REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL APPEAL NO. 49 OF 2014

AAA GROWERS LIMITED.....APPELLANT

VERSUS

EVANS MBURU NYOIKE.....RESPONDENT

[An appeal from the judgment of P. Nditika, Principal Magistrate, in Kandara PMCC No. 139 of 2013 delivered on 3rd June 2014]

JUDGMENT

1. The core of this appeal is whether the respondent, who was employed as a watchman, was injured in the course of his employment when he was attacked by thieves.

2. The facts are fairly straightforward. On the night of 3rd July 2013, the respondent was patrolling the appellant's farm. He found some thieves pilfering *sukuma wiki* and French beans on a section of the farm. The strangers pelted him with stones. One of the stones hit his left leg and caused him injuries.

3. In a plaint dated 22nd August 2013, he blamed the appellant for not providing him with protective gear or a safe system of work.

4. The appellant on the other hand contended, among other things, that it was not liable for the criminal conduct of the assailants; that it had provided the respondent with a whistle, torch and *rungu*; and, that the respondent had voluntarily assumed the risks of his job.

5. The learned trial magistrate found that the appellant was entirely at fault. He assessed general damages at Kshs 100,000 and special damages of Kshs 3,000. The respondent was also granted costs and interest.

6. The memorandum of appeal was lodged on 22nd August 2014 raising six grounds which I will condensed into two. Firstly, that negligence was not proved; and, secondly, that the submissions by the appellant or its evidence was not taken into account.

7. The appellant filed submissions on 13th November 2017 while those by the respondents were lodged on 23rd July 2020. On 13th October 2021, I heard final arguments from learned counsel for the disputants.

8. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.

9. The respondent testified in the lower court that-

> I was injured on the left leg. It has healed. I was beaten by thieves. I do blame the defendant because I had been assigned as the watchman alone. I also blame them as I was not assisted. I had not been given any protective gears [sic]. I did not have a torch. It was the duty of the company to provide me with the same.

10. In cross examination, he accepted that *"there are dangers involved in the kind of work. I had worked for 14 years. I was permanent. I had experience. We had been trained"*.

11. The appellant's witness on the other hand blamed the respondent for not taking care of his safety. He testified that the respondent had been supplied with a torch, a whistle and *rungu*. He also said that he was one of the watchmen who assisted the respondent and that the company took him to hospital

12. The learned trial magistrate concluded that-

> He (respondent) had been trained and accepted the job knowing the risk involved. However, it is equally important to note that the shamba in which the plaintiff was working was big. He ought to have had other guards. The place where the plaintiff was guarding had no light. If it was there, the plaintiff would have seen the robbers. Indeed, the defendant on its part did tell the court that the plaintiff had been provided with a whistle, rungu and torch……this evidence was not supported by any documentary evidence". [underlining added].

13. The legal burden of proving negligence or breach of any statutory duty of care fell squarely on the respondent's shoulders. Section 107 of the **Evidence Act**.

14. Granted the evidence I have highlighted I find that the conclusion by the trial magistrate was erroneous for the following reasons. Firstly, he properly found that the job of a watchman carried *inherent risks* which the respondent accepted. The trial magistrate also correctly found that the claimant had been trained. I would add that he had experience of 14 years. The respondent was attacked by *thieves*. The appellant's witness was a *fellow watchman* who came to his aid. It is thus not entirely correct that the respondent was working *alone*. Although the respondent claimed he was not supplied with a torch, his colleague testified that the respondent had been provided with a whistle, *rungu* and torch.

15. I thus readily find that the respondent was injured by thieves in the course of his employment. However, his job carried risks that he had assumed; and, he failed to prove that the appellant had not supplied him with safety gear or that he was working without back-up of another watchman. It follows that he did *not* fully discharge the burden of proof on liability.

16. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be absurd to expect an employer to be his employee's insurer round the clock. See ***Halsbury's Laws of England*** 4th edition volume 16 paragraph 562, ***Mwanyule v Said*** [2004] KLR 1**, *Arkay Industries Ltd v Amani*** [1990] KLR 309.

17. For all of those reasons, and with tremendous respect to the learned trial magistrate, the respondent's suit in the lower court was for dismissal.

18. I will now turn to quantum of damages. An appellate court will not interfere with quantum of damages unless the award is so high; or, inordinately low; or, founded on wrong principles. ***Butt v Khan*** [1982-88] KAR 1.

19. According to the medical reports by Dr. Karanja and Dr. Wambugu (exhibits 3 & 5), the appellant suffered soft tissue injuries that have completely healed. I cannot say that the general damages of Kshs 100,000 were inordinately high. The respondent also led evidence to prove the special damages of Kshs 3000 as per the receipt (exhibit 4). I would thus not disturb those findings.

20. But that is now water under the bridge: The respondent having failed to establish liability, this appeal must succeed. I hereby *set aside* the judgment and decree of the lower court dated 3rd June 2014. I substitute it with an order *dismissing* the respondent's case in the lower court.

21. Costs follow the event and are at the discretion of the court. Considering the predicament that has now befallen the respondent, I order that each party shall bear its own costs in the lower court and in this appeal.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 2ND DAY OF NOVEMBER , 2021

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

No appearance by counsel for the appellant and respondent.

Ms. Susan Waiganjo, Court Assistant.