



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCCA. NO. 9 OF 2014**

**BOB MORGAN SECURITY LTD.....APPELLANT**

**-VERSUS-**

**CAROLINE KAMENE MATILU.....1<sup>ST</sup> RESPONDENT**

**JAMES MULILI KYALO.....2<sup>ND</sup> RESPONDENT**

***(Formerly Milimani Commercial Courts CMCC 11026 of 2007).***

**JUDGEMENT**

**INTRODUCTION**

1. The Plaintiff lodged the suit seeking Special and General Damages on the basis that on 24/01/2005 the deceased was attacked by thugs while in course of his employment. That he sustained fatal injuries.

2. He blames Defendant for breaching of statutory duties as he was not provided with safety gear/clothing to protect him.

3. The Defendants filed Defence and denied the claim.

4. After hearing of the case the court made the following decision and award:-

- Liability - 100%.
- Loss of expectation of life - Kshs. 100,000/=.
- Award (under fatal accident Act) - Kshs. 1,600,000/=.
- Special damages - Kshs. 35,330/=.
- Plus costs.

5. Being aggrieved by the aforesaid decision, the Appellant lodged instant appeal and set out 5 grounds of appeal:-

***a) The Learned Trial Magistrate erred in fact and in law by failing to analyze the evidence and before it thereby arriving at an incorrect conclusion and finding that the Defendant was 100% liable.***

***b) The Learned Trial Magistrate erred in fact and in law by failing to take into account and to give due consideration to the evidence on record especially the police statement produced by the Plaintiff clearly indicating the Deceased contribution in his own death thus arriving at an erroneous conclusion and finding that the Defendants were 100% liable for the accident.***

***c) The Learned Trial Magistrate erred in fact and in law by making an erroneous assumption that the Plaintiff would have worked up to the age of 60 years which is the retirement age but failed to take into account that the Plaintiff's job was that of a risky nature.***

***d) The Learned Trial Magistrate erred in fact and in law by using Kshs. 9,600.00/= as the Plaintiff monthly thus failing to take into account the statutory deductions and the fact that the all the receipts produced before the court clearly indicated that the Plaintiff used to take home not more than Kshs. 5,000.00/= thus arriving at a manifestly excessive award.***

***e) The Learned Trial Magistrate erred in fact and in law by failing to take into account the award made under the law reform act when making the award under the fatal accidents act thus making an award that was manifestly excessive in the circumstances.***

6. Parties agreed to canvass appeal via written submissions but only Appellant filed the same.

### **APPELLANT'S SUBMISSIONS**

7. The Appellant submitted that, the deceased was provided proper clothing, a 6 pad whistle and on the fateful night the deceased was in possession of a baton. Over and above, the deceased had received training on how to handle the dog from a dog master according to the evidence tendered by DW2.

8. The defence witnesses both testified that the work station was in a generally safe area. The specific premises had a stone wall which had barbed wire and broken bottles as extra safety measures, a metallic gate, functioning electric lights and a functional alarm system.

9. The deceased after being provided with such a safe working environment and appropriate tools should have taken all reasonable steps to ensure his own safety. He should have kept a proper look out and done all things necessary to seek help when he became aware of the attack. He should have blown the whistle to alert the rest of the guards who would have come to his aid or set off the alarm system.

10. The liability of the employer is limited and more so when the work is risky in nature. The employer is only expected to take all reasonable care as enumerated in **para. 562 Halsbury's Laws of England 4<sup>th</sup> Edition (vol.16)** thus;

*“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.”*

11. In **Regina Kamanthe (Suing on behalf of the Estate of Boniface Muinde Nyamasyo (Deceased) –Vs- Esmond Bradley Martin [2015] eKLR** Judge J.K. Serگون reasoned out and held as follows;

*“There is no dispute that the deceased suffered fatal injuries on the head. Had he been supplied with a helmet most probably the impact of the blunt injury would have been reduced. I have already pointed out that the Defendant tried his level best to provide a safe working environment and a backup security system to assist the deceased. In the circumstances I do not think it is fair to find the Defendant wholly liable. The deceased was required in case of an attack to press the panic button to alert the other security backups to respond.*

*From the evidence tendered there appears that there was no evidence showing that the deceased did what he was required to do. Had he pressed the panic button a response would have come by. After carefully balancing the evidence I am convinced the deceased and the Defendant should each shoulder 50% liability.”*

12. It was submitted that he Magistrate erred in fact in failing to take into account that the Appellant had put in place safety measures in case of security breach. That the Magistrate failed to take into account the evidence of DW2 who stated that the area is secure, the Appellant's premises are secured with a wall built with stones, the gate is metallic, the presence of an electric light, and that there was light where the deceased had been short from. It is contended that the Appellant took all the necessary care to secure the premises and as such the court erred in finding them 100% liable for the accident.

13. On the doctrine of **volenti non fit injuria** which states that **if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort or delict.**

14. This is further supported by the decisions in following cases:-In **Japheth Natse Ifedha –Vs- Collindale Security Company Ltd [2005] eKLR**; Alnashir Visram J. was guided by Justice Shah's decision in the **David Ngotho Mugunga case**, where he noted as follows:-

*“I do not see how a Defendant can be liable for acts of robbers even if the employee had no implements of defence. It would be very simple for a gang of robbers to overwhelm one or two guards and take away all such implements and beat them up. This is where I think the doctrine of violent non-fit injuria comes in.*

*Any watchman who takes such a job does take the risk of being attacked by robbers and being hurt, there can be no doubt about it. The employer in my view cannot be liable for criminal acts committed by trespassers (or thieves or robbers which result in injuries to the employees. I would entirely agree with what Lord Herschell said in Smith –Vs- Baker & Sons (1891) 325 360. “The maxim (volente non-fit injuria) is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as wrong”*

*Whilst the facts in Morris –Vs- Murray & Another 919910 2C2 B6 were different the principal that emerges is that if one takes upon himself a task which is inherently dangerous he cannot complain in injury unless there is clear breach of duty or negligence on part of the other.”*

15. Alnashir Visram J. then held as follows;

***“I believe this duty of care at common law is relative to the nature of an employee’s work. The job of a watchman is inherently risky especially in this country. No person taking on such a job may claim that it is a risk free job. Of course, the employer must take care to provide the employee with the necessary tools – according to the evidence here, a “gadget” and more guards should have been provided. But as I have noted, he did indeed have a walkie-talkie. Because of the nature of the incident this did not help, nor would two additional guards have helped in the face of robbers armed with a gun.”***

16. The Appellant took all reasonable steps to ensure the deceased’s safety as he worked. The deceased willingly accepted the job knowing its nature and the risks that come with it. In light of the foregoing, it would be unfair to assign 100% liability to the Appellant. The court was urged to disturb the liability assigned by the trial court and set it aside and hold that each party should shoulder 50% liability.

17. The terms of the deceased’s engagement as a watchman were risky. The nature of his occupation is high risk and would expose him to factors that would be dangerous to his health and person.

18. Thus court urged to hold a multiplier of 25 as inordinately high in the circumstances and urged to adopt a multiplier of 10 in its stead.

19. In Japheth Natse Ifedha –Vs- Collindale Security Company Ltd [2015]eKLR; Alnashir Vishram J. held as follows:-

***“I believe this duty of care at common law is relative to the nature of an employee’s work. The job of a watchman is inherently risky especially in this country.***

***No person taking on such a job may claim that it is a risk free job. Of course, the employer must take care to provide the employee with the necessary tools – according to the evidence here, a “gadget” and more guards should have been provided. But as I have noted, he did indeed have a walkie-talkie. Because of the nature of the incident this did not help, nor would two additional guards have helped in the face of robbers armed with a gun.”***

20. This is the common practice by decision maker in this jurisdiction as can be seen in Raiply Woods (Kenya) Ltd –Vs- Lucy Nyambura Mwangi & Anor [2010] eKLR in which R. Lagat Korir J. was guided by the decision in the case of Grace Kanini Mithin –Vs- KBS Ltd & Anor Nairobi HCCC No. 4708 of 189. Ringera J. (as he then was) restated the principles that guide the court in the assessment of damages under the Fatal Accident Act in the following terms:-

***The court must find out as a fact what the annual loss of dependency is. In so doing, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fraction to be applied. Each case must depend on its facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case. The annual loss of dependency must be multiplied by a figure representing a reasonable number of years per case. In considering that reasonable figure, commonly known as the multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased’s age, his expectation of working years, the ages of the dependants and length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind.”***

21. In James Gakinya Karienyne & Anor (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) –Vs- Perminus Kariuki Githinji [2015] eKLR J. R.E. Aburili opined as follows:-

***“On the evidence before me, I would take the deceased’s monthly pay to be Kshs. 70,000/= less 12,936 tax = 57064 based on his March 2008 pay slip which was produced in evidence as an exhibit.” He went ahead to calculate the loss dependency using the net salary.***

22. Under the Fatal Accidents Act, the court has to consider any award given under the Law Reform Act. In Bernard Njuguna Karanja & Anor –Vs- Hyness Mutavi Kivuva (Suing as the legal representative of the Estate of Miriam Mumbua Makumi (Deceased) [2016] eKLR J. P. Nyamweya opined as follows:-

***“I however note that in law and practice, where a claimant get awards for loss of life both under the Law Reform Act and Fatal Accident Act, the former should be deducted from the latter. This principal was explained by the Court of Appeal in Kemfro – Vs- A.M. Lubia & Anor, [1982-1988] KAR 727 as follows;***

***“The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.” It is clear in the present appeal that the Trial Magistrate did not consider that the award under loss of expectation of life was to be deducted form the grand total once an award for lost years was made, and therefore erred in this respect when it came to the computation of damages.”***

23. In Mwita Nyamohanga & Anor –Vs- Mary Robi Moherai Suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & Another [2015] eKLR J. Majanja opined as follows:-

***“Finally, in assessing the damages under the Law Reform Act and Fatal Accidents Act, the Learned Magistrate did not make an award for pain and suffering and loss of expectation of life on the ground that the same would amount to double compensation.***

*This principal was explained by the Court of Appeal in Kemfro –Vs- A.M. Lubia & Anor [1982-1998] kar 727 as follows;*

*“The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.”*

*The duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same hence the claim for lost years and dependency will go to the same persons.”*

### **DUTY OF 1<sup>ST</sup> APPELLATE COURT**

24. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

### **EVIDENCE**

25. The Plaintiff (1<sup>st</sup> Respondent) stated that the deceased had been employed by the Defendant (now Appellant) has she stated that she was on 25/06/2005 called.

26. She did so to the deceased place of work where she learnt that her husband had been shot. She visited City Mortuary where the body was. She did obtain letters of administration, letter for the chief and D.C.

27. She also spent money in organizing and burying the deceased. She was also paid Kshs. 571,000/=. She produced two pay slips. She also visited the Appellant office and confirmed that there was no light where he was shot. She blamed the company for negligence.

28. The defence called two witnesses. DW1 confirms that the deceased was shot and he visited the scene after two days. He stated that the deceased had been trained, issued with a shirt, trouser, pair of boots, rain coat cap and whistle. The wall is stoned and gate is metallic. There was alarm which is functional.

29. DW2 stated that the deceased was at the back. The deceased had rain coat, sweater, masks and dog.

30. There is electric light at the gate. DW2 did not know how the thugs entered. He raised the alarm. The back up team responded.

31. The Trial Court considered the submissions by the Plaintiff and never occasioned to see the Defendant submissions. The court was called to decide on the twin issue of liability and damages payable.

32. The Plaintiff testified that at the place of work there was no light and the guards employed were few. DW2 only went to the scene two days after the accident. The person concerned with security did not visit the scene the same day. It is the duty of the Defendant to employ many guards.

33. DW1 did not exactly know what transpired at the scene. The person with whom the deceased was with stated that the deceased was alone at the back. The deceased person would not have been shot if there were many guards. The wall must not have been high enough so using a ladder. The thugs were able to climb. They would not have been able to climb if there were little gates on top.

### **ISSUES, ANALYSIS AND DETERMINATION**

34. After going through the evidence on record and the submissions, I find the issues are;

***i. Whether the Trial Court justified in holding Appellant 100% to blame?***

***ii. Was the award inordinately excessive requiring disturbances of the same?***

***iii. What is the order of the costs?***

35. On liability the trial court held the Appellant 100% liable on the ground that the Appellant ought to have employed many guards. The Magistrate erred in fact in failing to take into account that the Appellant had put in place safety measures in case of security breach.

36. The Appellant submitted that the Magistrate failed to take into account the evidence of DW2 who stated that the area is secure, the Appellant’s premises are secured with a wall built with stones, the gate is metallic, the presence of an electric light, and that there was light where the deceased had been short from.

37. It was further submitted that the Appellant took all the necessary care to secure the premises and as such the court erred in finding them 100% liable for the accident.

38. It is argued that The Appellant took all reasonable steps to ensure the deceased’s safety as he worked. The deceased willingly accepted

the job knowing its nature and the risks that come with it. In light of the foregoing, it would be unfair to assign 100% liability to the Appellant.

39. It is thus proposed that, the liability assigned by the trial court be set aside and that each party should shoulder 50% liability.

40. In **Japheth Natse Ifedha –Vs- Collindale Security Company Ltd [2005] eKLR; Alnashir Visram J.** was guided by Justice Shah's decision in the David Ngotho Mugunga case, where he noted as follows:-

*“I do not see how a Defendant can be liable for acts of robbers even if the employee had no implements of defence. It would be very simple for a gang of robbers to overwhelm one or two guards and take away all such implements and beat them up. This is where I think the doctrine of violent non-fit injuria comes in.*

*Any watchman who takes such a job does take the risk of being attacked by robbers and being hurt, there can be no doubt about it. The employer in my view cannot be liable for criminal acts committed by trespassers (or thieves or robbers which result in injuries to the employees. I would entirely agree with what Lord Herschell said in Smith –Vs- Baker & Sons (1891) 325 360. “The maxim (volente non-fit injuria) is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it, complain of it as wrong”*

*Whilst the facts in Morris –Vs- Murray & Another 919910 2C2 B6 were different the principal that emerges is that if one takes upon himself a task which is inherently dangerous he cannot complain in injury unless there is clear breach of duty or negligence on part of the other.”*

41. Further Alnashir Visram J. then held as follows;

*“I believe this duty of care at common law is relative to the nature of an employee's work. The job of a watchman is inherently risky especially in this country. No person taking on such a job may claim that it is a risk free job. Of course, the employer must take care to provide the employee with the necessary tools – according to the evidence here, a “gadget” and more guards should have been provided. But as I have noted, he did indeed have a walkie-talkie. Because of the nature of the incident this did not help, nor would two additional guards have helped in the face of robbers armed with a gun.”*

42. The evidence of DW2 stated that the area is secure, the Appellant's premises are secured with a wall built with stones, the gate is metallic, the presence of an electric light, and that there was light where the deceased had been short from.

43. I agree with the Appellant proposal that 50% liability was fair in the circumstances of the case and also relying on the cited authorities.

44. On quantum, the Appellant complains that, in computing the loss of dependency, the court used gross income in lieu of net income as held in cases of **Kanini Mithin –Vs- KBS Ltd & Anor Nairobi HCCC No. 4708 of 189** and **James Gakinya Karienyé & Anor (suing as the legal representative of the estate of David Kelvin Gakinya (deceased) –Vs- Perminus Kariuki Githinji [2015] eKLR.**

45. I agree with cited authorities and hold that the net income in the produced payslip about Kshs. 5,000/= ought to have been use and rule that same to apply herein. On multiplier, the used a figure of 25 years to deceased aged 33 years.

46. The Appellant view is that the terms of the deceased's engagement as a watchman were risky. The nature of his occupation is high risk and would expose him to factors that would be dangerous to his health and person. The Appellant therefore opined that a multiplier of 25 is inordinately high in the circumstances and suggested a multiplier of 10 in its stead. I agree with the Appellant submission but I reduce same to 15 years.

47. The Appellant also complained of the failing of the trial court to deduct the fatal accident award in the global award.

48. Appellant relied on holding of the case of **Kemfro –Vs- A.M. Lubia & Anor, [1982-1988] KAR 727** as follows;

*“The net benefit will be inherited by the same dependants under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.”*

49. In my view, the requirement in the Law Reform Act is to “take into account” and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency.

50. This view was buttressed by **Justice Mabeya in PERES WAMBUI KINUTHIA AND ANOTHER –VS- S.S. MEHTA & SONS LIMITED, NAIROBI CIVIL APPEAL NO. 568 OF 2010 (UR)** where he held that:-

*“In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –Vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words “to be taken into account” and “to be deducted” are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are “taken into account.” That the Section says what should be taken into account and not necessarily deducted.*

*That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act,*

*the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction.”*

51. Thus the court declines to disturb trial magistrate decision on that. The appeal thus succeeds to the aforesaid extent. The court thus makes the following orders;

**i. Liability 50; 50 between the parties herein.**

**ii. Pain and suffering - Kshs. 20,000/=.**

**iii. Loss of expectation of life - Kshs. 100,000/=.**

**iv. Loss of dependency  $15 \times 12 \times 5000 \times \frac{2}{3} =$**

**- Kshs. 600,000/=.**

**v. Special damages - Kshs. 35,350/=.**

**vi. Total 755350 less (50%) - Kshs. 377,675=.**

**Balance - Kshs. 377,675/=.**

**vii. Interest from the date of lower court judgement.**

**viii. The Appellant to get half costs of the appeal.**

**SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.**

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**C. KARIUKI**

**JUDGE**