Security Group Limited v Aluda (Civil Appeal 468 of 2018)
[2023] KEHC 21748 (KLR) (Civ) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 468 OF 2018

CW MEOLI, J

AUGUST 10, 2023

BETWEEN

SECURITY GROUP LIMITED ..... APPELLANT

AND

BRIAN KAVAJI ALUDA ..... RESPONDENT

(Being an appeal from the judgment of Mbeja, D.O, SRM delivered on 7th September, 2018 in Milimani CMCC No. 2177 of 2016)

JUDGMENT

1. This appeal emanates from the judgment delivered on 7th September, 2018 in Milimani CMCC No 2177 of 2016. The suit was commenced by way of the plaint filed on 14th April, 2016 by Brian Kavaji Aluda, the plaintiff in the lower court (hereafter the Respondent) against Security Group Limited, the defendant in the lower court (hereafter the Appellant). The claim was for general and special damages in respect of injuries allegedly sustained by the Respondent on or about 25th February, 2016 while in the lawful course of his employment with the Appellant.

2. The Appellant pleaded that on the above date, he was in the course of his lawful duties when the Appellant instructed its agents/servants/employees to forcefully eject him from its premises, thereby occasioning him serious injuries. The Respondent attributed his injuries to negligence and/or breach of statutory duty of care on the part of the Appellant.

3. The Appellant upon being served with summons entered appearance and filed the statement of defence dated 9th June, 2016, therein denying the key averments in the plaint and liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent. When the matter came up

for hearing, the Respondent testified, while the Appellant called three (3) witnesses. The trial court delivered judgment in favour of the Respondent as follows:

Liability 90%:10% in favour of the Respondent

a. General damages: Kshs 600,000/-.

b. Special Damages: Kshs 5,150/-.

Total Kshs 605,150/-.

Less 10% contribution Kshs 60,515/-.

Net: Kshs 544,635/-.

4. Aggrieved with the outcome, the Appellant preferred this appeal specifically challenging the trial court's findings on both liability and quantum, based on the grounds hereunder:

"1. The Learned Magistrate erred in law and fact by finding the Appellant 90% liable for the accident.

2. The Learned Magistrate erred in law and fact by failing to find that the Respondent fully contributed to the accident.

3. The Learned Magistrate erred in law and fact by finding the Appellant 90% liable whereas the Respondent equally contributed to his injuries.

4. The Learned Magistrate erred in law and fact in finding that the Respondent was injured in the course of his employment.

5. The Learned Magistrate erred in law and fact by failing to take into account the submission by the Appellant in the lower court on the issue of liability and quantum.

6. The Learned Magistrate erred in law and fact by awarding damages that were so inordinately high and manifestly excessive so as to amount to an erroneous estimate in the circumstances.

7. The Learned Magistrate erred in law and fact by making a decision on damages that was against the weight of evidence.

8. The Learned Magistrate erred in law and fact by taking into account irrelevant factors in awarding damages." sic

5. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in *Eastern Produce (K) Limited v Christopher Atiado Osiro* [2006] eKLR and *Treadsetters Tyres Limited v John Wekesa Wepukhulu* [2010] eKLR to contend that the burden of proof lay with the Respondent to prove his case on a balance of probabilities. That the Respondent did not tender any evidence to prove that he was either an employee of the Appellant at all material times, or that any injuries sustained by him were due to negligence on the part of the Appellant. Counsel therefore faulted the trial court for apportioning liability in the manner it did.

6. On quantum, it was contended that the award made of general damages was manifestly excessive and ought to be interfered with in line with the principles set out in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. It was further contended that a sum of Kshs 200,000/- would suffice as adequate compensation in respect to the injuries sustained by the Respondent, in the event that court upholds

the trial court's finding on liability. He referred to the case of *Parodi Giorgio v John Kuria Macharia* [2014] eKLR where a similar sum was awarded for injuries comparable to those sustained by the Respondent.

7. The Respondent defended the trial court's finding on both liability and quantum. On liability, his counsel relied on the decisions in *Samson Emuru v Ol Suswa Farm Ltd* [2006] eKLR and *Garton Limited v Nancy Njeri Nyoike* [2017] eKLR to buttress his argument that an employer owes a statutory duty to its employees, to provide a safe working environment and that in the present case, the Appellant was responsible for ensuring that the Respondent worked in a conducive environment which guaranteed his safety at all material times. The Respondent's counsel argued that in the absence of any evidence to the contrary by the Appellant, the trial court arrived at a proper finding on liability.

8. On quantum, it was the submission by counsel that the assessment of damages is discretionary and therefore ought not to be disturbed save in line with the principles set out by the respective courts in *Catholic Diocese of Kisumu v Tete* [2004] eKLR and *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR. That in the award made by the trial court in general damages was reasonable and within the range of awards made for injuries similar to or comparable with those suffered by the Respondent, including *Hussein Abdi Hashi v Hassan Noor*, [2004] eKLR and *Tarmal Wire Products Ltd v Ramadhan Fondo Ndegwa* [2014] eKLR where the respective courts awarded sums of Kshs 800,000/- and Kshs 500,000/- for comparable injuries. On that basis, the Respondent urged the court to dismiss the appeal with costs and to uphold the trial court's judgment in its totality.

9. The court has considered the original record, the record of appeal and the submissions made by the respective parties on this appeal. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
>
> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. An appellate court will not ordinarily interfere with a finding made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in

arriving at the finding it did. In this respect, the Court of Appeal in *Ephantus Mwangi and another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated the following to echo the above principles:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did".

11. The appeal herein challenges both the findings on both liability and quantum. The court will first address the former. The Respondent by way of his plaint averred at paragraphs 4, 5, 6 and 7 that:

> " 4. It was an express or implied term of the said contract of employment between the plaintiff and the defendant and or it was the duty of the defendant to take all reasonable precaution for the safety of the plaintiff while he was engaged upon the said employment not to expose the plaintiff to risk of damage or injury which it knew or ought to have known and to provide a safe and proper system of working and effective supervision of the same.
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> 5. That on or about 25th of February 2016 the plaintiff was engaged in the course of his lawfully assigned duties at the defendants premises on the instructions of the defendant, its agent and or servant, when the defendant instructed its agents, servants and employees to forcefully eject the plaintiff from the defendants premises. Consequently the plaintiff suffered loss and pain.
>
> 6. The plaintiff avers that the said accident was occasioned by reason of the negligence and or breach of duty on the defendant.
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> Particulars of Negligence by the Defendant
>
> a. Failure to take any or adequate precaution for the safety of the plaintiff.
>
> b. Exposing the claimant to risk of damage of which he knew or ought to have known.
>
> c. Failing to provide a safe and proper system of work at the said premises.
>
> d. Failing to provide adequate supervision, instructions so as to avert risk of injury to the claimant.
>
> e. It failed to screen or inadequately screened suitability of its agents, servants and or employees.
>
> f. It failed to establish any or adequate protocols, policies and regulations with respect to appropriate standards of conduct supervision and control of its employees and agents.
>
> g. Failed to protect the plaintiff.
>
> h. Causing the said accident.
>
> 7. In the alternative and without prejudice to the foregoing the plaintiff holds the defendant liable for breach of contract of employment and terms of employment between the plaintiff and the defendant.

Particulars of Breach

a. Failing to provide the plaintiff with a safe and proper system of work.

b. Exposing the plaintiff to injury or damage which was imminent.

c. Failing to give precaution to avert the damage to the plaintiff" (sic)

12. The Appellant filed a statement of defence denying the key averments in the plaint and liability. Alternatively, the Appellant pleaded contributory negligence against the Respondent by stating at paragraphs 6, 7 and 8 that:

"6. The Defendant further does not admit the occurrence of the accident as alleged in paragraph 5 of the Plaint and puts the Plaintiff to strict proof.

7. The Defendant further denies the particulars of negligence and/or breach of contract as particularized in paragraph 6(a-h) of the Plaint and puts the Plaintiff to strict proof.

8. Without prejudice and in the alternative the Defendant avers that if at all any accident occurred, which is not admitted, the same was caused and/or contributed to by the Plaintiff's own negligence.

Particulars of Negligence of the Plaintiff

a. Failing to keep proper look out for his personal safety.

b. Failing to take the caution necessary for his own safety in the circumstances.

c. Engaging in a dangerous and unauthorized activity.

d. Undertaking violent conduct.

e. Doing his job in an unauthorized manner.

f. And such further particulars to be adduced at the hearing thereof." (sic)

13. The trial court upon restating the evidence tendered by the parties, stated the following in its judgment concerning liability:

"It is not in dispute that the plaintiff was injured at his place of work where he had reported for duty.

The plaintiff had been around his place of work for a considerable duration of time. He understood and had in contemplation the risks involved in the nature of work he was engaged in and is in equal measure expected to have exercised restraint and been more alert as he performed his duties having in contemplation that he was duty bound to take instructions at the place of work. The plaintiff did not require much expertise on how to perform his duties his main obligation was to follow instructions this is so notwithstanding that he had just come from a funeral. In this regard much as I am satisfied that the plaintiff has established a prima facie case against the defendant on a balance of probabilities I am

inclined to hold that the plaintiff is also partly to blame for the accident. He ought to have been more careful and alert given the nature of his work. I am satisfied that the plaintiff was exposed to injury which was imminent given the work environment on 25/2/2016. This would have minimized the risk and degree of injury. In the result I hold that the plaintiff shoulders 10% liability while the defendant is liable in negligence at 90%, consequently judgment is entered in favour of the plaintiff against the defendant on liability in the ratio of 90:10 with the plaintiff shouldering 10%" (sic).

14. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.
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> However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:
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> > "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited* -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:
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> > "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

15. The Respondent's cause of action was founded on negligence and/or breach of statutory duty of care arising out of an employer-employee relationship subsisting between the parties at all material times. At the trial, the Respondent who was PW1 adopted his signed witness statement as his evidence and also produced his bundle of documents as P. Exhibits 1-4. The Respondent testified that on the material day, there was an altercation between him and his supervisor, one Mr. Njoroge, which resulted in the Respondent being removed from the Appellant's premises and taken to the police station to record a statement. That he was harassed by the station commander known as Mr. Wanjala and pushed while at the parking lot, hence fell into a ditch and sustained injuries on his right leg.

16. In cross-examination, the Respondent testified that a few staff members witnessed the incident but none of them was present in court to testify. He further testified that no one was charged with

assaulting him and that on the material day, he was angry as he had just returned to work from attending a funeral. That following the incident, he was removed from the premises and issued with a termination letter. During re-examination, it was his evidence that he did not trigger the altercation or scuffle at the Appellant's premises.

17. For the defence case, the Appellant called Peter Kinyanjui as DW1. The witness stated that he was an investigations officer who had prepared a report (tendered as D. Exhibit 1) concerning an altercation between an employee and his supervisor, the former being accused of insubordination. The witness stated that upon attacking his immediate supervisor, the employee was taken to Karen Police Station where he was held for some time to keep the peace, but that he was later suspended from employment. That following the altercation, a response team tried to intervene by restraining the employee and escorted him off the work premises, but the employee later returned claiming he had been injured on his foot.

18. That no documentation was tendered to support the reported injury. It was his evidence that following the incident, he wrote a recommendation to have the Respondent summarily dismissed for disregard of lawful authority and contravention of the provisions of the *Employment Act*. In cross-examination, DW1 testified that the investigations report was guided by CCTV footage as well as witness reports, while in re-examination, he clarified that he is the one who had signed the report.

19. Shadrack Okanya who was DW2 adopted his witness statement as his evidence-in-chief. During cross-examination, he testified that he worked for the Appellant as a security guard at all material times and that he was present at the time of the incident. He added that he heard the supervisor giving instructions to the Respondent and which were followed by insults hurled by the Respondent. The witness stated that he later went to the police station but did not participate in evicting the Respondent from the Appellant's premises.

20. Daniel Njoroge who was the final defence witness, namely, DW3 equally adopted his witness statement as his evidence-in-chief. At the point of cross-examination, he confirmed that the Respondent was at all material times an employee of the Appellant and further confirmed that on the material day, an altercation arose between him and the Respondent following which the latter assaulted him; that he instructed some guards to evict the Respondent from the premises; and that he had no knowledge as to whether the Respondent and the guards later fell into a ditch as purported, since he remained in the office. In re-examination, he stated that he visited the police station where he signed a document aimed at maintaining the peace.

21. From the court's re-examination of the pleadings and material, it is not in dispute that the Respondent was at all material times an employee of the Appellant. It is also not in dispute that an altercation ensued between the Respondent and his supervisor on the material date, thereby resulting in the Respondent's removal from the Appellant's premises and further ultimately to the matter being reported to the police.

22. On the question of whether the particulars of negligence were established against the Appellant through its employee(s) or agents, the court observed that the Respondent was the sole plaintiff witness at the trial and though he alleged in his statement that he was injured at his place of work by one or more of the Appellant's agent/employees and in the presence of a few employees, he did not call any person who had purportedly witnessed the incident to corroborate his testimony.

23. Besides, save for the medical report which confirmed the injuries sustained, the Respondent did not elaborate on the manner in which the injuries occurred or tender any credible evidence or material to connect the injuries with negligence and/or breach of statutory duty of care on the part of the

Appellant. This notwithstanding, the trial court proceeded to find that the Respondent had proved his case on a balance of probabilities.

24. The Court's considered view is that the finding by the trial court is not based on any credible evidence by the Respondent. The evidence tendered was not insufficient to warrant a finding of liability, and no facts were established from which any inference of negligence could be made against the Appellant and therefore call for a rebuttal. See *Nandwa v Kenya Kazi Ltd* [1988] KLR 488; and *Karugi & another v Kabiya & 3 others* (*supra*). Not even the finding of the trial court that the Appellant was partially liable had any evidential foundation. In the circumstances, this court must interfere with that finding by setting it aside, in which event, there would be no purpose in the court addressing the quantum of damages.

25. In the result, the appeal is hereby allowed, and the judgment of the trial court is hereby set aside and is substituted with an order dismissing the Respondent's suit in the lower court with costs. The costs of the appeal are awarded to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant: Mr. Opondo h/b for Mr. Michuki

For the Respondent: Mr. Wachira