REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL 43 OF 2001

EASTERN PRODUCE (K) LIMITED …….. APPELLANT

VERSUS

CHRISTOPHER ATIADO OSIRO ……...…… RESPONDENT

JUDGEMENT

Christopher Otiado Osiro, was at the material time employed as a watchman by Eastern Produce (K) Ltd. at its Chemoni Estate. While he was on duty at the Estates' water pump, he was attacked by a group of six thugs on 10/4/1997. He sustained a cut wound on the scalp as well as blunt trauma to the chest and the thoracio-lumberspine.

He blamed his employer for the damages arising from the said attack, as in his opinion, his contract of employment had provided that his employer shall take all reasonable measures for his safety, while he was engaged in his work, and he therefore attributed negligence to his employer, particulars of which were given in the plaint.

The employer on the other hand denied his claim and averred that if an accident had occurred he was to blame for it, and in turn pleaded that he was solely to blame for it and/or that he had contributed to it due to his negligence, particulars of which were spelt out in the defence.

There was no reply to that defence.

After a full hearing in which Osiro was the only witness, while the defence declined to call any evidence, the learned trial magistrate, found in his favour and awarded him Shs.70,000/- as general damages and a further sum of Shs.1,500/- being special damages.

Being aggrieved by the said decision, Eastern Produce (K) Ltd. which I shall hereinafter refer to as 'the appellant', has now preferred this appeal, which was originally based on eight grounds, three of which it's learned counsel chose to abandon during the hearing, leaving the following, which he chose to combine and to argue as one ground.

'*1. THAT the learned trial Magistrate erred in law in entering judgment for the plaintiff contrary to the laid down principles as to remoteness of damage and foreseability.*

2. THAT the learned trial magistrate erred in law in disregarding the evidence of the defendant witnesses without any proper cause.

3. THAT the learned trial magistrate erred in believing the uncorroborated evidence of the plaintiff, which was in any event insufficient.

4. THAT the learned trial magistrate erred in shifting the burden of proof to the defendant.

5. THAT the learned trial magistrate did not give due regard to Order 6 Rule 9 of the Civil Procedure Rules'.

It was the submission of Mr. Kuloba, the appellant's learned counsel that though the respondent's claim was based on negligence, no negligence was established against his client, as in any event it could not have reasonably foreseen the attack, which in his estimation was an isolated incident which couldn't have required a duty of care to provide either additional guards or equipment. He urged the court to find that his client had done all that was expected of it as the respondent had admitted having been given all the necessary protective gear required for the work of a watchman. It was also his submission that the respondent who had not filed a reply to the defence had in effect admitted negligence as attributed to him by the appellant.

Mrs. Kigen learned counsel for the respondent was however of the view that this appeal lacks in merit as the appellant which knew of the risks involved in the assignment, was under a duty to provide him with protective gear, and having chosen not to call any evidence, it had not controverted her client's evidence, and that in the circumstances, he had had proved his case on a balance of probability.

In rejoinder, Mr. Kuloba stated that a defendant cannot be required to disprove the case against him.

I have considered the pleadings before me, the submissions of both counsel as well the cited authorities.

As stated earlier the appellant did not adduce any evidence and all that the learned trial Magistrate had for reference were the pleadings and the respondent's evidence.

It cannot be gainsaid that parties are bound by their pleadings.

It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of **Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258,** where it was held that "*there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence".*

I have in mind the description of negligence as is to be found in **Salmond and Heuston on The Law of Torts 19th Edn.** where it is described as "*conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage…….<u>negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."</u>* (underlining is mine) The position is laid more clearly as "*In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing." (**Lord Wrigur in Lochgelly Iron and Coal Co. v. M'Mullan [1934] A. C. I,25)***

The evidence on record reveals that not only did the respondent confirm that he had been on guard duties with the appellant for over nine years during which time he was given protective clothing, but he also conceded during cross-examination that "*the company would not have known if the thieves were coming."*

Faced with that type of evidence, the learned trial Magistrate should have concluded that the respondent

had not proven the allegations of negligence against the appellant.

I do therefore find that the respondent failed to prove his case to the required standard in civil matters, and on that account I would allow this appeal.

But that was not all, for it is on record that the appellant denied the negligence in its entirety and in turn attributed it to the respondent, who unfortunately kept mum about it. The legal position was well laid down in a **Mount Elgon Hardware Ltd. v. United Millers CA (KSM) 19 of 1996,** it being that "*a party who does not traverse the particulars of negligence alleged in the respondents defence….had admitted the negligence alleged in the defence in terms of Order VI Rule 9 (1) of the Civil Procedure Rules*".

The upshot of this is that I find that the respondent failed to prove his case against the appellant to the required standard. I do in the circumstances find that this appeal is meritorious. I allow and set aside the judgment of the subordinate court. Each party shall however bear its own costs.

Dated and delivered at Eldoret this 31st day of January 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of: