



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1260 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**RAPHAEL KYALO MWANZA .....CLAIMANT**

**VERSUS**

**BOB MORGAN SERVICES LIMITED..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated 13<sup>th</sup> July 2015, the Claimant sued the Respondent for special and general damages arising from injuries sustained in the course of his employment. The Claimant's case is pleaded as follows:

2. The Claimant avers that on 16<sup>th</sup> June 2013, while on duty, he was assaulted by thugs at the Barclays Bank of Kenya go-down along Enterprise Road and sustained injuries as follows: -

- (i) Deep cut on the forehead.
- (ii) Lacerated scar on the forehead.
- (iii) Recurrent headaches.

3. The Claimant further avers that he is entitled to compensation under the workmanship compensation and had not resumed duty as he was dismissed while recuperating. That the Respondent failed and/or refused to honour the Claimant's demand rendering the suit necessary.

4. The Claimant prays for –

- (a) Special damages Kshs.5,775
- (b) General damages
- (c) Cost of the suit with interest
- (d) Any other relief that this Honourable Court may deem fit.

**Respondent's Case**

5. The Respondent filed its response to the memorandum of claim on 21<sup>st</sup> August 2015 affirming that it was a limited liability company as opposed to "a male adult of sound mind residing in Nairobi" as averred in paragraph 2 of the memorandum of claim.

6. The Respondent avers that it fulfilled its obligations and duty to the Claimant as required by law and the Claimant had been trained as security guard. It is further averred that the attack by thugs was unforeseen by the Respondent and the Claimant's employment involved certain risks. The Respondent denies the particulars of the injuries allegedly sustained by the Claimant.

7. It is further alleged that the Claimant failed to keep a proper look out or exercise reasonable care and thus exposed himself to risk of injury. The Respondent prays for dismissal of the suit with costs.

## **Evidence**

8. The Claimant testified that he was attacked by thugs on the morning of 16<sup>th</sup> June 2013 at his workplace along enterprise road and was taken to the Respondent's clinic where the wound was dressed and pain killers administered. That he returned on 17<sup>th</sup> June 2013, the wound was dressed again and sick off of four days was given effective 18<sup>th</sup> June 2013. That the Claimant reported the attack to the police on 25<sup>th</sup> June 2013. That the Respondent's clinic referred him to the Kenyatta National Hospital for further treatment on 21<sup>st</sup> June 2013 but was not given cash and had to borrow.

9. It is the Claimant's testimony that on 27<sup>th</sup> June 2013, he reported to the Respondent's clinic but was requested to furnish the clinic with the original results of treatment and sick off card.

10. On cross examination, the Claimant confirmed that he had been provided with all the necessary items as a guard and did not pay the bill at the Respondent's clinic and had no receipt from the Kenyatta National Hospital.

11. RW1 MR. DENNIS MICHIEKA confirmed that the Claimant was indeed referred to the Kenya National hospital and was given Kshs.3,000/= for the same, prior to his departure and is not claiming reimbursement. That after the Claimant was given sick off days, he absconded duty and was dismissed by a letter dated 23<sup>rd</sup> October 2013 but did not collect the letter. He had absented himself. RW1 testified that the Respondent did not have the Claimant's phone number.

12. It was the Respondent's testimony that letters sent to the Claimant's referees Mr. Dominic Nzioki and Samuel Kimeu were unresponded to.

13. On re-examination, RW1 stated that the Claimant was insured under WIBA and the email on page 19 was requesting for documentation for the insurer to compensate the Claimant.

14. Finally, the witness testified that the termination letter was addressed to the Claimant's postal address in his file. The witness also testified that the Respondent paid the Claimant's salary for June, July, August and September and the Claimant did not furnish evidence of his absence from the workplace.

## **Claimant's Submissions**

15. The Claimant isolates five issues for determination, namely whether:

- i) The Claimant was injured in the course of his duties;
- ii) The doctor's report should be adopted as evidence without the doctor's appearance in Court;
- iii) The Claimant's termination was unfair;
- iv) the Claimant was compensated for the injuries sustained;
- v) The Claimant is entitled to the reliefs sought.

16. On the first issue, it is common ground that the Claimant was attacked at his workstation on the morning of 16<sup>th</sup> June 2013 and was treated at the Respondent's clinic on the same day and subsequently referred to the Kenyatta National Hospital.

17. As regards the doctor's report, Counsel relies on Section 35(1)(b) of the Evidence Act to urge that the doctor's appearance could not be procured without delay or expense which in the circumstances of the case appear to the Court unreasonable.

18. It is submitted that the Claimant had no funds to cater for the doctor's court attendance expenses and urges the Court to rely on Section 35(1)(b) of the Evident Act to meet the ends of justice.

19. As to whether the Claimant was terminated unfairly, it is submitted that the Respondent led no evidence that the Claimant absconded duty. It is submitted that the Claimant's termination of employment was unfair.

20. On compensation for the injuries sustained at the work place, it is submitted that contrary to the Respondent's assertion that the Claimant was insured with AON, the insurer distanced itself from the claim by its email dated 10<sup>th</sup> November 2015.

21. It is further submitted that Claimant was not fully compensated for the injuries.

22. Finally, as regards the reliefs sought reliance is made on Section 12(3)(v), (vi) and 4 of the Employment and Labour Relations Court Act to urge that the receipts on record, are sufficient proof of the special damages claimed. That the Claimant is entitled to compensation for the injuries.

## **Respondent's Submissions**

23. As regards liability, the Respondent urges that the employer does not owe the employee an absolute duty other than to take reasonable care against risk of injury caused by reasonably foreseeable causes. The decision in **Purity Wambui Muriithi v Highlands Mineral Water Company Limited [2015] eKLR** is relied upon to reinforce the submissions.

24. It is submitted that the Respondent had given the Claimant the necessary paraphernalia for his duties as a security guard and had thus discharged its duty under the law. It is the Respondent's submission that the danger the Claimant was exposed to was beyond the Respondent's intervention and should therefore not be held accountable. Reliance is made on the decision in **Makala Mialu Mumende v Nyalu Golf and County Club [1989] eKLR**.

25. The Respondent further submits that the Claimant led no evidence that the Respondent was negligent. Reliance is made on the **Halsbury's Laws of England, 4<sup>th</sup> Edition**, page 662 as well as **Clerk and Lindsell on Torts, 18<sup>th</sup> Edition**, page 600 paragraph 4 on the burden of proof in actions for damages for negligence.

26. That the Claimant did not provide the particulars of negligence attributed to the Respondent. The Respondent urges the Court to hold that the Claimant was 100% liable for the injuries sustained in the course of his employment.

27. As to whether the Claimant was unfairly terminated, it is observed that the Claimant's Counsel attempted to adduce evidence on termination of the Claimant yet it was not an issue before the Court.

28. It is submitted that the parties are bound by their pleadings and any evidence at variance thereto should be rejected. The decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002**, the Court of Appeal decision in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**, and the Supreme Court decision in **Raila Odinga & another v IEB and 2 others [2017] eKLR** are relied upon to buttress the submission. The Court is urged to find as much.

29. As regards the doctor's medical report, it is opined that the Claimant's Counsel sought an adjournment to avail the doctor to produce the report and be cross examined on its contents and the same was granted but on the date of hearing the doctor was not available and the Claimant closed his case.

30. It is the Respondent's submission that the Claimant should not have a second bite at the cherry, having failed to avail the doctor to give evidence. That the Claimant has failed to establish his allegations on balance of probabilities. The decisions in **Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another [2000] eKLR** and **Valji Jetha Kerai & another v Julius Ombasa Manono & another [2019] eKLR** are relied upon to buttress the submission on the burden and standard of proof.

31. The Respondent urges the Court not to rely on the medical report on record.

32. Finally, on the quantum of general damages, it is submitted that the Claimant did not produce credible medical evidence to prove that he suffered injuries. That the Claimant's failure to lead medical evidence to demonstrate the nature of the injuries sustained was fatal to the claim of general damages.

33. Reliance is made on the decision in **George Kebaso Mabeya v Crown Industries Limited [2006] eKLR** to reinforce the submission.

34. On special damages, it is submitted that the same should be pleaded and specifically proved.

#### **Analysis and Determination**

35. I have carefully considered the pleadings, evidence on record, exhibits and submissions by Counsel. The issues for determination are whether: -

- i) The doctor's report should be adopted as evidence;
- ii) The Claimant was terminated unfairly;
- iii) The Claimant is entitled to the reliefs sought.

36. As to whether the doctor's report dated 26<sup>th</sup> March 2014 should be relied upon, whereas the Claimant relies on Section 35(1)(b) of the Evidence Act, exclusively, the Respondent relies on the provisions as interpreted by judicial decisions.

37. Section 35(1) of the Act provides that –

**(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say–**

**(a) if the maker of the statement either–**

**(i) had personal knowledge of the matters dealt with by the statement; or**

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

38. The Claimant submits that he was unable to secure the doctor's attendance owing to lack of funds to meet court attendance expenses. But as submitted by the Respondent, on the date of hearing the Claimant's Counsel sought an adjournment in order to avail the doctor and the Court obliged and adjourned the matter for one month.

39. On 15<sup>th</sup> November 2021, the new hearing date, the Claimant did not avail the doctor and no reason was provided. Counsel prayed that the medical report be relied upon as filed and closed the Claimant's case.

40. In the words of Warsame J. (as he then was) in **Theodore Otieno Kambogo v Norwegian Peoples Aid [2007] eKLR** cited with approval in **Valji Jetha Kerai & another v Julius Ombasa Manono & another (supra)** –

*“The fact that the defendant would not get an opportunity to cross examine the deponent greatly reduces the value and weight of that evidence. The court is not in any way saying that affidavit evidence is not good but is saying that the failure to test that evidence through cross examination may reduce its relevance or probative value to the person relying on the same.”*

41. The Court of Appeal was more authoritative in **Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another (supra)** where it expressed itself as follows: -

*“Under section 35(b) of the Evidence Act the medical report ought to have been produced by the maker thereof. The plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the defendant as well as to the plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court make calculations or to reach a conclusion thereon otherwise the award cannot stand ...*

*In this case the finding of the trial court cannot stand as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases ex parte, the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party.”*

42. Similarly, in **Meru South Farmers Co-operative Union Limited v Moses Otando Munaka & another [2015] eKLR**, Serгон J. was emphatic that:

*“In this appeal, damages can only be assessed based on the injuries suffered. It is therefore difficult to quantify the amount. Failure to tender medical showing the kind of injuries sustained is fatal unlike the authority cited by the trial magistrate. Damages are awarded purely not only on the injuries suffered, but, on the extent, or seriousness of such injuries. The damages awarded are pegged on such injuries. Without the evidence, it is impossible to assess the damages. With respect, the trial magistrate fell into error. There was no credible medical evidence to prove the injuries suffered by the 1<sup>st</sup> Respondent. There was therefore no basis to award damages.”*

43. The Court is in agreement with these sentiments and proceeds pursuant to their guidance.

#### **Is the medical report dated 26<sup>th</sup> March 2014 admissible under Section 35(1)(b) of the Evidence Act?**

44. Regrettably, the Claimant tendered no reason why it could not secure the attendance of the doctor. No explanation was given when Counsel sought an adjournment on 14<sup>th</sup> October 2021 and none was forthcoming for the non-attendance on 15<sup>th</sup> November 2021. The Court had granted the application for adjournment given the centrality of the doctor's evidence in this claim, which is to all intents and purposes an injury claim. The Court has no basis on which to award general damages.

45. In the absence of the evidence of the doctor who allegedly examined the Claimant on 14<sup>th</sup> March 2014 and in the absence of an affidavit or witness statement by the doctor, the medical report is of nominal probative value. As much as it is on record it was not spoken to by any witness nor were its contents subjected to cross examination by the Respondent.

46. In the upshot, the Court is satisfied that the Claimant has on a balance of probabilities failed to demonstrate the nature and extent of the injuries sustained in the attack.

47. As to whether the Claimant's termination was unfair, while the Claimant alleges that it was indeed unfair, the Respondent submits that since the issue of termination was neither pleaded nor testified about, parties are bound by their pleadings. The memorandum of claim dated 13<sup>th</sup> July 2015 makes no claim for unlawful or unfair termination or dismissal nor are attendant remedies sought.

48. In **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, A.C. Mrima J. stated as follows: -

*“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings.”*

49. In **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR** the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) v Nigeria Breweries PLC (supra)** as follows: -

*“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded ...”*

50. The essence of pleadings was also explained by the Supreme Court of Kenya in **Raila Amolo Odinga & Another v IEBC & 2 others (supra)** as follows: -

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”*

51. The pleadings and evidence on record relate to compensation for injuries sustained at the work place. The issue of termination was neither pleaded nor testified about and no relief is sought. As a consequence, nothing turns on his issue.

52. As regards reliefs, the Court proceeds as follows:

**(a) Special damages Kshs.5,775/=**

53. It is trite law that special damages must be pleaded and proved by evidence. Paragraph 5 of the memorandum of claim set out the particulars of special damages as follows: Medical expenses Kshs.4,275

Medical report Kshs.1,500

**Total Kshs.5,775**

54. The Claimant has availed the following receipts:

i) Kenyatta National Hospital (22.06.2013) Kshs.1,200

ii) Kenyatta National Hospital attendance

card P3 Kshs.1,000

iii) Antochem Pharmaceuticals (22.06.2013) Kshs.225

iv) Ploto Health Care Centre (24.06.2013) Kshs.400

v) Ploto Health Care Centre (29.06.2013) Kshs.200

**Total Kshs.3,625**

55. The Claimant is awarded the sum of **Kshs.3,625/=**

**(b) General damages**

56. Having found that the Claimant has not discharged the burden of proof in relation to the nature and extent of the injuries sustained, as against the denial by the Respondent, the Court further finds that the claim for general damages is unproven and thus unsustainable. The claim for general damages is **declined**.

57. The Court is guided by the words of the Court of Appeal in **Mohammed Hassan Musa & Another v Peter M. Mailanyi & Another (supra)** as follows:

*“We have come to the inevitable conclusion that, unfortunately for the plaintiff, despite his indefatigable efforts to bring the first defendant to justice, the plaintiff failed to prove his case as he is required to by law. We sympathise with him but sympathy is not enough. He may have been injured but the law must be observed. His undoing was that he presented his case with a lot of assumption and unfortunately the learned Judge went along with him. There was no justification to ignore elementary principles of law and procedure.”*

58. Strangely, there is no demand letter on record.

59. **In conclusion, judgment is entered for the Claimant against the Respondent for the sum of Kshs.3,625/=.**

60. **In light of the partial success, the Claimant shall have 50% of the costs.**

61. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF MARCH 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**