REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 391 of 2004

MELOKI OLE NCHORRAI…………………………..... APPELLANT

VERSUS

APOLLO TOURS & TRAVEL LIMITED .... RESPONDENT

(An appeal from the judgment of E.N. Maina, Principal Magistrate at the Chief Magistrate's Court, Milimani, delivered on 4th June, 2004 in Nairobi CMCC No. 8942 of 2003)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Meloki Ole Nchorrai, hereinafter referred to as the appellant. He had sued his employer, Apollo Tours & Travel Ltd, hereinafter referred to as the respondent. The appellant claimed general and special damages from the respondent for injuries sustained by him during the course of his employment. The appellant claimed that the injuries were a result of the respondent's negligence.

2. In its statement of defence, the respondent denied the appellant's claim. In particular, the respondent denied that the appellant was employed by it, or that the appellant was attacked within the respondent's premises. The respondent further denied being negligent or failing to provide a safe and proper working environment. Without prejudice to its denial the respondent maintained that there was no nexus between it and the thugs who attacked the respondent. Therefore it cannot be held vicariously liable for the criminal acts. The respondent further stated that it discharged its normal duty of care as a reasonable employer. The respondent maintained that the appellant failed to take care of his own safety, and therefore his injuries were wholly or substantially caused by his own negligence.

3. In proof of his case, the appellant testified before the trial Magistrate as follows. He was employed by the respondent as a watchman to guard the respondent's workshop at Westlands. On the material date at about 5.30 a.m. he was on duty with another colleague, when they were attacked by 12 thugs. The

appellant who was only armed with a spear and a sword was injured on the left side of the head and eye. He was also stabbed on the neck. The appellant's colleague was hit on the head with a hammer and he lost consciousness. The appellant switched on the alarm. The police responded to the alarm and took the two to hospital where they were admitted for 4 days. The appellant and his colleague were taken to hospital where the appellant was admitted for 4 days. The appellant produced medical reports. The appellant claimed that the respondent did not provide him with any helmet, boots or clothes or any other protective clothing. He further claimed that 2 guards were not enough to guard the respondent's premises.

4. The respondent also testified through its operations manager, Solomon Gitau (Gitau). The witness admitted that the appellant was working as a night guard. He explained that he received a report about the guards being attacked. He proceeded to the hospital where he found the two guards. The witness claimed that the compound was about ¼ to ½ acre. It was fenced with shrubs and barbed wire, and had 2 iron gates. Gitau explained that the fence had not been cut, although the padlocks were broken. He further testified that the watchmen were issued with a securex alarm, spear, poison arrow and swords but were not issued with any protective apparel such as a helmet. He maintained that the watchmen were supposed to be patrolling the compound and not sitting in one place.

5. In her judgment, the trial Magistrate found that the appellant had not proved his case on a balance of probabilities as there was no evidence that the respondent failed to take reasonable care for the appellant's safety. The trial Magistrate noted that although the appellant claimed that he was not supplied with boots, coat or helmet, he had not asked for such protective gear, nor would the gear have prevented the kind of injuries that the appellant sustained. The trial Magistrate noted that the appellant was dozing on the job, and failed to keep a proper look out. She therefore dismissed the appellant's claim.

6. Being aggrieved by that judgment the appellant has lodged this appeal raising 13 grounds as follows:

(i) The learned trial Magistrate misdirected herself and erred in law and fact by holding and concluding that the appellant had not proved his case on a balance of probabilities, in the face of truthful, cogent, evidence to the contrary.

(ii) The learned trial Magistrate misdirected herself and erred in law and fact by disregarding the cogent, truthful testimony of the appellant and relying on the coached, untruthful and uninformed testimony of the respondent's witness and dismissing the appellant's suit without justification.

(iii) The learned trial Magistrate misdirected herself and erred in law and fact, by holding that the respondent had not breached its duty of care to the appellant, while the respondent's witness had confirmed to the Court that the respondent had not provided the appellant with a helmet and having observed in her judgment that -

"it is trite law that an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances, so as not to expose them to any unnecessary risk."

(iv) The learned trial Magistrate misdirected herself and erred in law and fact, by holding that a helmet would not have protected the appellant in any event, while there was medical evidence on record that the appellant had sustained serious injuries to the head.

(v) The learned trial Magistrate misdirected herself and erred in law and fact, by holding that it had not been demonstrated that the respondent had breached its duty of care to the appellant, while there was cogent, truthful testimony to the contrary on Court record and further shifting that duty to the appellant in the background of the Courts comments amplified at ground 3 above.

(vi) The learned trial Magistrate misdirected herself and erred in law by disregarding the *ratio decidendi* in ***HCCC No. 214 of 1978 – Mghosi vs. Gayatri Engineering Works***, [1981] KLR, 136-173 at page 164.

(vii) The learned trial Magistrate misdirected herself and erred in law and fact by disregarding the *ratio decidendi* in ***C.A. No. 116 of 1989, Makala Mailu Mumende vs. Nyali Golf Course and County Club*** (unreported).

(viii) The learned trial Magistrate misdirected herself and erred in law by completely ignoring the appellant's case law above-stated in its entire judgment while the said authorities were not only binding on the Court, but very relevant to the appellant's case.

(ix) The learned trial Magistrate misdirected herself and erred in law and fact, by estimating the quantum of damages at Kshs.130,000/= which was too low as to be unreasonable considering the medical evidence on Court record showing that the appellant had sustained very serious injuries warranting much higher damages.

(x) The learned trial Magistrate misdirected herself and erred in law and fact, by disregarding the *ratio decidendi* and the trend in award of damages in ***HCCC No. 579 of 1989, Franke Ray vs. Paul Kalama & 3 Others*** (unreported), and ***HCCC No. 4539 of 1987, Priscilla Wekesa vs. Andrew Mwabingu & Another*** (unreported) and ignoring the authorities completely in her judgment.

(xi) The learned trial Magistrate misdirected herself and erred in law and fact by writing and delivering a contradictory and inconsistent judgment.

(xii) The learned trial Magistrate misdirected herself and erred in law and fact, by dismissing the plaintiff's case against binding decided case law, and against the weight of evidence.

(xiii) The judgment of the trial Court as written and delivered cannot be supported in law or fact.

7. Following an agreement by the parties, written submissions were exchanged and filed, and the Court invited to determine the appeal based on those submissions. On the issue of liability it was submitted on behalf of the appellant, that the trial Magistrate confirmed in her judgment, that the appellant was injured

on the left side of the head, the eye and the neck, and that the appellant was not provided with any helmet, boots or coat. It was argued that the trial Magistrate was wrong in finding that the protective clothing would not have protected the appellant from the kind of injuries he sustained.

8. It was further contended that the trial Magistrate's finding that the appellant was dozing and that the appellant failed to switch on the alarm, was not supported by any evidence. It was maintained that the trial Magistrate shifted the statutory duty of the employer to take reasonable precaution for the employees' safety, onto the appellant. It was submitted that the trial Magistrate ignored relevant binding authorities on the issue of liability.

9. In that regard the Court was referred to the following authorities:

· ***C.A. No. 116 of 1989, Makala Mailu Mumende vs. Nyali Golf Course and County Club,*** where the Court of appeal dealing with a similar situation, in which a watchman who had not been provided with a helmet was attacked and injured, unanimously held that the employer was liable.

· ***HCCC No. 214 of 1978, Mghosi vs. Gayatri Engineering Works [1981] KLR 163.***

10. On the issue of quantum, it was submitted that the trial Magistrate's assessment of Kshs.130,000/= completely ignored relevant authorities which were cited to her on comparable injuries. The Court's attention was drawn to the medical reports and discharge summary which were produced by consent, in which the appellant's injuries were listed as:

(a) wounds on the head,

(b) wounds on the face,

(c) wounds on the neck,

(d) Haematoma around the eyes,

(e) Hairline fracture of the frontal process of the right maxilla (jaw).

11. It was noted that the appellant had residual disfigurements such as scars on the neck, face and scalp and large keloids which would require surgery to remove. It was submitted that a sum of Kshs.800,000/= would be reasonable compensation. The Court was therefore urged to allow the appeal, set aside the judgment of the lower Court, give judgment in favour of the appellant and award him general damages.

12. For the respondent, it was submitted that this Court being an appellate Court it should be wary of overturning any finding of fact by the trial Court, as it neither heard the witnesses who testified, nor observed their demeanor. In that regard, ***HCCA No. 152 of 2003 Statpack Industries vs. James Mbithi Munyao*** was relied upon. On the issue of liability it was submitted that for the appellant to succeed, in negligence, he had to prove a causal link between the respondent's negligence and the appellant's injury. It was submitted that in this case the appellant's injury was caused by an act committed by thugs/thieves/robbers, and that there was no nexus between the thugs and the respondent. The Court was referred to ***HCCC No. 2366 of 1999, David Ngotho Mugunga vs. Mugumoini Estate.***

13. It was submitted that the evidence before the trial Magistrate showed that the appellant was provided with the requisite protective gear. It was further noted that the appellant suffered injuries to other parts of the body in respect of which the helmet could not have been of use. It was argued that the respondent had no control over the actions of the thugs. It was maintained that the appellant failed to take

care of his own security in that he saw danger coming but chose to walk into it by confronting the thugs. The appellant therefore brought harm to himself. It was maintained that the respondent had provided reasonable care by providing a fence, a steel gate firmly locked, protective gear for the appellant and an alarm switch. The respondent therefore fully complied with the statutory duty it owed the appellant.

14. On the issue of quantum, it was submitted that the assessment of quantum by the trial Magistrate could only be interfered with, if it was manifestly low or excessive as to be a wrong estimate of injuries sustained by the appellant. It was maintained that the appellant suffered soft tissue injuries which have healed, and that the award by the trial Magistrate was just, fair, sufficient and commensurate with the injuries sustained by the appellant. The Court was therefore urged to dismiss the appeal with costs.

15. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower Court. I have also considered the submissions which were filed in the lower Court, and the submissions which were filed before me. Although the respondent denied in its defence that the appellant was its employee, the respondent's witness admitted in his evidence that the appellant was a night guard in the respondent's premises. Moreover, the appellant produced an identification card issued to him by the respondent, which identified him as a workshop guard. Thus, there was ample evidence that the appellant was employed by the respondent.

16. The appellant claimed that the respondent only issued him with a spear, sword, and an alarm for performing his duties. The appellant denied that the respondent issued him with any helmet. This was consistent with the evidence of the respondent's witness who conceded both in his evidence in chief, and under cross-examination, that the appellant was not issued with any helmet. The trial Magistrate appeared to have accepted the appellant's evidence that he was not issued with any helmet. However, she found that the appellant did not request for the protective gear, nor would the protective gear have prevented the injuries that he suffered.

17. I find that the trial Magistrate did not properly address her mind to the duty of the respondent to the appellant as an employee. In the case of ***Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47***, the Court of Appeal held 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. Thus, in this case, the appellant had to establish that the respondent failed to exercise reasonable care for his safety against risks which were reasonably foreseeable.

18. The particulars of negligence alleged by the appellant against the respondent, in his plaint, were as follows:

(i) failing to provide a safe system of work,

(ii) failing to provide proper and protective gear,

(iii) failing to post enough guard at the premises,

(iv) exposing the plaintiff to a risk of danger/injury of which they knew or ought to have known,

(v) allowing the plaintiff to work under such dangerous conditions.

19. The appellant was a guard/watchman, a job which was no doubt risky. It was not entirely possible for the respondent to provide a system of work which could be said to be entirely safe. Nonetheless, the position in this case is not different from that which obtained in the case of ***Makala Mailu Mumende vs. Nyali Golf & Country Club*** (supra) wherein Nyarangi J.A. stated:

"**No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in. But, however inherently dangerous, an employer is expected reasonably to take steps in respect of the employment, to lessen danger or injury to the employee."**

20. Thus the respondent was under a responsibility to provide the appellant with all the necessary appliances and protective clothing so as to enable the appellant carry out his duties with minimal risks. The danger of the appellant being attacked was not unforeseeable, and therefore it was necessary for the respondent to provide the appellant with a helmet. The trial Magistrate misdirected herself in holding that the helmet would not have protected the appellant from the kind of injuries he sustained.

21. Indeed, in the case of ***Makala Mailu Mumende vs. Nyali Golf Course & Country Club*** (supra), it was stated that, "*the question is not whether a helmet would have protected the plaintiff from injury to the apex of the head, but whether the helmet could reasonably be regarded as capable of minimizing the injuries to the head*." In any case as was evident from the medical reports which were produced in evidence, the appellant suffered injuries which included head injuries. Obviously a helmet would have played a great role in minimizing the injuries.

22. I find that in failing to provide the appellant with a helmet, the respondent failed in its duty of providing reasonable care for the appellant's safety against risks reasonably foreseeable. The respondent is therefore liable to the appellant. Nevertheless, the appellant appears to have also failed to exercise due care for his own safety. His work required him to be alert and watchful. The appellant did concede under cross-examination that he was actually dozing. That would probably explain how such a large number of intruders gained access into the compound without the appellant and his colleague noticing. It would also explain why the appellant only used the alarm after they were attacked. I find that the appellant was contributorily negligent. I would accordingly hold the appellant contributorily negligent to the extent of 30% and find the respondent liable to the extent of 70%.

23. On the issue of quantum, the general principle is that an assessment of damages by a trial Court can only be interfered with if it is manifestly low or excessive as to be a wrong estimate of the injuries sustained by the victim. In this case, the trial Magistrate assessed a sum of Kshs.130,000/= to be appropriate for the injuries which were suffered by the appellant. Although the trial Magistrate did not make any reference to the appellant's injuries or the authorities which were cited to her, it is apparent that she had the same in mind. I note that the appellant only provided digest copies of the authorities which he relied upon. Moreover, the injuries in those authorities appeared to be much more serious than the injuries that were suffered by the appellant. I find that the award of Kshs.130,000/= was neither too low nor excessive nor was it based on wrong principles as to justify the intervention of this Court.

24. The upshot of the above, is that I allow the appeal, set aside the judgment of the lower Court and substitute it thereof with a judgment in favour of the appellant. I award the appellant general damages of Kshs.130,000/=, subject to contribution of 30%. I further award the appellant interest on the judgment sum from the date of the judgment of the lower Court and costs of the suit and the appeal.

Those shall be the orders of this Court.

Dated and delivered this 4th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Kinyanjui for the appellant

Advocate for the respondent, absent

Eric, court clerk