



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

**AT MOMBASA**

**APPEAL NO.19 OF 2015**

**JAH HENDRICKS.....CLAIMANT**

**VS**

**DAVID CHARO SIRYA.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The respondent (plaintiff in the original suit) was employed by the appellant (the defendant in the original suit) as a Night Security Guard at a construction site. On 28.10.2002, the respondent was on duty with a fellow guard (Jefferson) when he was attacked and seriously injured by thugs. Thereafter he sued the appellant for negligence before the Senior Resident Magistrate court in SRMCC 3172 of 2006 and was awarded kshs. 480,000/= as general damages. The appellant was aggrieved by the said decision and filed this appeal before the High Court in 2011. The appeal was then transferred to this court on 9.7.2015.

2. The appeal is based on the following five grounds of appeal:

1. The Honourable Learned Magistrate erred both in law and in fact in finding that the Appellant was liable to compensate the Respondent for injuries sustained by the Respondent while in the employment of the Appellant.
2. The Honourable Learned Magistrate erred both in law and in fact in finding that the Respondent had a cause of action against the Appellant.
3. The Honourable Learned Magistrate erred both in law and in fact by finding that the Respondent proved his case on a balance of probabilities.
4. The Honourable Learned Magistrate erred both in law and in fact in failing to:-
  - a. ***Consider properly the evidence adduced by the Appellant and the Submissions made by the Appellant's Advocates.***
  - b. ***Consider the contradictions in the evidence given by the Respondent.***
  - c. ***Make any or proper findings in the evidence given in Court***
  - d. ***Give any or any proper reasons for finding and for giving judgment in favour of the Respondent.***
5. The Honourable Learned Magistrate erred both in law and in fact in apportioning liability and in awarding a sum of ksh.480,000/= as general damages which was inordinately high in the circumstances.

3. The appeal was disposed of by way of written submissions filed by counsel for the two parties.

### **Appellants' Case**

4. The appellant argued ground 1 to 4 together and ground 5 separately. The effect of the foregoing was to reduce the grounds of appeal to two namely, liability and quantum of damages.

### **Liability**

5. It was submitted for the appellant that the respondent did not prove breach any of the particulars of negligence pleaded and/or particulars of breach of statutory duty. That the respondent admitted in evidence that the appellant had provided him with protective and defensive gear including Helmet, club (rungu) and a whistle. That the appellant in his testimony had also confirmed that he provided the said safety and protective gear to the respondent plus safe systems and working condition including a perimeter wall, proper lighting and back up from K.K. Guards in case of need. Consequently, according to the appellant, the subordinate court erred when he held that the appellant was to blame 100% for the injuries sustained by the respondent while on duty.

6. It was further submitted for the appellant that it is the respondent who was negligent by failing to keep vigil while on duty as a result of which the attackers were able to chisel a hole on the perimeter wall through which they gained entry to the site. That the respondent was attacked while he had put on a helmet and with alarm switch which he used to call K.K. Guards for back up. Consequently, the appellant urged the court to find that he had provided all the necessary protection to the respondent and reverse the impugned judgment accordingly. In the alternative, the appellant urged the court to apportion liability between him and the respondent at the ration of 10:90% respectively.

7. As regards the quantum of damages, it was submitted for the appellant that the sum of kshs.480,000/= awarded was in ordinately high. That it was arrived at after the court applied the wrong principles and by taking into account irrelevant factors such as Loss of hearing which had not been pleaded and which was a misapprehension of the evidence adduced by the respondent. That the respondent never amended his plaint to plead loss of hearing as one of the particulars of his injuries before the trial court considered it in his judgment. He urged the court to award kshs.3,000,000/= less contributing negligence by the respondent. He relied on several persuasive judicial precedents from the High Court.

### **Respondents' case**

8. It was submitted for the respondent that the trial court never made any error in finding the appellant liable for negligence in failing to provide safe working conditions for the respondent as a result of which the respondent was attacked by thugs while on duty and was severely injured. It was however admitted that the appellant had built a perimeter wall, back-up alarm from K.K. Guards, and a colleague guard to assist in the guarding. That the thugs dug a hole on the perimeter wall which the used to gain entry to the sight. That when the respondent saw the thugs he pressed the back-up alarm and within 3 minutes he was rescued albeit after the injury.

9. He urged that the perimeter wall was weak and the court rightfully found the appellant liable for negligence 100%. He relied High Court precedence in **HCCC 31 OF 2003 Ken-knit (k) Ltd vs Timothy Sangale Imile** where it was held that once the employer retains the services of a Security Guard as Watchman instead of contracting an established Security Firm, then it was his duty to provide reasonable protective tools and environment to such an employee. He urged the court to find that the respondent was working in a dangerous situation which led to his injuries.

10. As regards the quantum of damages, the respondent submitted that kshs.480, 000/= was not too high in the circumstance of this case. He further submitted that the injuries sustained were severe including Fracture of the skull at the base, Blood clot within the skull, cut on the head and blunt injury to the right hand. He urged the court to consider the medical report by Dr. Ajoni Adede who testified as Pw1 in the Subordinate Court and upheld the award of kshs.480,000/=.

## **Analysis and Determination**

11. After carefully considering the material placed before it, the court framed the following issues for determination :-

- a. Whether the trial court erred both in law and fact when it held that the appellant was in this case 100% liable for negligence.
- b. Whether the trial court erred both in law and facts by awarding to the respondent Kshs.480,000/= as general damages.

## **Negligence**

12. This being a first appeal court reevaluated the evidence adduced by the parties during the trial. The appellants evidence that he was supposed to remain at the Guard house where the alarm was and not to patrol was not supported by any evidence. The claimant admitted that he was supplied with helmet, whistle, arrows and 9 rungu (club). He further admitted that there was perimeter wall around the site he was guarding with electric fence. He however contended that the employer should have provided him with hand spray.

13. The appellant's evidence in response was that he had provided all kind of security measures to the respondent for his safe working environment. That he had cleared the site, build a 7 feet Perimeter wall with an electric fence and safety lights around the compound. That he had built a guard house and a servant quarter with alarm buttons for KK Guards. That he had also provided the respondent with pangas, rungu (club), whistle, helmet, bow and arrows. That the respondent was supposed to patrol the compound at night but he did not. That had he been vigilant, he would have heard the thugs chiseling the wall because the area was a bit remote and quiet. He was therefore caught unawares while the other guard, Mr. Jefferson ran away. That one of the guards pressed the alarm at 23.42 hours and KK Guards arrived to rescue the respondent within 3 minutes.

14. Mr. Julius Night Mjomba works for the appellant. He testified as DW2. He confirmed that on 28.10.2002 he was sleeping and at between 11.00pm and 12.00am, he was woken up by a person screaming and after sensing danger, he pressed alarm and security guards came. He then learned that the thugs had accessed the site through the stone wall and injured the respondent. That as a mason he gave the opinion that it would take 15 to 20 minutes for one to make the hole through the stone wall. He confirmed that the respondent had been provided with tools of work including helmet, whistle, shoes and the site had a perimeter wall and an alarm.

15. On a balance of probability, this court finds that the respondent had provided safe working conditions for the respondents. Firstly, he built a 7 feet parameter wall with electric fence, guard house and servant quarter. He also provided him lockable gate with padlocks. He further installed safety lighting in the site and cleared the compound. He further provided back up alarm from KK Guards in case of need. Lastly he provided the respondent with safety tools including helmet, whistle, rungu (club) pangas, bow and arrows not forgetting hiring another guard Mr. Jefferson Wanyama to assist in the vigil. The court therefore disagrees with the respondent's evidence that he had not been provided with safe working conditions. The court therefore agrees with the appellant that the respondent was provided with all safety features and tools to enable him to work safely.

16. In view of the foregoing the court finds that this case is distinguishable from the ***HCCA NO. 31 OF 2003, KEN-KNIT [K] LTD VS TIMOTHY SANGALE IMILE [2006] eKLR*** in which the employer was found liable for not providing a watchman with the basic and essential protective items in the Kenyan circumstances namely, torch, rungu (club), over coat and helmet. Consequently, the court in this case is of a different opinion regarding the appellants' liability for negligence from that of the trial court. This court finds and holds that the trial court fell into error when he found that the appellant was 100% liable for the respondent's attack and injury on the fateful night. The decision of the trial court on liability is therefore reversed and replaced with a finding that liability will be apportioned equally at 50%.

17. The reason being that the appellant never stated the size of the area of the site where the respondent was allocated to guard. The appellant's case is that there were only 2 guards on duty to man the gate and patrol the area. The fact that one could not hear the chiseling being done from the gate (guard house) on a quiet night means that the area was expansive. That observation is corroborated by the respondent's testimony on page 16 of the record of appeal that 2 guards were few for the site. That the area being large required additional guards for efficacy. In addition the foregoing observation, the evidence by DW2 points to the fact that there were other persons including DW2, himself who were living within the site with the authority from the appellant. DW2 told the trial court that he heard screams while sleeping and pressed alarm and shortly thereafter security guards arrived. DW2 was a mason working for the appellant in the same construction site and is highly probable that there were other workers residing therein. The presence of other people in the site potentially compromised the security for the respondent.

### **Quantum of damages**

18. On page 41 of the record of appeal, the trial court noted that the plaintiff prayed for an award of kshs. 550,000/= as general damages while the defendant submitted for kshs.300,000/= for the same. He then went on to award kshs.480, 000/= after referring to the particulars of injuries outlined in the Medical Report produced as exhibit 1 as:

**“– Head injury with blood clot subdural hematoma within the skull.**

**-Fracture skull at the base**

**- Cut on the head**

**- Blunt object injury to the right hand.”**

In addition to the medical report, the trial court also considered the judicial precedents entered by the parties and the inflation factor.

19. The appellant has submitted that the award of kshs. 480,000/= was excessive in the circumstances and it was arrived at after considering irrelevant and unpleaded matters like loss of hearing. Paragraph 7 of the plaint outlined the particulars of injuries as Deep cut wound parietal region with small subdural hemorrhage and fractured skull at the base. There is handwritten addition to the said paragraph 7 of loss of hearing on left ear. That additional item is not backed by an application for leave to amend and no leave order was minuted in the court proceedings to that effect. However, the court did not rely on that unpleaded item to assess the quantum of damages awarded. Consequently the court will not interfere with the award of kshs. 480,000/= by the Lower Court.

20. It is trite law that an award of general damages is discretionary and as such, the same can only be interfered with on appeal if it is demonstrated that the award is excessively high in the circumstances of the case and that it was arrived at through application of the wrong principles and by taking into account irrelevant factors or by failing to take into account relevant factors. In this case the trial court considered the pleadings, medical report, judicial precedents cited and the inflation factor in arriving at the award of kshs. 480,000/=. All the said factors referred to by the court were relevant and correct.

### **Disposition**

21. The appeal is allowed to the extent that the decision of the trial court on liability is set aside and replaced with an order that liability for negligence is apportioned and equally between the Appellant and the respondent at the ratio of 50:50%. The quantum of damages awarded is however affirmed. Each party shall bear his own costs of the appeal because they have both partially succeeded in their respective cases.

**Signed, dated and delivered at Mombasa this 26<sup>th</sup> day of February, 2016.**

**ONESMUS MAKAU**

**JUDGE**