



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 39 of 1998

ELPHAS WANIRE MAKIN.....
APPELLANT

V E R S U S

EXCELLENT SECURITY SERVICES LTD.....
RESPONDENT

(Being an appeal from the Judgment of Muchelule Chief Magistrate delivered on

25.6.1997 in Chief Magistrate Civil Suit No.756 of 1993)

J U D G M E N T O F C O U R T

The Appellant was the Plaintiff at the lower court. He sued for special damages, general damages and costs from the Defendant who was his employer. The Defendant is a Security Services firm. It hired the Appellant as a night guard. At the material time the Appellant was a supervisor who at night, moved from one premises to another to check whether other night guards were at their place of work carrying out their guarding duties. He was provided with a bicycle as the means of transport. It would appear from the records that the bicycle the Appellant used was not equipped with a head light. Nor was the appellant himself provided with a torch or a helmet. It is not easy to understand how he was able to use his bicycle during dark nights, but those are the conditions he worked under for the Respondent. His basic salary was Kshs.1,500/- per month.

On 6.5.1993 at night, at Ganjoni area the Appellant who was in the course of his abovementioned employment was attacked by robbers who hit him with a stone on the head causing him serious injury. They robbed from him his bicycle and money. He was later rescued by other guards and taken to Coast Provincial Hospital where he was admitted for two days before being discharged. He continued with out-patient treatment. Later during this treatment he lost consciousness and fell down indicating that the head injury was more serious than earlier thought. He was re-admitted for a further five days when medical examination established partial paralysis of one side of his body. Later Dr. Muthunzi prepared a medical report, Exhibit 2. Re-examination was later done by another Doctor, Dr. Mwangombe, a neurologist. The two medical reports were accompanied by a third one by Dr. Mendes, who examined the Appellant

on behalf of the Respondent herein. The three doctors' findings established that the head injury was so severe that it depressed the skull fracturing it on the vertex. A huge bone chip fell inside the cranium. This led to post-traumatic convulsions with left sided hemi-paresis. The effect of the above was low libido, occasional numbness on the left side of the body as well as reduced sensation on the same side. He will continue to have serious post-traumatic headaches on the right side. Sight at night was similarly reduced. There is a recommendation that he undergoes surgery to uplift the bone chip on the cranium.

The Respondent did not really deny these facts. It in fact went ahead to fill Workman's Compensation Claim for the Appellant and the form of such claim and the above medical reports were all exhibited in the lower court. The Respondent decided not to attend court and defend the Appellant's claim although his advocate was in court. The Respondent's written defence was merely a general denial of the Plaintiff's claim though, without prejudice, it tried to shift the blame to the Appellant by stating that the latter conducted himself without due care and that he had in any case accepted such risk by accepting the risky job and that he should not, therefore, be heard to complain. However, defence was clearly proved to have been a sham when he failed to turn up in court and controvert the Appellant's evidence.

The Plaintiff's plaint was admittedly very poorly drawn. Nor were his advocate's written submissions any better except probably in putting on record the various decided authorities that could guide the court in arriving at a proper and just decision to both parties. It is also difficult to understand why a serious case such as this which had ample evidence available could be filed in a lower court limited in its pecuniary jurisdiction clearly to the prejudice of the Plaintiff. Worse still if the case was filed in the lower court at its start when the medical condition of the Appellant was unknown, there is no reason on the record why an application to transfer the same could not be made later to transfer it to the High Court for the benefit of the Appellant when the medical reports finally revealed the seriousness of the injuries. Be that as it may, the case came for a hearing before Honourable Muchelule. The above evidence was placed before him. It was not controverted by the Respondent who did not turn up. The counsel for the parties highlighted the substance of the evidence before him and quoted the applicable law and legal precedents. I have examined the Honourable Magistrate's judgment. He properly examined the evidence before him. How then he came to the conclusion with all the uncontroverted evidence before him, that the Plaintiff failed to prove his claims even in respect to general damages, is most difficult to understand or appreciate. It is true that Appellant's work at night involved risk even of being attacked by robbers as happened in this case. But to conclude that the employer, effectively had no duty of supplying safety items or establishing safe working conditions to the employees like the Appellant, like a torch or a helmet, is clearly an error in law that cannot be left undisturbed, lest it leads to similar judgments being found in the judiciary records. The Respondents may clearly have not encouraged the robbers to attack the Appellant, but lack of a torch which could have helped appellant to see the robbers and avoid them or help to avoid the attack was a failure in the duty of care imposed by law upon the employers such as the Respondent. Nor can it be argued that if the Appellant wore a helmet it could not have mitigated or even totally avoided the injuries that the Appellant finally sustained that unfortunate night. The trial Magistrate erred in failing to appreciate the duty of care that was imposed upon the Respondent. Had he so appreciated, he would have found for the Appellant and would have proceeded to assess the due damages. There was sufficient evidence before him to find for the Appellant. Furthermore, even when he believed he had no evidence before him to proceed to assessment, he should have adopted the practice now fully accepted in the courts of law of assessing damages in case his findings on matters of fact are not upheld by a higher court. This is so because having heard the case he might be in the best position to award a fair and just amount of damages.

As the situation stands, this court must overturn the Honourable Magistrate's finding on facts and law and finds that the Appellant proved his case on the balance of probability and is entitled to damages.

In my view the Appellant through his advocate wanted to limit the damages awardable to the pecuniary jurisdiction of the Chief Magistrate generally fixed at Kshs.500,000/- as earlier commented, but as for what reason, this court has no answer. The Appellant did not establish on the record that the Chief Magistrate who decided this suit at the lower court had any special jurisdiction beyond the above sum at the relevant time. The best course in my opinion would be to refer the case back to the Chief Magistrate

to assess damages but since the particular Magistrate is no longer in this Station and in view of the fact that this court has original jurisdiction to make relevant orders, and also since the matter in my view has not only been improperly handled by the Plaintiff's counsel and the lower court so far, a further delay will further prejudice the Appellant who until now may need the money to go for further medical treatment. I will accordingly assess damages as follows, being persuaded by the case of : Robinson Ndiri Gachui –vs- Kenya Tea Development Authority, Mombasa HCCC No.1679 of 1992 – Mbogholi, J., where the court found that the claimant had sustained a fracture of the skull, paralysis of the left side of the body and a slurred speech. He awarded Kshs.800,000/- as general damages. In this case before me, the injuries are similar except that the Appellant has or will most likely be liable to develop epileptic fits. He also has lost his libido and has continual headaches. Furthermore, the doctor, specialist, has recommended further surgery which will cost more money. I would award –

a) General damages for pain suffering and loss of amenities – Kshs.750,000=

b) Further medication - Kshs.300,000=

Total - Kshs.1,050,000=

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No evidence was properly led on special damages and loss of future earning capacity. I would not therefore award anything thereunder.

Before making final orders in this case I would wish to make two comments. The first one is that in view of the fact that the Plaintiff through his lawyers had decided to limit the awardable damages to the Chief Magistrate's court's jurisdiction, the above award shall be reduced to the sum awardable by the Chief Magistrate generally, which is Kshs.500,000/-.

The second comment is that Mr. Gikandi's conduct in this appeal was not only fair and just to the parties herein but he went out of the way to assist this court to arrive at a fair and just final decision. At one stage he was apprehensive that he was going overboard in favour of the Appellant who was not his client. But it is my opinion that in taking the course he did, he saved his client from paying the double amount of damages that would have been the end result of this case where the possible course might have been a fresh assessment at the lower court. This could easily have led to an application for transfer of the matter to this court which could give this court a full right to assess damages on its original jurisdiction.

The final orders therefore are that judgment is entered for the Plaintiff/Appellant for:-

a) General damages of Kshs.500,000/-.

b) Interest at 14% from the date of judgment until full settlement.

c) Costs to the Plaintiff/Appellant on the sum awarded to be agreed upon between the parties or be taxed.

Dated and delivered at Mombasa this 11th day of June, 2002.

D. A. ONYANCHA

J U D G E

Delivered in the presence of:

Kinyua – for Khaminwa -for Plaintiff/Appellant

Gikandi - for Defendant/Respondent