



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 124 OF 1998

PETER BULINDA SHITSAMAPLAINTIFF

VERSUS

TEMBO INVESTMENT LTD.DEFENDANT

J U D G M E N T

The plaintiff brings this action on behalf of the estate of his son who died while on duty at the premises of the defendant. There is also a claim for the defendants who have been deprived of financial help due to the death of the deceased.

It is not disputed that the deceased Felix Bulinda Shitsama was employed by the defendant as a bouncer. The true meaning of this word in relation to his duties is not clear but it is said evidence that he was to check on noisy customers inside the night club and on that night he was on security side. The deceased earned Shs. 4,000/- per month and he was aged 26 years when he died. His father said he received from him Shs. 2000/- per month.

He died on 2-6-1997 after being shot by robbers who attacked the premises at night of first June, 1997 at 3.00am on 2nd day. The deceased was survived by his father and mother and sisters and brothers. He was not married and did not have any children.

On that night PW2 Tom Sankwa said that he was in charge of security when thieves came in they were in a car he asked his guard man Cosmas to request them to park their car properly. They refused. Deceased was in office. PW2 exchanged words with one of the robbers who said he was a police man. This man drove his car out of the gate. He later came back with other persons. Another vehicle Toyota came in. PW2 was at the area where customers purchase tickets. He heard a shot and he saw the deceased fall to the ground. The robbers then took the money from the cash box. There were people in the disco. There were 12 askaris that night. The deceased was on the side of accounts office. There was no electronic door by cash office, no metal detector, there was no radio communication. The deceased had nothing to protect himself. This witness said that after the incident the security has been strengthened. There were 7 robbers who came in. They approached in a clever manner without attracting too much attention and it is only when they approached cash office that they became violent and shot the deceased who was at the cash office.

The defendant did not produce any evidence although there was a defence filed. The allegations in the defence were therefore not supported by evidence and that the case of the plaintiff is therefore proved to the required standard.

This case arises out of obligation of employer (defendant) to the employee (deceased) particulars of negligence are stated as failure to ensure there was enough security within its premises. The premises are

said to be Tembo Disco on the main Mombasa/malindi Road. It was a night club and disco. Although there were 12 askaris it will be seen that the robbers were seven in number. The manner they entered the premises shows that the defendant did not have adequate security notwithstanding the 12 askaris. These askaris must have been unable to provide the quality of security that could have kept the premises safe. Members of public were at liberty to enter freely. There were no metal detectors or radio communication or other devices to offer detection of robbers. The defendant did expose the establishment to robbery and attacks as is claimed.

It is also claimed that the cash office was not secured. The evidence shows that since that incident, security has been so improved that robbers cannot enter the cash office.

I therefore find that the defendant was under duty to secure the premises and not to expose his employees to risk. It is said that the deceased should have known that the job he was doing was risky. This is not borne by any evidence. It is not shown that he had any training to qualify him as a security expert and the nature of work he did was not any more risky than any other in the city. He lost his life because the defendant was careless and negligent in the maintenance of reasonable security in the premises. The very fact that the robbers found their way from the car park to the cash office without being detected is a sign of the careless manner in which the premises was kept.

I do find that the negligence as pleaded is proved. The defendant took the security of the premises too casually and the result was the death of the deceased.

I enter judgement against the defendant at 100% on liability. As to quantum counsel for the plaintiff proposes an award of shs. 100,000 for loss of expectation of life. Although defendant proposes shs. 60,000/- I am convinced that shs. 100,000/- is appropriate award after taking into account the age of the deceased at the time he was cut of without time to raise a family. On the issue of pain and suffering before death, there is no evidence and it is clear death was evident. No award is made under this head. On the issue of dependency the deceased was aged 26 years. He could have lived a reasonable life but it is not certain for how long. Life has many uncertainties. The dependants are his parents are already over 45 years old. The father was in gainful employment with Kenya Ports authority. The case of dependency of these people has to be considered. I do not consider that his job was risky. I have already said he was not trained in security employment. His job was just like other unskilled labour. I am of the view that a multiplier of 20 is appropriate which will bring the dependency to 480,000/-. The claim for special damages is claimed at Shs. 195,237/- supported by receipts exhibited in a bundle marked Exhibit 4.

Counsel for the defendant did not cross examined on these receipts.

They include receipt for coffin transport tickets.

Mass Stipend

Receipt for funeral flowers

Funeral advertisements

Provisions for food

These items form our evolving culture on funerals and cannot be dismissed out of hand. Our constitution provides that the courts do recognize customs of Kenyans and enforce the same except where it is proved repugnant.

I therefore allow the claim for special damages as pleaded and proved.

The upshot is therefore award as follows;

Loss of expectation of life shs. 100,000

Dependency shs. 480,000

Special damages shs. 195,000

Shs.775,000

Deduct workman compensation

already paid shs. 255,000

Shs. 520,000

Judgement is therefore hereby entered for plaintiff against defendant in the total sum of shs. 520,000/- plus interest and costs at court rates.

The said sum of apportioned between the defendant's

Father (plaintiff) 50%

Mother 50%

Dated 13/9/2002

J. Khaminwa

COMMISSIONER OF ASSIZE

HON. J. KHAMINWA

LADY COMMISSIONER