REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 41 OF 2013

UMOJA SERVCE STATION LTD……..…APPELLANT

VERSUS

EVANS MOCHUMBE GWARO……...…RESPONDENT

(Being an appeal against the judgment/decree of Hon. J. Wambilyanga, Resident Magistrate in Nyeri C.M.C.C No. 295 of 2009 delivered on 8th November 2010)

JUDGMENT

1. The respondent, Evans Mochumbe Gwaro, filed suit against the Appellant in the lower court seeking for the following: -

    a) General damages for pain and suffering together with future medical expenses

    b) Special damages for Kshs. 16,700/- with interest from 11th December 2007

    c) Costs

    d) Interests on a), b) and c) at court rates

    e) Such further and better relief as the court deems fit

2. The Respondent was the Appellant's employee night watchman at its property consisting of 16 houses on one acre described as Umoja Estate at Classic, Nyeri.

3. On 30th November 2007 the Respondent was attacked by robbers at 2.30am while on duty. He sustained injuries to his head and arms. His screams for help alerted the tenants who woke up and put on their security lights. The robbers took off. The tenants rushed him to Mathari hospital where he was admitted for 11 days.

4. It was the respondent's claim that that the Appellant was liable to compensate him for the injuries he sustained. He contended that the appellant had failed to provide him with protective gear including a helmet, safe working system, proper training, exposure to risk of injury and failure to provide reinforcement during the attack.

5. It was the appellant's contention that it provided all the adequate , a torch, a whistle, a rungu. That the respondent had also brought his own panga and bows and arrows. It denied exposing expose him to any risk of injury arguing that by taking the job of a night watchmen the Respondent knew the nature of his work. The Appellant denied owing him any duty of care.

6. That the appellant could not be held liable for the actions of third parties hence acclaim under the common law principle of negligence would not lie arguing that the Respondent ought to have based his claim on Work Injury Benefits Act..

7. The learned trial magistrate found for the respondent in common law. That the respondent had proved his case of negligence against the Appellant on a balance of probability.

8. The learned trial magistrate found liability in favour of the respondent at 75:25 against the appellant.

    a) General damages- 200,000/-

b) Special damages 1000/-

Less 25% 50,250/-

Total 150,750/-

9. Aggrieved by the trial court's decision, the Appellant filed the instant appeal on the following grounds: -

a) The learned magistrate erred in law and in fact in concluding that the Respondent's claim was based on common law and yet the evidence clearly pointed to a statutory duty under Work Injury Benefits Act, No.13/17.

b) The learned magistrate erred in law and in fact in making a finding that the appellant had not supplied the Respondent with protective tools and yet there was no dispute he had been provided with the ones he did not own.

c) The learned magistrate erred in law and in fact in apportioning the appellant almost the entire blame for the attack on the Respondent although the Respondent was aware of the risk his job entailed when he accepted the appointment.

d) The learned magistrate erred in law and in fact in concluding that this claim did not fall within the Work Injury Benefit Act No.13/17 merely because the Respondent was no longer in employment of the Appellant.

e) The learned magistrate erred in law and in fact in making a finding that the Appellant's duty of care to the Respondent extended beyond that the former had provided the latter.

10. Parties agreed to canvass the appeal by way of written submissions.

The Appellant's submissions

11. The appellant's position was that it had provided a secure environment for the Respondent. The premises had a live kei apple secure perimeter fence and a steel gate. It also provided him with a whistle, a torch and a rungu. Thus the Appellant had discharged its statutory duty.

12. That the Respondent was aware of the risks of his job including an attack by thugs. That the respondent was found sleeping by the thugs contrary to the terms of his employment. That the Appellant had paid the hospital bills out of sympathy and compassion, offered him work on lighter duties and paid his final dues.

13. The Appellant urged the court to allow the appeal and award costs in both the trial and this court to him.

Respondent's submissions

14. It was not disputed that he had sustained injuries. That a whistle and a torch were not sufficient tools for the job and he ought to have been supplied with a helmet and heavy gloves would have been of help which would have reduced the risk of serious injury on the head and arms.

15. He relied on the case of **John Mukura Karari vs Nicholas Kinyua Mbui [2005] eKLR** where the Defendant was found negligent for failing to provide the Plaintiff with a helmet. He also relied on **Makala Mailu Mumende vs Nyali Golf & Country Club Civil Appeal No.16 of 1989** cited in the aforementioned John **Mukura's** case.

16. He also argued that there was no evidence that he was asleep when the attack happened, that awareness of the risk of the job did not negate the Appellant's duty to provide reasonable protective gear such as a helmet. That the liability apportioned at 75%:25% in the Respondent's favour was fair in the circumstances.

17. The Respondent urged this court to dismiss the appeal with costs to him.

Issues for determination

a) The issue for determination in this appeal is whether the employer of a watchman is liable to compensate him in the event that he suffers injuries in the course of his duty. The side issues will be what type of protective gear should the employer of a watchman provide to him to ensure his safety in the event of any attack by thieves/robbers/thugs?

b) Whether the respondent discharged the burden of proving the liability of the appellant to the required standard.

c) Whether liability was properly apportioned between the parties.

d) Who should bear the costs of the appeal and the court below?

18. The mandate of the this court as first appeal, court is to reassess, re-evaluate and re-examine the evidence in the lower court and make

its own findings and arrive at its independent conclusion, bearing in mind the fact that it never heard and or saw the witnesses as they testified. I am guided by the holding in **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** that:

> *"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect .*
>
> *However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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* **(Abdul Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270).**

a) **Whether the claim by the respondent against the appellant was sustainable.**

19. The Appellant's first ground of appeal is that the trial court erred in concluding that the Respondent's claim was based on common law and yet the evidence clearly pointed to a statutory duty under Work Injury Benefits Act, No. 13/07. The appellant did not argue this ground hence it is considered abandoned. See **Primarosa Flowers Limited vs Commissioner of Domestic Taxes [2019] eKLR** where it was held: -

> ***"45. The Appellant did not submit on grounds No.5, 7 and 8 of the Memorandum of Appeal but only on grounds No.1, 2, 3, 4 and 6 and as such the grounds which were not submitted on are declared as abandoned."***

20. Nevertheless, the Respondent was at liberty to bring the claim either under common law or Work Injury Benefits Act, No. 13/07. The claim is therefore sustainable as held in **Garton Limited v Nancy Njeri Nyoike [2016] eKLR** as follows: -

> *"In this case I find that the respondent had the option of instituting suit against the appellant for negligence/breach of statutory duty of care and or the Kenya Wildlife Service through the District Committee. In the former case, she, however, must prove acts of negligence or the alleged breach of statutory duty of care whereas in the latter case she would not be required to prove negligence…*

b) Whether the respondent discharged the burden of proving the liability of the appellant to the required standard.

21. In **Halsbury's, Laws of England, 4th Edition** it is stated at paragraph 662 (p. 476) as follows: -

> *"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."*

22. Employer's liability is defined as follows according to **Winfield and Jolowicz on Tort 13th Edn.p.203: -.**

> *"At common law the employer's duty is a duty of care, and it follows that the burden of proving negligence rests with the plaintiff workman throughout the case. It has even been said that if he alleges failure to provide a reasonable safe system of working the plaintiff must plead, and therefore prove what the proper system was and in what relevant respect it was not observed."*

23. In **Boniface Muthama Kavita vs Carton Manufacturers Limited Civil appeal No. 670 Of 2003[2015] eKLR** Onyancha J observed that:

> *"The relationship between the Appellant and the Respondent as employer and employee creates a duty of care. The employer is required to take all reasonable precautions for the safety of the employee, to provide an appropriate and safe system of work which does not to expose the employee to an unreasonable risk.*

24. In **Nickson Muthoka Mutavi vs Kenya Agricultural Research Institute [2016] eKLR** it was held:-

> *"The principles of law that can be distilled from the above legal authorities is that for the Appellant to succeed in his claim, he has to prove, among others, that he was injured while engaged on duties that he was assigned or expected to perform in the course of his employment. Further, the Appellant also has to prove any one or more of the particulars of negligence and breach of statutory duty pleaded as against the Respondent, and to show that he was also not negligent in the performance of his duties."*

25. The Respondent herein clearly demonstrated in evidence that he was on duty, the work he was supposed to do. The allegation that he was negligent himself by sleeping on the job was not proved hence there is no evidence of his being negligent on his part. The injuries on his arm could have come out his attempts to fend off the attacks on his head.

26. The appellant's argument that the respondent knowingly took up a dangerous job and therefore is not deserving of any compensation is untenable. The Court of Appeal in **Civil Appeal No. 16 of 1989 (Mombasa) - Mumende –vs- Nyali Golf & Country Club (1991) KLR** held as follows: -

> *"Just because an employee accepts to do a job which happens to be inherently dangerous in, in my judgment, no warrant or excuse*

for the employer to neglect to carry out his side of the bargain and endure the existence of minimum reasonable measures of protection."

27. In **East Africa Tanning Extract Company Ltd vs Gerishon Barasa Wanyonyi [2002] eKLR** it was held: -

> *"It is trite law that an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances so as not to expose them to unnecessary risk.*
>
> *In the particular circumstances of this case, I am in agreement with Mr Kitiwa that where the respondent was employed as a watchman to guard property on a ten-acre area, a prudent employer would have been expected to provide him with protective devices so as not to expose him to unnecessary risk. Such necessary protective devices would have included a whistle, a helmet, protective clothing, and a back-up security system, both human and mechanical. The very fact that the appellant felt a need to employ a guard at its Chemeset Piggery points to its knowledge and awareness that there was a likelihood that its property would be liable to be stolen by thugs. An attack on the respondent was therefore foreseen and contemplated. There is no evidence on record to suggest that the appellant provided the respondent with reasonable protection to his person.*
>
> *It is true that the work of a watchman entails some risk, and that watchmen take upon themselves risks necessarily incidental to their employment. Nevertheless, in such circumstances, an employer's duty to the watchmen remains the same; to take reasonable care, to maintain a safe proper and suitable security system and to provide them with sufficient protective tools for their use and generally to take adequate measures which will ensure their safety in the discharge of their duties."*

28. In **Brinks Security Ltd. vs James Nyaga Mwaniki [2014] eKLR** it was held:-

> *"12.The Respondent was employed as a watchman. The Respondent was attacked by thugs while in the course of his duty as a watchman. The injury incurred was on the head. I agree with the holding by the trial magistrate that the helmet is one of the crucial items that the Respondent ought to have been provided with. A helmet could have prevented the injury or at least reduced the severity of the same. There was therefore breach of duty by the Appellant. I am fortified in this view by the passage from Halsbury's Laws of England 3rd Edition Vol. 28 paragraph 88:-*
>
> *"Where the relationship of master and servant exists the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service a servant is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer."(emphasis mine)*

29. It is clear from the foregoing authorities that the Appellant had a duty of care to provide the Respondent with protective gear for his work as a watchman. The Respondent gave evidence of breach of this duty by stating that he was neither given a helmet or a padlock for his safety at the workplace. The Appellant's witness stated in cross-examination: -

> ***"I did not say we gave him protective gear. I said we provided him with a whistle, button, torch, rungu, arrows were stolen. The rungu, sword were his but the rest were ours. At Umoja Services we do not have a book to show that he was supplied with those items. The court cannot know that he was supplied with those items."***

30. The appellant conceded to not providing the respondent with sufficient protective gear. The respondent in fact did more to care for his own safety than the appellant. The Respondent proved breach of duty of care by the Appellant for failure to provide necessary protective gear such as a helmet.

31. Regarding the injuries Appellant's witness admitted that the Respondent was injured while on duty at Umoja estate. The Respondent also testified that he was injured twice on the right arm and twice on the head. The injuries are substantiated by a P3 form produced by PW2. There was no counter appeal on the amount awarded as compensation.

32. The Respondent therefore properly proved his claim at the required standard of balance of probabilities.

c) Whether liability was properly apportioned between the parties.

33. The third ground of the Appellant's appeal is that the trial court erred in apportioning the Appellant almost the entire blame for the attack on the respondent although the latter was aware of the risk his job entailed when he accepted the appointment. The issue of risk has been dealt with at length. There was no evidence of the Respondent sleeping on duty.

The Respondent on the other hand submitted that the apportionment of blame at 75%:25% by the trial court was fair in the circumstances of the case.

34. Is there any reason at all to interfere with the trial magistrate's determination? In the East African Court of Appeal decision of **Railways Corporation v. E.A. Road Services Ltd. (1975) EA 120, 130, Musoke, JA** held:

> *"As regards the appeal itself it is a well settled principle that this court will not interfere with apportionment of liability assessed by a trial judge, except where it can be shown that there is some error in principle, or the apportionment is manifestly erroneous. See **Khambi and Another v. Mahithi and Another, [1969] E.A. 70**; **Zarima Akbarali Shariff and Another v. Noshir Prosesha Sethna***

and Others, [1963] E.A. 239 *and* ***George Willaim Bumba v. Phillip Okech Civil Appeal No. 53 of 1974(unreported)****. In the* ***Bumba*** *case, this court held that it may also interfere if in its opinion* ***'the assessment is based on a wrong appreciation of the evidence'." (emphasis mine)***

35. In **Meloki Ole Nchorrai v Apollo Tours & Travel Limited [2009] eKLR** the watchman was found to have contributed 30% to their attack for failure to exercise due care for his safety. The court held: -

> *"I find that in failing to provide the appellant with a helmet, the respondent failed in its duty of providing reasonable care for the appellant's safety against risks reasonably foreseeable. The respondent is therefore liable to the appellant. Nevertheless, the appellant appears to have also failed to exercise due care for his own safety. His work required him to be alert and watchful. The appellant did concede under cross-examination that he was actually dozing. That would probably explain how such a large number of intruders gained access into the compound without the appellant and his colleague noticing. It would also explain why the appellant only used the alarm after they were attacked. I find that the appellant was contributorily negligent. I would accordingly hold the appellant contributorily negligent to the extent of 30% and find the respondent liable to the extent of 70%."*

36. In this case the Respondent stated on cross examination that the premises had a perimeter fence and a metal gate. Although the compound had a live fence he did not testify whether he noticed the robbers coming in. That in itself was a sign of not having been sufficiently alert. However, he did not object to the contribution awarded to him. The appellant's complaint is untenable. .

Disposition.

Having considered, evaluated and re assessed all the evidence, the submissions and authorities cited, I find that the appeal lacks merit. The same is dismissed with costs and interest at court rates to the respondent.

Dated, signed and delivered in open court at Nyeri this 27th June 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Ms.Gichana holding brief for Kebuka Wachira for appellant

No appearance for respondent

Judge