



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Nyarangi & Gicheru JJ A)

CIVIL APPEAL NO 16 OF 1989

MAKALA MAILU MUMENDEPLAINTIFF

VERSUS

NYALI GOLF & COUNTRY CLUB.....DEFENDANT

JUDGMENT

(An appeal from the Judgment of the High Court at Mombasa, Bosire J, dated 24th November 1988

in

Civil Case No 43 of 1988)

November 7, 1989, the following Judgments were delivered.

Nyarangi JA. There is before the Court an appeal by the plaintiff Makala Mailu Mumende from the judgment of Bosire, J given on November 24th, 1988 whereby he set aside the interlocutory judgment which had been entered therein on March 7th, 1988.

The action took the form of a claim by the plaintiff, who is the appellant before us, against the defendant for personal injuries suffered by him in the course of his employment by the defendant at the Nyali Golf & Country Club.

At the material times, the plaintiff was employed by the defendant as a guard. On August 13th, 1986 in the course of his employment with the defendant and while guarding a bar at the Nyali Golf Club, the plaintiff was assailed by a gang of people who seriously injured him.

The facts which triggered off this litigation were that by August 13th, 1986 at 1 am, the plaintiff, who has been in the service of the defendant for just over six years, was going round when he saw four people. They did not talk to the plaintiff and they walked towards him menacingly. Noticing that, the plaintiff hurried to pull an alarm only to find some other people. The plaintiff changed direction but met the first four persons who confronted him and then cut him on the forehead, bent him over and hit him on the apex

of his head. He fell and was then stepped on at his left jaw which was fractured. Thereupon the plaintiff became unconscious and found himself at the Coast General Hospital on regaining consciousness. He remained at the hospital until August 22nd, 1986 on which day he was released but continued treatment as an outpatient. By the time he gave evidence before the High Court, he could not see clearly and he was unable to chew well. He chewed meat using the right side of his jaw. He used glasses to have clearer vision. During sunny periods, the plaintiff experienced serious headache.

The only medical evidence adduced was that of an Orthopaedic Surgeon who reported on the plaintiff on June 18th, 1986. Dr Khandwalla assessed the plaintiff's age as 56 years and found a head and dental injury. There was pain on the teeth which were intact. There was pain if the teeth were pressed. There were scars on the forehead 6 cm occiput 5 cm and 3 cm. The scars were hidden by a growth of hair. The doctor found the other systems normal.

The Surgeon's opinion was: the plaintiff had headache and felt dizzy due to the severe head injury. The condition would persist on and off for which medication will be continued. The Surgeon thought the difficulty in chewing was due to the severe injury to the plaintiff's dentures. The problem, reported the Surgeon, would persist permanently as the plaintiff was operated for the fractured mandible.

The plaintiff's wages were Shs 1,100/- per month. When and if he did overtime, he was paid for the overtime. He did not however suggest any amount for the overtime payment.

The defendant supplied him with a club, a torch and a whistle, He had not been provided with a helmet although his trade union had earlier on suggested that the plaintiff and his workers be provided with helmets.

Cross-examined, the plaintiff told Bosire, J that his duties were to guard the club premises and property inside the premises. It was his duty to prevent thieves from stealing from the club. However, if a large gang of thieves came to the club, he could not possibly prevent them from stealing and all he could then do would be to scare the thieves and call for assistance. On the material day, after he saw the thieves, he ran to switch on a radio alarm. He did not blow his whistle as there were many thieves who could therefore not be scared that way. He was intercepted as he was going to press the alarm. For the same reason, he was unable to use his club. The plaintiff said some money was kept inside the club premises. There had been a previous similar incident when he and a co-worker were surprised, held, had their hands and legs tied and one member of the gang was left guarding the two while the others broke into the club premises. Fortunately, none of them was injured.

The plaintiff thought a helmet was necessary and said KK Guards are provided with helmets.

Although his employers wanted him to continue working, the plaintiff left his employment because of a problem with his eyesight. The other vital features in this case are the procedural ones.

It will be observed that appearance was entered for the defendant on April 26th, 1988. But, mark you, the request for judgment for Shs 1,200/- was filed on March 3rd, 1988 and an *ex parte* judgment entered on March 7th, 1988.

On April 27th, 1988, the case was listed for assessment of damages on August 24th, 1988.

After those two matters, an application by chambers summons, praying for orders that the interlocutory judgment entered therein be set aside and the defendant be granted leave to file its defence, was made on May 30th, 1988. On August 24th, 1988, Bosire J dismissed the chamber summons with costs.

“for want of prosecution”.

The matter came speedily before the Court because on the same day, that is to say, August 24th, 1988, counsel for the defendant applied for an adjournment to enable him to apply to set aside the *ex-parte* dismissal of the application to set aside the *ex-parte* judgment. After hearing the matter argued, the judge

refused to grant an adjournment and ordered that the suit proceeds.

I do not think that there was any vagueness whatever about, the consequence of the decision of the judge. The judge decided to proceed with the assessment of damages.

In my judgment, therefore, the issue of liability was already settled (in favour of the plaintiff of course) by the time the judge embarked on the task of assessment of damages. So that as a matter of law and fact, it was no longer open to the judge to consider whether the plaintiff's claim had or did not have a firm basis. The cause of action could not at that very late stage be questioned.

The evidence which was adduced in the proceedings for assessment of damages was specifically for that purpose and for none other. That evidence was not intended to establish the existence or otherwise of a cause of action.

A judgment which is entered in default of appearance for a defendant presupposes that there is a cause of action.

If the judge felt that there was no cause of action, he should have allowed the application for adjournment and thus enable the defendant to apply for the *ex-parte* judgment to be set aside.

The fact is that there was no defence to the plaintiff's claim. There is nothing about that claim to suggest that it is founded on illegality. And, the judge was not required to confirm or not to confirm, the interlocutory judgment entered in the suit. From the moment he refused to allow an adjournment so that an application to set aside the *ex-parte* dismissal of the defendant's application to set aside the interlocutory judgment could be made, the judge had before him a perfectly valid judgment.

The judge was not deciding on an application to set aside the judgment and so he had no jurisdiction to set aside that judgment.

The plaintiff's suit could not be dismissed as liability had been admitted. No injustice would have been occasioned to either party if the judge had proceeded along the lines I have suggested. The judge would merely have acted according to legal procedure.

True, justice must be done to both or all parties. But, justice must be done according to law.

With the utmost respect to the judge, the approach he adopted is contrary to the procedure of law and was therefore erroneous. The judge did not accomplish the task he set out to do; he did not assess damages. At the conclusion of a review of the evidence, the judge held that at common law an employee takes upon himself risks necessarily incidental to his employment; that an employer does not warrant the safety of the employee's working conditions where the nature and character of the work upon which he willingly engages for gain is inherently dangerous and that the defendant took all reasonable steps.

“to have two watchmen and to install a radio alarm.”

The memorandum of appeal contains four grounds of appeal. The first and second are a complaint that the judge misdirected himself by dealing with the issue of liability.

The third ground criticizes the judge for setting aside the interlocutory judgment.

The fourth ground explicitly confines itself to the failure on the part of the judge to assess the damages.

I have in previous passages dealt with the first three grounds. That being so, I can come immediately to the point raised by this appeal on the measure of damages in a case where a security guard is attacked in the course of his duty.

The complaint of counsel for the plaintiff was that the appellant, a night watchman, should have been

issued with a helmet. It was pointed out that the Trade Union of the appellant had demanded the issue of helmets which are common in the trade. Counsel gave as an example the practice of the firm of KK Guards where it is common for that type of equipment to be issued to guards. It was submitted that given the nature of the appellant's work, a helmet would have minimized injury to the appellant's head. Counsel for the respondents submitted that a helmet would not be helped in so far as the injury to the jaw is concerned. Counsel went further and urged that the defendant had provided adequate protection, that is to say, a club, a whistle, a torch and another watchman.

Counsel thought that a sum not in excess of Shs 50,000/- would suffice as general damages if his arguments do not prevail with the Court.

So far as the assessment of damages is concerned, I think I should refer to section 3 (2) of the Judicature Act, cap 9. That provision is the jurisdiction for us here doing what the High Court has not done.

First, some words as to the issue of negligence. Having admitted liability, it goes without saying that the defendant club was negligent in not providing a suitable helmet to the appellant. Strangely enough, counsel for the respondent submitted that there was no negligence on the part of the Club.

The plaintiff's claim, which stands unanswered, is that it was a term of the contract of employment and / or it was the duty of the employer to take all reasonable precautions for the safety of the plaintiff while at work and not expose him to risk of injury which the employer ought, reasonably to have known. There was no evidence before the High Court in support of the defendant's suggestion that it provided reasonable protection.

In a nutshell the plaintiff's case is, I apprehend, this. The defendant should have provided him with a helmet when his Trade Union made the demand on his behalf. The defendant had knowledge of a previous incident similar to the material one when he and his co-guard were attacked, held, had their hands and legs tied and placed under guard. No injuries were inflicted on either. That incident should have spurred the defendant into immediate action. More equipment more particularly a suitable helmet to protect the head, forehead and the jaw area should have been issued to the plaintiff as a matter of urgency. The failure by the defendant to accede to the plaintiff's plea was unreasonable, negligent, and actionable. The severe head injury which he sustained could have been minimized if he had on a helmet at the time he was hit on the apex of his head.

That exposition finds support in paragraph 562, *Halsbury's Laws of England*, 4th Edition Vol 16 which is in the following terms:-

“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 from an injury which he may sustain in the course of his employment in consequence 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 conditions, nor is he an insurer of his employee's safety; the exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends to his person.”

The underlining is mine.

See also; *Harris v Bright's Asphalt Contractors Ltd*, (1953) 1 QB 617 where a workman was subjected to unnecessary and reasonably foreseeable risk. It was held that in failing to take such precautions as would guard him from being injured, the employers were guilty at common law.

In *Smith v Baker v Sons* [1891] AC, 325 Lord Herchell had this to say on this point,

“It is clear that the contract between employer and employed involves, on the part of the former, a duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition and so to carry on his obligations as not to subject those employed by him to unnecessary risk.”

I also bear in mind Lord Wright’s ruling in *Wilson & Clyde Coal Co Ltd v English*, [1938] AC P 57 that

“The same principle in my opinion applies to those fundamental doctrine of common employee and for the performance of which employers are absolutely responsible. The obligation is fulfilled by the exercise of due care and skill.”

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.

Paragraph 560, *Halsbury’s Law of England, 4th Edition*, Vol 16, states *inter alia*

“At common law 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 an unnecessary risk”.

Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and endure the existence of minimum reasonable measures of protection. The necessity is the greater for an employer to protect his employees from danger after a warning following a potentially dangerous incident during which no injuries are sustained.

In the circumstances of this case, a helmet would not reasonably be regarded as a modern weapon.

The question is not whether a helmet would have protected the plaintiff from the injury to the apex of the head but whether the helmet could reasonably be regarded as capable of minimizing the injury to the head.

In my judgment, the defendant was negligent in not providing the plaintiff with a helmet at the time he was employed as a night watch-man. The defendant’s failure to supply a helmet after evidence of the previous incident of attack is an act of continued negligence. In measuring the care, one must balance the risk against the measures necessary to eliminate the risk – *Watt v Hertfordshire County Council*, [1954] 2 All ER 368 at 371. Although the surgeon did not say so as the point was not put to him, it is reasonable, in my view, on account of the location of the injury on the apex of the head, to hold that it is more likely than not, that the injury to the head would have been less severe if the plaintiff was wearing a helmet which equipment would, because of its structure, have covered the entire head including the apex and the forehead.

Prudent employers of security personnel for night or day would well be advised to take heed. It does appear to me that it is vital for a suitable helmet to be provided and to cover the head, the forehead and the jaw area. A club, a whistle and a torch should continue to be provided. The security industry is booming. In recent years there has been an increase in the number of security personnel guarding companies’ premises and facilities. Banks and private homes are increasingly using security guards to protect property from theft or damage. It is no longer a luxury for a firm to have security staff.

Such being the circumstances, it is essential that employers of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen. After all, the keen demand for security personnel means there is a role for them to play.

It seems to me that all the merits in this case are in favour of compensating the plaintiff for the loss of

earning and for pain and suffering.

He was 56 at the time he was injured and incapacitated. Medical evidence was that at his age, and with the kind of injury he sustained, a man is not suitable for a watchman's job. His employer was prepared to continue to employ him.

I see no reason why the plaintiff would not have served until he was 60. I would, therefore, say his loss on this score is the equivalent of four years' wages. At a salary of Shs 1,100/- per month, the total loss would be Shs 52, 800/-. The defendant should compensate the plaintiff for the loss. I would give Shs 100/-per month towards medication so that if the plaintiff lives to be 65, the amount would be Shs 10,800/-.

The defendant contributed towards the injuries. I am bearing that circumstances in mind in my assessment of general damages. In all the circumstances taking into account the loss in pay, the necessary continued medication for the persistent injuries and the pain and suffering, I would award Shs 80,000/- as general damages all told.

I would give judgment for the plaintiff Makala Mailu Mumende against the defendant for

(i) Shs 1,200/-

(ii) Shs 80,000/-

With costs and interest at court rates from to-day until payment in full. As Gachuhi and Gicheru JJ A also agree, it is so ordered.

Gachuhi JA. The facts relating to this suit are contained in the judgment of Nyarangi JA which I have had the advantage of reading in draft form. It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger to avoid any negligence, but will not be responsible of the employee's own negligence in execution of such employment. The appellant was a member of a union which union had demanded that the employer provide helmets to the watchmen. The request must have been based on good grounds. Other security guards are provided with helmets. The helmet was not, so to speak, to provide absolute protection but would minimize any injury. The employer failed to provide the appellant with the helmet and when he was attacked he was severely injured. It is submitted, and I accept it, that had the appellant been provided with a helmet, the injury he received would not have been so severe. The tools that the appellant was provided with, ie a rungu a torch and a whistle were not meant to be weapons with which to fight intruders but to ward them off. A helmet would prevent an object thrown at the employee from receiving head injury. The employer was aware of this, and in my view, it failed to do what was required of it and for that reason it was negligent. It cannot rely on the previous incident when the appellant was not injured after he was confronted in similar circumstances. any attack would take different forms from the other and even the injury inflicted would be different one from the other. Past experiences demanded better protection.

On the question of the dismissal of the plaintiff's suit by the judge I would say that on the day fixed for assessment of damages the judge was seized with powers to assess the damages and not otherwise. An interlocutory judgment had already been entered. There was no application before him to set it aside. The judge, having refused an application for an adjournment to enable an application to be made for setting aside the ex parte judgment, was bound by the judgment. He was bound to assess the ex parte judgment, was bound by the judgment. He was bound to assess the damages. Even if he was inclined not to award damages, he was bound to assess it for the purpose of an appeal, if one was filed as did happen.

I would allow this appeal with cots. I am in agreement with Nyarangi JA regarding quantum of damages and with orders on costs.

Gicheru JA. I have had the advantage of reading in draft the judgment of Nyarangi JA. I agree with it. I also agree with the orders proposed therein.

Dtaed and Delivered at Mombasa this 7th Day of November, 1989

J.M GACHUHI

.....

JUDGE OF APPEAL

J.O NYARANGI

.....

JUDGE OF APPEAL

J.E GICHERU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR