



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 942 of 2004

MINI BAKERIES LIMITED.....APPELLANT

VERSUS

REUBEN KALOKI MUINDI.....RESPONDENT

***(An appeal from the judgment of the Hon. Mr. Cheronu, SRM at the
Chief Magistrate's Court at Milimani in CMCC No.4515 of 2002
delivered on 14th October, 2004)***

J U D G M E N T

1. This is an appeal arising from a suit which was filed in the Chief Magistrate's Court at Nairobi by Reuben Kaloki Muindi (hereinafter referred to as the respondent). He had sued Mini Bakeries Ltd (hereinafter referred to as the appellant). The respondent's suit which was said to be under the Workman's Compensation Act, and the Common Law, was for general and special damages, arising from the negligence of the appellant.
2. The appellant filed a defence to the respondent's suit in which the appellant denied liability or the allegations of negligence attributed to it. In the alternative, the appellant maintained that if there was an accident involving the respondent, then the respondent was wholly and substantially responsible for the injuries suffered as the same was as a result of the said negligence.
3. Hearing of the suit proceeded before a Senior Resident Magistrate, during which the respondent testified in support of his case, whilst Felix Muiya testified for the appellant. The respondent testified that he was working for the appellant as a driver cum salesman. On the material day, he was driving a van delivering and selling bread. He reported to work early in the morning and continued with his work until 2.30 p.m. when some robbers stopped him took him to the back of the vehicle and shot him in the neck. The appellant was taken to MP Shah Hospital where he was admitted for 5 days. Upon discharge he was treated as an outpatient at Kangundo Hospital. He reported the incident at Kileleshwa Police Station. He was issued with a police abstract report and a P3 form, both of which he produced in evidence.
4. He was later examined by Dr. P.M. Kariuki whose medical report was produced in evidence by consent. The respondent blamed the appellant for his injuries contending that the appellant had failed to provide security even though it knew that the respondent was carrying a lot of money around. The respondent also claimed that the appellant did not give him any advice as to how to handle a situation such as the respondent encountered.
5. Felix Muiya, who was a turn-boy in the appellant's motor vehicle, explained that on the material day, he was working with the respondent. They started working at 5.00 a.m. They counted and signed for the bread which

was issued to them. Thereafter they started distributing and selling the bread. While driving along Mamlaka road which had some potholes, four men accosted them. One of the men was armed with a pistol. The respondent and Muiya were ordered to come out of the vehicle. One of the man tried to get the key from the respondent, but the respondent held on to the key. The respondent and the witness were ordered to get into the back of the lorry. Muiya entered the lorry but the respondent resisted. The respondent threw the car keys towards a neighbouring building, and it was then that the respondent was shot three times and he fell down.

6. The robbers took the respondent's wallet and money from his pocket and then walked away. While Muiya was still at the scene, some police officers arrived. A vehicle belonging to the appellant also passed by and the respondent was taken to MP Shah Hospital. Muiya explained that there had been another similar incident in Kileleshwa Pulstma Springs after which he was cautioned and instructed by the appellant that if there was such an incident they should not resist the robbers but follow their instructions and later to report to the police and the employer.
7. In his judgment the Senior Resident Magistrate noted that it was not disputed that the respondent was shot by thugs whilst in the course of his employment with the appellant. The trial magistrate found that the respondent was a faithful and committed servant who was ready and willing to suffer any consequences in order to protect the interest of his employer, and therefore, the respondent cannot be blamed for his commitments to duty. The trial magistrate further noted that the respondent was collecting an average of Kshs.50,000/= per day, and that by entrusting the respondent and the turn-boy with such an amount of money without any security, the appellant was exposing the respondent to a danger or risk which the appellant knew or ought to have known.
8. The trial magistrate found that the appellant was negligent in not taking precautionary measures, by failing to engage the services of a security firm or police officers to escort the respondent and his colleague. The trial magistrate therefore found the appellant fully liable to the respondent. The trial magistrate awarded the respondent Kshs.200,000/= as general damages for pain, suffering and loss of amenities and Kshs.1,000/= as special damages.
9. Being aggrieved by that judgment, the appellant has lodged this appeal raising three grounds as follows:
 - (i) The learned Magistrate erred in law and in fact by holding the appellant 100% liable.
 - (ii) The learned Magistrate erred in law and in fact by holding the appellant liable for a situation that was beyond the appellant's control.
 - (iii) The award granted by the learned Magistrate is excessive considering the injury.
10. Following an agreement by the parties written submissions were duly exchanged and filed. The court is now invited to determine this appeal based on those submissions. For the appellant, it was submitted that although the respondent claimed that he was the one collecting the sale proceeds, that was not the case. It was maintained that the respondent did not lock the door to the vehicle thereby enabling the robbers to gain access to the vehicle. It was noted that the respondent conceded that the appellant could not surcharge him for loss of the proceeds of the sale of bread where the loss had arisen due to reasons beyond the control of the worker.
11. Counsel for the appellant referred to the evidence of the defence witness who stated that the appellant had given specific instructions that in the event of confrontation with robbers during the delivery and sale of bread, they should not offer any resistance but should follow the instructions given by the robbers, and at the earliest opportunity report the matter to the police station and the appellant. Counsel for the appellant further urged the court to note that the respondent resisted the thugs by refusing to hand over the keys and throwing the keys away. He therefore submitted that the trial magistrate erred in holding the appellant liable for the respondent's injuries.

12. For the respondent it was submitted that the appellant had failed to demonstrate the errors that were alleged to have been committed by the trial magistrate. The court was urged to uphold the judgment of the trial magistrate as there was sufficient evidence in support of the court's finding on liability. The court's attention was drawn to the evidence adduced in the lower court that despite the fact that the respondent and the defence witness used to collect large sums of money the appellant had not provided them with any form of security. The appellant was therefore negligent as it failed to discharge its obligation towards the respondent. It was further submitted that the award of Kshs.200,000/= made by the trial court was not excessive considering the nature of the injuries sustained by the respondent. The court was therefore urged to dismiss the appeal.
13. I have carefully reconsidered and evaluated the evidence which was adduced before the lower court. I have also considered the pleadings and submissions which were made in the lower court as well as the submissions filed in this court. The respondent's suit as pleaded in the plaint was a claim under the Workman's Compensation Act and the Common Law. However, in the suit before the trial magistrate, the respondent appears to have pursued his claim purely as a claim for damages for negligence under Common Law.
14. The particulars of negligence which were alleged in the plaint against the appellant were as follows:
- (i) Failing to have enough reinforcement to curb the menace.
 - (ii) Failing to have safety equipment in the motor vehicle prevention.
 - (iii) Failing to warn the plaintiff of the dangers involved in his work.
 - (iv) Failing to have regard and safety of the plaintiff at his place of work.
15. The extent of an employer's common law duty to an employee is captured in *Halsburys Laws of England 4th Edition Volume 16 Par.562* as follows:
- "It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee to compensate him for any injury, which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends only to his person."*
- The above position was adopted as the law applicable in Kenya in *Mwanyule vs Said T/A Jomvu Total Service Station [2004] 1 KLR 47*, by the Court of Appeal. In that case the Court of Appeal concluded that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.
16. It was common ground that at the material time, the respondent was employed by the appellant as a driver cum salesman. It was also not disputed that the respondent suffered injuries during the course of his work as a result of being confronted and shot by armed robbers, who unsuccessfully attempted to take control of the appellant's motor vehicle which the respondent was driving. Noting that the robbery took place in broad daylight, the question is whether the risk of such a robbery was reasonably foreseeable, such that it could be prevented by the appellant taking reasonable precaution. And if so, whether the appellant failed to take adequate precautions for the respondent's security.
17. The respondent's main complaint was that the appellant did not provide him with any security even though his work involved moving around with a lot of money. The respondent did not specify how much money he used to move around with on average. That question was put to the defence witness by the court, and the witness

explained that they used to collect on average about Kshs.50,000/= per day. The respondent was of the opinion that this was a lot of money. Nonetheless, the money was not by any standards so much as to require special security measures to be put in place. Such measure as proposed by the respondent would have necessitated armed guards to counter armed robbers. Indeed, if such were the case, police officers and security firms would be doing nothing other than providing escort services to not only businessmen and other persons involved in business transactions but any other person carrying a similar amount of money.

18. Moreover, the risk of motor vehicles being carjacked having now become common place. It cannot be concluded that the respondent's robbery was targeted at the amount of money that he was carrying. Reasonable precautions against such risks would mean that each motorist would require an armed guard to protect them against carjackers. I find that in the circumstances of this case, providing reinforcement or safety equipment against the risk to which the respondent was exposed was not practically possible and the appellant cannot be held to have been negligent in failing to provide the same.
19. This is clearly a situation where the respondent having accepted the job assigned to him by the appellant, which involved moving around in a vehicle selling bread, voluntarily undertook upon himself the risks which were incidental to his employment and indeed to any other motorist. That risk included the risk of being carjacked, injured or robbed by armed robbers. The respondent did not need to be advised by the appellant not to resist armed robbers. That was obviously a matter of common sense. Perhaps as observed by the trial magistrate, the respondent was overzealous in protecting his employer's property. That may place a moral obligation upon the appellant to show its appreciation by compensating the respondent for his injuries. There is however no legal obligation arising under common law or tort. The respondent was on the right track when he filed his claim partly under the workman compensation Act, Cap 236 where he would have been entitled to compensation without proof of negligence on the part of the appellant. That limb of the claim was however not pursued nor any evidence adduced in that regard.
20. With regard to the assessment of quantum of damages, the appellant suffered gunshot wounds on the neck and both shoulder joints for which he was admitted in hospital for about 6 days. His residual injuries included healed scars on the left shoulder and right shoulder and psychological trauma. In awarding the sum of Kshs.200,000/= the trial magistrate was guided by the case of *Jacinta Akinyi and another vs Philip Kipterer and another*. That case involved much more serious injuries which resulted in that plaintiff being unconscious for 3 days. The injuries included head injuries, dental fracture, and injuries on the eye requiring corrective plastic surgery. Thus, the trial magistrate was misguided in following that authority. In this case, apart from the minor scars, and psychological trauma, the respondent's injuries were essentially soft tissue injuries. A sum of Kshs.80,000/= would have been appropriate compensation for the injuries suffered, and I would find the award of Kshs.200,000/= made by the trial magistrate inordinately high and based on wrong comparables.
21. The upshot of the above is that this appeal must succeed. Accordingly, the appeal is allowed, judgment of the lower court set aside and substituted thereof with an order dismissing the respondent's suit. In the circumstances of this case, I do not find it appropriate to award any costs. Each party shall therefore bear its own costs.

Dated and delivered this 26th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Onyancha H/B for the appellant

Nzavi for the respondent

Eric - Court clerk