



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HIGH COURT CIVIL CASE NO.242 OF 1995

SAMMY MWEU MUTUTU.....PLAINTIFF

VERSUS

**PHILLIP MULILI
MULI.....1ST
DEFENDANT**

**THE CHAIRMAN BOARD OF
GOVERNORS**

**MUKUYUNI DAY S.
SCHOOL..... 2ND
DEFENDANT**

Coram: J. W. Mwera - Judge

M/s Muteti - Advocate for the Plaintiff
N/A - Advocate for the Defendant

J U D G E M E N T

The file bears a plaint dated 8th March, 1994 filed at Mombasa High Court. The plaintiff sued the defendant under the Law Reform and Fatal Accidents Acts in a matter involving the late Nathan Mututu Kilonzo. The suit then found its way to Machakos.

It was pleaded that Mukuyuni Day Secondary School of Makueni district, the 2nd defendant of which Philip Muli was/is a chairman of the Board of Governors, at the material time employed the deceased Mutuku as a night watchman. That it was a term of the contract of employment that the second defendant should take all reasonable precautions and safety measures to ensure that the deceased Mutuku was not exposed to any risk as a night watchman while on duty with the defendant. But that on 9th May, 1992 at about 1.00 a.m. when the deceased was on duty on the defendant's premises, thugs raided the school and fatally injured Mutuku. That this was to be attributed to the defendant's contractual or statutory duty of employment in which they defaulted. That the deceased (it was pleaded as plaintiff) was not provided with a safe system of work, protective equipment, radio alarms, signals etc by which Mutuku would fend off the risk or call for help. That at the time of his death the deceased had been providing for his widow and two children one aged 31 years and the other seventeen. So reliefs were sought as set out above.

A defence filed on 13th April, 1995 began by doubting the plaintiff's capacity to sue and proceeded to deny that the defendant and the deceased had a contract of employment which contained terms of employment that provided for working gear and safety/risk measures. Negligence was denied

and it was added that the deceased materially contributed to what befell him by not taking due regard for his own safety while on guard duties. That he did not take any reasonable precaution to prevent the injury that caused his death. Six agreed issues were filed on 24th October, 1997.

On 20th September, 2000 the court heard the plaintiff (PW1) who said that the deceased was his father. PW1 took out a temporary grant to administer the deceased's estate (Exh P1) and then filed the suit. He testified that the deceased had been employed as the second defendant's watchman since 1981.

That on the material night the deceased was on duty at the school. The following morning a villager informed PW1 that his father had been killed at the school. In a classroom there the late Mutuku lay dead on the floor, tied across the mouth. PW1 did not know who killed his father. They took away the body.

PW1 further testified that his father used to arm himself with a bow at work and he carried a whistle. That the employer did not provide him with uniform, helmet or rungu. That the five (5) acre school compound was not fenced. PW1 then produced the late Mututu's burial and death certificates (Exhibits P2, 3). That funeral expenses totaled to Kshs.8,077.00 as per receipts which the funeral committee had. The witness got an abstract for the death of a public employee (Exh P4) and showed that Mututu earned Kshs.755.00 per month (not Kshs.717.50) in August K89. The court heard that by 1992 he was earning Kshs.1,085.00. By the time of trial, all dependants were adults.

In cross examination the court was told that PW1 only learnt that thieves who went to steal at the school where the deceased was on duty killed him. That he held the defendant liable because it did not have a fence round the school compound and it did not provide the deceased with proper clothing and other work items which would have helped the deceased to call for help. PW1 emphasized that the deceased was armed only with a bow and arrows and he did not know if he tried to run for safety. That the deceased had a co-worker on duty but PW1 did not know what became of him on the fateful night. That the deceased set aside for the support of this family Kshs.700.00 per month. Since his death the family had to rely on the farm to support itself. That Mututu died at age 70. That the PW1 ignored/overlooked to lodge a claim under the workman's compensation scheme with the school.

There were several adjournments before finally the learned State Counsel closed his case without calling defence. Witnesses had not been forthcoming. By the time the judgement was drafted, the court had submissions only from the plaintiff.

It was submitted that the second defendant take 100% liability on the evidence by the plaintiff that was not controverted. That Kshs.8,147.00 cover special damages while loss of expectation of life should be put at Kshs.80,000.00. As for loss of dependency a sum of Kshs.900.00 per month was suggested over a multiplier of 8. A total of Kshs.57,600.00 was arrived at. A total award came to kshs.145,747.00. The case of MAKALA MUMENDE VERSUS NYALI GOLF & COUNTRY CLUB CIVIL APPEAL NO.16/89 was cited to support the liability issue.

To begin with liability, this court is bound to find that the defendant should bear it and on the only basis that it did not bring evidence to rebut the claim in the plaint that it was liable at common law or by statute. Agreed, the plaintiff did not lay this before the court by evidence or in submission, but the claim was laid and it was not rebutted by evidence. The court heard that the deceased went to guard the defendant's compound in his own clothes and carrying his own bow and arrows plus a whistle. The defendant provided nothing even bare or basic enough, for guarding the large school compound which was unfenced.

In the **Makala Mumende** case (above), the appellant was a night watchman at the respondent club. Unlike in our case he was provided with a club, torch and a whistle. Thieves raided the club and injured the appellant much. There had been a similar raid before and so the respondent knew what risk awaited its watchmen, by experience. The suit had started with an interlocutory judgement on liability against the respondent. Apparently the respondent applied to set it aside and in a confusion of what went on in the

High Court, if this court may term it so after perusing Nyarangi J. A's judgment, the Court of Appeal found that with that interlocutory judgement validly on record, the High Court did not have to go round it, and as it were, hear the case on liability. The learned judges however, re-addressed liability. It said in part.

"The plaintiff's claim, which stands unanswered is that it was a term of the contract of employment and/or it was the duty of the employer to take all reasonable precautions for the safety of the plaintiff while at work and not to expose him to risk of injury which the employer ought, reasonably, to have known. There was no evidence before the High Court in support of the defendants suggestion that it provided reasonable protection".

In the present case, the defendant did not even suggest that it took reasonable precautions about the deceased's safety while at work.

The Court of Appeal appreciated the aspect of liability in (such) employment in a manner that this court can hardly resist. It began by reciting paragraph 562 Halbury's Laws of England 4th Edition (Vol.16) thus:

"562 it is an implied term of contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends to his person."

After citing two or so English cases to support the above, the learned judges said in the concurrent judgement under review:-

"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work, the plaintiff was engaged in. But, however, inherently dangerous, an employer is expected reasonably to take steps in respect of the employment, to lessen danger or injury to the employee". Then they added: "Just because an employee accepts to do a job which happens to be inherently dangerous is, in (our) judgement, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure existence of minimum reasonable measures of protection In the circumstances a helmet would not reasonably be regarded as a modern weapon".

That court then concluded that the respondent was negligent in not providing the appellant with a helmet when he was engaged in night watchman's duties. It should not be lost sight of here that this court has found that on the unrebutted pleadings and evidence from the plaintiff's side, he has proved his case. But what is now on is to show that in cases of this type liability can and should be proved on the material set out.

So if there should be more questions from the **Makala Mumende** case which this court finds quite pertinent, here comes what employers of (night) watchmen should have in mind:

"Prudent employers of security personnel for night or day duties would well be advised to take heed. It does appear to (us) that it is vital for a suitable helmet to be provided and to cover the head, the forehead and the jaw area. A club, a whistle and a torch should continue to be provided. The security industry is booming. In recent years there has been an increase in the number of security personnel guarding companies' premises and facilities. Banks and private homes are increasingly using security guards to protect property from theft and

damage. It is no longer a luxury for a firm to have security staff. In the circumstances it is essential that employers of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen".

This was sometime in 1989. Security aspects have since changed for the worse and what was termed reasonable precaution by security firms in 1989 about their staff minimum protection must have also changed and more stands to be given attention. The Court of Appeal allowed the appeal and awarded damages.

In our present case the court makes the following awards:-

Under the Law Reform Act:

Loss of Expectation of Life - Kshs.70,000.00

Pain and Suffering - Kshs.20,000.00

Kshs. 90,000.00

Under the Fatal Accidents Act the only evidence placed before the court was a March 1989 pay slip bearing a net salary of Kshs.717.50. The court accepts this and on noting that Mututu died aged 70 years, allows a multiplier of five (5). The round up sum arrived at is kshs.28,800.00. (717.50 X 12 X 5 X two thirds). The plaintiff also gets Kshs.8,147.00 as reasonable special damages. The total award here is:-

Loss of Dependency - Kshs. 28,000.00

Special Damages - Kshs. 8,147.00

Kshs.36,947.00

The grand award is

Under the Law Reform Act Kshs. 90,000.00

Under the Total Accident Act Kshs. 36,00.00

Kshs.126,947.00

Now by any standards this is such a small total figure that this court takes the course not to consider by deducting this Law Reform Act award from the whole sum because the same claimant benefits under both Acts (see Kemp & Kemp: **The Quantum of Damages.**)

In sum the plaintiff is awarded kshs.126,947.00 (One Hundred and Twenty Six Thousand, Nine Hundred and Forty Seven Shillings Only). Costs awarded on the lower court scale. Judgement accordingly.

Dated, read and delivered on 9th January, 2002.

J. Mwera,

Judge.