



**JOEL MUTEMI KIVANGU.....PLAINTIFF**

**VERSUS**

**SAIKO LEKERESIE.....1<sup>ST</sup> DEFENDANT**

**GEORGE KINUTHIA NJUGUNA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 20/09/2010, the Plaintiff herein sued the Defendants herein for the following orders-

- (a) ***General damages for pain and suffering and loss of amenities;***
- (b) ***General damages for loss of earnings and loss of earning capacity;***
- (c) ***General damages for future facial plastic re-constructive treatment;***
- (d) ***Special damages in the sum of Kshs. 6,000/=;***
- (e) ***Costs of and incidental to this suit and interest thereon at court rates from the date of filing suit until payment in full.***

**THE PLAINTIFF'S CASE**

The Plaintiff alleges that at all material time hereto he was a tenant of the 2<sup>nd</sup> Defendant having rented/ leased house no. 14 which is located on the premises known as L.R NO. 12167/44 situate within Nakuru Municipality owned by the 2<sup>nd</sup> Defendant herein. At all material time hereto, the 1<sup>st</sup> Defendant was the 2<sup>nd</sup> Defendant's servant, employee and/ or servant having been employed by the 2<sup>nd</sup> Defendant as a watchman on the premises.

The Plaintiff alleges that on 18/12/2009 at around 8 pm, he was opening the door to his aforesaid house NO. 14 when the 1st Defendant in the course of his employment and as the 2<sup>nd</sup> Defendant's servant, employee and or agent and without any reasonable and probable cause or provocation, violently attacked and or assaulted the Plaintiff with a club (*rungu*) as a result of which the Plaintiff suffered and sustained serious injuries namely:-

- (a) ***total and irreversible loss of the right eye***
- (b) ***laceration and bruises on the forehead***

(c) *facial deformity arising from the scars*

Following the incident, the Plaintiff was admitted at the Evans Sunrise Medical Centre for 4 days and thereafter was transferred to Armed Forces Memorial Hospital where he was admitted for 2 weeks.

The 1<sup>st</sup> Defendant was thereafter charged in Nakuru Criminal Case NO. 7179/2009 with the offence of assault causing grievous harm and was on 11/02/2010 convicted on his own plea of not guilty and sentenced to 15 years imprisonment.

The 2<sup>nd</sup> Defendant has been sued as the 1st Defendant's employer and the owner of the suit premises wherein the Plaintiff was assaulted and is vicariously liable for his employee's tortious acts.

The Plaintiff testified to the claim as itemized above, and produced a receipt for his treatment at Evans Sunrise Medical Centre. It was his testimony that on the material day, he came home at around 7.45 pm when he found that there was no one at the main gate. He proceeded to his house and as it was dark switched on the lights at the corridor when somebody switched off from behind him. He turned to see the 1st Defendant and then proceeded to his house. Upon reaching the door to his house, he greeted the 1st Defendant who was standing next to it. Instead of responding, the 1st Defendant hit the Plaintiff with a club where after he lost consciousness. He was adamant that he did not provoke the 1st Defendant on the material day of any other previous day. PW2 P.C Peter Murithi confirmed that the Plaintiff herein made the report of the assault incident to the Police on 18.12.2009. He confirmed having visited the scene and seeing blood on the spot where the Plaintiff had been attacked which was outside his door.

### **THE DEFENDANTS' CASE**

The Defendants, in a Defence dated and filed on denied the occurrence of the incident, the particulars of injuries and special damages alleged in the Plaintiff and put the Plaintiff to strict proof thereof.

The defendants have invoked the doctrine of *volenti non fit injuria* and that the Plaintiff was in the habit of abusing the 1st Defendant while intoxicated, head butting the 1st Defendant for no apparent reason, demeaning the 1st Defendant on the basis of the Plaintiff's work and level of education and not adhering to instructions and requirements that bound all the tenants.

It is further alleged that on the material day, the Plaintiff spat on the 1st Defendant's face and proceeded to switch on the light that had been switched off by the 1st Defendant hence provoking the 1st Defendant.

DWI confirmed that at the time of the incident, the plaintiff was a tenant at his premises and that the 1st Defendant was his guard. He stated that he had seen the Plaintiff drunk several times. He did not witness the incident on the material date but states that he had been informed by his son that it is the plaintiff who had initiated the attack by first insulting the 1st Defendant then shoving him to the wall. It is then that the 1st Defendant went and took his *rungu* and hit the plaintiff herein.

DW2 testified that she was also a tenant in the 2nd Defendant's premises and was the 2nd Defendant's daughter in-law. She said that she knew both the Plaintiff and the 1st Defendant. She stated that on the material day, she came home and found the Plaintiff and the 1st Defendant quarreling. She stated that at the time, the Plaintiff was very drunk. She says she saw the Plaintiff shove the 1st Defendant to the wall and that is when the 1st Defendant took out his club and hit the Plaintiff in the eye.

### **ANALYSIS OF EVIDENCE AND SUBMISSIONS**

Following the close of the Defendant's case, parties were ordered to file written submissions, setting out their respective positions. The Plaintiff's counsel filed on 10th May 2012 his submissions dated 8th May 2012. The Defendant's counsel did not file any. It is however not in dispute that the Plaintiff was the 2nd Defendant's tenant of three (3) years standing at the suit premises. It is also not in dispute that the 1st Defendant was the 2nd Defendant's watchman. It is further not in dispute that the

plaintiff sustained some serious injuries leading to the loss of any eye. On the material night in the hands of the 1st Defendant. What is in dispute is the cause of the assault by the 1st Defendant upon the Plaintiff.

According to the Plaintiff, the assault on him by the 1st Defendant was entirely unprovoked. He had come back to his flat at about 6.30 p.m., and again left for supper at the local shopping centre, and retraced to his house at about 7.45 p.m. He found no one at the gate, and he proceeded to his flat, to which he testified the 1st Defendant followed him, and finding the corridor dark, he switched on the lights and the same lights were switched off from behind him by the 1st Defendant, and that when he turned he found the 1st Defendant who declined to return his greetings and instead hit him hard on the eye with a rungu. He made a report to the local Police on 18th December 2009 and P.C. Murithi (PW2) confirmed the Report, visited the scene and found stains of blood outside the plaintiff's door.

The Defence however painted a totally different picture. Even if the court were to give no or little weight to the evidence of DW1, the 2nd Defendant, as mere hearsay, the court cannot ignore the evidence of DW2, even if she was the daughter-in-law of DW1. Her evidence is critical in the determination of this suit.

The date was 18.12.2009. The time was about 8.00 p.m. He had come from her chores as a business lady. She found the plaintiff and the 1st Defendant of whom he knew quarreling at the main gate. The Plaintiff was very drunk. She sought to establish the cause of the quarrel. She was informed by DW1 that the plaintiff had "hit and shaken and spat on him", (*the watchman*).

DW2 also testified that the watchman (DW1) as the plaintiff did not tell him why he had hit him, he would follow him to the flat and find out why he had hit him. She (DW2) went along with the watchman and that the watchman did ask the plaintiff why he quarreled with him each time he returned to the premises. Instead of answering the watchman the plaintiff got hold of the watchman, shook and shoved him to the wall. It is, at that stage that the watchman took out his rungu and hit the plaintiff on the face blackening his eye, and started bleeding. DW2 thereafter called out for help of neighbours, Damaris, Lucy and Gambo all came and helped to take the plaintiff to hospital.

She knew the Plaintiff drinks, and staggers when he returns to his flat, as he lives in flat No. 10, while she lived in the opposed flat No. 11, and Lucy Nyambura is in flat No. 12.

DW2 was emphatic that she witnessed the Plaintiff hit and push the 1st Defendant till he fell on a table, and that is the stage when the watchman hit the plaintiff on the eyes. Her evidence was not a fabrication to favour her father-in-law. She was his tenant, and had come to testify, and her testimony is what she saw and with her own eyes.

The question is, is the 1st Defendant liable, and if so, is the 2nd Defendant vicariously liable for the acts of the 1st Defendant.

On the 1st question is the 1st Defendant liable, the answer must be an emphatic "No" why? Because the 1st Defendant was not served. It is not enough to say, that because the 1st Defendant pleaded guilty to assault causing actual bodily harm, he is therefore liable in this action.

There is no presumption of law that because he pleaded guilty to the charge in a criminal matter he would also admit liability in the civil suit, without being heard. That would be condemning him without being heard.

No evidence was led by the plaintiff that the 1st Defendant was served or that any attempt was made to serve him with civil process. It is no answer to say that he was serving a jail term of fifteen years. There is no law that prohibits service of process upon in-mates in our prisons. It would thus be contrary to the rules of natural justice to condemn him unheard. For that reason, I find and hold that the 1st Defendant cannot be held liable on a process in which he has not been heard.

The second question is whether the 2nd Defendant, his employer can be held liable for the bad or criminal conduct of the 1st Defendant? It was common ground that the 1st Defendant was an employee of the 2nd Defendant. It is therefore correct to say that the relationship of the 1st and 2nd Defendants was that of master and servant.

The third question then is when is a master vicariously responsible for the acts of the servant? The Judicature Act, (*Cap. 8, Laws of Kenya*), imports the common law of England, to be applied in Kenya, subject always to the Constitution, and our written laws. The common law of England as learned from Standard Reference Books such as *Halburys Laws of England*, 3rd Edition Vol. 22, pp. 225-230 paras 403 – 409, and Text Books such as **SALMOND ON TORTS** 11th Edn. p. say -

***“... 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 and unauthorized mode of doing some act authorized by the master.”***

And **Salmond** at p. 90 when dealing with same topic says -

***“... if the unauthorized 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.”***

I wish to adopt the words of Halbury J in **WARREN VS. HENRYS [1948] 2 LL E.R. 955 at 938 -**

***“Without multiplying the ways in which this matter has been expressed and judges have sought to mark the limitations or bounds within which a master is to be held liable. I may use one more quotation. It is from SCRUTTON, L.J. In POLARD VS. JOHN PARR & SONS [1927] 1 K.B. 243 -***

***“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 or employed 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 as to take the act out of the class of acts which the person is authorised or employed to do.”***

The evidence here is that the 1st Defendant was employed to guard the premises of the 2nd Defendant and his seat of work was at the gate, he would let in tenants and their invitees, both of whom would be expected to accord the 1st Defendant the courtesy that behoves a human being, no matter how or why the file was, or how lowly the person holding that job looked.

What is clear from the evidence of DW2, in particular, but also DW1, is that the plaintiff had an altercation with the 1st Defendant at the gate. DW2 witnessed it. She got no explanation from the Plaintiff to her inquiry as to what they were quarreling about. Instead of responding to her, the Plaintiff walked away, towards his flat. The 1st Defendant, the watchman, explained to her that the plaintiff had hit, and shaken the watchman and spat at him. He told her that he would follow him, (*the Plaintiff*) and asked him *“why he was quarreling him every time he comes to the gate.”*

DW2 accompanied the watchman towards the plaintiff's flat. The plaintiff testified that the place was dark and that he switched on the corridors lights which the watchman switched off, and that before he could understand what was going on, the watchman hit on the face and injured his eye and he bled.

This version is contracted by DW2, who accompanied the watchman. When the watchman sought an explanation as to why he always quarreled him whenever he come to the gate, the plaintiff held and shook the watchman who fell on a table, and who upon recovering his balance, took out his club and hit the plaintiff on the eye thus occasioning him serious injury. DW2 was emphatic that what she testified

is what she saw and witnessed. It is not a fabrication.

The question is, whether in those circumstances it can be said in law, that the watchman, 1<sup>st</sup> Defendant was acting in the course of employment, or put differently is this an act which can be said to be in a class of acts which the person was authorised or employed to do? I do not with respect to the Plaintiff and his counsel think so. The act of the watchman cannot be said to be an act which was connected with his employment. It seems to be entirely not an act of vengeance, but an act of personal defence. The 1<sup>st</sup> Defendant was personally and intentionally hitting back at the Plaintiff, because, **firstly**, the Plaintiff had quarreled, shaken and spat on him at the gate, and **secondly** the plaintiff had repeated the same acts of violence on him by holding and shoving him over till the watchman fell over a table. That act cannot be said to have any connection whatsoever with the discharge of any duty for the 2<sup>nd</sup> Defendant.

The act of assault or more accurately, I think of self-defence, was a matter which affected the watchman's personal integrity, and security of person, and there is no evidence it was otherwise.

In the circumstances, I can find no evidence to hold the 2<sup>nd</sup> Defendant vicariously liable, and having reached this conclusion, there is no case for considering the plaintiff's other claims for damages.

The suit is therefore dismissed with a direction that each party bears his own costs.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 5<sup>th</sup> day of October, 2012**

**M. J. ANYARA EMUKULE**

**JUDGE**