



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET  
Civil Appeal 31 of 2003**

**KEN-KNIT (K) LTD.....APPELLANT**

**VERSUS**

**TIMOTHY SANGALE IMILE.....RESPONDENT**

**JUDGEMENT**

This is an appeal against the decision of the Chief Magistrate at Eldoret Mr. Solomon Wamwayi delivered on 22<sup>nd</sup> May, 2002 in SPM.C.NO.605 OF 2001. In his judgement, the Learned Trial Magistrate awarded the Respondent a sum of Kshs.72,000/= as general damages for pain and suffering resulting from an incident at the Appellant's premises.

The Respondent (the plaintiff in the suit before the Chief Magistrate) filed the said suit claiming inter alia general and special damages against the Appellant (Defendant in the suit) for negligence. The Plaintiff was employed as a security guard by the Defendant at its premises. On the night of 24<sup>th</sup> July and 25<sup>th</sup> July, 1996 while on duty the plaintiff was attacked by thugs at about 3a.m. while he was guarding a lorry in the Defendant's premises. Some of his work-mates, other security guards were guarding stores.

During the attack, the plaintiff sustained various injuries to the head and the right hand fingers. In the suit, the Plaintiff based his action on negligence of his employer, the Defendant. The particulars of the negligence were that the Defendant:-

- a) Failed to take adequate or effective precautions for the safety of the plaintiff.
- b) Exposed the plaintiff to a risk of injuries while it knew or ought to have known about.
- c) Failed to provide any suitable working environment for the plaintiff.
- d) Failed to provide the plaintiff with protective working gear.

During the trial, the plaintiff testified that there were no security lights at the premises at the material time and he was not provided with a torch, rungu, overcoat, helmet and whistle. The Plaintiff's colleagues who had whistles raised an alarm after he had screamed and the thugs ran away. The Plaintiff further testified that his colleagues had private whistles which I understood to mean that they were not provided by their employer. He added that his colleagues were also not provided with torches, runqus and helmet for their protection in the course of their duties.

The Defendant did not call any witness in its defence at the trial. The trial court, therefore, relied on the plaintiff's testimony and evidence. During cross-examination, he denied that he was attacked while asleep on duty.

In the appeal, there were seven grounds of appeal. The Respondent abandoned all except grounds 1 and 4 which were:-

**“1. That the Learned trial Magistrate erred in law in entering judgement for the plaintiff contrary to the laid down principles of remoteness of damages and foresee ability and condemning the appellant for acts committed by trespassers /thugs.**

2. ....
3. ....
4. **That the Learned trial Magistrate erred in shifting the burden of proof to the defendant.**
5. ....
6. ....
7. ....”

In submissions for the Respondents its counsel argued, inter alia, that:-

1. There was an alarm which was switched on making the robbers ran away.
2. The Appellant’s colleagues had personal whistles.
3. There was no evidence to show that if he had such a whistle he would not have been injured.
4. The Appellants did not show that he had asked for the aforesaid items and the said request was refused.
5. That the Appellant had accepted to work in the conditions at the Respondent’s premises.

Both parties referred to authorities which are on record. The Respondent cited the decision in **VRAJIT TRADERS LTD .V. STEPHEN ARAP MIGE** High Court Civil Appeal No. 45 of 1996 (Unreported).

On the facts, I do hereby find that the trial magistrate had the testimony and evidence of the plaintiff only. The Defendant did not avail or call any single witness. I do hold that they did this at their own peril. The Magistrate was entitled to rely on the evidence of the plaintiff which was given on oath. Unless the court found that the plaintiff had lied or was unreliable as a witness, it was entitled to find in his favour on the facts on a balance of probability. The onus of proof was on the Plaintiff throughout the trial. However, in the absence of any Defence witness to challenge or rebut the testimony of the Plaintiff, there was nothing that the Court could go by to weigh the available evidence against.

I therefore, I do hold that the trial magistrate did not shift the burden of proof and it is the Defendant which failed to provide the court with any assistance to test the weight of evidence and veracity thereof. The credit – worthiness of the Plaintiff as a witness was not tested by any rival evidence.

On the facts, I do find that there were no security lights at the place the Plaintiff was assigned to guard, i.e. where the lorry was parked. He was not provided with any torch, rungu, overcoat, helmet and whistle. I do find that these are basic and essential protective items for a security guard or night watchman in the circumstances of Kenya. Without this items, I wonder why the plaintiff was employed in such a capacity. There was no evidence that the plaintiff was a trained karate expert having a “black – belt” qualification that he did not require such common and usual protective tools. In the case of **EAST AFRICA TANNING EXTRACT COMPANY LIMITED –VERSUS- GERISHOM BARASA WANYONYI**, High Court Civil Appeal No. 11 of 2000 (unreported), Justice Etyang held as follows:-

**“.....A Watchman’s tools include a torch, whistle, rungu/club, helmet, shield and protective clothing. There should be provided, where possible, back-up systems through regular patrols by armed supervisors and easy accessibility to alarm communications. All this is intended to lessen danger to him in the discharge of his duties.”**

I take judicial notice that in both the aforesaid case and this one, the Respondents are commercial and industrial corporations. In the circumstances, I would agree with Justice Etyang as the duty of these employers to provide the aforesaid basic and essential protective tools to their security guards and/or watchmen. Each case, however, could be decided on their own special facts and circumstances. The court could possibly consider a different standard for watchmen in domestic or residential premises particularly with regard to patrols, alarm and communication systems.

In this case, I do not accept that there was a security alarm system installed at the Respondent's premises. I do find that the alarm that the Appellant raised was that of his vocal cords, his screams. There was no evidence of an electric alarm system to be switched on. The Respondent did not call any evidence to prove this suggestion brought in through cross-examination.

The Respondent relied on the English case of **WITHERS –V- PERRY CHAIN CO. LTD (1961) 3, A1 E.R. 676** in support of the argument that the relationship between an employer and employee is not that of a school master and pupil. Devlin L.J. said at P, 680:-

**“ In any opinion there is no legal duty on an employer to prevent an adult employee from doing work ;which he or she is willing to do. If there is a slight risk, as the judge has found it, is for the employee to weigh it against the desirability, or perhaps the necessity, of employment. The relationship between employer and employee is not that of a schoolmaster and pupil. There is no obligation on an employer to offer alternative safe employment, though no doubt a considerate employer would always try to do so as the defendants thought they had done here. Nor is there any obligation on an employer to dismiss an employee in such circumstances. It cannot be said that an employer is bound to dismiss an employee rather than allow her to run a small risk. the employee is free to decide for herself what risks she will run.....”**

I would distinguish the aforesaid case from the one before me. That case involved a party who had a unique type of dermatitis in that she had a skin which was susceptible to certain ingredients in lubricating grease, oil, and paraffin. In the course of her duties at her employer's factory which manufactured components for bicycles, she developed skin trouble and she had to stop work. This is despite the use of gloves and availability of washing facilities. After sometime, she came back to her employer and asked to be given other work. The employer assigned her work at an assembling section which was free of grease. She became sick again. She returned a third time seeking work. Each time she produced a clean medical certificate from her doctor certifying that she was free of the ailment she had suffered. Ultimately, she went to court seeking damages for negligence from her employer for allowing her to work after the first incident.

Those facts are clearly different and distinguishable from the case before this court and the **WITHERS** case is not of any relevance to this Appeal. In the **VRAJIT TRADERS LTD V.S. STEPHEN ARAP MIGE**, the employee was a driver who was on duty when he was attacked along Nairobi – Nakuru road by armed robbers. The robbers shot at the lorry he was driving. He was injured was hit in his middle finger but the bullet passed through the window. He applied the brakes and fled the scene together with his turn-boy. In the claim against his employer, it was held that in effect that it would be unreasonable for an employer of a driver driving along Nakuru – Nairobi road at 4 P.M to provide armed escort to its driver and lorry. It was held that this type of security is the responsibility of the Government. I agree. In this case, the premises were private commercial premises, and it is the duty of the owner to provide himself with security inside the perimeters of such private premises in the circumstances of this case. And once, the employer retained the services of a security guard or watch-man instead of contracting an established security firm, then it was his duty to provide reasonable protective tools and environment to such an employee. As held by Justice Etyang in the **EAST AFRICA TANNING** case:-

**“ I think is settled law that however inherently dangerous the work an employee is engaged to do, an employer is expected reasonably to take steps in respect of that work, to lessen danger or injury to employee.”**

In the light of the foregoing, I do hereby find that this appeal has no merits and it must fail. I hereby do

dismiss the appeal with costs to the Respondent.

**DATED AND DELIVERED ON THIS 31<sup>ST</sup> DAY OF OCTOBER,2006.**

**M.K. IBRAHIM**

**JUDGE.**