REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 70 OF 2013

RILEY FALCON SERVICES.....APPELLANT

VERSUS

JARED OCHIENG JOMBO.....RESPONDENT

(Being an Appeal from the Judgment of Hon. T.Obutu (SPM) in KisumuCMCC NO.448 of 2011 delivered on 26th February 2013)

JUDGMENT

1. **Jared Ochieng Jombo*(hereinafter referred to as respondent)*** sued **Riley Falcon Services*(hereinafter referred to as appellant)*** in the lower court claiming damages for injuries allegedly inflicted by the appellant's employees on 30.10.11.

2. Defendant/appellant filed a statement of Defence and denied the claim and urged the court to dismiss the respondent/plaintiff's suit with costs.

3. In a judgment delivered on**26th February, 2013,**the learned trial Magistrate found that the respondent had proved his case on a balance of probability and awarded him Kshs. 400,000/- with costs.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 12.6.14 filed a Memorandum of Appeal on 25th August 2017 which sets out 6 grounds as follows:-

1) The Learned trial Magistrate erred in fact and in law and in finding liability against the appellant when the evidence on record clearly proved that the respondent did not identify the employees of the appellant whom he alleged assaulted him

2) The Learned trial Magistrate erred in fact and in law and in finding liability against the appellant when the respondent dis not demonstrate that the alleged assailants did so in performance of their duties as security guards when they beat him up

3) The Learned trial Magistrate erred in law and in failing to give satisfactory rational and discernable reasons for his finding that the appellant is liable 100% while the evidence on record was wanting

4) The Learned trial Magistrate misapprehended the extent and severity of the injuries suffered by the respondent leading to erroneous estimate of the damages and loss sustained

5) The Learned trial Magistrate erred in fact and in law and in awarding costs to the plaintiff yet plaintiff failed to show any evidence that the demand notice of intention to sue had been issued to the defendant

6) The Learned trial Magistrate erred in fact and in law and in failing to consider the pleadings and evidence presented by the appellant

SUBMISSIONS BY THE PARTIES

5. On 3.10.17, parties were directed to file written submissions to which they dutifully complied.

Appellant's submissions

6. It was submitted for the appellant that the respondent did not name the persons that assaulted him or prove that they were appellant's employees. To this end, the appellant cited ***David Munyei & 3 others v Ronald Barasa [2006] eKLR***where the judge held:-

> ***"The plaintiff did not know them but they were in uniform. None of the parties alleged that the plaintiff was a suspect in any investigations of commission of any offences. The plaintiff did not claim that the 3 guards placed him "under arrest" for such reasons".***

6. The court further held:-

> ***"In the end, I find that the Fourth Defendant was not and could not have been vicariously liable for the acts of the 1st, 2nd and 3rd Defendants and it was an improper finding by the Trial Magistrate to find so. The assault was occasioned by the caprice of the three security guards and were not acts in the course of their employment in the circumstances".***

7. In the same case, the judge cited **CLERK & LINDSELL ON TORTS** 18th Edition, (London sweet & Maxwell, 2000), in which the authors stated:-

> *"**It is, in general, the case that the employer will not be liable for an assault committed by his employee unless done in the wrongful exercise of a discretion vested in the employee....."***

8. The Judge referred to **SALMOND ON TORTS**, 10TH Edition p.89-90 in which it was stated:-

> ***"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.....if the unauthorized and wrongful act.....is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible:- for in such a case the servant is not acting in the course of his employment, but has gone outside of it."***

9. On quantum, the appellateoffered Kshs. 150,000/- and cited ***SimonMungaiKariukivFatmaHassan [2017] eKLR*** in which the court awarded Kshs. 230,000/- for hairline fracture and soft tissue injuries.

Respondent's submissions

10. It was submitted for the respondent there was prove that the security guards that assaulted the respondent were acting in the performance of duty assigned to them by the appellant and that appellate was vicariously liable. To this end, the respondent cited***JosephCosmas Khayugila v Gigi&Co Ltd& Anor (1987) 2 KAR 93***where the court stated:-

> ***"vicarious liability will arise where there is demonstration that the tortfeasor was at the time of***

the occurrence of the delict a servant or an agent of the principal".

11. In ***Tabitha Nduhi Kinyua V Francis Mutua Mbuvi &Another [2014]***the Court of Appeal observedthat vicarious liability is not limited to employment relationships.

12. On quantum, the respondent urged the court not to disturb the award and relied on ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***where the Court of Appeal in held:-

> **"An *appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low …."***

13. The respondent also relied on Kigaraari – Vs Aya [1982 – 88] 1 KAR 768 that

> **"Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees."**

The evidence

14. This being the first appeal, it is my duty under section 78 of the Civil Procedure Act to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions 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."***

15. The appellant told court that on 30.10.11, he was assaulted outside Tusky's shop by petitioner's guards who arrived in M/V KBL 717A which was branded Riley Falcon. He said he identified the guards by their uniform. DW2 confirmed that on the material date, he called for reinforcement to arrest suspected thieves at the scene respondent alleges to have been assaulted. That 4 guards arrived in M/V KBL 717A.

Analysis and Determination

16. I have perused the entire record of appeal and considered the submissions by both counsels. I note that the appeal revolves around both liability and quantum which I shall consider as hereunder.

17. From the evidence on record, it is evident that M/V KBL 717A in which respondent alleges to have been assaulted was at the scene of the incident and it was used to take 4 theft suspects to the police station. The 4 guards that allegedly arrested the respondent and assaulted him were not called as witnesses and respondent's testimony is therefore not controverted. The 4 guards had been called to the scene in the course of their duty to arrest some suspects.

18. I find and hold that the trial magistrate rightfully held that the guards were on duty and acting on instruction of the respondent and found the respondent liable at 100%.

19. A medical report tendered by Dr. Okombo shows that plaintiff suffered:-

- Injury to the right wrist joint with fracture
- Injury to the right hypochondrial area
- Injury on right hip joint

20. At the time of examination by Dr. Okombo, 11 days after the accident, the respondent had not recovered. There was however no evidence to show that he had not recovered when he testified on 9.10.12 which was one year after the accident.

21. The case of ***Agnes Makinya Vs Stephen Njuguna Gatua HCCC 2427 OF 1990*** that the trial court relied upon in awarding Kshs. 400,000/- was neither attached to the submission before the trial court or before this court. There is therefore no evidence that Kshs. 400,000/- had been awarded for injuries similar to the ones suffered by the respondent.

22. In the case of ***Simon Mungai Kariuki v Fatma Hassan [2017] eKLR*** in which the court awarded Kshs. 230,000/- for hairline fracture and soft tissue injuries. Damages must be within limits set out by decided cases. ***Simon Mungai Kariuki v Fatma Hassan (Supra)*** is a recent case with more or less similar injuries.

Orders

23. In the result the appeal succeeds only to the extent that the award for Kshs. 400,000/- is set aside and substituted with an award of Kshs. 300,000/ general damages with costs in the lower court. Each party shall bear its own costs of this appeal.

DATED AND DELIVERED THIS *21st* **DAY OF** *November* **2017**

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Mr Osodo holding for Onyango

Respondent - Ms Odok holding brief KOKE