REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO 11 OF 2000

EAST AFRICA TANNING EXTRACT COMPANY LTD.....APPELLANT

VERSUS

GERISHON BARASA WANYONYI .....RESPONDENT

(An appeal from the Judgment of the Resident Magistrate at Eldoret, JA Wanjala RM Esq

dated 6th August 1999 in PMCC No 971 of 1996)

JUDGMENT

The appeal before me is filed by East Africa Tanning Extract Company Limited (appellant) through the law firm of M/s Nyairo & Co Advocates. It is an appeal from the judgment of Miss JA Wanjala, then Resident Magistrate in PMCC No 971 of 1996 which she delivered on the 6th August, 1999 and which she found the appellant liable to pay Gerishon Barasa Wanyonyi (respondent) general damages for breach of implied terms of the contract of employment between the appellant and the respondent.

It was the respondent's case against the appellant that he was employed by the appellant on the 24th February, 1990 as a general worker, and that it was a term of employment that the appellant would take all reasonable precautions for his safety while he was engaged upon the said employment, not to expose him to a risk to damage or injury of which the appellant knew or ought to have known, and to provide him with a safe and proper system of working.

More particularly the respondent pleaded in his plaint, and verified that plea with oral evidence, that on or about the 2nd November, 1995, while he was lawfully on duty, guarding the appellant's premises (being Chemeset Piggery), and due to the negligence of the appellant, a group of about six people (thugs), intending to steal the appellants property, attacked him and seriously injured him.

The respondent pleaded, and verified that the plea again in his oral evidence, that the appellant failed to take any or any adequate precautions for the safety, exposed him to a risk of attack by the thugs and subsequent injuries which he sustained, failed to provide him with protective clothing, helmet, shield and a whistle, and failed to provide reinforcement for security of the system, particularly as the premises he was guarding was on a ten acre area.

The respondent testified that with a whistle, he would have raised alarm by blowing it and other people would have gone to his rescue. The shield would have protected his body from stones, a helmet would have protected his head. He said he had raised this matter with the appellant's manager earlier on before he was attacked but he was waved off and told either to continue working or to stop. He decided to continue working as he was on lawful employment.

The respondent tendered into evidence a medical report prepared by Dr JK Kattam (exhibit 2) who examined him on the 9th November, 1995. The respondent was found to have sustained injuries on his chest, left shoulder and left abdomen. On the chest he had sustained soft tissue injury to the front part of the chest and felt acute pain. There were bruising over the site. X-ray films of the chest showed no fracture. He had sustained a cut on the left shoulder, soft tissue swelling and was in pain. He had also sustained a blunt injury to the left side of the abdomen. Dr Kattam's prognosis was:

> "Mr Wanyonyi suffered soft tissue injuries and pain as a result of the assault. His injuries are expected to heal."

The appellant filed a statement of defence denying liability and pleading that the respondent substantially contributed to this incident by failing to adhere to safety rules set by the appellant company, exposing himself to risk and damage which he knew or ought to have known, falling to use the provided safety clothing and deliberately inflicting injury upon himself.

The appellant is a limited liability company, incorporated in Kenya under the Companies Act chapter 486 Laws of Kenya, with directors and other officers empowered to sue or be sued. Not a single officer of the appellant company came to court to verify these pleadings, particularly to explain the circumstances under which the respondent had allegedly been provided with protective clothing and failed to use them and how the respondent had deliberately self-inflicted injuries which Dr Kattam described in the medical report.

The learned trial magistrate reviewed the recorded evidence adduced by the plaintiff and perused the exhibits, she gave judgment against the appellant on liability and awarded the respondent Kshs 66,000/- general damages.

Mr Nyagaka advocate from M/s Nyairo & Co Advocates, prosecuted this appeal. His first ground of appeal is that the learned trial magistrate erred both in law and in fact in ignoring the issue of remoteness of damages.

It is trite law that an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk.

In the particular circumstances of this case, I am in agreement with Mr Kitiwa that where the respondent was employed as a watchman to guard property on a ten acre area, a prudent employer would have been expected to provide him with protective devices so as not to expose him to unnecessary risk. Such necessary protective devices would have included a whistle, a helmet, protective clothing, and a back-up security system, both human and mechanical. The very fact that the appellant felt a need to employ a guard at its Chemeset Piggery points to its knowledge and awareness that there was a likelihood that its property would be liable to be stolen by thugs. An attack on the respondent was therefore foreseen and contemplated. There is no evidence on record to suggest that the appellant provided the respondent with reasonable protection to his person.

It is true that the work of a watchman entails some risk, and that watchmen take upon themselves risks necessarily incidental to their employment. Nevertheless, in such circumstances, an employer's duty to the watchmen remains the same; to take reasonable care, to maintain a safe proper and suitable security system and to provide them with sufficient protective tools for their use and generally to take adequate measures which will ensure their safety in the discharge of their duties.

A watchman's tools include a torch, whistle, *rungu*/club, helmet, shield and protective clothing. They should be provided, where possible, backup systems through which regular patrols by armed supervisos and easy accesibility to alarm and communciation systems. All this is intended to lessen danger to him in the discharge of his duties.

At paragraph 560, *Halsbury's Laws of England*, 4th Edition, Vol 16, it is stated, *inter alia*:

> "At common law an employer is under duty to take reasonable care for the safety of his employees in all the circumstances"… so as not to expose them to unnecessary risk."

In *Makala Maku Mumende vs Nyali Golf & Country Club* CA No 16 of 1989 Mombasa Nyarangi JA (as then was) observed:

> "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. The necessity is the greater for an employer to protect his employees from danger after a warning following a potentially dangerous incident during which no injuries are sustained."

I think it 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 the employee. The issue of remoteness of damages in this case did not therefore arise.

I find therefore that the liability of the appellant was established in this case and I do hereby hold that the appeal on liability has no merit.

On quantum of damages the award of Kshs 66,000/- was not excessive in the circumstances.

This appeal fails in its entirety and is hereby dismissed.

I award costs of this appeal to the respondent.

I so order.

Dated and delivered at Eldoret this 12th day of June, 2002

A.G.A Etyang

Judge