



**Nyauma v Attorney General (Cause 271 of 2016)
[2022] KEELRC 12926 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12926 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 271 OF 2016
S RADIDO, J
OCTOBER 19, 2022**

BETWEEN

WILLIAM OCHARO NYAUMA CLAIMANT

AND

ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. William Ochako Nyauma (the claimant) is a sergeant with the Kenya Prisons Service. On September 15, 2016, he sued the Honourable Attorney General (the respondent), alleging vicarious liability for injuries sustained in the course of work.
2. The respondent filed a response on November 10, 2016, and the cause was heard on June 9, 2022.
3. The claimant testified, but the respondent did not call any witness. Its attempt to secure an adjournment to call witnesses was declined because it had failed, despite previous indulgences by the court, to file and serve witness statements.
4. The claimant filed his submissions on July 14, 2022, and the respondent on July 15, 2022.
5. The court has considered the pleadings, evidence, and submissions.

Background

6. The background is based on the claimant's testimony.
7. On or around September 15, 2015, the claimant was on duty at the Kibos Prison gate. At around 0800 hours, some 13 prisoners were being processed at the gate when a warder allegedly uncuffed one, and the prisoner attacked the claimant on the jaw leading to the loss of 3 teeth. 2 teeth became loose.



8. The claimant was taken to the prison clinic, got treated and was given 3 days off duty. The same day, the claimant reported to the police and was issued a medical examination report (P3).

Jurisdiction

9. The respondent urged the court to decline jurisdiction on the ground that the claim fell within the ambit of the Director of Occupational Safety and Health as contemplated by section 16 of the [Work Injury Benefits Act](#), which provides that:

No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
10. According to the respondent, the claimant was aware of the risks associated with the job of a prison warder.
11. The claimant had pleaded *ubi jus ibi remedium* (where there is a right, there is a remedy).
12. Under sections 3 and 4 of the [Work Injury Benefits Act](#), the claimant should have sought compensation for the injuries sustained in the course of work. It is not in dispute that there was a remedy provided in law for the injuries suffered by the claimant, if at all.
13. The claimant did not pursue the option/remedy under the act. In that respect, the court would decline jurisdiction in the first instance as its jurisdiction is a deferred jurisdiction.

Liability in negligence

14. The claimant's action was also anchored on the doctrine of *res ipsa loquitur* (the thing speaks for itself), which connotes that the mere happenstance of the assault and associated injuries implied negligence on the part of the prison authorities.
15. The respondent, however, urged that no vicarious liability could be found against it because the claimant had not established that he sustained injuries within the precincts of work since he did not make a report to any of his seniors.
16. In the respondent's view, the claimant had not proved negligence or breach of the duty of care.
17. In an action asserting negligence or breach of duty of care, the party so asserting should set out with clarity the particulars of the negligence or breach of duty of care.
18. In the case under examination, the claimant did not outline the particulars of negligence relied on to enable the court to find a legal nexus between the injuries and the employer to warrant a finding of vicarious liability.
19. Despite the respondent not leading any evidence, the court finds that the claimant did not meet the standard of proof expected of him.

Conclusion and Orders

20. From the above, the court not only declines jurisdiction but finds no merit in the cause. It is dismissed with no order on costs.

DELIVERED VIRTUALLY FROM KWALE, DATED AND SIGNED ON THIS 19TH DAY OF OCTOBER 2022.



RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For claimant Mr Bigogo, instructed by Bigogo Onderi & Co Advocates

For respondent Ms Jumma for Ms Orege, Senior Litigation Counsel, Office of the Honourable Attorney General

Court Assistant Chrispo Aura

