REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Appeal 759 of 2003

SIMON MUZEE alias SIMON MUSEE ……..……. APPELLANT

VERSUS

SATVINDER S. SEKHON sued as Chairman

of and on behalf of the National Officials of

the ROYAL NAIROBI GOLF CLUB ……..…….....… RESPONDENT

(An Appeal from the Judgment of Hon. G. Nzioka, SRM in Milimani Commercial Courts RMCC No. 7534 of 2002 delivered on 29th October, 2003).

JUDGMENT

At 8.00 pm on 31st October, 2000, the Appellant (Plaintiff in the lower court) then an employee, working as a golf attendant with the Respondent Golf Club, suffered severe injuries following an attack on him by armed thugs at the Respondent's premises in Nairobi.

In his Plaint, filed in the lower court on 25th September, 2002, he blamed the Respondent for his injuries arising from the Respondent's "breach of duty of care and/or breach of the express and implied terms of the contract of employment", and outlined the following particulars of negligence:

(a) Failing to take any adequate measures or precautions to ensure that the place where the plaintiff carried out his work was safe and adequately secured.

(b) Failing to provide or maintain a safe and proper system of working.

(c) Failing to adequately light up the expansive Golf Course.

(d) Failing to ensure that strangers did not gain access to the Golf Course.

(e) Failing to provide equipments for self-defence.

(f) Failing to respondent to the Plaintiff's distress call.

The Respondent, in its defence filed on 31st October, 2002 denied any negligence and denied specifically that the accident alleged occurred on its premises.

The lower court, in a Judgment that focused needlessly on the location of the accident (whether it was on the Respondent's premises or not) instead of on whether the Respondent was in any way "negligent", found that both parties were equally liable, and awarded Kshs.150,000/= in general damages, subject to the Appellant's contribution of 50% liability.

Aggrieved by that decision, the Appellant has appealed to this court on liability and quantum, on the following 11 grounds of appeal:

"1. THAT the learned Magistrate erred in fact and in law in resolving an alleged conflict of evidence as to where the cause of action arose by apportioning liability.

2. THAT the learned Magistrate erred in fact and in law in relying on the Respondent's evidence while simultaneously impugning the competence of such evidence.

3. THAT learned Magistrate erred in fact and in law in failing to find the Defendant fully liable.

4. THAT the learned Magistrate erred in fact and in law in relying on the Respondent's ridiculous evidence and in particular.

(i) The evidence that the appellant's chopped off fingers were found the next day and taken to the appellant in hospital.

(ii) The evidence that the appellant whose fingers were chopped off elected to go and sleep as opposed to seeking treatment.

5. THAT the learned Magistrate erred in fact and in law when she failed to take Judicial notice of:-

(i) The presence of amorous carnivores in Kibera where the fingers were allegedly found after 13 hours which fingers would have been a delicacy for the amorous carnivores in the form of dogs

(ii) The impossibility of any sane human being to withstand the pain of chopped off fingers and massive bleeding that would make it reasonable to seek treatment as opposed to seeking sleep.

6. THAT the learned Magistrate erred in fact and in law when she failed to comprehend whether it was reasonable for the Respondent to retain the Appellant in employment in the face of the Respondent's allegations directed at the Appellant bordering on gross misconduct calling for summary dismissal as opposed to suspension.

7. THAT the learned Magistrate erred in fact and in law when she failed to comprehend the significance of the Respondent's evidence as to forwarding the demand letters and the suit papers to the Respondent's insurer. 8. THAT the learned Magistrate's finding as to where the cause of action arose was a departure from the pleadings as the same was not expressly and specifically pleaded and the finding thereof was thus erroneous.

9. THAT the learned Magistrate's award of damages in the sum of Kshs.150,000/= was inordinately low.

10. THAT the learned Magistrate's Order on costs was gravely erroneous and unjust.

11. THAT the learned Magistrate's failure to award damages for lost earnings and lost capacity to earn as pleaded and asked for under paragraph 8 was erroneous."

Mr Harun, Counsel for the Appellant, argued before this Court that the Respondent should have been held fully liable for this accident, and the fact that the lower court found conflict in evidence as to whether the attack took place within the Respondent's premises, or outside, was no reason to apportion blame.

He submitted that the Appellant had established liability on the grounds that the Appellant had not been provided with a guard while working in the dark. He argued that the only direct evidence available to the lower court was that of the Appellant, and that his evidence should have been preferred, as opposed to the Respondent's witness who was not present at the time of the incident. Mr Harun further submitted that the award for general damages was inordinately low, that the court erred in not assessing damages for loss of capacity to earn; and that liability having been assessed at 50/50, costs should have been assessed in the same ratio, as opposed to each party bearing its own costs.

Ms Janmohamed, for the Respondent, submitted that the onus of establishing negligence was on the Appellant. He had not done so. He had not shown how the Respondent was negligent, and urged this Court to apportion liability in the ratio of 70 to 30 in favour of the Respondent. She argued that there were material contradictions in the date of the accident whether it took place on 30th or 31st October, 2000. On quantum, she submitted that the award was fair, and that there was no evidence before the lower court on loss of earning capacity.This being a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

First, let me deal with two issues raised at this appeal, relating to damages for loss of earning capacity and the apportionment of liability. Having reviewed the evidence before the lower court, I agree with Ms Janmohamed that there is no evidence before the lower court of loss of earning capacity. The Appellant did not testify how, and whether, his capacity to earn in the future had been diminished because of the injuries suffered by him. The closest he came to in support of his argument is that the Appellant "was suspended from work". That is hardly sufficient to lay a basis for a claim of lost earning capacity. Secondly, Ms Janmohamed's submission that liability should be re-apportioned to 70/30 in favour of her client cannot be sustained as the Respondent has not filed a cross appeal, nor has it appealed against the decision of the lower court, and is now deemed to have accepted the decision of the lower court – however wrong it might be.

Now, going to the substance of this case, did the appellant establish, on a balance of probability, a case of negligence against the Respondent? In his pleadings, as we have seen, he alleged that the Respondent was negligent in failing to provide a safe working place or system of work; failing to adequately light up the golf course; failing to prevent strangers from entering; and failing to provide equipment for self-defence. In his evidence before the lower court he said as follows:

"I blame the defendant because they did not give me a security guard to watch over …"

and yet in his cross-examination he admitted that indeed there were security guards at the gate. If he meant that his employers should have provided him a personal guard, that would be an unrealistic expectation, and in any event there was no evidence that his contract of employment entitled him to a personal guard as he watered the lawns of the golf course.

He then says that the Respondent did not provide him with "protective clothing e.g. a light and I was in darkness". He does not say how a light would have protected him from an attack that took place.

On the other hand, the Respondent gave evidence that its club has a high perimeter wall, and that there were security guards stationed at the gate towards Kibera where the Appellant was injured. This evidence had not been challenged.

So, then, in what way was the Respondent negligent? Did the Appellant establish his case on a balance of

probability? I am not satisfied that he did. This was an unfortunate incident where thugs broke in and attacked people. In ***David Ngotho Mugunga vs Mungomoini Estate (HCCC 2366 of 1989)*** Shah, J (as he then was) said:

> ***"I do not see how a defendant can be liable for acts of robbers even if the employee had no implements of defence."***

An employer's duty at common law is to take all reasonable steps to ensure the employee's safety. But he cannot baby-sit an employee. He is not expected to watch over the employee constantly. (See Woods vs Durable Suites Ltd (1953) 2 AER 391)."

In ***Statpack Industries vs James Mbithi Munyao (HCCA No. 152 of 2003),*** I said as follows, and I apply the same to this case:

> ***"Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.***
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> ***Here, in this case, the Respondent did not lead any evidence to connect his injuries or accident to an act or omission on the part of the Appellant. The real cause of the accident was not established. The learned Magistrate ought to have asked herself, as I have repeatedly tried to ask myself, "so what exactly did the employer do or did not do that caused this accident?" And I cannot find the answer in the testimony adduced before the lower court.***
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> ***In Wilsher vs Essex Area Health Authority (1988) 2 W. L. R. 557 the House of Lords held that where a Plaintiff's injury could have been caused by six possible factors of which the defendant's negligence was only one, the onus was on the Plaintiff to establish "causation", and that, in that case he had failed to establish that the defendant's negligence was the cause of the accident. It is instructive to note that in the Wilsher case, the House of Lords noted that at least one of the factors of negligence could be attributed to the defendant. Here in this case before me, not a single element of negligence has been pleaded or proved against the Appellant, who took all reasonable steps to provide protective clothing, and to instruct employees on safety issues.***
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> ***Similarly, in Cummings (or McWilliams) vs Sir Willian Arrol (1962) 1 AER 623 the House of Lords held that even assuming the defendants were in breach of their duty in not providing a safety belt to their deceased employee, nevertheless they were not liable in damages because their breach of duty was not the cause of the damage suffered.***
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> ***Likewise, I find that there was no evidence presented to the lower court to enable the court to draw a fair conclusion that the accident was caused by the negligence and/or breach of duty of care by the Appellant employer."***

Therefore, this appeal cannot succeed. However, as there is no cross-appeal, I have no choice but to uphold the decision of the lower court, and leave the apportionment of liability undisturbed.

With regard to quantum, the Appellant's injuries included amputation of the left index finger at the terminal phalanx, compound fracture of the third middle phalanged shaft, cut wound in the dorsal aspect of the fourth digit, and deep cut on the right of scalp. Based on these injuries, I believe the lower court applied the correct principles in its award for general damages.

The Court of Appeal in the case of ***Butler vs Butler C A No 49 of 1983*** laid down the following

principles that an appellate court should consider in reversing an award of damages by the lower court.

> "(a) That the court acted on wrong principles;
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> (b) That the court has awarded so excessive or so little damages that no reasonable court would;
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> (c) That the court has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered, and in the result, arrived at a wrong decision."

Taking those principles into account, and based on the evidence in the lower court, I believe an award of Kshs.150,000/= for general damages is fair.

Accordingly, and for reasons outlined, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 19th day of September, 2005.

ALNASHIR VISRAM

JUDGE