REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE 254 OF 1997

JOHN MUKURA KARARI …….....……..……. PLAINTIFF

VERSUS

NICHOLAS KINYUA MBUI ……..…..……. DEFENDANT

J U D G M E N T

John Mukura Karari (hereinafter referred to as the Plaintiff) has brought this suit against Nicholas Kinyua Mbui (hereinafter referred to as the Defendant) seeking general and special damages suffered by him as a result of the negligence of the Defendant in failing to provide a safe and proper system of work and in failing to take reasonable precautions for the safety of the plaintiff whilst Plaintiff was working for him as a watchman at the Defendant's Kagumo saw mills.

In his evidence the Plaintiff testified that he was employed by the Defendant as a watchman. By November 1994 he had worked for the Defendant for a period of 9 years and was guarding the Defendant's Kagumo sawmills.

On the night of 10th and 11th November 1994, the Plaintiff was on duty at the sawmill when he was attacked and injured by a gang of robbers. Plaintiff became unconscious and only later found himself at Kerugoya Hospital with head injuries and injuries on his left leg and left hand.

The Plaintiff testified that the premises he was guarding was fenced with off cuts and was about 100 steps square with no security lighting. He denied having fallen asleep on the job or having been negligent in failing to restrain the robbers. He maintained that he was not provided with any protective clothing or equipment and that his injuries would have been less severe had he been provided with protective clothing such as a helmet. Plaintiff produced a police abstract report of the robbery and testified that as a result of his injuries his right hand side was not functioning well.

Dr. Eliud Mwangi a Consultant Physician testified that he examined the Plaintiff on 25th September 2002 and prepared a medical report which he produced in evidence. He noted that the Plaintiff had a history of having been assaulted and that his injuries included a deep cut wound on the right parietal region, a cut wound on the frontal region, a cut wound on the occipital region, bruises on the lower and upper limbs and blunt injuries to the chest and back. He was admitted at Kirinyagah Nursing Home from 11th November 1994 to 24th December 1994 when he was discharged. During examination the Plaintiff complained of recurrent headaches and loss of memory and concentration. The Plaintiff also walked in difficulties and had slurring of speech. Dr. Mwangi formed the opinion that the Plaintiff had not fully recovered.

In his written submissions Mr. Gathiga Mwangi who appeared for the Plaintiff relying on **Civil Appeal No. 16 of 1989 Makala Mailu Mumende v/s Nyali Golf and Country Club** urged the court to find that the Defendant was liable as he had failed to ensure the existence of minimum reasonable measures of

protection for the Plaintiff. He urged the court to award the Plaintiff a sum of Kshs.900,000/= as general damages and Kshs.80,000/= for loss of earning capacity.

In his defence the Defendant denied that the Plaintiff was attacked by robbers and also denied all the particulars of negligence attributed to him. He maintained that he supplied the Plaintiff with all necessary safety equipment and did not expose the Plaintiff to any risk of injury. The Defendant maintained that if the Plaintiff was attacked as alleged then the same was caused by the negligence of the Plaintiff.

In his evidence before this court, the Defendant testified that on the morning of 11th November 1994, he went to his sawmill and found that there had been a robbery and his landrover vehicle was stolen, the office broken into, power saws and other office equipments were missing. The Plaintiff who was the watchman was lying on a gunny bag in a pool of blood and besides him there was a bow, arrow, a torch and a helmet. He took the Plaintiff to Kirinyagah nursing home where he was attended. Plaintiff was referred for a brain scan and Defendant took him to M.P. Shah Hospital in Nairobi.

The Plaintiff was thereafter discharged from Kirinyagah Nursing home and the Defendant paid the bill.

The Defendant testified that he continued paying the Plaintiff's salary through plaintiff's wife for a period of 6 months even though he had only employed the Plaintiff on casual basis and was therefore under no obligation to pay him. He maintained that he had electricity at the sawmill and there was electric security lighting and the premises were well fenced. The Plaintiff was also provided with a raincoat, helmet spotlight and a bow and arrow. He maintained that he did all that he needed to do and therefore prayed that the Plaintiff's suit be dismissed.

Under cross-examination, the Defendant explained that all his documents and records were destroyed in a fire at the sawmill. He conceded that he had not paid any money to the Plaintiff under the workman's compensation Act.

In his written submissions Mr. Kibicho urged the court to reject the Plaintiff's evidence as untruthful and unreliable. He urged the court to find that the Defendant provided the Plaintiff with proper appliances such as a club, whistle, coat and helmet and was not therefore negligent. He submitted that the Plaintiff was negligent in sleeping whilst on duty and in failing to put on the Helmet provided

Relying on **Halsbury Laws of England 4th edition Vol. 16 at paragraph 562 and Nairobi HCCC 2366 of 1989, David Ngotho v/s Mugumoini Estate,** Defence counsel submitted that any watchman who takes such a job takes the risk of being attacked by robbers and being hurt and the employer cannot be liable for criminal acts committed by trespassers which results in injury to the watchman.

The defence also challenged the medical evidence adduced in support of the Plaintiff's claim as Dr. Mwangi examined the Plaintiff about 8 years after the incident and relied on medical records from and the P3 filled by the police Doctor none of which were produced in evidence. Likewise he submitted that the claim for loss of earning and special damages should also fail as appropriate evidence in support of the damages was not adduced.

From the evidence, it is not disputed that on the night of 10th and 11th November 1994, there was a robbery at the Kagumo sawmills owned by the Defendant. It is also not disputed that the Plaintiff was at the material time working as a watchman for the Plaintiff and that he was found on the morning of 11th November seriously injured and unconscious. Notwithstanding the denial by the Defendant it is evident that the Plaintiff's injuries were suffered during the robbery that occurred at the Defendant's sawmill. The question is whether the robbery was as a result of any negligence on the part of the plaintiff and whether the Defendant had taken reasonable precaution to ensure that the Plaintiff was not exposed to any risk of injury.

The Plaintiff testified that there was no security lighting at the Sawmill. This was however denied by the Defendant who claimed that there was electricity lighting. Although the Defendant claimed his

records had been destroyed in a fire it would not have been difficult for him to call evidence from the Kenya Power & Lighting to confirm when electricity was installed in the premises. I believe the Plaintiff's evidence that there was no security lighting in the premises. The Plaintiff testified that he was suddenly accosted by a gang of robbers when he went to check on a knock at the door, the Defendant however maintained that the robbers easily attacked the Plaintiff because Plaintiff was asleep. There is however no evidence to substantiate the allegation that the Plaintiff was asleep.

Indeed if Plaintiff was asleep the robbers would not have assaulted him the way they did as they would have easily overpowered him and tied him up. The fact that the Plaintiff was seriously assaulted is an indication that he was offering resistance and was a threat to the robbers hence their vicious attack on the Plaintiff.

The Defendant further alleged that the Plaintiff failed to put on the Helmet provided to him. This was however denied by the Plaintiff who maintained that no helmet was provided by the Defendant. In this regard it was really the word of the Plaintiff as against that of the Defendant, however, I find it difficult to believe that the Plaintiff would have failed to put on the Helmet if one was indeed supplied to him.

The Defendant implied that the Plaintiff might have removed the Helmet and kept it aside to sleep, however I find that the Plaintiff was not asleep and do therefore reject that preposition. I find that no helmet was in fact supplied to the Plaintiff.

In the case of **David Ngotho Mugunga v/s Mugumoni Estate HCCC 2366 of 1989 (Nrb)** (cited by the defence counsel), A.B. Shah J. (as he then was) stated:

"Clearly it is the duty of the employer to provide any watchman with all possible implements for defence and attack (within legal limits). If such implements were not provided the employer is clearly in breach of such duty."

In the earlier case of **Makala Mailu Mumende and Nyali Golf & Country Club Civil Appeal No. 16 of 1989** which was cited by the Plaintiff's advocate. Nyarangi, JA stated:

"Just because an employee accepts to do a job which happens to be inherently dangerous is in my judgment no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection …….. In my judgment the Defendant was negligent in not providing the Plaintiff with a helmet at the time he was employed as a night watchman."

I do find that in this case the Defendant was under a duty to ensure the existence of minimum reasonable measures of protection for the plaintiff. The Defendant was in breach of this duty by failing to provide the Plaintiff with a Helmet. I therefore find the Defendant negligent and liable to the Plaintiff.

Although it was not disputed that the Plaintiff was injured, it was for the Plaintiff to prove the extent of his injuries. The Plaintiff relied on the evidence of Dr. Eliud Mwangi who examined him about 8 years after the incident and who relied on medical record from Kirinyagah Nursing Home and a P3, none of which was produced in evidence nor their makers identified or called to testify. Dr. Mwangi therefore relied on hearsay evidence and his evidence cannot be relied upon. I concur with the defence counsel that the evidence of this witness was not sufficient to prove the extent of the injuries suffered by the Plaintiff arising from the robbery. Based on the undisputed evidence that the Plaintiff suffered injuries and had to be admitted in hospital, I would award the Plaintiff a modest sum of Kshs.100,000/=.

As regards the special damages and loss of income. The particulars of the special damages were not specifically pleaded. There was also absolutely no evidence of the Plaintiff income. In any case given the Plaintiff's age he was well past the standard retirement age. I find that no sufficient evidence was adduced in support of the claim for special damages or loss of income, and therefore award none.

The upshot of the above is that I do give judgment in favour of the Plaintiff as against the Defendant in the sum of Kshs.100,000/= being general damages for pain and suffering. I make no award in respect of

special damages or loss of earning capacity.

I award costs to the Plaintiff.

Dated signed & delivered this 6th day of October 2005

H. M. OKWENGU

JUDGE