



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 776 OF 2010

B O E.....1ST CLAIMANT

S A E (suing as Administrator and legal representative of

the estate of the late V E E.....2ND CLAIMANT

VERSUS

WELLS FARGO COMPANY LIMITED.....RESPONDENT

Mr. Namada for claimants

Mr. Ogunde for respondent

JUDGMENT

1. The claimants seek reliefs under the Law Reform Act, Fatal Accidents Act and the Employment Act. The claimants are the administrators of the estate of the late V E E against the respondent, the former employers of the deceased for the benefit of the deceased dependants or his estate.

Facts of the case

2. The deceased was an employee of defendant as a cash-in-transit escort security guard. At the time of his death he was undertaking his employment duties. It is pleaded that the death was a direct result of his employment and arose in the course of his duty and service to his employer.

3. On the 4th of January 2007 the deceased was fatally shot by armed thugs while in the course of escorting transit cash.

4. It is the claimants' case that the respondent owed the deceased the duty of care in the course of his work. At the time of the shooting, the deceased was seated in a cash-in-transit motor vehicle transiting money along the Njoro Nakuru Highway.

5. It is the claimants' case that the employment contract between the deceased and the respondent had both express and implied contractual obligations to undertake and ensure certain terms and obligations were fulfilled in relation to the deceased as follows;

(i) To pay his salary for the services the employee provided.

(ii) To provide a safe and convenient working environment for the deceased while on duty with the

respondent.

(iii) To avail to the deceased as their employee security and safety while carrying out their duties and at all times during working hours.

(iv) Particularly as a cash-in-transit escort the respondent had a duty to ensure special protection for the deceased in the course of such duty and to ensure his safety while carrying out such duties in appreciating the attendant risks.

(v) Further, as a cash-in-transit escort the respondent had a duty to provide the deceased with such specialized wear such as bullet proof vestings, bullet proof helmets or just strong helmets to protect the deceased in such shooting incidents.

6. Further, the respondent had a duty to ensure the deceased carried out his duties and travelled in a secure environment and thereby had a duty to ensure that the transit motor vehicle was bullet proof and was made in such a way as would enable the deceased to evade and protect themselves in case of such an attack.

7. The respondent had a duty to equally take out a mandatory insurance on the life of the deceased to protect and provide for the family in the event of death.

8. It is the claimants' case and submission that the respondent breached all the above express and implied terms of employment in respect of the deceased as a result of which the deceased died on the material date.

9. As a result, the deceased's family which entirely depended on him and his estate suffered damage and loss and continues to suffer loss and damage which loss and damage in spite of demand and notice, the respondent have so far ignored and/or refused to make good.

10. At the time of his death, the deceased was 33 years old and was married to S A E and they had five (5) children namely;

(i) I A – aged now fifteen (15) years;

(ii) E E – aged now eleven (11) years;

(iii) N E – aged now nine (9) years;

(iv) J A – now 6 years

(v) T A – aged now three (3) years.

He also left behind his mother C A O.

The family depended wholly on the deceased on the deceased for food, shelter, schooling and general upkeep and daily life provisions.

11. The deceased earned Kshs.7,504 gross salary less kshs.410 statutory deductions leaving a net salary of Kshs.7,094. The entire family above has lost out on the vital support arising from the death of the deceased the family spent in excess of Kshs.100,000 in funeral and burial expenses which they too claim to be paid.

12. The deceased was a fit and healthy person at the time of his death and looked forward to career growth and development. He was educated up to fourth form and had good prospects in life. The family and estate seeks compensation for his loss of life.

13. The deceased also endured pain and suffering arising from the shooting before he died. He died a few days later while undergoing treatment at Nakuru General Hospital. The estate and family seek compensation for the pain and suffering experienced.

14. The claimants aver that the respondent never paid the deceased's terminal dues upon his death and claims the following terminal dues;

(i) One month's salary in lieu of notice.

(ii) Service pay for nine (9) completed years of service @ eighteen (18) days' salary for every completed year of service being $18/30 \times 7,094 \times 9$ Kshs. 38,308.

15. In spite of letter of demand, the respondent has ignored and/or refused to compensate the claimant hence this cause of action.

16. The claimants pray that the court grants the reliefs sought in the memorandum of claim.

Response

17. The respondent filed a statement of response on 5th August 2010. The respondent admits particulars of the parties as set on under paragraph 1 – 4 of the statement of claim.

18. The contents of paragraph 6 (i) (ii) and (iii) are also admitted by the respondent. The respondent however denies the content of paragraph 6 (iv), (v) and (vi) of the memorandum of claim.

19. The respondent while denying all other particulars of claim states that it paid Kshs. 80,000 to a trust fund account at National Bank of Kenya Limited in Nakuru for the education of the children of the deceased.

20. The respondent also states that it paid all the terminal dues of the deceased to the deceased's wife which the wife acknowledged. The respondent prays the suit be dismissed with costs.

21. Determination

Issues for determination are as follows;

(i) Whether the respondent is liable for the death of the deceased.

(ii) If the answer to the (i) above is in the affirmative, what is the quantum of damages due to the claimants.

(iii) Whether the claimant is entitled to other reliefs sought.

Issue i

22. On the issue of liability, the court of **Appeal in Makala Mumende –vs- Nyali Golf and County Club Civil Appeal No. 16/89** stated as follows;

“To begin with liability, this court is bound to find that the defendant should bear it and on the basis that it did not bring evidence to rebut the claim in the plaint that it was liable at common law or by statute the appellant was a night watchman at the respondent club. Unlike in our case he was provided with a club torch and a whistle. Thieves raided the club and injured the appellant much. There had been a similar raid before and so the respondent knew that risk awaited its watchmen, by experience.”

23. In addressing the issue, of liability the court of Appeal recited **paragraph 562 Halbury's Laws of**

England 4th Edition (Vol.16) thus;

“562 it is an implied term of contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employers’ duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relationship of employer and employee, to compensate him for an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee’s working conditions, nor is he an insurer of his employee’s safety. The exercise of due care and skill suffices. The employer does not owe any general duty to the employee to take reasonable care of the employee’s goods. No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work, the plaintiff was engaged in. But however, inherently dangerous, an employer is expected reasonably to take steps in respect of the employment to lessen danger or injury to the employee.”

24. In the present case, the claimants state that the respondent did not take reasonable steps to provide protective clothes and apparels to the deceased including bullet proof vesting, helmets and other necessary accessories well knowing that cash-in-transit escort were inherently dangerous and armed attacks by robbers had occurred regularly in the country. That the respondent failed to make the cash-in-transit vehicles bullet proof openly exposing the deceased to danger or being directly shot at.

25. That the respondent continued to keep the deceased in a closed up backside of the transit motor vehicle with no option of being able to see outside and therefore unable to see the direction of the attack and take appropriate self-protection initiatives and for maneuvers. The respondent had not taken out any life insurance cover on the life of the deceased which exposed the deceased to death without any damage pay and compensation to his family and dependants.

26. As a result, the claimants submit, the deceased died a needless death when the motor vehicle was sprayed with bullets leaving him to die helplessly.

27. The respondent in its statement of response filed on 5th August 2010, admitted its obligations to the deceased set out under paragraphs 6 (i) (ii) & (iii) of the statement of the claim while asserting that it had taken necessary security and safety measures to protect the life and limb of the deceased in the course of his duty as set out under paragraph 6 (v) of the statement of claim. The respondent further averred the deceased was covered by the workmen compensation Act which dues had already been tabulated and paid out.

28. RW1, gave sworn testimony in support of the respondent’s case to the effect that, he was a crew commander in the cash-in-transit (CIT) business of the respondent and was the crew commander of the vehicle that was involved in the shooting incident of 4th January 2007 which resulted in the death of V E, the deceased. RW1 admitted the vehicle was attacked by armed robbers and that the vehicle had two (2) armed police officers. That the crew including the deceased had protective clothing including helmets. That CIT personnel including the deceased were trained and experienced and had to have first served as guards for two years before being deployed to CIT unit. That they underwent specific training formerly on handling of cash and steps to maintain vigilance. RW1 stated that the incident was unfortunate occurrence and it was the only attack he was aware of on a CIT vehicle belonging to the respondent.

29. From a careful analysis of the evidence by the parties the conclusion by the court on the facts of the case is that the respondent had taken some steps to ensure the safety and security of the guards involved in cash-in-transit event but had not provided the following;

(i) Bullet proof vests.

(ii) Armoured vehicles and the security guards including the deceased were placed at the back of the security motor vehicle in a locked enclosure in which movement was minimal and from which

it was not possible for the guard to see the outside of the vehicle.

30. The evidence by the respondent is that the provision of two armed officers to escort the cash-in-transit vehicle, head helmet to the guards and special training to the guards were reasonable steps to ensure the safety and security of the deceased and it was not reasonable in the circumstances of the security industry in Kenya for the respondent to provide bullet proof vests and armoured motor vehicles for cash-in-transit crew.

31. The court did not get any evidence on the industry requirements in Kenya for cash-in-transit crew. The court is not in a position to say whether or not armoured vehicles and bullet proof vests are available for use and/or are reasonable expectations by cash-in-transit crew in this country. However the court is not satisfied that the deceased was placed in a safe environment, in a pickup with square carrier from which one could not see outside while inside in view of the fact that there was only one peeping hole from the uncontradicted evidence by CW1, S A E. The witness told the court that she was familiar with the vehicle the deceased used for cash-in-transit. That she had entered it in the past, when the deceased was involved in an accident and she had, with others used the vehicle to see the deceased at the hospital.

32. This uncontroverted evidence by CW1 presents the deceased in a position of a helpless sitting duck on the face of an armed attack by robbers as happened on the fateful day. It is not in contention that cash-in-transit escort was a dangerous job and possibility of armed robbery could not be ruled out. It is not unreasonable to expect a person caged, as the deceased was, with little space for movement to have protective gear including bullet proof vest, if not placed in an armoured vehicle, if it was indeed necessary to have a person caged in the square carrier in which the money was kept.

33. The duty of care in the circumstances presented is not a shared one, but rests on the respondent to ensure that the deceased was not overly exposed to risk of injury or death from external attack while caged at the back of the cash-in-transit vehicle. The respondent has in common law a duty of care to see that the deceased and others in this position did not suffer injury or death as a result of negligent omission to provide a suitable environment in which the deceased operated, being caged, unprotected, unarmed, and with little mobility which can hardly be said to be a safe environment and the respondent must be held responsible for the consequences, that were reasonably foreseeable and which resulted in the death of the deceased.

34. In this respect, I refer again to the holding by the appellate Judges in Makala Mumende case (supra)

“just because an employee accepts to do a job which happens to be inherently dangerous is, in (our) judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure existence of minimum reasonable measures of protection. In the circumstances a helmet would not reasonably be regarded as a modern weapon.”

35. In the circumstances of this case, and following the reasoning of the Judges aforesaid, it is my considered view that in the circumstances of this country, a bullet proof vest in addition to a helmet comprises minimum reasonable measure of protection for a guard placed in a dangerous environment as was the deceased case, in a square cabin holding cash, not armoured and with no outward visibility and little room for any maneuver in the event of an attack.

36. The court therefore finds the respondent to be 100% liable for the death of the deceased in the course of his duty. The court has considered the **Court of Appeal case in Sammy Mutuku -vs- Philip Mulili & another (2002) eKLR** in arriving at this decision.

37. The relief sought is under Law Reform Act Cap 26 Laws of Kenya and the Fatal Accident Act Cap 32 laws of Kenya.

38. There is no dispute that the respondent has made payment in the sum of Kshs.496,760.00 computed under the workman's compensation Act.

39. The claimant however seeks relief under the heads of loss of life, pain and suffering and a claim for funeral expenses which is special damages that must be proved.

40. The principles applicable to an assessment of damages under the Fatal Accidents Act are;

- a) The court must establish the value of annual dependency which value is the multiplicand.
- b) The value is derived from the net earnings of the deceased.
- c) The court is to multiply the multiplicand by a reasonable figure representing the life expectation of the deceased which is referred to as the multiplier.
- d) The expectation of life and dependency of the dependants and chances of life of the deceased and dependants are also relevant factors.
- e) The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature. See **Alliance One Tobacco (K) Ltd. V. Isaac Jandi Mbane (2015) eKLR.**

41. In the present case, the claimants propose a multiplier of 27 years whereas the respondent proposes a multiplier of 20 years considering the decision cited by the claimants in **Hiribo Vs. Redland Roses (2006) eKLR.**

42. The deceased was 33 years old at the time of his death and had 27 more years to work before retirement. The deceased earned a monthly salary of Kshs.7,504. The deceased had a wife and five children as set out in the statement of claim. The deceased also left behind his mother and father who solely depended on him since he was the sole bread winner of the entire family. The deceased used most of his income to support the entire family.

43. By fact of his death, the family lost most of the financial and moral support that they would get from the deceased during his life time and employment.

44. The claimants submit that the deceased used about two thirds ($\frac{2}{3}$) of his net income on his dependants and thus dependency ratio of two thirds ($\frac{2}{3}$) should be applied.

45. In this regard, the court finds that a multiplier of 20 years and a multiplicand of $\frac{2}{3}$ of Kshs.7,504 is appropriate award to the dependants giving a total award of Kshs.1,200,640.

Loss of life

46. Under this heading, the family of the deceased especially his wife and five children have suffered great loss and have been traumatized by the loss of their husband and their respectively. The deceased's wife has had to take up the role of the deceased as the head of the family at a tender age.

The court awards Kshs. 150,000 in respect of loss of life.

Pain and suffering

17. The deceased was shot on 4th January 2007 and succumbed to the bullet wound injuries on the 6th January 2007. The deceased suffered pain and agony for three days. CW1 gave vivid testimony in this respect which was not traversed. The tearful claimant told the court that the deceased was completely neglected by the respondent under poor hospital conditions during the period. The court awards Kshs. 300,000 for pain and suffering born by the deceased before he met his death.

Funeral expenses

48. No receipts were produced in respect of the funeral expenses. The court makes no award in this respect.

Terminal benefits

49. The claim for terminal benefits was settled by the respondent out of court and is therefore not considered.

50. In the final analysis, the court makes the following award to the claimants against the respondent;

a) (i) Loss of dependency Kshs.1,200,640.

(ii) Loss of life, Kshs.150,000.

(iii) Pain and suffering Kshs.300,000.

Total award Kshs.1,650,640.

b) Interest at court rates from date of judgment till payment in full.

c) Costs of the suit.

Dated and delivered at Nairobi this 27th day of July 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE