



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**APPEAL NO. 25 OF 2017**

**(Originally High Court Civil Appeal No. 152 of 2009)**

**PATRICK KOFIA**

**APPELLANT**

**v**

**GOGAR FARM LTD**

**RESPONDENT**

**(An appeal from the Judgment of the Honourable Principal Magistrate Honourable MR. ONYIEGO in NAKURU CMCC NO. 765 OF 2006 delivered on 25<sup>th</sup> June, 2009)**

**JUDGMENT**

1. The Magistrate's Court dismissed the Appellant's suit on 25 June 2009. The cause of action was anchored on breach of contract/negligence.
2. In the judgment, the learned trial Magistrate indicated that the Appellant had not proved negligence and opined that he should have sought compensation under the legal framework for workmen's compensation, which at the material time was the Workmen's Compensation Act (repealed by Work Injury Benefit Act No. 13 of 2007).
3. The Appellant was aggrieved and he filed a Memorandum of Appeal before the High Court setting out some 11 grounds of appeal.
4. On 27 October 2016, the High Court caused the Appeal to be transferred to this Court due to jurisdictional reasons.
5. The Appellant had filed his submissions on 14 September 2015 while the Respondent filed its submissions on 6 May 2016.
6. It is not in dispute that the Appellant, a security guard was attacked by some boys while in the course of employment in 2005.
7. It is also not in dispute that the Appellant sustained injuries.
8. What is in issue is a mixed question of fact and law, that is whether the Appellant made a case for breach of the common law duty of care owed by an employer to an employee rather than the statutory duty created by the Workmen's Compensation Act.
9. The record of testimonies show some inconsistencies as to what exactly happened. The Appellant

asserted that he was attacked by a group of 5 persons while the Respondent's witness maintained that the Appellant was attacked by his 13 year old son.

10. However, the Respondent did not make any inquiries during cross examination of the Appellant on its version that the Appellant was attacked by his 13 year old son, who was arrested and that he failed to cooperate with the Police in building a case in prosecuting the son.

11. Despite the inconsistency, it was incumbent upon the Appellant to discharge the evidential burden to prove negligence.

12. But did he prove negligence on the part of the employer? It is not clear from the evidence on record whether the Appellant was provided with any safety equipment (such as whistles, batons etc.) considering his tasks as a watchman.

13. The Appellant also testified that the farm he was guarding was very big and he was alone, while some 4 guards were assigned to a neighbouring farm. The testimonies were not controverted.

14. The parties cited 2 cases to support their respective positions.

15. The Respondent sought umbrage in a passage in *David Ngotho Ngunga v Mugumoini Estate*, High Court Civil Case No. 2366 of 1983, where Shah J (as he was then) observed that An employer could not be held liable for the criminal acts committed by robbers who are actually trespassers. The plaintiff took up a dangerous task of working as a watchman and he cannot be heard to complain of injuries suffered as a result of an attack by robbers unless he demonstrated that there had been a clear breach of the duty of care by the defendant.

16. The Appellant on the other hand referred the Court to a decision in *State House Girls High School & Ar v Evans Mose* (2010) eKLR to the effect Although it is evident that the work of a night watchman is inherently dangerous, it was the duty of the appellant to provide the respondent with reasonable protection to minimise the danger to which the respondent was exposed to as a night watchman.

17. The Court in the *State House Girls High School* case also made reference to a holding by the Court of Appeal in *Mumende v Nyali Golf and Country Club* (1991) KLR 13 that just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or an excuse for the employer to neglect to carry out his side of the bargain and to ensure the existence of minimum reasonable measure of protection (the Court found that failure to provide a helmet was evidence of negligence).

18. Considering the testimony on the size of the farm, the Court would therefore conclude that the Appellant demonstrated breach of duty of care under the common law.

19. And just for the sake of clarity, this Court does not consider that the availability of a cause of action under the Workmen's Compensation Act could stop the Appellant from opting to anchor his cause of action on the common law.

20. This Court in this respect finds that the trial Court erred in law and fact in reaching a conclusion that the Appellant had not proved his case on a balance of probability.

## **Quantum**

21. The Respondent had proposed damages of Kshs 80,000/- while the Appellant suggested Kshs 300,000/- as general damages.

22. Considering the injuries sustained by the Appellant and that he opted to go the common law breach of duty of care route rather than the certain Workmen's Compensation Act route, the Court would assess general damages in the sum of Kshs 45,000/-.

## **Conclusion and Orders**

23. The Court allows the Appeal and orders that

- (i) the judgment of the trial Court be set aside.
- (ii) judgment be entered for the Appellant in the sum of Kshs 45,000/-.
- (iii) Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 17<sup>th</sup> November 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant Mrs. Musili instructed by Gekonga & Co. Advocates

For Respondent Mr. Kiburi instructed by Kagucia & Co. Advocates

Court Assistant Nixon/Martin