



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 20 OF 2002

**MODERN SECURITY SYSTEMS & PRODUCTS
LTD.....APPELLANT**

VERSUS

BONFACE ODUOR

LUBALE.....RESPONDENT

JUDGMENT

By a plaint dated 20/6/2009, the plaintiff Bonface Oduor Lubale sued his former employer, Modern Security System & Products Ltd for damages for injuries he sustained while on duty. After hearing the case, the Senior Resident Magistrate entered judgment for the plaintiff for general damages of Kshs.80,000/- plus costs and interest. The defendant was dissatisfied with the said judgment and filed an appeal dated 20/2/2002 based on two grounds; that the respondent was not entitled to compensation under the Workers Compensation Act as no such claim was disclosed in the pleadings; that the award of general damages of Kshs.80,000/- was awarded without any basis.

Mr. Mahida who urged the appeal on behalf of the Defendant/Appellant submitted that nowhere in the plaint was there a claim for damages under the Workman's Compensation Act and that liability having been specifically denied in the defence, the suit should have been dismissed. Mr. Mahida further urged that under the **Workman's Compensation Act**, there are provisions for bringing of a claim and there can be no general award for injuries; That injuries under the said **Act** are based on the salary earned, percentage of disability and the period for which one suffered. He further urged that the court having not made any finding of negligence, the court should set aside the award for having been made in error.

In reply Mr. Nyamwange, counsel for the plaintiff/respondent urged the court to look at the pleadings and evidence adduced in the lower court and make its own findings. He submitted that there is no dispute that the respondent was on duty when he was injured and the defence blamed him for not using the alarm but it was conceded that the alarm had been installed by another security company and they were not aware whether it was in good working condition or not.

The brief facts of the respondent's case were that he had been employed by the appellant as a night guard at Shah Lalji School. On the night of 4/2/2000 at about 11.00 p.m. to 12.00 p.m., while with another guard, they were attacked by thugs who injured him and he suffered injuries. It has not been disputed that the plaintiff was attacked while at his place of work or that he suffered injuries. He attributed the injuries suffered to the defendant's negligence in:-

- (a) requiring the plaintiff to work in an unsafe place.
- (b) Requiring the plaintiff to work in a place where several guards were required.
- (c) Failing to provide the plaintiff with any protective gear or any other equipment to use while in his employment.
- (d) Requiring the plaintiff to work against the established system.
- (e) In breach of the terms of employment.

In support of the above allegations, the plaintiff testified that the thugs invaded them from behind and his colleague escaped but he was injured. He said he was entitled to be supplied with a torch, whistle, rungu, coat, helmet and gloves and that he had not been given any. He further testified that there was no light behind the school and the school was too large for two persons to guard. He said that though there was an alarm it was far from them to reach it at the time of attack.

DW1 the defendant's Area Manager and DW2 testified that each watchman were supplied with a torch, whistle, rungu and uniform. DW1 denied that they ever knew that thugs would attack and besides their client had only requested for two guards to supplement the other security system of alarm. Both DW1 and 2 also testified that the school is well lit save for the playground where there are no lights.

I have two versions of whether or not the plaintiff was supplied with the necessary implements to assist in his work. Whereas the applicant said he was not supplied with any, DW1 and 2 said watchmen were supplied with the named items. If indeed the plaintiff had not been given the necessary implements for his work, he did not give any reason why he did not request for items or turn down the job and move on to another where he could be properly equipped for the job. I would prefer the defence evidence that the items had been given to him as indeed the lower court must have believed.

As to whether there was sufficient light where the plaintiff was working, and DW1 and 2 said that there was sufficient light. In any event since the plaintiff said that he was attacked from behind it was unlikely that he would have done anything to stop the attack since it seems to have been sudden.

The plaintiff as an employee of the defendant was owed a duty of care by the defendant but it must be such act seen that the defendant could have foreseen, or such acts that are reasonable and incidental to the plaintiff's work. When a person takes up the job as a watchman, he risks attacks from robbers and thieves. I would agree with Justice A.B. Shah in the case of **DAVID NGOTHO NGUNGA V. MUGUMOINI ESTATE, HCC 2366/1983** where the judge observed that an employer could not be held liable for the criminal acts committed by robbers who are actually trespassers. The plaintiff took up a dangerous task of working as a watchman and he can not be heard to complain of injuries suffered as a result of an attack by robbers unless he demonstrated that there had been a clear breach of the duty of care by the defendant. For the above reasons, I would reach the same finding as the lower court did that the plaintiff failed to prove negligence on the part of the defendant.

Upon perusal of the plaint I find no claim under the Workman's Compensation Act Cap. 236 Laws of Kenya under which the lower court proceeded to award damages to the plaintiff. I do agree that the **Act** does provide a procedure for compensation. **Section 13** of the Act requires that a notice be issued that proceedings for recovery of compensation will be filed. Under **Section 16** of the **Act**, an employer and workman are at liberty, with approval of the Labour Commissioner to agree on compensation. If the employer to whom notice is issued does not agree to the sum to compensate the workman within 21 days, then **Section 17** of the **Act** comes into play. The workman can apply to court in the prescribed manner for the determination of his claim. Under **Section 25**, a workman who is injured while in employment has the right to institute civil proceedings against the employer. Under **Section 25(2)** if after the hearing, the court finds that the employer is not liable to compensate the workman, the court can proceed to determine whether compensation under the Workman's Compensation Act is payable to the plaintiff and may assess the amount of compensation due. Under the same subsection, the court is allowed to take into account any extra costs that may have been incurred by the employer, by reason of the independent proceedings. For clarity I think it necessary to set out **Section 25** of the **Workman's Compensation Act**. It reads as follows:-

“(1) Where the injury was caused by the personal negligence or willful act of the employer or of some other person for whose act or default the employer is responsible, nothing in this Act shall prevent proceedings to recover damages being instituted against the employer in a civil court independently of this Act:

Provided that –

(i) if damages are awarded after compensation has been paid, the amount of damages awarded in such proceedings shall take into account the compensation paid in respect of the same injury under this Act;

(ii) a judgment against the employer in such proceedings shall be a bar to proceedings under this Act in respect of the same injury at the suit of any person by whom or on whose behalf the proceedings against the employer were taken.

(2) If, in proceedings independently of this Act or on appeal, it is determined that the employer is not liable under such proceedings, the court in which such proceedings are taken or the appellate tribunal may proceed to determine whether compensation under this Act is liable to be paid to the plaintiff, and may assess the amount of compensation so payable, but may deduct from such compensation any extra costs which in the opinion of the court or appellate tribunal have been incurred by the employer by reason of the proceedings having been taken independently of this Act.”

Though the lower court did not state under what provision of the Act it made the award, it must have been aware of **Section 25 (2)** of the **Workman’s Compensation Act** and must have awarded the damages under that Section. I find that the court had the jurisdiction to make the award. The defendant did not challenge the sum awarded and I find no reason to interfere with the award. The medical report produced in evidence disclosed that the plaintiff suffered grievous harm and I will uphold the award.

In sum, I find no basis for interfering with the lower court’s decision and I hereby dismiss the appeal with costs to the plaintiff/respondent.

DATED and DELIVERED this 19th day of November, 2010.

R.P.V. WENDOH

JUDGE

Present:

Mr. Nyambane holding brief - Respondent

Mr. Mahida - Appellant