



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 78 OF 2008**

**JOSEPH KAMAU.....APPELLANT**

**VERSUS**

**THE HEALTH SERVICE BOARD**

**P.C.E.A. KIKUYU HOSPITAL.....RESPONDENT**

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgement of the Chief Magistrate Milimani CMCC No. 2767 of 2005 delivered on the 4<sup>th</sup> February 2008.
2. The appellant filed suit for compensation for injuries suffered while in the course of duty with the respondent. The trial court found that the appellant failed to prove liability of the respondent and proceeded to dismiss the suit in its entirety.
3. The appellant appealed on 9 grounds as indicated in the Memorandum of appeal that can be summarised as follows;

*a) That the learned magistrate erred in law and in fact by failing to find that the appellant had proved the respondent was liable.*

*b) That the learned magistrate erred in law and in fact by failing to make a finding on quantum of damages.*

4. The appellant subsequently passed on and was substituted by one Millkah Nyambura Kamau. The parties disposed of the matter by way of written submissions.

**B. Appellant's Submissions**

5. The appellant submitted that the respondent did not adduce evidence to rebut the appellants evidence as the appellant had proved the nexus between the robbers and the respondent. The appellant thus submitted that the trial court exceeded its jurisdiction by establishing new facts that were not adduced as evidence by the respondent and as such the judgement should be set aside. The appellant relied on the case of **Nathif Juma Adam v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR.**
6. The appellant further submitted that the respondent breached its common law duty in failing to meet its obligations in providing the appellant with adequate security and was thus liable for the injuries sustained by the appellant and further that it was improper for the trial court to apply the maxim *volenti non fit injuria*. The appellant relied on the cases of **HCCC Nairobi Civil Appeal No. 206 Of 2001 Crops Estate Limited v David Irungu Gathaka & Anor** and **Japheth Natse Ifedha v Collindale Security Company Ltd (2005) Eklr.**
7. The appellant further submitted that the respondent did not allude to who else was liable for the injuries sustained by the appellant and further that further that the trial court erred in dismissing the suit in the absence of any evidence of defence. The appellant relied on the case of **Baker N. Alukonya v Westmont Power (K) Ltd (2010) eKLR.**
8. The appellant further submitted that the trial erred in failing to make a finding on quantum contrary to provisions of Order 21 Rule 4 of the Civil Procedure Rules 2010 on the contents of a judgement.

**C. Respondent's Submissions**

9. The respondent submitted that an employer cannot be held liable for the injuries sustained by an employee as a result of criminal acts of trespassers, thieves or robbers. The respondent relied on the case of **Nairobi HCCC No. 2366 of 1989 David Ngotho Mugunga v**

## Mugumoini Estate.

10. On quantum, the respondent submitted on their proposal for general damages had the appellant proved liability and on special damages, the respondent submitted that the same were not strictly proved and should not be awarded. However, the respondent gave proposals for general damages as Kshs. 3,500,000/= and for several other heads as was claimed in the plaint.

### D. Analysis & Determination

11. The duty of a first appellate Court as was held in the cases of **Mwana Sokoni v Kenya Bus Service Ltd (1985) KLR 931** and **Selle v Associated Motor Boat company ltd (1968) EA 123** as to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

12. The undisputed facts of this case are that the appellant, a driver, and an employee of the respondent was on the 30/9/2002 at around 6pm instructed to take the respondent's hospital workers to their homes after which he left with two nurses to Kawangware in Nairobi where one of the nurses lived. At around 7.00pm he was accosted by robbers at Kawangware Estate who shot him and stole the respondent's vehicle. The appellant subsequently became a paraplegic and lost all sensation from the chest downwards.

13. The appellant alleged the respondent was liable for negligence that led to the attack. He suffered injuries as a result. The respondent denied the claim in his statement of defence.

14. From the grounds of appeal and the reliefs sought herein, and the submissions made thereon by the parties, it is evident that the appellant is contesting the findings of the trial court on liability and quantum of damages. It is not in dispute that the appellant was in the employment of the respondent when he was injured. The issues before court for determination are as follows:-

- i. Whether the respondent is liable for the injuries suffered by the appellant,
- ii. Whether the appellant is entitled to any damages and if so, the quantum of damages.

15. The appellant's submissions on liability were that the respondent failed to exercise duty of care imposed on an employer for it failed to provide him with protective clothing or bullet proof vest and vehicle despite previous complaints of insecurity in the area and further that the respondent had not rebutted or controverted the evidence on record.

16. According to the respondent, the appellant failed to prove the negligence in part of the respondent by stating in his testimony both in his evidence in chief and in cross examination that neither him nor the respondent could have anticipated the robbery and further that the incident happened before 8pm which he admitted was not late and further that the appellant conceded that it was not the respondent's duty to ensure security in the area.

17. The legal principles that regulate the relationship between an employer and employee as regards the duty to provide a safe working environment is described in **Halsbury's Laws of England 4th Edition, Vol.16 par.562**, as follows:

***"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."***

18. The Court of Appeal in the case of **Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47** also held that that the employer owes no absolute duty to the employee, and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.

19. Therefore, the appellant needed to establish that the respondent failed to exercise reasonable care for his safety against risks which were reasonably foreseeable. The appellant in this respect testified that while carrying out his duties, he was attacked by the robbers, and shot. He blames the respondent for not providing him with a bullet proof vest or helmet or bullet proof vehicle for his protection.

20. The respondent on the other hand contended that the appellant failed to prove negligence against it as he had conceded in his testimony both in his evidence in chief and in cross examination that neither him nor the respondent could have anticipated the robbery and further that the incident happened before 8pm which he admitted was not late in the night. The appellant also conceded also that it was not the respondent's duty to ensure security in the area.

21. The appellant's argument that the respondent's failure to provide him with a bullet proof vest and vehicle as well as security, was an act of negligence is not consistent with his testimony that indeed neither him nor the respondent could have anticipated the robbery.

22. The employer's duty of care at common law is "to take reasonable care for the safety of his employees in all the circumstances ... so as not to expose them to an unnecessary risk." (See **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 16, paragraph 560**).

23. This duty of care at common law is relative to the nature of an employee's work. The job of a driver within Nairobi is not inherently

risky as compared to that of the security forces operating in high risk areas especially terrorism prone areas. No person taking on such a job may claim that it is a risk-free job as they should be attendant to the risk of car-jacking. This is the risk faced by all drivers including drivers of private vehicles. The appellant did not adduce evidence to show that his job was high risk to justify being provided with protective clothing like a bullet proof vest and bullet proof vehicles.

24. Having considered the evidence, it is my finding that the appellant failed to prove negligence or breach of the employment contract against the respondent and as such, liability was not proved.

25. The magistrate had a duty to assess damages even though the appellant's case was not successful. The appellant claimed several heads of damages in his plaint. I have perused the submissions of the parties and considered the authorities relied on.

26. For general damages Dr. Simiyu in his report states that the appellant suffered a fracture dislocation T4, penetrating chest injury, paralysis of both limbs, loss of sensation T4, loss of urine and stool control and loss of sexual function. He was treated at Kenyatta National Hospital, Spinal Injury hospital among others. He suffered 100% liability. He died ten (10) years after the incident and the case was taken over by the appellant being the next of kin.

27. The injuries were indeed very serious and put the deceased on a wheel chair. There was no input on the quantum of damages from the respondent in this appeal. In the lower court, the respondent proposed general damages of Kshs. 2,000,000/= while the respondent proposed Sh.3,500,000/=.

28. Considering the medical report and the authorities of both parties, I would award Kshs. 2,000,000/= for pain and suffering had the suit been successful.

29. In future medical expenses, Dr. Simiyu recommended several items including a wheel chair, a special bed, a ripple mattress, urine bags, doctor's fees, special clothing among others. Now that the deceased passed on, the cost of the fore-tested items are not awardable.

30. Consequently, the damages for pain and suffering are assessed at Kshs. 2,000,000/=.

31. Having found that the appeal is not successful, I hereby dismiss it. Bearing in mind the unfortunate circumstances that the appellant's family find themselves in, I hereby order that each party meets its own costs of this appeal and of the court below.

32. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2019.**

**F. MUCHEMI**

**JUDGE**