistrate, Naivasha dated 3<sup>rd</sup> October, 2007]

**JUDGMENT**

The Respondent was employed by the appellant as a guard. He brought an action against the appellant alleging that on the night of 18<sup>th</sup> February, 2006 while so engaged within the premises of the appellant, he slipped into a ditch and fell. As a result thereof, he suffered an injury to his left hand. He attributed the injury to the negligence and/or breach of a statutory duty owed to him by the appellant.

The appellant on the other hand denied the occurrence of the accident as claimed, maintaining that on 18<sup>th</sup> February, 2006, the respondent was not on duty having absented himself from work between 16<sup>th</sup> February and 19<sup>th</sup> February, 2006 (both days inclusive). It was also the appellant's contention that the respondent suffered the injuries in question in his house on 17<sup>th</sup> February, 2006.

The learned trial magistrate, N. N. Njagi, Principal Magistrate, considered the evidence before him and gave judgment in favour of the respondent in the sums of Kshs.70,000/= and Kshs.2,000/=, general and special damages, respectively subject to 30% contributory negligence against the respondent. Both the finding on liability and the award aggrieved the appellant who brought the instant appeal on seven grounds which may be summarized as follows:

- i) that the respondent failed to prove his case;
- ii) that the learned magistrate failed to consider the evidence on record as well as submissions;
- iii) that the learned magistrate erred in finding that the injury was sustained at the respondent's place of work;

iv) that the damages were excessive.

The claim as I have stated earlier was based both on the tort of negligence and breach of contract of employment. The issues which fell for determination before the trial court which are also the issues in this appeal are:

- i) whether the respondent was on duty on 18<sup>th</sup> February, 2006;
- ii) whether he suffered any injury on that date while on duty;
- iii) whether the appellant was liable in negligence or was in breach of a statutory duty;
- iv) whether the respondent was entitled to damages and the quantum of such damages.

The respondent contended that while going to clock-in, he slipped into a ditch or trench carrying water for the green houses. It was at night and the area had no light. The accident was witnessed by his workmates, Macharia and Kinte Lengaou and the supervisor was called.

The respondent went to the appellant's clinic for treatment and later he was attended at Naivasha District Hospital. He blamed the appellant for failing to provide him with a torch and to light up the area.

Both **D.W.1, Kenneth Kipchumba Kemboi**, the supervisor and **D.W.2, Kinte Lengaou**, the appellant's fellow guards were categorical that on 18<sup>th</sup> February, 2006, the respondent was not on duty. They supported this assertion with the entries in both the muster roll and the patients' register maintained at the appellant's clinic. The two exhibits and the entries were not challenged. There is also evidence, which was conceded by the respondent that on 17<sup>th</sup> February, 2006, he fell in his house and was injured on the left hand. Because he had been absent from work for about three days, when asked to show cause why disciplinary action should not be taken against him, he explained in writing about how he suffered injury at his house.

Looking at the totality of the evidence on record, that is, the respondent's testimony, the uncontroverted evidence in the muster roll and the patients' register together with the admission of a fall by the respondent on 17<sup>th</sup> February, 2006, I come to the conclusion that the respondent failed to discharge the burden of proof that indeed he was on duty on 18<sup>th</sup> February, 2006. If he was not on duty on 18<sup>th</sup> February, 2006, it follows that he could not have been injured on duty.

For what it is worth, I will consider the third issue, namely whether the appellant was liable for the injuries (which I have found were not sustained at work). The respondent in cross-examination confirmed that the trench/ditch had been there since he was employed in 2005; that he knew the area very well; that he had gone many times to clock-in and had never fallen; that he had a torch which was not very bright; that other workers clock-in at the same spot and none of them has ever been injured. With the foregoing concession, how can the appellant be blamed either in tort (negligence) or contract (breach of statutory duty)?

For all these reasons, I find that the learned trial magistrate failed to evaluate the evidence and fell into error in finding that the respondent was injured in the course of his duty and in apportioning liability.

This appeal succeeds and is allowed with costs. The judgment of the lower court is set aside and costs of the trial are similarly awarded to the appellant.

**Dated, Signed and Delivered at Nakuru this 29<sup>th</sup> day of May, 2012.**

**W. OUKO**  
**JUDGE**