REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL APPEAL 88 OF 1998

GOHIL SOAP FACTORY LTD……..…….…….APPELLANT

VERSUS

DICKSON ODIMA YIM……...……..RESPONDENT

JUDGEMENT

The Appellant has appealed from the judgement of the Resident Magistrate in the chief Magistrate's Civil Case No. 2329 of 1996 dated 3rd November, 1998. During the hearing of the appeal the Appellant was represented by Mr. Mahida while the Respondent was represented by Mr. Gekong'a. According to Mr. Mahida, the Amended Plaint was filed after the pleadings had been closed – and that no leave was sought to file the same. That meant that the Court should only have considered the original Plaint and the defence. Besides the above, Mr. Mahida submitted that since the claim was based on employer/employee relationship – and that the learned Magistrate had found that he had **not** been employed by the defendant – he should **not** have gone ahead and entered judgement in favour of the Plaintiff. Mr. Mahida was of the opinion that the claim would only have succeeded if the same had been brought under the Occupiers Liability Act. **Secondly**, Mr. Mahida submitted that there was **no** evidence that any fence was fixed after the Plaintiff had been harmed. He further submitted that the scene had been visited and found to be protected. Apart from the above, he argued that the finding by the learned Magistrate that the fence must have been fixed after the incident had **no** basis at all. In conclusion, Mr. Mahida submitted that the award of Kshs.250,000/= was excessive – and that an award of between Kshs.100,000/= to Kshs.120,000/= would have been reasonable.

On the other hand, Mr. Gekong'a has opposed the appeal. According to him, the Amended Plaint was filed within time. He further submitted that the defence was filed on 24th October, 1996 – though the same was served on 8th November, 1996. Due to the above, he submitted that the date started running from that date.

As far as liability is concerned, Mr. Gekong'a submitted that the Respondent had proved his case on a balance of probabilities. He recalled the evidence of the Plaintiff who stated that he had fallen on a pool of acid and that the hole had not been fenced. He further added that the Plaintiff, the DW1 and Court confirmed that the scene had not been fenced.

Besides the above, Mr. Gekong'a further submitted that since that was the first day that the Plaintiff had worked on the premises he should have been taken around to familiarize himself with the place. In default, then the Appellant must be held liable to the dangers that they had exposed the Respondent.

To support his submissions, Mr. Gekong'a referred the Court to ***Clarke & Lindsel on Torts Page 684 – 685*** and the case of:

(1) Lougher Vs Kenya Safari Lodges & Hotels Ltd.

(2) Miriti Vs Firoze Construction Ltd.

As far as the quantum is concerned, Mr. Gekong'a quoted the case of ***Mawingo Bus Services Ltd. Vs Hellen Omukuyia.*** He concluded by stating that the Court should be slow to change the award of the Lower Court. He was of the opinion that the award of Kshs.180,000/= was reasonable and fair.

This Court has carefully perused the submissions by both Counsels and the entire record of appeal. Though Mr. Mahida claimed that the Amended Plaint was served **without** the leave of Court, he never denied that the defence was served on the Respondent on 8th November, 1996.

The record clearly show that the Amended Plaint was filed on 12th November, 1996. That means that the same was filed on time. Though the matter was raised in the submissions of the Appellants – it is unfortunate that the learned Magistrate never made any finding on the same.

Secondly, it was crystal-clear that the incident took place on the first day that the Respondent was posted to the premises of the Appellant. Since that was the first day to be there, it was incumbent for the Appellant to organize a tour of the premises. That was especially crucial since there were some dangerous chemicals on the premises. This Court concurs with the sentiments of **Mc Cardie J.** in the case of **Mcleman Vs Seager** in which he stated as follows:

> ***"So, too, as to premises generally, the rule, I think, is the same and upon the decisions as they stand may be stated as follows – namely, where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties – unless it provides to the contrary – contains an implied warranty that the premises are as safe for such purpose as reasonable care and skill on the part of any one can make them."***

In this particular case, the Plaintiff/Respondent stated outright that he had been employed by **Opiss Security** as a security guard and had been deployed on the material day to work in the premises of the Appellant/Defendant. Since the latter had agreed to have a security guard deployed in his premises, there was an implied warranty that the same were safe to allow him to perform his duties.

Thirdly, it was apparent that the Plaintiff/Respondent had basically suffered the following injuries:

- Second degree burns on the:

· ***Right lower limb from the thigh upto the foot.***

· ***Left thigh.***

· ***Left hand and wrist joint***

Though the wounds healed, there are prominent hypertrophic scars which are permanent dejects marring the cosmetic appearance. The degree of injury was classified as harm with a permanent disability of 10%.

Having perused the quoted authorities carefully, I hereby find that the injuries by the Plaintiff/Appellant in the case of ***Boniface Musyoka Ndolo Vs Pauline Katonge Msau – Civil Appeal No. 34 of 1996, Nairobi*** – were extremely serious and hence the justification for the award of Kshs.600,00 for general damages.

On the other hand, the injuries suffered by the Plaintiff in the case of ***Mary Muhonja Vs The Board of Governors of Erusui Girls Secondary School – Nairobi HCCC No. 132 of 1992*** compare favourably with the present case. Though the awards do differ, I do **not** wish to interfere with the discretion of the learned Magistrate. The simple reason is that I do not see any justification for doing so. This Court is

alive to the sentiments expressed by Hon. Hancox J. A., (as he then was) in the case of ***Yusuf Juma Vs City Council of Nairobi and Daniel Nachela Kahungu [1982-88] 1 KAR 681*** where he stated as follows:

> ***"the test as to when an Appellate Court may interfere with an award of damages was stated by LAW J.A., in Butt Vs Khan [1982-88] 1 KAR 1. "An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or law."***

In view of the above analysis, I hereby dismiss the appeal since the same has no merits at all.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open Court in the presence of Mr. Gekong'a for Respondent and Mrs. Manyoni for Mr. Mahida for Appellant.

MUGA APONDI

JUDGE

19TH OCTOBER, 2005