



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 189 OF 2017

NAIROBI CLUB REGISTERED TRUSTEES.....APPELLANT

VERSUS

JMM.....RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree of the Hon. D. Mburu

delivered on 29th March, 2017 in CMCC No. 880 of 2014)

The respondent herein was an employee of the appellant who brought a suit against the employer following an attack while she was on duty. Other than the physical injuries she sustained, she was sexually violated and blamed the appellant for not providing a safe working environment, and therefore was negligent by exposing her to unsafe and vulnerable working hours. The blame was not restricted to the appellant alone but extended to its security personnel, agents or servants. The appellant denied the respondent's claim but after full trial the lower court found the appellant wholly liable and proceeded to make an award of Kshs. 2 million general damages plus costs in favour of the respondent. The appellant was aggrieved by the said judgment and lodged this appeal.

In the Memorandum of Appeal dated 26th and filed on 27th April, 2017 the appellant faulted the lower court for holding that the guards contracted by the appellant to guard the appellant's premises were the appellant's agents, when in fact they were independent contractors. Connected to the said ground, the lower court was faulted for holding the appellant vicariously liable for the acts and omissions of the said guards, when the appellant did not have control or authority over the said guards.

Further, it was the appellant's position that the acts complained of by the respondent were committed by third parties, for which the appellant had no control over. The appellant also raised issues with the lower court for holding that the appellant had failed to discharge its duty of care to the respondent, when in fact the appellant had taken reasonable measures to safeguard the respondent while on duty at the appellant's premises. Reliance on the case of **W.J & Another vs. Astarico Henry Amukoa & others (2015) e KLR** was also faulted due to different facts and circumstances from the present case.

Upon directions by the court, both parties filed their respective submissions and cited some authorities which I have considered. As required of me, I am to consider the evidence presented before the trial court with a view to making independent conclusions.

The respondent was assigned night duties at the appellant's club when on the date of the assault, robbers stormed into the premises, ransacked the same and in the process stole the plaintiff's mobile phone and rings. Her workmate managed to escape but the respondent's arms were tied and her mouth sealed with a masking tape. Thereafter one of the robbers proceeded to rape her.

The assailant then escaped and the respondent ran to the gate where the club's security personnel helped to untie her and remove the tape from her mouth. The matter was reported to the police and the respondent taken to hospital for treatment. After some time, the respondent was assigned duties to work at a new work station which she declined, whereupon the appellant terminated her services. The appellant admitted that the incident indeed took place, but that the respondent declined to be deployed to a less conspicuous work station.

In deciding in favour of the respondent on liability the lower had the following to say;

“The plaintiff was an employee of the defendant. The defendant owed the plaintiff a duty of care; a duty to provide a safe working environment especially that the plaintiff was required night. The guards contracted by the defendant were negligent. They did not even detect the robbers who had enough time to ransack the premises and even for one of them to sexually assault the plaintiff. The negligence was confirmed by D.W. 1 in his evidence. It is what led to the termination by

the defendant of the contract with Riley Services. The defendant breached its statutory duty towards the plaintiff and this exposed the plaintiff to sexual attack.”

Earlier on, the court observed that the appellant did not seek to enjoin [Particulars Withheld] Limited as a third party in the suit. The appellant also did not lodge any claim on behalf of the respondent against Riley Services Limited. The court concluded it could not make any adverse findings against that security firm when it had not been accorded a hearing.

On the relationship between the appellant and the security firm, the court observed that the appellant had contracted the security services and therefore the security firm was an agent of the appellant, and therefore must bear vicarious liability for the negligence of its agent. There was no contract between the respondent and the security firm.

The analysis of evidence by the lower court cannot be faulted by any standards. The appellant seeks to shift blame to the security firm yet those guards could not be guarding the appellant’s premises without a contract between the two. I agree, by that arrangement, the guards held all responsibility for and on behalf of the appellant. In the event of any breach of the contractual arrangement, then the appellant was at liberty to apply for third party notice to issue upon the security firm or claim indemnity for any decree that could have been issued against it. This, the appellant did not do.

The relationship between the appellant and the respondent was that the appellant owed the respondent a duty to provide a safe working environment. For robbers to access the premises, ransack and eventually sexually assault the respondent, they had sufficient time to do that. At no time did the guards raise any alarm. In fact, there is no indication that any back up alarms existed in these premises. There were some guards at the gate who did not even hear what was going on in the premises. This confirms that the premises were unsafe and this can only be attributed to the appellant. The respondent was left exposed and vulnerable. The negligence on the part of the guards extended to the appellant. The finding on liability cannot be faulted.

On quantum, it was considered that the respondent suffered emotional trauma, and the cited case was in agreement with her experience, though relating to a minor. The principles applied were not out of the ordinary. The award of Kshs. 2 million was not inordinately high to attract the intervention of this court.

In the end, I find the appeal lacking in merit and is therefore dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE