



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.188 OF 2002

RILEY FALCON SECURITY LIMITED.....APPELLANT

VERSUS

JOSEPH NGEDE SWETARESPONDENT

J U D G E M E N T

This is an appeal against the judgment of the Senior Principal Magistrate Kisumu, Kisumu Chief Magistrate's Court in CMCC No.335 of 1999. The appellant was the defendant in that suit where the respondent who was the plaintiff claimed for compensation arising from injuries he alleged to have sustained while in the cause of duty in the employment of the appellant.

The appellant denied the claim and stated further that the claim was time barred and sought for dismissal of the suit.

In his judgement trial magistrate entered judgment for the plaintiff and awarded damages of Kshs.120,000/=, interest and costs. The appellant being dissatisfied with the judgment filed this appeal on the following grounds:-

- **The learned trial magistrate erred in fact and in finding that there was any evidence of negligence tendered against the appellant by the respondent.**
- **The learned trial magistrate erred infact and in law in finding that the appellant had breached its statutory duties towards the respondent.**
- **The learned trial magistrate erred in fact and in finding that the respondent was injured on the date and at the time alleged in the plaint where there was no evidence to prove the fact.**
- **The learned trial magistrate erred in fact in finding that the respondent sustained injuries alleged in his pleadings when there was no evidence to support the fact.**
- **The learned trial magistrate erred infact and in law failing to consider the evidence tendered before her as a whole, or failing the underline material inconsistent in the respondent's evidence and failing to consider the appellant's evidence in defence.**
- **The learned trial magistrate erred in law in making an award of damages when none had been claimed by the respondent.**
- **The learned trial magistrate erred in fact and law in her apportionment of liability and in awarding damages that were inordinately high to consider against comparable cases.**
- **The learned trial magistrate erred in law and in fact in failing to consider the defence of Limitation raised by the appellant in its pleadings.**
- **The learned trial magistrate erred in law in fiddling to find that she had no jurisdiction to hear and determine the matter.**

Against the above grounds the appellant prayed for the appeal to be allowed and for the judgment of the trial court to be set aside.

This is the first appellate court. It has the duty to consider the evidence on record, evaluate, examine and analyse the same and arrive at its own independent opinion. See the case of **Sella & another versus Associated Motor Boat Company Limited & another (1968) G.A. at page 123.**

In evaluating and analyzing the evidence on record I shall look at the salient features of the evidence. The plaintiff's side had 2 witnesses in support of the claim and the defence had 1 witness.

In his amended plaint dated 24th April, 2001 the plaintiff (respondent) claimed for compensation under the workman's compensation and under common law for breach of statutory duty. He claimed that the plaintiff failed to provide him with enough work force and to provide proper working condition and facilities e.g. whistle and a rungu. In the alternative he claimed negligence on the part of the defendant by exposing him to risk, failing to give him enough workforce, enough protective devices and failing to offer basic training. The respondent claimed to have received injuries to the neck, back, abdomen, chest and head.

In his evidence the respondent stated that he had been employed as a security officer by the plaintiff. He produced his employment card he further claimed:

- **That on 10/5/96 he was attacked while guarding East Africa Sea food at about 3 a.m.**
- **The compound was large yet he worked alone.**
- **When he was attacked he blew his whistle, however he was hit on the back of his head with a stone and he fell down.**
- **He was beaten. The assailants had stones, metal bars and other weapons.**
- **He received injuries to the head, back, legs and other parts.**
- **He was issued with a whistle and rungu.**
- **Police took him for treatment and returned him at the premises he was guarding.**
- **He had been taken to New Nyanza General Hospital and he continued treatment at a private hospital in Nyamasaria.**
- **He was dismissed when he claimed for compensation.**

PW2 Dr. Dickson Nyamogo a medical practitioner stated that on the 12th of April, 2010 he examined the respondent who informed him that he had been attacked while on duty. He saw his treatment cards, examined him and prepared a medical report.

The defence called one witness **DW1 Tobias Otieno Osee** who stated as follows:

- **He is the General Manager with the appellant.**
- **That when the appellant receives reports of injury from its employees, the same information is filed and investigations initiated. The Insurance and Ministry of Labour are also advised.**
- **Their records do not show any report by the respondent.**
- **No police record/statement or investigation on the alleged injuries was ever received by the appellant.**

This being a civil case the respondent had to prove his case on a balance of probability. The respondent gave evidence of the alleged attack, injuries sustained and produced a medical report. **PW2** gave information based on what **PW1** told him and on the basis medical treatment cards. The said treatment cards were not produced as exhibit though. Although the lower court alluded to the said treatment card they did not form part of the court record the appellant was justified, in its ground 3 of this appeal where it states that there was no evidence of injury before the court.

The allegation that the respondent was hurt at his place of work in my view was not proved on a

balance of probability in that no report was made to the company at the hearing of the case no eye witness was called and indeed no police report was produced yet **PW1** claims that the police took him to hospital. Why did he not call evidence to support his claim?

In the circumstances of this case in the absence of immediate treatment cards I find that there was no proof of injuries, sustained at the respondent's place of work, for that reason this court cannot possibly find that the appellant was in breach of its statutory or common law duties and therefore compensation in the matter claimed or any other does not arise. For the claim to have succeeded the treatment card said to have been relied upon ought to have been produced. Since there was denial that an attack happened where the respondent was injured the onus of calling evidence of the attack squarely lay on the respondent yet he failed to call evidence to support his allegation.

For the reasons stated above the judgment of the trial court is hereby set aside. In its place the case against the respondent in the lower court is dismissed. I do not make any order as to costs.

Dated and delivered at Kisumu this 13th April, 2011

**ALI-ARONI
J U D G E**

In the presence of:

.....**Counsel for Appellant**
.....**Counsel for Respondent**