



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. 11 OF 2018

(Before Hon. Justice Mathews N. Nduma)

CHEMELIL SUGAR COMPANY LIMITED.....APPELLANT

VERSUS

GEORGE OMONDI ATHEMBO.....RESPONDENT

JUDGMENT

1. The appeal is against the judgment of Mbugua SRM in Nyando SRMCC NO. 225 of 2016 in which the learned magistrate found the Appellant liable for the injuries sustained by the respondent in course of duty and apportioned liability in the ratio of 70% to 30% in favour of the respondent. The learned magistrate proceeded to award the respondent Kshs. 180,000 as general damages for pain and suffering.

2. The Appeal is based on six (6) grounds set out as follows:

- a. That the learned magistrate erred in fact and in law in not appreciating sufficiently or at all that the Appellant cannot in law be held vicariously liable for the criminal acts committed by trespassers, robbers and or thieves to its employees, which result in injuries.
- b. That the learned trial magistrate erred in fact and law in arriving at the finding that the Appellant was liable for the Respondent's injuries when there was no evidence of negligence or statutory breach of duty on the part of the Appellant.
- c. That the learned trial magistrate erred in fact and in law in finding that the Respondent was injured in the course of duty when the evidence on record clearly stated otherwise.
- d. That the learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the doctrine of volenti-non-fit injuria was a complete defence for the Appellant.
- e. That the judgment and/or the decision of the learned magistrate was against the weight of the law.
- f. That the learned trial magistrate erred in fact and in law in failing to consider the pleadings filed and the evidence presented to her in its entirety.

3. It is well established in the case of *Selle and another vs Associated Motor boat Company Limited and others (1968) EA 123*, this being a first Appeal, the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

Facts of the case

4. The court has examined the record of the proceedings in which the respondent who testified as PW1 told the court that he was employed by the Appellant as an electrician at the Chemelil sugar company from 2001. That on 17th September 2005 at 9.00 pm in the night, PW1 was going to work from home on night shift. At 10.00 pm, PW1 met company security guards at Jogoo estate. They arrested PW1, and beat him up. PW1 said he knew them because of their dressing. That he did not know them personally. PW1 was on a bicycle. The assailants undressed PW1 and tied him up. They took the bicycle and Kshs. 140 from a wallet of PW1, a watch, hat and gumboots.

5. PW1 testified that he got injured on the head, where he was cut. PW1 also suffered a broken right arm and got bruises on the back and

arms from whips.

6. PW1 was rescued by a Good Samaritan who then took him to Chemelil sugar. PW1 produced treatment notes. PW1 was admitted at Ratiro Medical Centre in Kisumu on 18th and 19th September 2005.

7. Under cross examination, PW1 stated that at the time of attack, he had not reached the work place and had therefore not signed up for the night shift. That the attack occurred at Jogoo Estate. PW1 stated that he knew assailants but did not prefer charges against them for theft and assault because he did not know them by name. PW1 said that the stolen items were not recovered. PW1 said he earned Kshs. 9,200 gross salary at the time. PW1 stated that he never managed to clock-in at work on the 17th September 2005 the night he was assaulted.

8. Under re-examination, PW1 stated that Jogoo Estate is one of the company estates and insisted that his attackers wore company uniform worn by security guards.

9. The Appellant called DW1, George Omondi Amieno a supervisor at the security section of the respondent at Chemelil Sugar Company. DW1 testified that he stayed at Madaraka estate in Chemelil. That on 17th September 2005, while coming from a funeral he heard screams from Jogoo estate. DW1 said he and some neighbours went to the scene and found the respondent. His hands and legs were tied up and he had no clothes. That he was about a kilometer away from the factory. That the respondent informed them that he had been attacked by thieves on his way to work. That several items had been stolen from him and was assaulted. DW1 said that the respondent lived at Mashambani village and the place he was assaulted was within the Chemelil Sugar Company. DW1 testified that they took the respondent to his house, dressed him and took him to hospital.

10. Under cross examination, DW1 confirmed that the respondent was going for the night shift. He said the place the respondent was attacked was generally not a safe place to walk at night because of the sugar plantations. That the attack took place around 10 p.m in the night.

11. Under re-examination, DW1 stated that employees made their own arrangements to work place. That there was no designated route for employees to follow to the work place. DW2 Gwehara Kennedy collaborated the evidence by DW1. He was one of the persons who went to help PW1 after hearing the screams.

12. The issues for determination are:

a. Whether the learned magistrate erred in holding the Appellant viciously liable for the injuries sustained by the respondent upon being assaulted by unknown assailants on his way to work on the night of 17th September 2005.

b. Whether the magistrate erred in awarding general damages to the respondent for pain and suffering against the Appellant at the ratio of 70% to 30%.

Issue (a)

13. From the testimony of PW1, DW1 and DW2 it is common cause that the respondent was assaulted, robbed and sustained injuries on the night of 17th September 2005 whilst riding his bicycle to work at around 10 p.m. Even though PW1 stated that his attackers wore uniform similar to that worn by the Appellant's security guards, the identity of the attackers was never established nor was it proved that they were employees of the respondent. Indeed, PW1 did not identify the attackers to DW1 and DW2 when they rushed to rescue him.

14. It is not in dispute that the attack took place about one kilometer away from the factory where PW1 was going to report in the night shift at around 10 p.m. It is also not in dispute that the attack took place in the sugar plantations owned by the Appellant and therefore within the company establishment.

15. The Appellant had not made any transport arrangements for employees who reported for night shift including PW1. The testimony by DW1 is that each employee determined by what means and which route to take to the factory. It was the choice of PW1 therefore to follow a path within the sugar plantations at night. Evidence by PW1 that that route was generally not safe at night, especially as late as 10 p.m was not placed in dispute. PW1 had served the Appellant for about three (3) years and must be presumed to be aware of the surroundings since he lived in a nearby village outside the Appellant's premises. Indeed PW1 himself stated and the learned magistrate found in his judgment that the particular route followed by PW1 was not safe at night due to the sugar plantation.

16. The learned magistrate also correctly found that it was not proved that PW1 was attacked by company employees.

17. The learned magistrate nevertheless found that

“PW1 was attacked because he was working in an environment that was conducive to such attacks yet he had to go to work at that time.....The company had not provided him with reasonable security. Expecting him to report to work from 10.00 p.m in the night without considering how PW1 was to get to work was amounting to a mark of negligence on the part of defendant. The plaintiff too must bear some degree of contributory negligence as he was quite aware the danger linked to darkness yet he still opted to go to work”

18. This is the finding that is faulted by the Appellant.

19. From the evidence before the trial court, there is no evidence that the Appellant had a contractual or statutory obligation to provide

transport to work. There is also no testimony by DW1, and DW2 that there was an alternative and safer route for employees to follow to the factory at night. It is clear that the company had provided housing to some employees of the company but PW1 was not one of those employees with company housing. He had to travel from a nearby village. The respondent in his submissions before the magistrate simply stated that he was not provided with safe means of transport and therefore the Appellant was vicariously liable for the injuries sustained whilst he was on his way to work.

20. On the other hand, the Appellant submitted that the respondent was not assaulted at the work place since he had not clocked in at the factory at the time he was assaulted by unknown assailants and robbed of his property. There is no evidence that the assault and the robbery was ever reported to the police and no P3 form was produced to that effect. However all witnesses were in agreement that the assault and robbery took place in the sugar plantations owned by the Appellant.

21. The Appellant relied on the case of *David Mugunga vs Muntomoini Estate Nairobi HCC NO. 2366 of 1989 where A.B Sha J.* held

“The employer in my view, cannot be liable for criminal acts committed by trespassers (or thieves or robbers) which result to injuries to the employees. I see no negligence also on the part of the defendant, its agents or servants and defence of volenti non-fit-injuria is a complete defence..... cannot make(defendant) liable vicariously for criminal acts of trespassers. The suit in the end result is dismissed with costs”

22. The Appellant further relies on the case of *Jeewarat vs Warner Bros. Entm't Inc. 177 Cal. App. 4th 427, 98 Cal. Rptr. 3d 837 (2009)* where it was held that an employee is not regarded as acting within the scope of employment while going to and coming from work.

23. The respondent has not provided any relevant authority to counter the submissions by the Appellant. The basic minimum condition of employment in Kenya are provided under “Part ‘V’ Reliefs and Duties in Employment” in the Employment Act Cap 226 (repealed by Employment Act, 2007)

24. The part cites Inter alia, hours of work, sick leave, housing, water, food and medical attention to be mandatory, minimum provisions to an employee by an employer. Transport to and from work is not included as a mandatory minimum provision by an employer to an employee.

25. It is true that in certain circumstances depending on the environment and hours of work especially in the security and hotel industry, provision of safe transport means is regulated by the parties contracts of employment including Collective Bargaining Agreements and Regulatory Wage orders negotiated within the sector.

26. The respondent in this case did not adduce evidence regarding any contractual provision which mandated the Appellant to provide PW1 with transport to work as an electrician working in a night shift that commenced from 10 pm in the night.

27. In the absence of any such evidence, the court cannot impute such an obligation on the employer unless the same is specifically provided in any law with respect to night shifts. I am not aware of any such provision of general application to all sectors in respect of employees doing night shift.

28. Therefore, it is the court’s finding that the learned magistrate erred in law and fact by finding in absence of any evidence to that effect that the Appellant was negligent and therefore vicariously liable for the injuries sustained by the respondent by “expecting him (PW1) to report to work from 10.00 pm in the night without considering how PW1 was to get to work”.

29. This contractual obligation imputed by the learned magistrate on the part of the appellant was not supported by any evidence before the learned magistrate nor supported by any legal provisions or case law placed before the learned magistrate.

30. Accordingly, the court finds that the finding by the magistrate on the issue of liability was erroneous in this respect.

31. Further, PW1 was not assaulted in the course of his employment and/or under the direct statutory care of the Appellant since he had not arrived at the designated workplace at the time of assault.

32. The respondent is also to be faulted for not reporting the criminal act, by unknown assailants to the police who would have possibly arrested the attackers and rescued some of the property stolen from the respondent. These unknown assailants also bear civil liability to the respondent for the assault and injuries sustained by the respondent but not the Appellant.

33. Therefore, the court finds the Appeal has merit in the aforesaid respects, faults the findings by the learned magistrate in attributing negligence and vicarious liability to the Appellant not supported by the facts before the trial court and the law applicable.

34. With regard to the award of General damages, it follows that the award of the same in favour of the respondent as against the Appellant to be born at 70% by the Appellant was based on wrongful imputation of liability to the Appellant and therefore, the finding was erroneous in law and fact.

35. Accordingly, the court sets aside the entire judgment by L.N. Mbugua SRM delivered on 18th July 2007 in favour of the respondent.

36. With regard to the issues of costs, the facts of the case do attract sympathy to the respondent who was attacked by unknown assailants on his way to the work place.

37. We find this an appropriate case for each party to bear their own costs of the suit in the trial court and this court.

Judgment Dated, Signed and delivered this 18th day of September, 2019.

Mathews N. Nduma

Judge

Appearances

Otieno, Ragot and Company for Appellant

Madalo and Company Advocates for the

Chrispo – Court Clerk