



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO.206 OF 2001**

**CROPS ESTATE LIMITED ..... APPELLANT**

**VERSUS**

**DAVID IRUNGU GATHAKA**

**PAUL KARIUKI THUBI ..... DEFENDANTS**

**J U G D E M E N T**

The respondents were employed by the appellant as watchmen guarding the latter's coffee stores. The physical address of the appellant was not given.

But on the night of 4th/5th May, 1998, while on duty, they were attacked by robbers in process of which they were injured.

The thought the appellant had not provided them with proper and a safe working environment, so they filed a suit in the court of the Resident Magistrate Gatundu to claim from the said appellant both special and general damages for the injuries sustained in the robbery. They blamed the appellant for negligent.

After a defence was filed to the suit by the appellant to deny the claim, the matter was fixed for hearing before a Resident Magistrate (Shem Kebongo) on 25th January, 2001 and 15th March, 2001 when parties appeared before the Magistrate and testified in the case.

The Learned Magistrate wrote and delivered his judgement on 5th April, 2001 finding the appellant to blame for this robbery to the extent of 90% while the respondents were to blame to the extent of 10%.

He awarded the first appellant general damages of Kshs.57,000/= less 10% leaving a sum of Kshs.51,300/= while the second appellant was awarded Kshs.88,000/= less 10% leaving a sum of Kshs.79,200/=. Each of them received specials of Kshs.800/= and this is why this appeal was filed to this court.

The memorandum of appeal filed in this court on 9th May, 2001 cited five (5) grounds of appeal. These grounds faulted the trial Magistrate for finding that the appellant was liable in negligence and in his award of damages in the ratio of 90% against the appellant and 10% against the respondents; and/or in his finding that the respondents had proved their case on a balance of probabilities when there was no evidence to support this holding.

That he erred in failing to consider the defence case/evidence; that the awards made were not supported by the evidence adduced or that they were excessive.

The appeal was placed before this court on 18th September, 2002 when counsel for the parties appeared and submitted either in support or opposition to it.

Counsel for the appellant submitted that defence evidence and authorities were not considered by the Magistrate and that failure to reply to the defence was an admission of the allegations made in such defence.

According to counsel, where somebody takes on a risky job, the doctrine of *volenti non fit injuria* applies.

That since the respondents had been supplied with basic appliances, the apportionment of liability at 90%:10% ratios was improper.

That the case was not proved, as to liability, as required by law and that if the authorities supplied by the appellant were considered, a lower award would have been made otherwise awards made in the case were excessive.

Counsel prayed that the appeal be allowed and the lower court judgement set aside with costs.

Counsel for the respondent opposed the appeal and stated that where an employee is injured while on duty, the employer is liable for failing to provide a safe and healthy working place by failing to provide appliances like the helmet and for failing to re-enforce security during the period of high coffee thefts; by providing extra guards.

Counsel said the respondents did not anticipate being injured by robbers at their place of work hence the doctrine of *volenti non fit injuria* could not apply.

That the learned Magistrate considered treatment cards and medical reports to make his awards and that they were commensurate with the injuries sustained. He prayed that the appeal be dismissed with costs.

It is true the maxim *volenti non fit injuria* – applies where one has invited or assented to an act being done towards him and cannot, when he suffers from it, complain of it as a wrong; or one – like in the case subject to this appeal, who takes upon himself a task which is inherently dangerous, cannot complain of injury unless there is a clear breach of duty or negligence on the part of the other party – see Smith v Baker & Sons (1991) A.C 325 at page 360 and Morris v Murage & Another (1991) AC 2 B 6.

In the case subject to this appeal, there was a fence around the factory in form of a mesh wire reinforced by Keiyapo plants. I would consider this ordinarily sufficient fencing for each factory and not inadequate as the respondents tended to put it.

The respondents were provided with bows, arrows, a whistle and torch. These, I would consider sufficient implements for the type of duties the respondents were re-employed to perform.

But being a high coffee thefts seasons as both parties admitted in the lower court, it was negligence or breach of statutory duty on the part of the appellant to engage only two guards instead of the usual four (4) or more to guard the factory on the date of the incident.

In such circumstances it would have been improper for the lower court to apply the maxim “*volenti non fit injuria*” when the appellant obviously provided inadequate security. I support the Magistrates’ apportionment of liability and have no reason to interfere with it.

As regards the award of damages the learned Magistrate must have considered the treatment cards and medical reports prepared by Dr. Macharia in order to award these.

In any case, I am not persuaded that these assessments were excessive by any standards, and in particular in view of the declining Kenya shilling.

However, apportionment of liability should also have applied to special damages. Other than this observation on the application of apportionment of liability to special damages, this appeal has no merit and I dismiss it with costs.

Delivered this 24th day of September, 2002.

**D.K.S AGANYANYA**

**JUDGE**