Diro v Suntu & another (Civil Case E071 of 2021)
[2024] KEHC 7261 (KLR) (Civ) (12 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7261 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E071 OF 2021

JN MULWA, J

JUNE 12, 2024

BETWEEN

JOHN DIRO ..... PLAINTIFF

AND

ROBINSON OLODARU SUNTU ..... 1ST DEFENDANT

SEASONS RESTAURANT AND HOTELS LIMITED ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiff who is an Advocate of the High Court of Kenya. By his plaint dated 3/3/2021 he sued the defendants seeking special damages in the sum of Kshs. 1,445,273/=, future medical expenses, general damages for pain and suffering, special damages for loss of business and earning at Kshs. 20,000,000/= plus costs and interest.

2. The cause of action as stated in the plaint arose from an alleged battery/assault upon the plaintiff by the 1st Defendant on 7/11/2020 causing him to sustain grievous bodily harm. At the material date and time, at about 7:05 hours, the 1st defendant was an employee of the 2nd Defendant, and was in the cause of his employment with the 2nd Defendant as a security guard at its Seasons Restaurant and Hotels Limited situated at Embakasi.

3. The plaintiff was a lawful guest at the 1st Defendant's hotel, Seasons Restaurant for the period 6.50pm - 7:05 pm where he alleges to having gone to meet a client to execute a big contract worth Kshs. 200,000,000/= and had decided to walk out and return as the client had not arrived and that as he was leaving the hotel premises while at the exit gate/barrier, without any cause, colour of right and/or provocation the 1st defendant instigated an argument that led to the guard slapping him at the back of his head, brandishing a "rungu" with a metal affixed to it and hitting him on his right hand side of his head and skull including inflicting deep cut wounds on both of his hands leaving him for dead.

4. The particulars of battery and injuries caused to the plaintiff are stated at paragraph 13 and 16 of the plaint.

   In addition, the plaintiff claims to have incurred losses in medical and related expenses in the sum of Kshs. 480,273 /= and post hospitalization expenses of Kshs. 965,000/=. He seeks compensation from the defendants as particularized at paragraph 18 and 21 of the plaint.

5. The Plaintiff therefore prays for judgment against the defendants for: -

   a) Special damages. —---------- Kshs. 1,445,273/=

   b) Future medical expenses.

   c) General damages for pain and suffering.

   d) Special damages for loss of business and earnings of Kshs. 20,000,000/=

   e) General damages for loss of business and earnings.

   f) Cost of the suit and;

   g) Interest thereon at court rates until payment in full.

6. Together with the plaint the plaintiff filed his witness statement dated 4/03/2021 and his list of documents as well as his four witnesses' statements.

7. The 1st defendant did not file his defense upon being served with court process upon which Interlocutory judgment was entered against him on 15/02/2022.

8. The 2nd Defendant filed its statement of defense in which it denied the plaintiff's claim including occurrence of the incident and more particularly, that it was negligent in any manner, further stating that in the alternative, that if the said incident occurred which it denied, it could not be held vicariously liable for the alleged assault committed by its employee done in wrongful exercise of a discretion vested in the employee and puts the plaintiff to strict proof of the allegations. The 2nd Defendant further denies particulars of the injuries, special and general damages, and further places the plaintiff to strict proof of the same.

9. Lastly, the 2nd Defendant denied having been served with notice to sue but admits the court's jurisdiction in regard to the suit and seeks dismissal of the same with costs. In response to the 2nd Defendant's defense, the plaintiff filed a reply to the statement of defense dated 18/05/2021 reiterating its claim in the plaint and thereby praying for striking out of the defense for disclosing no defense in law.

Plaintiff's Case and Evidence.

10. The plaintiff testified as PW1 and adopted his witness statement dated 4/03/2021 as his evidence in chief as well as his Documents as filed.

    On cross examination the plaintiff testified that as he was leaving the hotel while at the barrier/gate the first defendant, without any provocation or cause, hit him at the back of his head and as he turned to find out what had happened, the 1st defendant removed his metal- handed "rungu" and told him that he would finish him and also removed a sword, raised it towards him and while he was defending himself, raised his hands in surrender but the sword slashed his left hand below the elbow and right wrist and was left bleeding before he was rescued and given first aid and rushed to the nearby Bliss Hospital and later to Nairobi Hospital where he was treated and admitted for seven days.

11. It was his evidence that as a result of the injuries, he lost the business he had gone to do at the hotel, being to execute a big contract with one of his clients, Multiple Hauliers (E.A) Limited worth Kshs. 200 million and Kshs. 20 million in legal fees as the client withdrew instructions but the fee note had been raised two months prior to execution of the contract. In addition PWI testified that due to the injuries he had to employ a caregiver, a driver and a stenographer for which he sought reimbursement in terms of special damages.

12. PW1 further testified that he doubted whether the 1st Defendant was trained as he was not handled professionally stating that the security guard asked him if he wanted a fight when he turned to see who and why he was slapped.

13. PW2 was one Leonard Oyamo. He relied on his witness statement dated 7/10/2021. He stated that he was an employee of the 2nd Defendant as an Administrator for six years. He testified that on the material day he did not visit the hotel as he was working at the Peponi Head Office, but testified that he saw the plaintiff and spoke with him at the parking and saw him walking in and out, and also saw the first defendant removing a rungu at the gate and beating the plaintiff after which he helped him to hospital.

14. PW3 was Doctor Meshach Adams Orondo who produced a medical report prepared by Doctor Nan'gole Wanjala on the plaintiff's injuries as P. exhibit 5 dated 17/11/2020.

    PW4 Lydia Nyagaya was the plaintiff's wife. Her witness statement is dated 7/11/2020. Her evidence was that she was called to the scene where she saw the plaintiff bleeding from the hands and took him to Nairobi Hospital from Bliss Hospital where he had been taken. It was her testimony that upon discharge she attended to each and every of his needs.

15. PW5 Clive Critchlow was the general and relationships manager operations at Multiple Hauliers (E.A) Limited. He adopted his witness statement dated 4/03/2021 and testified that he was to meet with the plaintiff at the Hotel to discuss a business contract but did not meet him due to the incident. It was his testimony that the contract for discussion was worth Kshs. 200 million and if successful, the legal firm, Diro Advocates, would charge Kshs. 20 Million on legal fees. It was his evidence that the company withdrew instructions and never paid the invoice issued two months prior to the execution of the contract.

Defence Case and Evidence.

16. The Second Defendant called two (2) witnesses.

    DW1 was Wilson Oyamo. He relied on his witness statement dated 7/10/ 2021. His evidence was that he did not witness the incident but testified that as an employee of the company the hotel's guards are trained but that injuring a patron is not part of the services they offer or do. He confirmed that the first defendant was an employee of the hotel but failed to produce any documents to show that the hotel's security guards are properly trained.

17. DW3 Cepher Ochieng testified that he was an employee of the hotel as a security guard and that he was at the hotel premises when the incident occurred at the hotel gate and that he heard an argument between the 1st defendant and somebody, but did not witness the incident. He stated that they are trained on how to treat and handle hotel guests and that the incident happened outside the hotel gate.

    Upon the above pleadings and evidence, as advocates for the parties' filed written submissions. I have carefully considered the same.

18. The issues that arise for determination in my view are four, thus -

a) Whether the first defendant is liable for battery/assault causing grievous bodily harm to the plaintiff.

b) Whether the 2nd Defendant is vicariously liable for the negligence of the first defendant?

c) Whether the plaintiff is entitled to the orders sought?

d) Who bears the cost of the suit?

Both parties have extensively submitted on the issues as framed.

Plaintiff's Submissions.

19. On the doctrine of vicarious liability, the plaintiff submitted that when a tortious act is done in the scope or during the course of employment by the tortfeasor, the doctrine is applicable citing the observations by Waki J. A. in P. A. Okello and another T/A Kaburu Okello and partners V. Stella Karimi Kobi & 2 others. Civil Appeal number 183 of 2003 that -

> " In assigning vicarious liability, the learned judge appreciated correctly that it arises when the Tortious Act is done in the scope or during the course of his employment" borrowing from the Court of Appeal in Tabitha Nduhi Kinyua v. Francis Mutua Mbuvi & Another (2014) eKLR while citing the case Kenya Bus Services Limited V. Kawira in Civil Appeal No. 295 of 2000, and added that-
>
> "The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time of the delict"

20. Based on his arguments on the above observations, the plaintiff concluded at paragraph 74 of its submissions that if there is a relationship, there must be a sufficiently close connection between the wrongful act and the relationship between the tortfeasor and the employer, meaning that it would be just to impose liability on the employer, the 2nd Defendant for the tortious actions of the 1st Defendant.

2nd Defendant's Submissions

21. The 2nd Defendant's submissions are of a different view based on Salmond on Torts, 6th Edition, 1924 at page 100 that;

> " Under the rule of law, a master is not responsible for wrongful act done by his servant unless it is in the course of employment and deemed to be done if it is either
>
> a) Wrongful act authorized by the master or;
>
> b) A wrongful and unauthorized mode of doing some act authorized by the master.

22. It is therefore submitted that the 2nd Defendant ought not to be found liable for the criminal assault/ battery if the hotel never authorized criminal acts to be committed by the security guard while in the course of his employment.

23. Additionally, the 2nd defendant put forth two stage tests that must be met before employers may held liable for criminal acts of their employees, citing 2 decisions of the UK's Apex Court;

1) SC 13; and Barclays Bank PLC V. Vailans [2020] UK

2) WM Morrison supermarkets. PLC Varilous claimants [2020] UK SC to the holdings that there must be a:-

   i. Close connection between the relationship and the wrongdoing which makes it fair and just to hold the defendant responsible and;

   ii. that there is sufficiently close connection between the wrong act and what the wrongdoer had been authorized to do by the defendant, which makes it fair and just to hold the defendant liable for the wrongdoer's actions.

   By the above tests the 2nd defendant submitted that there existed neither a close connection between the wrongdoer, the 1st defendant, the wrongful act and what he had been authorized to do by the 2nd defendant.

24. At Clerk & Lindsell on Torts 18th Edition (London Sweet & Maxwell 200) it is provided that–

> " It is in general the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of discretion Vested on the employee."

25. In our local jurisdiction, the 2nd defendant cited the cases-

Evans Okuku Khaduli V. Daross Security Firm [2018] eKLR; Stratpack Industries V. James Mbithi Munyao HCCA. No 152 of 2013 for the proposition that the Plaintiff must prove a causal link between someone's negligence and his injuries and must adduce evidence from which on a balance of probabilities, a connection between the two may be drawn as not every injury is necessarily a result of someone's negligence adding that an injury perse is not sufficient to hold someone liable for the same.

26. The second defendant further cited Joel Mutemi Karangu V Saiko Lekeresie & Another [2012] eKLR for the proposition that circumstances of each incident ought to be interrogated individually to find out whether such wrongful act could be closely connected to the security guard's discharge of the employer's duty.

27. Additionally, the 2nd defendant has urged the court to find and hold that there could be no way a security guard could act the way the 1st Defendant acted, attacking the plaintiff with such intensity out of nothing without any provocation or in self-defense and find that it was purely out of self-defense that he fought back the Plaintiff.

28. On the matter of Special and general damages sought by the Plaintiff, the 2nd Defendant submits that none have been proved to the required standard of proof as no receipts for payment of the special damages were produced to the court.

29. It is further submitted that damages for loss of business to the law firm Diro Advocates LLP where the Plaintiff is a partner under the *Limited Liability Partnership Act* No 42 of 2011, the claim cannot be sustained as it is not instituted by the law firm, but a personal claim instituted by the plaintiff in his personal capacity.

The court has therefore been urged to find that the 2nd Defendant is not vicariously liable for the criminal and tortious actions of the 1st defendant nor for the resultant damages claimed by the plaintiff and dismiss the suit with costs.

Analysis and Determination.

30. Both the plaintiff and the 2nd Defendant, by their pleadings and evidence agree that indeed the 1st Defendant, Robinson Orodaru Suntu was an employee of the 2nd Defendant on the material day and time of the alleged assault to the Plaintiff as his employment data had been provided by the plaintiff and confirmed by the 2nd defendant's witnesses. Court record shows that he was duly served with the plaint and the summons to enter appearance but failed to enter appearance or file defense and upon request by the plaintiff under Order 10 Rule 6 of the Civil Procedure Rules (CPR) interlocutory Judgment was entered against him on 15/02/2022.

31. There is also sufficient evidence that the incident occurred within the 2nd Defendant's premises at the exit barrier to the hotel and that the 1st defendant, a security guard manning the exit entry at the barrier was on duty acting within the course of his employment. Whether what he did was authorized by his employer is an issue for the court's determination.

32. Further, it is not in contention that there was a confrontation and arguments between the security guard and the plaintiff that resulted to the battery/assault upon the plaintiff from which he (Plaintiff) sustained serious injuries as particularized in the plaint and evidenced by the various medical reports and documents.

33. The tort of battery is defined in Blacks Laws Dictionary 9th Edition as-

> " the non-consequential touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. In tort battery is defined as an intentional and offensive touching of another without lawful justification.
>
> Under the Criminal justice in Kenya, the Penal Code, Cap 163 Section 4 defines grievous harm as any harm which amounts to a maim or dangerous harm, or serious or permanent injuries---."

Section 9(1) thereof provides: -

> " Subject to the provisions of this code relating to negligent act and omissions, a person is not criminally responsible for any act or omission which occurs independently of the exercise of his will or for the event which occurs by accident."
>
> That resonates well with the plaintiff's pleadings in his plaint and in the P3 on medical examination report at the Embakasi Police Station.

34. The gravamen in this suit in my view and flagged by both parties in the issues for determination is issue no. 2 above;

> " Whether the 2nd defendant is vicariously liable for the negligence of the 1st defendant."

For a litigant to succeed under the doctrine of vicarious liability of an employer by an employee, the plaintiff must prove a causal link between the employees' negligence and his injuries and further adduce evidence from which on a balance of probability a connection between the two may be drawn as stated in Stratpack Industries case (supra).

35. Under Section 3 & 4 of the Occupiers Liability Act Cap 34 Laws of Kenya, an occupier owes a duty of care to all his lawful occupants, visitors and trespasser;

1. "To take such a care as in all the circumstances of the case, is reasonable to see that the visitor will be reasonably be safe In using the premises for the purposes for which he is invited or permitted by the occupier to be there..." as held in MNK (suing as friend) Patrick Kyalo Maundu v Joseph Mwaura (20170 e KLR"

36. For one to impose vicarious liability on a company, the person must be an employee to the company acting within the scope of Authority. The employee must be acting within his duty or course of his employment. However, where the employee commits a crime outside the normal course of duty and without authority of the employer liability cannot be passed over to the company as held in Vincent Okello V. Attorney General (1995) KLR.

37. In Salmond's Law of Torts Sweet and Maxwell 10th Edition, P345. Salmond it is observed that: -

> " Every act done, authorized or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by any person or body or persons to whom the general powers of the corporation are delegated is for the purpose of the law of Torts the act of the corporation itself, whether intra vires or ultra vires of the aid the corporation is liable accordingly for the act or of any Tort committed in respect of it by any agent or servant of the cooperation within the scope of its authority or employment."

If the directors of the company authorized the company employees or agents to undertake an act which is ultra vires the corporation will not escape liability merely because the act was outside the powers of the corporate body- as observed in Campbell versus Paddington [1911)] I KB 869, where it was emphasized that a company is liable for ultra vires Acts only if it authorizes them.

It therefore follows that where a Tort of criminal act, which arises out of such authorized ultra-vires Act and is not authorized by the corporation the corporation cannot be liable.

38. In Huggins (R V Huggins) [1730] 883; 93 ER 915, a warden was charged with the murder of a prisoner whose death had been caused by the servant of Huggins deputy. The court held that though the servant was guilty, Huggins was not, since the Act was done without his knowledge. Further Raymond, CJ. Said

> " It is a point not to be disputed, but that in criminal cases, the principal is not answerable for the act of the deputy as he is in civil cases: They must each answer for their own acts and stand or fall by their own behavior."

39. Juxtaposing the above principles with the plaintiff's circumstances and observations from the Court of Appeal case Waki J. A. in P. A. Okala and another, (supra) that:-

> " in assigning vicarious liability, the judge appreciated correctly that it arises when the tortious act is done in the scope or during the course of his employment", the plaintiff failed to appreciate that in the same case, the Court of Appeal rendered itself further that the principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delicate of its employee in circumstances in which the employer is not in itself at fault. That was in 2003, twenty years ago and which decision or observations have since been overtaken by more recent Court of appeal divisions within and outside our jurisdiction".

40. A reading of Salmond's book on Torts 6th Edition, 1924. It is emphatic that a wrong or criminal act authorized by the master, the master will be held liable, but a wrongful and unauthorized mode of

doing some act otherwise by the master the master will not be held liable. The above principles were tested and applied in 2020 in the UK cases Barclays Bank PLC V Various CSC [2020] (supra) and W. M. Marison Supermarkets PLC V. Various Claimants [2020] (supra) where the court's held that for the master or employer to be held liable for wrongdoing of their employees there must be close connection and circumstances that makes it fair and just that the employer to be held liable.

In addition, there must be close connection between the wrong act and what the employee had been authorized to do for the employer to be held vicariously liable.

41. In Evans Okuku Kadhuli V. the Rose Security Firm (supra), and Startpack Industries Limited V. James Mbithi Munyao (Supra), the courts rendered that a plaintiff must prove a causal link between someone's negligence by sufficient evidence to the injury as an injury perse is not sufficient to hold someone liable.

42. The plaintiff in his plaint stated particulars of the 2nd Defendant's negligence as follows;

    a) Failing to exercise its duty of care towards the plaintiff as an occupier of its premises by ensuring that there is proper training of all persons recruited as guards

    b) Breaching the duty by failing to advise and or have minimum policy guidelines to guide its employees/servants to treat licensed occupiers/clients with decorum and respect.

    c) The attack on plaintiff left him for dead and had to undergo reconstructive surgery for slightly over four (4) hours.

    d) The second defendant is vicariously liable for the actions of the first respondent, having employed him as a security officer while knowing that he had little or no knowledge in matters security and,

    e) The plaintiff suffered grievous bodily harm on both the left and right hands, causing him to be transfused with eight (8) pints of blood.

43. On cross-examination the plaintiff did not adduce any evidence that and that there was the 2nd defendant failed to do any of the alleged negligent acts. He testified that there was no proper training of its security guards, nor did it have policy guidelines on how to treat occupiers/clients of the hotel with decorum. Other than stating as such, no evidence was produced to prove the allegations.

44. Upon further cross-examination on proof of the breaches or failures, all what the plaintiff could say was that he doubted whether the first defendant was trained as he did not handle him professionally. It is trite in Law that it is not enough to plead, but that any allegation of fact must be proved in line with provisions of 107-109. *Evidence Act*, Sections 107-109.

45. In Strartpack Industries V. James Mbithi Munyao (supra), the Court of Appeal rendered that proof of someone's negligence and his injuries must be adduced from which on a balance of probability a connection may be drawn. In my considered view and upon interrogation of the plaintiff's case and evidence, no proof or sufficient proof was to prove the particulars of negligence attached to the 2nd Defendant for it to be found to be curiously liable for the 1st Defendant's criminal assault/battery on the Plaintiff.

    I have perused the plaintiff's witness statement that he relied on as his evidence in chief against his oral evidence on cross-examination. Whereas he testified that he had not engaged in an argument with the

1st defendant, it is evident that there was indeed arguments and confrontation contrary to what he pleaded at paragraph *6* that: -

> "While leaving the said premises, without any cause, colour or right and/or provocation whatsoever instigated an argument with the plaintiff and slapped him from the back when he turned to inquire the reasons behind the aggression, while hurling all manner of vulgar and despicable statements to the plaintiff".

There cannot be arguments and confrontations by one person, meaning both parties must have been involved in the arguments that resulted to the "fight" and injuries to the plaintiff.

46. The above in my opinion ought to be looked into against the plaintiff's averments and statements that the 1st defendant attacked him for no reason or at all, and the 2nd Defendant's submissions that there was no reason whatsoever why the security guard, whom the plaintiff testified to have not known prior to the incident to attack him and seriously injure him to the extent stated in the medical records.

47. I am also not persuaded that no arguments took place between the plaintiff and the 1st Defendant prior to the incident. DW2 confirmed both in his witness statement and in evidence that he indeed heard the 1st Defendant arguing with someone at the hotel gate before the incident. In addition, PW2 stated that as the plaintiff approached the gate, he heard a confrontation between the plaintiff and the first defendant on matters he did not know and saw the 1st Defendant raise his rungu towards the Plaintiff. A confrontation just like an argument cannot be by one party.

48. On the above basis, I find the Plaintiff's evidence that the 1st defendant without any cause, reason or provocation whatsoever attacked him to be without basis, and agree with the 2nd Defendant's submission that it could not be possible that a security guard could have attacked the plaintiff for no reason or at all to the extent of the injuries he sustained.

49. On the burden of proof, the party advances a claim in the matter of occupiers liability has the burden of proof to prove that the owner of the premises has failed to take reasonable cause expected under Section 3 & 4 of the Act as stated in the case of Catherine Wangechi Wariahe (suing as Administrator of the late James Mwambiriro Njeri) v. Meridian Hotel Limited [2016] eKLR wherein the court stated:-

> "As is the case of any tort, the party advancing the claim bears the burden of proof of the standard of which is on a balance of probability. Section 3 aforesaid does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A plaintiff who invokes that section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of before liability can attach."

50. In the circumstances thereto, it is proper and appropriate to come to a finding that the battery and assault to the plaintiff was wholly and/or substantially initiated by either of them, the plaintiff and/or the first defendant, and could not be wholly attributed to any alleged negligence by the 2nd Defendant, none having been proved.

51. It is settled and trite Law that an employer cannot be held vicariously liable for a wrongful act done out of personal vengeance by the employees even if done during the employees' course of employment, unless the employer did authorize such criminal activities or act. In this incident, there is no evidence that the 2nd Defendant authorized the mode of doing such an act of violence against the hotel's patron during the course of employment of the security guard with the 1st defendant.

52. In the case of Joel Mutemi Kirangu v. Saiko Lekeresie & Another [2012] eKLR, (supra) the court held that: -

> " A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either –
>
> (a) A wrongful act authorized by the master; or
>
> (b) A wrongful act and unauthorized mode of doing some acts authorized by the master".
>
> Further, in Salmond's book on the law of Torts to at page 90, cited above in the topic under discussion, it was held;
>
> > "------if the authorized and wrongful act----- is not so connected with the authorized act as to be a mode of doing it, but is an independent act the master is not responsible for in such a case, the servant is not acting in the course of his employment, but has gone outside it".
>
> In Pollard vs. John Parr and Sons [1927] IKB 243 it was held:-
>
> > " To make an employer liable for the act of a person alleged to be his servant, the act must be one of a class of acts which the person was authorized to do. If the act is one of that class, the employer is liable, though the act is one negligently, or in some cases even if it is done with excessive violence. But the excess may be so great that as to take the act out of the class of acts which the person is authorized or employed to do".

53. The above is one of the limitations of bounds within which a master is to be held liable, as cited from the holding by Scrutton L. J. in the Pollard V John Parr and Sons (supra). Considering the excess in the violence meted upon the plaintiff by the 1st Defendant, there would be no iota of justification for any employer to authorize an employee in this case a security guard to employ and or use such excessive force and violence upon a hotel patron for whatever reason.

I must state here that it is unfortunate that the 1st Defendant could not be traced as said by the plaintiff to attend court to tell his story on the unfortunate confrontation and arguments that led to the violent attack upon the plaintiff.

54. To that extent I am persuaded to find that the 1st Defendant's act though done during the course of his employment of the 2nd Defendant was not done in execution and/or discharge of any duty place upon him. He was in my persuasion not doing what he was employed and authorized to do, and even if so, the manner in which he did it was outside the limitations upon which the employer could be held vicariously liable. The act of the security guard cannot be connected with his employment or discharge of his duty for the 2nd Defendant.

I associate myself with the holding in Joel Mutemi Kirangu (supra) for a finding that there was no evidence adduced by the plaintiff and his witnesses that unleashing violence upon the hotel patrons, and in particular, the plaintiff was among the duties that the employee had been authorized by the 2nd Defendant to do.

55. The general principle in the law of Torts as stated in Clerk & Lindsell on Torts and cited in Evans Okuku Khadoli case (supra) is that:-

> " it is in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of discretion vested in the employee---".

The duty of an employer as enumerated in numerous decisions is to take reasonable care for the safety of patrons in a hotel establishment.

56. The plaintiff as I have held above did not adduce any evidence to show any negligence on the part of the 2nd Respondent. As clearly stated in the Stratpack Industries case, (supra). It was upon the Plaintiff to strictly prove that the 2nd Defendant, as he was invited to do, was indeed negligent for the attack and injuries that he sustained as the injuries perse are not sufficient to hold anyone liable for the same and more particularly, to hold the 2nd defendant liable in negligence for the actions of the 1st Defendant.

57. On the burden of proof, a party advancing the claim bears the burden of proof to the required standard of proof on the matter of occupiers liability, as held in the case Catherine Wangechi Wariahe V. Meridian Hotel Limited (2016) e KLR wherein the court stated:-

> " As is the case of any tort the party advancing the claim bears the burden of proof which is on a balance of probability. Section 3, aforementioned does not create a presumption of negligence whenever a person is injured on the premises. A plaintiff who invokes that section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of before liability can attach."

58. The plaintiff has failed to discharge that burden of proof in my considered opinion. The court is left with no option but to find that the 2nd Defendant cannot be held vicariously liable for the wrongs and criminal action/battery committed by the 1st Defendant against himself. The reliefs sought by the plaintiff against the 2nd Defendant, Seasons Restaurant and Hotels Limited cannot be available to the plaintiff as against the 2nd Defendant as prayed in the suit.

59. Interlocutory judgment was entered against the 1st Defendant on 15/02/2022. The court shall now interrogate the reliefs sought by the plaintiff being general and special damages to find out whether the plaintiff is entitled to the said orders from the first defendant.

Whether the Plaintiff is entitled to the orders sought?

60. Special Damages.

A sum of Kshs. 480,273/= is pleaded as medical expenses and Kshs. 965,000/= as future medical expenses totaling to Kshs. 1,445,273/=. It is trite law that special damages must not only be pleaded but also strictly proved by production of evidence of receipts showing money was paid in respect of the injuries suffered (in this case) and to support the amounts claimed as held in Michael Wafula Malenya V. Matunda(fruits) Bus Services Limited [2022] eKLR. Special damages may not be the direct, natural, or probable consequences of the act complained of and may not be inferred therefrom. The plaintiff filed a list of documents dated 3/03/2021 and relied on the same during his evidence in chief. He was hospitalized for seven days. Upon discharge he testified to having had to continue with treatment incurring further expenses that 1 shall sequentially interrogate the claim.

a. A sum of Kshs. 415,343/= is pleaded.

This is the final bill upon discharge from Nairobi Hospital.

I have seen the summary as prepared and the payment receipts details including payment by M-Pesa and the date of such payments to Kenya Hospital Association. Though the 2nd Defendant submits that no such payment receipts to the hospital are exhibited, I am satisfied that Kshs. 415,343/= was proved. It is allowed.

b) Consultations, pharmacy and dressing Kshs. 63,260/= (After hospitalization).

I have looked at the cash receipts from various chemists. They do not bear names of the purchasers nor for whom the medicines were bought for. I am unable to certify them as being payments for medicines or dressings for the plaintiff. They are not strictly proved as demanded under the law. This claim is disallowed.

c) Consultations, Doctor Nangole F. Wanjala.

Payment receipts are provided. I allow the said amount of Kshs. 41,800 only.

d) Transport expenses of Kshs. 370/-, not supported.

I declined to allow the same for lack of strict proof.

e) Service of demand letter and company search including CR-12 Kshs 1400. - This expense is allowed at Kshs. 1,400/=.

Total under this sub-head of Kshs. 43,200/= is allowed.

2. Future Medical Expenses.

A sum of Kshs. 965,000/= is pleaded.

The plaintiff did not make any submissions on this claim. His doctor's report dated 25/01/2021 does not indicate that he would need future medical attention that would require expenditure, only that at the moment, at discharge he was undergoing physiotherapy and occupational therapy sessions.

61. A claim for future medical expenses is a special claim within a claim for general damages. It must be specifically pleaded and proved.

The Court of Appeal in Tracom Limited & another V. Hassan Mohammed Aden [2009] and cited in Kovu Holy Family Mission Hospital v. Koech [2022[eKLR.

> " We readily agree that the claim for future medical expenses is a special claim though within general damages and needs to be specifically pleaded and proved---- As regards future medication (Physiotherapy) the law is also well established that although an award of damage to meet the cost thereof is made under the topic of general damages, the need for future medical care is itself a special damage and must be pleaded if evidence thereof is to be made and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from infringement of a person's legal right, should be pleaded".

62. The Plaintiff has thrown figures to the court on what should be awarded without proof on how the said sum is arrived at. For instance, at paragraph 21 of his plaint physiotherapy at Kshs. 2,500/= per week for 12 months at 120,000/=. The same goes for caregiver charges at Kshs. 25,000/= for two months, Kshs. 60,000/= for 12 months for a driver and a stenographer at Kshs. 25,000/= for 3 months.

63. Further, in the Transcom case the Court of Appeal rendered that once the plaintiff pleads the need for further medication as a future medical expense, the plaintiff may not need to specifically state what

amount will be the exact amount as that would depend on other several matters as the place where treatment will be undertaken, and concluded that;

> "---- We think all that is necessary to plead (If it has to be pleaded at all) is the approximate sum of money that the future medical expenses will require".

64. While not departing from the learned Judges' of Appeal as rendered in the Transcom case, the plaintiff's ought to lay a basis on the amount required in future by evidence from either medical facilities on the amount chargeable for the specific and nature of treatment.

65. This would have been well stated in the medical report where the doctor would have given an approximate of the future treatment and expenses.

In addition, the Court of Appeal in 1998 in Mbaka Nguru & Another v. James, George Rakwar [1998] KLR. Omolo Tunoi and Shah JJ. A awarded the plaintiff future medical expenses as the amount pleaded was spelt out in the doctor's report.

In Kenneth Nyaga Mwige v. Austin Kiguta & 2 others [2015] eKLR, the court declined to award future medical expenses as the plaintiffs Dr. had not stated the approximate expenses.

66. In my considered view, a medical report should guide the court on what future medical treatments and related needs the plaintiff may require including the approximate itemized monetary requirements.

A court should not be left to guess what future needs that the plaintiff may require as it lacks the appropriate expertise in the medical field. I take guidance from the cases Brenda Nyaboke Michira V. German International Corporation GLZ 2017 eKLR, wherein the plaintiffs doctor gave approximate costs of the future need, care and medication.

67. In Ngure Edward Karega V. Yusuf Deran Nasir [2014] eKLR in similar scenario, the doctor gave a quotation by a physiotherapist.

I am therefore not persuaded that the claim for future medical expenses and related services being a special damage claim has been proved. It is dismissed.

2. Damages for Loss of Business and Earnings.....-Kshs. 20,000,000/=

68. The plaintiff claimed that as a result of the injuries, he lost opportunity to execute a contract with a client from which contract he would have been paid Kshs. 20 million as per a legal fee note issued by the client two months before execution of the contract. It was his submission that the alleged client Multiple Hauliers (E.A) Limited by its General Manager, Operations who testified as PW5 that the plaintiff's law firm Diro Advocates LLP, was in its panel of advocates and that as a result of the incident the contract valued at Kshs. 200 million was canceled. It is curious that a fee note for the unexecuted contract could have been issued two months before discussions of the contract was done, and claimed as a special damage. The operations manager of the alleged client, PW5 testified that the meeting at the 2nd Defendant's hotel on the material day was to discuss a business contract. To my understanding, there was no contract from which a fee note could have been generated before it was discussed, agreed, drafted and executed. Nothing was produced to the court to show that indeed the plaintiff was in the panel of advocates of the client.

69. Being a special damage, it ought to have been strictly proved. Neither the empanelment of the plaintiff to the alleged client's panel of law firms nor the alleged contract were shown to the court to support the claim.

70. A limited liability partnership as the plaintiff's legal firm is (though no evidence has been tendered is incorporated under the *Limited Liability Partnership Act* No. 42 of 2011. It is a corporate body with a legal personality separate from its partners. It can sue and be sued under its name. The claim before this Court is fashioned as the plaintiff's personal injury claim such that, and not the partnership's benefit. The Plaintiff having not proved the existence of the business that he lost as a result of the injury in any way, then this court cannot grant the relief sought for lack of proof.

71. I take guidance from the case cited by the plaintiff, David Muriithi Githaiga V. CFC Stanbic Bank Ltd [2019] eKLR wherein the court failed to award to the plaintiff damages for loss of business when no evidence to support the amount claimed for loss of the business was produced. The court is not blind to the fact that indeed the plaintiff may have lost briefs during his hospital stay of seven days and recuperation period but as a special damage claim, the loss ought to have been proved.

The claim is dismissed.

General Damages for pain and suffering.

72. The injuries the plaintiff sustained are stated in the medical report dated 25/01/ 2021 prepared by Doctor Nag'ole F. Wanjala as hereunder;

1) Deep cut in right forearm with injury to ulnar artery, nerve and flex or muscles

2) Deep cut on the left forearm with injury to the left ulnar nerve and flex or carpi ulnaris tendon

3) Repair of tendon, nerve and blood vessels were done while in theater was transfused 4 pints of blood having been found to be anemic.

4) He continued on intravenous fluids, antibiotics and painkillers.

5) Was discharged on 13/11/2020.

6) Currently undergoing physiotherapy and occupational therapy sessions.

The medical report was duly produced and admitted as an exhibit.

The injuries were serious but upon treatment in seven days, he was discharged for follow up in the clinic. I have taken note of the injuries.

73. In his submissions under this sub-head of damages, the plaintiff has proposed general damages in the sum of Kshs. 2 million upon factoring in inflation relying on several authorities among them:

a. Easy Coach Limited V Emily Nyangasi [2017] eKLR.

Facial injuries, injury to the chest, right hand with cut wounds, injury to right leg.

The Court on appeal awarded Kshs. 700,000/= general damages.

b. Agnes Wakaria Njoka vs. Josphat Wambugu Gakungi 2015 eKLR with 2 Deep cut on hand, deep compound fracture on right forearm fracture of the skull at Occipital. The Court of Appeal awarded Kshs. 650,000/=.

c. Gitonga V. Kalungi. Civil Appeal number E034 of 2021 [2022]

i. Brain confusion.

ii. Loss of consciousness for two hours.

iii. Blood loss.

iv. Soft tissue injuries.

v. Fracture with posterior hip dislocation.

On Appeal the High Court enhanced the award from Kshs. 1,000,000/= to Kshs. 1,700,000/=.

d. Simba Platinum Limited versus Nicholas Auma Wandera [2021] eKLR.

i. Multiple fractures on left arm.

ii. High Court at Kisumu on appeal upheld general damages of Kshs. 2,000,000/=

74. I have considered the authorities cited by the plaintiff. The principles that underpin the award of damages for personal injury claim have been stated in a myriad of Superior Courts decisions.

In Charles Oriwo Odeyo One V Apollo Justus Andabwa and another [2017] eKLR, the principles were stated thus:-

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurate with the injuries sustained.

3) Previous awards in similar injuries are a mere guide, but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards, but factors such as inflation should be taken into account.

5) The award should not be inordinately low or high.

75. Considering the past decisions (as provided by the plaintiff) and others, as well as the nature of the injuries sustained by the plaintiff, I find the injuries to the plaintiff to be not so serious as sustained by the Plaintiff in Simba Platinum Limited (supra) as the plaintiff did not suffer any fractures on the left arm.

The plaintiff's injuries are also not as serious as sustained by the Plaintiff in Gitonga Kalunde (supra) where the plaintiff sustained structures to the left acetabulum with hip dislocation.

76. Likewise, the plaintiff's injuries are not as serious as those of the plaintiff in Agness Wakaria Njoka (supra), as he did not sustain compound fractures, but deep cuts and wounds on his arms with loss of blood.

I am therefore persuaded that an award of Kshs. 1,500,000/= is fair and just in the circumstances.

Final Orders

77. The Court finds that the plaintiff has proved his case to the required standard of proof, upon a balance of probabilities against the 1st Defendant and holds him wholly liable in damages for the injuries the plaintiff sustained on 7th November 2020 at the 2nd Defendant's Hotel premises.

78. The plaintiff's case against the 2nd Defendant is found to be devoid of merit and is dismissed with costs.

Consequently, the following orders are issued:

1) Liability:

The 1st Defendant is wholly liable for injuries and consequential damages to the plaintiff as hereunder:

2) Damages:

a) In patient Medical expenses at Nairobi Hospital ..... Kshs. 415,343/=

b) Other related medical expenses upon discharge ..... Kshs. =43,200/=

c) Future medical expenses.. Nil.

d) General damages for pain and suffering ..... Kshs. 1,500,000/=

e) Special damages for loss of business and earnings..... Nil.

Costs -

79. The plaintiff shall have cost of the suit from the 1st Defendant, BUT shall pay costs of the suit to the 2nd Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE 2024.

JANET MULWA

JUDGE