



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 554 OF 2004

TWIGA CONSTRUCTION CO. LTD.....APPELLANT

VERSUS

MICHAEL ODHIAMBO RESPONDENT

*(Appeal from the judgement of M. A. Murage (Mrs) Senior Resident Magistrate's Court at Nairobi
dated 29th November, 2002)*

JUDGEMENT

1) The subject matter of this decision is the appeal against the judgement of Hon. M. A. Murage, the then learned Senior resident Magistrate delivered on 29.11.2002 vide Nairobi S.R.M. C.C.C. no 4592 of 2002. The history behind this appeal is short and straightforward. Michael Odhiambo Oganga, the Respondent herein, was employed by Twiga Construction Co. Ltd, the Appellant herein as a night guard at the Appellants construction site at kayole. On the 2nd day of May 2002, at about 2.45 am the Respondent was attacked by thugs while in the course of the Appellant's employment and in the process he sustained serious injuries. The Respondent filed a compensatory suite against the Appellant for damages for the injuries he suffered before the Senior Resident Magistrate's court, Nairobi. The Respondent alleged that he was not given protective gear, a whistle, a club, gumboots and uniform among other things. The Appellant disputed the Respondent's claim. It however admitted that the Respondent was injured while in the course of its employment as a night guard. The Appellant raised the defence of volenti non fit injuria.

2) Hon. M. A. Murage, learned Senior Resident Magistrate heard the case and on 29.11.2002 she gave judgement in favour of the Respondent in the sum of kshs.81,500/= as special and general damages. The Appellant being dissatisfied filed this appeal. On appeal the Appellant put forward the following grounds.

- 1. The Learned Senior Resident Magistrate misdirected herself by ignoring well settled legal authorities cited by counsel for the Respondent by virtue of which no liability ought to have been attributed to the Appellant for acts of strangers;***
- 2. The Learned Senior Resident Magistrate erred in law and infact in reaching conclusions without adducing any or any reasonable grounds for so doing;***
- 3. The Learned Senior Resident Magistrate erred in holding the Appellant to be guilty of negligence in total disregard of the evidence before her and judicial precedent;***

4. The Learned Senior Magistrate erred in law and in fact in not appreciating and/or considering the evidence in its entirety as regards contributory negligence by the Respondent;

5. The Learned Senior Resident Magistrate erred in law in failing to reach a determination on the evidence before her on the issue of the Respondent's contributory negligence

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have considered the rival written submissions and the authorities submitted. Though the Appellant put forward a total of five grounds the same may be summarised to one main ground.

4) It is argued that the learned Senior Resident Magistrate erred when she found the Appellant wholly liable and yet the Respondent had failed to tender credible evidence to show that he was not supplied with the necessary tools of trade. The Appellant argued that the Respondent ought to have tendered evidence proving that he was not supplied with a whistle, alarm, a bow, uniform, arrows and boots. The Appellant further argued that it had adduced evidence to support its assertion that the aforesaid tools of trade were supplied to the Respondent. The Respondent on his part pointed out that the attack was as a result of lack of implements and that there were very few guards assigned to the Appellant's premises.

5) I have re-evaluated the evidence that was presented before the trial court. The Respondent (plaintiff) testified alone in support of his case. He stated that on the fateful night, he was attacked by a gang of between 7 and 10 people who were armed with rungu, pangas and iron bars. He was held up, threatened and cut on the right leg, hip, ribs and chest. The Respondent specifically stated that he had no whistle, alarm, bow nor arrows. He also stated that he was not supplied with a helmet, uniform nor boots. He further stated that since the Appellant's compound is bit 10 guards were assigned duties to guard but on the fateful night they were only four. The Respondent further alleged that there was no proper fence. In cross examination, the Respondent said the Respondent said that he was not given protective gears which could have minimised.

6) The Appellant's case was supported by the evidence of Elijani Kimani who stated that the plaintiff's premises are in a portion of land measuring 2 acres. He stated that the compound is fenced and was guarded by eight watchmen. He stated that each watchman was given a bow, a rungu, whistle, night coat. The witness further stated that there was an alarm which was functioning. He stated that the alarm would alert when the fence is cut. In cross-examination the witness stated that he had not come with the Appellant's record showing that those implements were provided.

7) The learned trial Senior Resident Magistrate considered the evidence from both sides and came to the conclusion that the Appellant gave no evidence to prove that a bow was provided. She also concluded that there was no credible evidence that the alarm was tested and found functioning. The learned magistrate also found that there was no evidence that the Respondent was given protective gear.

8) On my part and after a careful re-evaluation of the evidence tendered before the trial court, I am convinced that the learned Senior Resident Magistrate came to the correct conclusion. There is no dispute that the witness summoned the Appellant gave a general overview of what implement the Appellant supplied to the watchmen. In view of the serious defence set up by the Respondent, the Appellant was expected to present strong evidence to controvert the evidence presented by the Respondent. It would have been prudent for the Appellant to even present a register of the items supplied to the watchmen and name the watchmen who worked with the Respondent on the fateful night. The Appellant further failed to tender evidence showing that the alarm had been tested and found working. According to the evidence by the Respondent, the gang who attacked him gained access to the Appellant's premises by cutting the wire fence. This assertion was not denied by the Appellant's witness. In fact it was the evidence of the Appellant that the alarm would alert if the fence is cut. It is therefore obvious that the alarm was not functioning. I cannot comprehend why the Appellant did not summon those watchmen who were with the Respondent the fateful night to explain whether or not alarm alerted them when the fence wire was cut. In the second ground, the Appellant has complained that the Respondent should have been ordered to shoulder contributory negligence. I do not think apportionment of liability should be made in this case.

There was no evidence that the Respondent had moved out of the Appellant's compound. It is therefore unfair in the circumstances of this case to apportion liability on the part of the Respondent.

9) **In Makala Mailu Mumende =vs= Nyali Golf Course and County Club, C.A no 116 of 1989,** the Court of Appeal dealt with a near similar case in which a watchman was attacked and seriously injured in the course of his work and had not been provided with a protective gear. The Court of Appeal unanimously held that the employer was liable. Nyarangi J. A who sat in the case stated as follows:

“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.”

10) The position in common law was succinctly stated in **Halsbury's laws of England, 4th Edition vol. 16 para 560** as follows:

“At common law an employer is under the duty to take reasonable care for the safety of his employees in all the circumstances..... so as not to expose them to unnecessary risk.”

11) In this appeal it is clear to me that the Appellant did not provide the Respondent with the necessary protective gear to enable him carry out his duties with minimal risks.

12) In the end, I find no merit in this appeal. It is dismissed with costs to the Respondent.

Dated, Signed and Delivered in open court this 19th day of February, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent