



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Civil Case 103 of 2003**

**DAVID MUNERIA**

**PIUS KETER**

**PATRICK WANYAMA**

**E.A.T.EC. :.....APP  
ELLANTS**

**VERSUS**

**RONALD  
BARASA:.....RESPONDENT**

**JUDGEMENT**

This is an appeal against the judgment of the Senior Resident Magistrate in Eldoret SPM.CC.NO.197 OF 1999 delivered on 8<sup>TH</sup> August,2000. In the said judgment the Learned Magistrate found in favour of the Respondent herein and awarded general damages in the sum of Kshs.100,000/= together with costs.

In the suit, the plaintiff, who is the present Respondent claimed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who were employed as security guards assaulted him at the 4<sup>th</sup> Defendant's premises where the plaintiff was also employed and while he was on duty. The plaintiff claimed that he sustained severe injuries and suffered loss and damages. The particulars of injuries sustained were:-

- a) Blunt trauma to the chest.
- b) Bruises to the back
- c) Injuries to the left forearm
- d) Blunt trauma to the neck.

It was the plaintiff's claim and contention that the 4<sup>th</sup> Defendant was vicariously liable for the said assault and damages sustained. In his evidence the plaintiff testified that on the 29<sup>th</sup> September, he was at

his place of work. While removing tree barks at the 4<sup>th</sup> Defendant's premises, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's who were security guards came to him and told him that he was required at the company's offices. He said that while accompanying them to the office, the three beat him up and he sustained the injuries set out above.

The appeal herein is against the finding of the trial court on liability and the amount awarded in general damages. The Appellant contends that the trial magistrate erred in law and in fact in holding the Defendants vicariously liable contrary to the laid down principles. The Appellants also question the finding that the three defendants accused of the assault were acting in the course of their employment at the material time.

In the absence of cases on assault by employee being cited by counsel, the court looked up precedents in this area. In the textbook, **CLERK & LINDSELL ON TORTS** 18<sup>th</sup> Edition, (London sweet & Maxwell,2000), the authors stated:-

**“It is, in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of a discretion vested in the employee.....”**

In the present case, the plaintiff claims that the first three Defendants who were security guards came to him and brought a message that he was required in the company's office. The plaintiff did not know them but they were in uniform. None of the parties alleged that the plaintiff was a suspect in any investigations of commission of any offences. The plaintiff did not claim that the 3 guards placed him “under arrest” for such reasons. He said that as they went to the office they pounced on him and beat him up. No reasons are given and no motive shown. The plaintiff did not show that the three security guards were in the performance of their duties as security guards when they beat him up i.e. protecting the property of their employer or arresting him on suspicion of commission of any offence and were in the process of taking him to the police station, etc. In the English case of **WAREN –VS- HENLYS LTD (1948)** 2 Al I E.R .935, erroneously believing that the plaintiff had tried to drive away from the garage without paying or surrendering coupons for petrol which had been put into the tank of his car, a petrol pump attendant used violent language to him. The plaintiff paid his bill and gave up the necessary coupons, and after calling the police, told the pump attendant that he would report him to his employers. The pump attendant then assaulted and injured him. In an action for damages for personal injury by the plaintiff against the employers, it was held that the Defendants were not liable for the wrongful act of their employee, since that act was done of personal vengeance on the employee's part and was not done in the course of his employment, it not being an act of a class which the employee was authorized to do or mode of doing an act within that class. The Judge referred to **SALMOND ON TORTS**, 10<sup>TH</sup> Edition p.89-90 in which it was stated:-

**“ A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.....if the unauthorized and wrongful act.....is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible:- for in such a case the servant is not acting in the course of his employment, but has gone outside of it.”**

In the present case, it is stated that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants came to the plaintiff and told him that he was required in the office. To that extent, they were simple messengers delivering a message. Why it was necessary for 3 guards to deliver a message is quite puzzling but I leave it at that as none of the parties suggested any other contrary reasons. No witness was called by the Defendant to deny that the 3 guards were ever sent on such an errand.

Be that as it may, was it within their discretion or was it a mode of delivering the message for the 3 guards to beat up the plaintiff? There was no allegation or evidence that the act was authorized by the 4<sup>th</sup> Defendant and neither is use of any violence or assault a mode of carrying out the errand of delivering a

message. In my view, the duty of an employer was to take reasonable care for the safety of an employee and the evidence did not show any negligence on the part of the 4<sup>th</sup> Defendant.

The Defendants were sued jointly and severally in the suit and the trial court found that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had assaulted the plaintiff. I have considered the evidence on record and in particular that of the 1<sup>st</sup> Defendant who testified on behalf of the Defendants. I think that the trial magistrate considered the evidence before her and on a balance of probability found that the first three Defendants assaulted the plaintiff. The injuries on the plaintiff resulted from what were wilful and criminal acts of the 3 Defendants. The plaintiff was neither under arrest or a suspect for them to use any force to keep him in custody or take him to the police. There were no allegations of resistance. The first Defendant denied that he was on duty on 29<sup>th</sup> September, 1998 but the record shows that he testified that he left duty at 6p.m on 29<sup>th</sup> September, 1998. In any case the Defence did not bring any documentary evidence to assist the court in this regard. I will therefore not interfere with the trial court's finding in respect of the First Defendant's involvement.

In the end, I find that the Fourth Defendant was not and could not have been vicariously liable for the acts of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and it was an improper finding by the Trial Magistrate to find so. The assault was occasioned by the caprice of the three security guards and were not acts in the course of their employment in the circumstances.

I therefore, uphold the finding on liability in respect of the first, second and third Defendants jointly and severally as determined by the Trial Magistrate.

With regard to quantum, the Appellants have not been able to demonstrate that the amount awarded in the sum of Kshs.100.000/= was excessive or out of tune with past awards in respect of similar injuries. I will not interfere with the amount of damages and the court's discretion in the regard.

As a result I do hereby dismiss the appeal of the first, second and third Appellants with costs to the Respondent. However, I do hereby allow the appeal by the Fourth Appellant and quash and set aside the judgment of the trial magistrate as against it with no order as to costs.

**DATED AND DELIVERED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF MAY, 2006.**

**M.K. IBRAHIM**

**JUDGE**

**25/05/06**

Coram – Ibrahim J

C/C - Chelanga

Mrs. Kittony for the Respondent.

Mr. Kuloba for the Appellant

Judgment read in their presence.

**M. K. IBRAHIM**

**JUDGE**