REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 63 OF 2011

FOAM MATTRESS LTD.....APPELLANT

VERSUS

FREDRICK OMONDI.....DEFENDANT

JUDGMENT

The appellant's appeal is composed of the following grounds:-

(a) The learned trial magistrate erred in law and in fact in holding the appellant liable for the assault occasioned to the respondent on the basis that the appellant was negligent in failing to provide security to its employees yet this was an issue that was not pleaded and could therefore not have formed a basis for the said judgment, and by so doing the court prejudiced the appellant who has found itself condemned by ambush without a legitimate opportunity to defend itself on the issue.

(b) The learned trial magistrate erred in law and in fact by failing to appreciate that the plaintiff had neither pleaded in is plaint nor proved that the risk of such assault from fellow employees was of such a nature that the appellant would have reasonably contemplated the same to occur in the nature of the plaintiff's work or duties assigned to him such that there would have been a reasonable obligation on the part of the appellant to contemplate the need for provision for such security to its employees including the respondent against such assault while at work.

(c) The learned trial magistrate erred in law and in fact by reaching a finding that the appellant was vicariously liable for the injuries occasioned to the respondent on assault by the appellant's alleged employees yet non of the alleged employees were identified by the plaintiff or any other witness to have been legitimate employees of the appellant or otherwise any link established between the appellant and the alleged who committed the assault to justify that finding.

(d) The learned trial magistrate erred in law and in fact by reaching a finding that the appellant was vicariously liable for the alleged assault occasioned by its alleged employees yet thee was no prove that the nature of the work assigned to those alleged employees had any relation to such used of violence against fellow employees that would have found justification for such a finding.

(e) The learned trial magistrate erred in law and in fact failing to evaluate the evidence against the law relating to the issue before him on the basis only that the appellant had not called witnesses to testify on defence.

(f) In the alternative and without prejudice to the foregoing the learned trial magistrate erred in

law and in fact by failing to apportion liability for the contributory negligence against the respondent as pleaded in the defence and borne out in cross-examination, and by reaching an excessively high award of Kshs.150,000/= as general damaged for the injuries allegedly sustained by the respondent which was not comparable with the range of awards for the same injuries awarded by courts of equal competence.

It was the respondent's case that on 22-11-2004 he was assaulted by some unknown persons at the appellant's premises. According to him the assailants were people who were working for the appellant since the assault took place at the appellant's factory. He had worked there for over one year.

In his evidence the respondent said:

"we entered inside the company. We found a group of people in a discussion. They attacked us using sticks and weapons. They said they did not want outsiders to work in the company".

The respondent went ahead to produce the treatment documents including the P3 form among others.

The appellant on the other hand filed its defence denying wholesomely the plaintiff or respondent assertion. It however did not call any witnesses. At the end of the hearing the trial court awarded the respondent the sum of Kshs.150,000/= as general damages having found the appellant negligent.

There is no dispute that the respondent was an employee of the appellant. The LD104 form says as much. It appears equally from the evidence on record that the respondent was attacked while at the appellants premises. The FLD104 shows the same.

The big question which forms the gist of the appellant's memorandum of appeal is the element of negligence. Was the respondent the author of his injuries? Was the appellant vicariously liable for the injuries occasioned to the respondent?

The respondent told the trial court that his assailants were a group of people within the company. On cross-examination he said that he did not know their names but **"I know they were workers of the company".**

I do not buy this line of evidence. Surely he cannot claim to have worked for the appellant for a whole one year everyday reporting and fail to at least recognize or identify one person. I find that the respondent was not truthful at all. Was the appellant therefore liable for the acts of the "employees" who assaulted the respondent? Was the appellant vicariously liable?

Vicarious liability has been defined by Black's Law Dictionary 7th Edition as **"Liability" that a supervisory party (such as employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties".**

The learned trial magistrate found that the appellant's action of not providing security caused the respondent to be attacked and injured. He argued that the appellant did not take any reasonable precaution to ensure that the respondent worked in a safe environment.

In his evidence however the appellant conceded that there was one watchman manning the gate. According to my analysis of his evidence and by extension the findings of the trial court, had the appellant enough security in the premises the respondent would not have been attacked.

I respectfully disagree. The duty of any employer is to provide the necessary security commensurate to the services it provides. A factory such as the one operated by the appellant is ordinarily expected to have adequate security to guard against theft or other illegal infiltration by the strangers and not to guard against employees fighting.

As a matter of fact it is not foreseeable that employees in any working environment would fight during

the cause of their duty.

Clerk & Lindsell on Torts 18th Edition (London, Sweet & Maxwell 2000) states:-

"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 assault by the employees, if indeed the attackers were the appellant's employees, was not sanctioned by the appellant. It was not part of the appellant's code of conduct to its employees.

Consequently, and having come into the above finding, I do conclude that the respondent was not able to establish any negligence on the part of the appellant. There is no nexus between the appellant and the alleged employees. Equally the respondent did not bother to pursue any criminal aspect of the attack despite the treatment documents as well as a P3 form from the police.

He told the court **"P3 form confirms I knew one of the persons who accosted me by appearance and not by name. I did not take any action against them. I just made a report to the police. No charges were preferred against them I have not sued them todate".**

In the premises I do set aside the lower court judgment entirely and proceed to allow this appeal with costs both in lower court and in the high court to the appellant.

Orders accordingly.

Dated, signed and delivered at Kisumu this 13th day of July, 2012.

H.K. CHEMITEI
JUDGE

In the presence of:

……for the appellant

……...for the defendant

HKC/va