



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

Civil Appeal 147 of 2001

E.A.T.E.C

PETER EMACHUKU.....APPELLANT

VERSUS

FESTO AHANZA ANGOSI:.....RESPONDENT

JUDGEMENT

(Being an appeal from the Judgment of Mrs. H. Ongundi, Senior Principal Magistrate delivered on 9/10/2001 in Eldoret CM.CC.NO.1778 OF 1995)

This is an appeal against the finding on liability only. The Respondent had sued the Appellants in the Senior Principal Magistrates Court for general, and special damages for injuries he suffered on 4th October, 1993 at the First Appellant's premises when he was allegedly assaulted by the First Appellant's employee, the second Appellant and another unknown person.

In his plaint, the Respondent had pleaded that on or about the 4th October, 1993 he was an employee of one John Lugaka who had a contract to uproot tree stumps upon the 1st Appellant's Tea Block Farm at Outspan Estate. When he arrived at the farm with his bicycle in readiness to commence his work, the second Appellant and another security guard unknown to him and who were in the 1st Appellant's uniform approached him and without listening to him to explain his presence on the farm, pounced on him with clubs and pangas, alleging that the Respondent had come to steal firewood belonging to the 1st Defendant. The Respondent added that the second Defendant and his mate assaulted him as a result of which he sustained severe bodily injuries and also took away his bicycle.

The Respondent gave the particulars of injuries as follows:-

- (a) Cut wound on the right forearm resulting in amputation of the same at the digital end.
- (b) 2 deep and large cut wounds on the head (parietal region).
- (c) 1 deep cut wound on the head (Temporal region).

The Respondent also claimed special damages in the sum of Shs.4,500/= being the value of the bicycle and fee for his medical Report.

The Respondent also claimed general damages for unlawful arrest, detention and malicious prosecution. The Respondent enjoined the Attorney General as the Third Defendant for this head of claim. The

Respondent pleaded that immediately after the assault, the Plaintiff proceeded to Hospital and after discharge to Eldoret Police station where he reported the assault. He was issued with a P3 form when he took to a doctor who completed the same. He returned the P3 form to the Police station but nothing was done by the police due to lack of transport. On 20th December, 1993 the First Appellants security officers appeared at the Police Station and allegedly after discussions with the Police, the plaintiff was arrested and placed in police cells up to 3rd January, 1994 when he was taken to court and charged with stealing firewood contrary to section 275 of the Penal Code and assault contrary to section 251 of the Penal Code.

The Respondent further pleaded that he appeared in court several times for the hearing in case Eldoret SPM. Criminal Case No. 10 of 1994 but neither the police nor the security officers appeared in court. On 4th May, 1995 the case was dismissed under section 202 of the Criminal Procedure Code. It was the Respondent's case that his arrest and subsequent detention by the police was unlawful and his prosecution was malicious as the same were designed to protect the security officers from answering for their acts.

After hearing the case, the Trial Magistrate went ahead to award the Respondent the sum of kshs.450,000/= being compensation to the plaintiff. He also awarded special damages in the sum of Shs.2000/= and costs of the suit. It is clear from the judgment. The Trial Magistrate held as follows:-

“ I find all the three defendants to be jointly and severally liable for the unlawful acts of the second Defendant, the other EATEC guard and the Police Officers. Liability is assessed at 100%.....

I therefore enter Judgment for the plaintiff in the sum of Shs.452,000/= plus costs and interest. The Judgment is against all defendants.”

It is clear from the foregoing that the award of general damages is for both the injuries sustained and the claim for unlawful arrest, detention and malicious prosecution.

This appeal is only in respect of **LIABILITY**.

Relying on the Memorandum of Appeal, the First and Second Appellants submitted that the Trial court erred in holding the Appellants liable without evidence. Counsel for the Appellants argues that there was no evidence to prove that the Second Appellant was employed by the First Appellant and that there was no evidence that the Second Appellant was performing work for the First Appellant. The Appellants also asserted that the Respondent had been attacked by robbers and which fact came from his own evidence. The court ought to have found the Respondent as having been attacked by robbers.

Regarding the acquittal in the criminal case, the Appellants submitted that there was no evidence of such acquittal. They invoked the provisions of section 107 and 109 of the Evidence Act which ought to have been applied by the learned Magistrate. That acquittal cannot be proved without documentary evidence. The Appellants also question the judgment in that there was no evidence of malicious arrest and this allegation had not been pleaded in the plaint.

The Appellants also argued that the decision was against the weight of evidence. The finding of joint liability with the Attorney General was also questioned. The Appellants argued that the same should have been apportioned. There was an objection by counsel for the Respondent that this was not a ground of appeal and was a new matter. The Appeal was opposed by the Respondent.

I have carefully perused the proceedings and the Judgment of the trial magistrate. The Respondent as the plaintiff in the case duly testified and was cross-examined at length. He was the only witness for his case. The Defendants did not call any witness. The Third Defendant, the Attorney General did not take any step or action in the proceedings. The case against it went undefended. I do hereby find that the Respondent did testify on oath. He was cross-examined at length and on a balance of probability, proved his case against the Defendants.

The First Appellant did not call any witness or lead any evidence to disprove the claim that the second Appellant was not its employee. The Respondent said that the two who attacked him were the First Appellant's security guards. He was particularly clear about the second Appellant. It would have been the easiest thing for the First and the second Appellants to attend court and testify to demonstrate that the two had no relationship. None of them turned up in court. It is noted that both the First and Second Defendants were duly represented by counsel in the Magistrate's Court. They are also represented by the same counsel in the Appeal.

It is puzzling that Counsel for the two Appellants, could submit that:-

- There was no evidence to prove that the second Appellant was employed by the First Appellant.
- That the Second Appellant was performing work for the First Appellant.

These submissions appear to me to be inconsistent with the fact that counsel was acting for both the Defendants in the trial court and in the appeal. Their defences and submissions have always been joint and such submissions required that each be represented by different counsel. However, the most crucial thing is that the only evidence before the court was that laid down by the plaintiff. The court had nothing else to go by. I am satisfied that there was sufficient evidence and that the court properly applied the required test of proof – on a balance of probability.

The plaintiff also duly discharged the burden of proof as required by sections 107 and 108 of the Evidence Act. The plaintiff did not sit back but actually came to court, testified on oath and withstood the vigour of cross-examination. The Appellants are wholly to blame for not coming forward to support their Defences. Defending by cross-examination and submissions has its pit-falls and frailties.

The Respondent in cross-examination stated that the two security guards besides assaulting him robbed him of his bicycle. He did not say that he was attacked by robbers. It may have been ideal for the Respondent to have produced the proceedings in the Criminal case in which he was charged at the instance of the First and Second Appellants. However, there is no provision in section 107, 108 and 109 that requires that proof of any particular fact must be by way of documentary evidence. I think there is the question of credibility and veracity. The trial Magistrate must have believed in the testimony of the Respondent, that he was prosecuted and acquitted.

I am satisfied that the second Appellant and the other security guard who was left out of the proceedings were employed by the First Appellant as security guards. It is therefore of no surprise that both 1st and 2nd Appellants retained counsel and had a joint defence. I am also satisfied that the 2nd Appellant and his colleague were in the course of their duty when they attacked the Respondent. I am of the view that the attack on the Respondent was closely connected with the duty of the Second Appellant in protecting the premises and property of his employer which were the authorized acts. In **SALMOND ON TORTS, 10TH Edition P.89 – 90** it was sated:-

“ A master is not responsible for a wrongful act done by his servants 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.....”

Each case must be decided on the particular facts and circumstances disclosed. As it was the duty of the second Appellant and his colleague to protect the property of their employer, the assault was an unauthorized act within the province of their duty and the employer was vicariously liable.

I will not deal with the question of joint liability with the Attorney General and that of apportionment. It was not a ground set out in the Memorandum of Appeal. The Appellants are bound by their pleadings.

In the end and in view of the foregoing , I do hereby dismiss the Appeal herein with costs to the Respondent.

DATED AND DELIVERED AT ELDORET ON THIS 5TH DAY OF JULY,2006

M.K. IBRAHIM

JUDGE