



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 123 of 2010

**BERNARD KIBANDI.....APPELLANT**

**versus**

**TM -AM CONSTRUCTION CO. LTD.....RESPONDENT**

*(appeal arising from the judgment of Hon. A.K. Kaniaru P.M. Murang'a in Civil Case No. 216 of 2009)*

**JUDGMENT**

This is an appeal from the judgment of A.K. Kaniaru then P.M. Murang'a wherein the same dismissed the appellants suit against the respondent.

Being dissatisfied with the said judgment the appellant filed the appeal herein wherein the same raised the following grounds as per the memorandum of appeal filed on 9th July 2010.

1. ***That the honorable magistrate erred in law and in fact by entering judgment against the plaintiff and failing to appreciate the evidence that the appellant was not provided with adequate protective gear at the time the appellant was attacked by thugs.***
2. ***That the honorable magistrate erred in law and in fact in failing to establish negligence on the part of respondent despite overwhelming evidence from the appellant.***
3. ***That the honorable magistrate erred in law and in fact by failing to appreciate that the respondent owed the appellant a duty or care and that there was breach of that duty.***
4. ***That the honorable magistrate erred in law and in fact in disregarding, authorities cited by counsel for the appellant in his written submissions.***
5. ***That the honorable magistrate erred in law and in fact by failing to address and make a finding on all the issues raised by the appellant in his pleadings, evidence and submissions***
6. ***That the honorable magistrate erred in law and in fact in relying on issues which had not been pleaded or raised by the respondent and further in failing to make an adverse finding as against the respondent for adducing evidence which contradicted its own pleadings.***
7. ***That the honorable magistrate erred in law and in fact in failing to hold that the respondent was estopped from denying liability in respect to general damages having paid special damages tot he appellant.***

By the consent of the parties directions was given that the appeal be disposed of by way of written submissions which have now been filed and which I have had the advantage of reading.

This being a first appeal the court is bound to re-evaluate the evidence tendered before the trial court assess the same and come to its own conclusion though taking into account the fact that the same did not have the advantage to see and hear witnesses.

The appellant by a plaint dated 21st July 2009 filed suit against the respondent in which the same pleaded as follows.

**3. on or about midnight of 29th July 2008 the plaintiff was on the course of his employment by the defendant as a watchman/guard for its site situated at Gakonya area when thugs attacked him and seriously injured him which incident he blames the defendants for its negligence/breach of legal duty and therefore claims damages.**

**Particulars of negligence/breaching legal duty**

- i. Failing to provide the plaintiff with a torch and or install efficient lighting system.**
- ii. Failing to provide the plaintiff with a whistle and or an alarm.**
- iii. Failing to provide the plaintiff with sufficient and proper protection gear.**
- iv. Failing to construct a watchman shelter at a vantage position to enable the plaintiff oversee the entire site with ease.**

**The Respondent on 1st September 2009 filed a defence in which the same pleaded as follows.**

**3. The content of paragraph 3 of the plaint are admitted to the extent of there being an attack but the defendant avers that the plaintiff was attacked way out of his usual place of work and was therefore on frolic of his own. The plaintiff is put into strict proof.**

**4. Further and in the alternative and without prejudice to paragraph 3 above the defendant avers that it was not negligence in any manner and had provided the plaintiff with all the necessary equipments and the particulars of negligence or breach of legal duty are denied.**

It is upon the above pleading that the parties testified before the trial court.

P.W.1 Dr. Julius Kimani Mwangi testified on the injuries sustained by the plaintiff/appellant as injuries to the face, left thumb, left ear lobe, left foot and back together with a commuted fracture of the proximal phalanx of the left thumb.

P.W.2 the appellant testified that he was on duty with the defendant (respondent) as a watchman guarding earth moving machines and that he was alone while they were supposed to be two or three watchmen.

At midnight he was attacked by thugs and one of the said thugs hit him on the head. He stated that he did not have a torch or whistle, he reported the attack to the foreman and was subsequently taken for treatment.

Under cross examination he stated that he was not given a torch, a whistle bow and arrows and that if he had been given the said items he would have countered the thugs. He confirmed that he had signed against the said items in the register and that in the report to the police he had indicated that he had lost the said items to the thugs.

D.W. 1 Joseph Wachira Macharia testified that he was the defendant foreman and that it was his

duty to ensure that the employees were provided with necessary tools. He produced a copy of the page of the register showing that the appellant had been issued with and signed for the items stated in the plaint.

The trial court found as a fact that the appellant had been provided with the said items and held that the appellant had not proved negligence and that no duty had been breached by the respondent and dismissed the case.

From the memorandum of appeal and the submissions by both advocates the only issue for determination is whether the appellant had proved that the respondent had breached the duty owed to the same on whether the respondent was negligent

It has been submitted by the appellant that the respondent did not provide him with the items listed.

As stated above the trial court found as a fact that the appellant was provided with the said items and I have no reason to interfere with the trial court finding on fact.

The other issue raised by the appellant is that the same raised the issue that they were supposed to be two or three watchmen while he was alone which fact was not denied by the respondent's witness and that the trial court in dismissing the said issue together with lack of shelter and or alarm device stated that the number of thugs was too big and thus the plaintiff could not have done anything even if he had a sword as the thugs would have climbed up the place.

It is trite law that the respondent can only be held to be liable if he failed to provide minimum reasonable measure of protection for the appellant as was stated in the case of **Makala Mailu Mwende and Nyali Golf & County club. Civil appeal No. 16 of 1989 – Mombasa**

There was evidence tendered before the trial court and as stated above find as a fact that the appellant was provided with all possible implements as pleaded by the appellant and as stated above I find no reason to interfere with the said finding of fact.

The only issue which though not pleaded was raised by the appellant and not considered by the trial court in his judgment is the issue of additional watchmen. Had the appellant been provided with additional watchmen might be the attack would have not been as was the case herein. I am therefore of the considered opinion that the respondent should bear some responsibility for failing to do so.

I therefore allow the appellant's appeal and set aside the judgment on liability and having looked at the evidence tendered before the trial court and the submissions by the respondent that the said aspect was not pleaded and taking into account the fact that parties need not plead evidence I assess the respondent liability to the appellant at 20% for failing to provide additional watchman.

I therefore substitute the finding with judgment on liability at 20% against the respondent and since the trial court had assessed a general damages at Kshs. 200,000/= I award the appellant general damages of Ksh. 40,000/- being 20% of Kshs. 200,000/- save for the matter of liability as stated herein I find no fault with the trial courts judgment on the issues of authorities submitted by the appellant having ruled that there was no liability proved the same was no under duty to analyse all the authorities submitted.

I also note that the fact that the respondent paid for the treatment incurred by the appellant did not mean that the same had admitted liability but was under duty to do so under the provisions of the Workmen's Compensation Act now repealed.

Since the appellant has parerally succeeded in this appeal I order the respondent to pay 20% of the cost of this appeal and the lower court.

It is so ordered.

Dated and delivered at Nyeri this 29th day of November 2012.

**J.W. WAKIAGA**  
**JUDGE**