



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 660 OF 2011

HUDSON LUVINZU ELAVONGAAPPELLANT

VERSUS

KENROID LTD.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable C.Obulutsa (Mr) Senior Principal Magistrate (as he then was) delivered on 6th December 2011 in Milimani Commercial Courts CMCC 241 of 2007. The appeal is lodged by Hudson Luvinzu Elavonga who was the plaintiff against the trial court's decision of dismissing his suit against the defendant/respondent Kenroid Limited. The appellant's claim before the subordinate court was premised on the plaint dated 18th January 2007 wherein he alleged that while he was engaged upon his employment with the respondent as a driver and driving motor vehicle registration No. KAS 273 V, he was attacked by thugs after collecting/sales/orders and or depositing the defendant's monies at a bank due to the respondent's alleged breach of common law duty, negligence, statutory and or contractual obligation on the part of the respondent. The appellant claimed that as a result of the respondent's negligence and or breach of statutory or contractual obligations, namely:
 - a. Failing to provide him with protective apparel such as bullet proof vest;
 - b. Exposing hi to danger;
 - c. Failing to ensure that the plaintiff was exposed to a safe working environment by adequately securing the motor vehicle;
 - d. Failing to train the plaintiff on safety measures, defensive driving mechanisms;
 - e. Failing to provide the plaintiff with back up security;
 - f. Failing to adequately arm the plaintiff to enable him perform his duties sufficient protection.
2. The appellant also invoked the application of the doctrine of Res Ipsa Loquitur. The appellant was shot in the left thigh, left index finger; abdomen among other injuries for which he suffered loss and damages and claimed compensation.
3. The respondent filed a defence to the appellant's suit in which it denied all the allegations of negligence attributed to it and in the alternative, the respondent invoked the doctrine of *violent non fit injuria* against the appellant. Further, it pleaded that it was not liable to criminal acts of third parties which could not be foreseen; is too remote to constitute any actionable claim and prayed for dismissal of the appellant's suit with costs.
4. The suit proceeded to hearing before the Principal Magistrate (then) Mr C. Obulutsa. The appellant testified in support of his claim and produced documents as exhibits. On behalf of the respondent, Amos Kuduyu; the accountant testified denying all the allegations leveled against the

respondent by the appellant.

5. This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act as interpreted in the case of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** wherein Sir Clement De Lestang held inter alia:

“ This court must consider the evidence, evaluate it itself and draw its own independent 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 of the impression based on the demeanor of a witness id inconsistent with the evidence on the case generally (Abdul) Hammad Sarif V Ali Mohammed Solan [1955, 22 EACA 270].”

6. In addition, the Court of Appeal in the case of **Mbogo V Shah & Another [1968] EA 93** settled the circumstances under which an appellate court may interfere with a decision of the trial court and pronounced itself thus:

“ I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

7. Applying the above principles to the instant appeal, the appellant testified as PW2 and stated on oath that he was working for the respondent Kenroid (K) Ltd as a driver to one of the Directors on the material date. That they would advertise, visit clients to provide out products and take orders and money from those delivered. That on 23rd September 2005, he was driving Mr Rakesh in motor vehicle registration No. KAH 273V returning to the company at 4pm, and on reaching the company premises, driving at 40 kilometer per hour, there were many pedestrians so a person suddenly appeared on his side, brandishing a pistol and fired at the appellant. The bullet hit the windscreen and ripped his left fore finger and stomach. Another thug opened the passenger door and fired at his left leg and then appellant was thrown out. He heard the thugs shout “Toa Pesa.” The appellant passed out and found himself admitted at St John’s Hospital. The appellant blamed the respondent employer for reasons that they dealt with money and therefore they should have been provided him with security. That they had deposited money at Unga House Westlands. He produced hospital treatment notes, Workmen’s Compensation Form (LD 104), search for the motor vehicle he drove on the material day showing it belonged to the respondent and demand letter to the respondent.
8. In cross examination the appellant stated that he had been a driver from May 2005 to July 14th 2006. That he was assigned the subject motor vehicle specifically to drive Mr Rakesh. That on that material day he was on duty from 8.30 am and left at 9.30 am for work and returned at 4pm. He stated that Mr Rakesh was a Marketing Officer. The appellant stated that he did not know the banks that dealt with the respondent and neither could he remember the banks they went to in Westlands on that day. He stated that he was not given the money to bank and stated that Mr Rakesh had the money. He stated that the company was not aware that the thugs were coming. He stated the he was not given a bullet proof vest and that he had never seen a civilian driver being given bullet proof vests. He stated that the company never provided them with security and that Mr Rakesh was not his witness.
9. In re-examination PW2 stated that he was not given security; the company was expected to defend them and that he did not know if Mr Rakesh was fully employed then.
10. The appellant also called PW1 Dr Kinuthia who examined the appellant on 25th June 2010 and confirmed the injuries sustained by the appellant being bullet wounds on the left hand, abdomen and thighs. Dr Kinuthia prepared a medical report which he produced as an exhibit 1 (a) and a

- receipt for shs 2000/- for the medical report preparation as P exhibit 1(b). The Doctor testified that he relied on discharge summary and LD 104 form during the medical examination. He stated that the appellant needed physiotherapy and drugs.
11. The defence/respondent called DW1 Mr Amos Kudoyo an accountant who testified that the appellant was their driver but that money and banking was channeled through finance department through PW1. That the company had corporate customers who paid by cheque and that marketing did not deal with banking. He testified that on 23rd September 2005 they received cheques which were banked at ABC Industrial Area Branch. That they did not have any bank account in Westlands. He stated that Mr Rakesh was a Sales Executive and was never used for banking. He admitted that the appellant was indeed shot which he stated was an unfortunate incident and not because he was dealing with money as they never handled money in their premises.
 12. In cross examination, DW1 stated that Rakesh was still an employee of the respondent and that Eunice Nyaga was the clerk who did the banking. That in 2005 it was Mrs Ina who did the banking. He denied that he was responsible for assigning duties and neither did he witness the incident although he rushed to the scene. He stated that cheques could be collected or sent to them. He stated that Mr Dhora Shah was in charge of marketing.
 13. In re-examination the DW1 stated that he was sent to court by the Managing Director.
 14. In his judgment the Learned Senior Principal Magistrate noted that there was indeed a shooting incident where thugs attacked and shot the appellant outside the respondent's premises injuring the appellant who was on duty. However, he found that the respondent could not be held liable for negligence. In his view, the appellant's claim only lay under the Workmen's Compensation Act. He therefore dismissed the suit with costs. Had he found the respondent liable, he would have awarded him kshs 300,000/- general damages and shs 2,000/- special damages proved.
 15. It is that judgment of 6th December 2011 which provoked this appeal. The appellant vide his Memorandum of Appeal dated 21st December 2011 sets out 7 grounds of appeal challenging the decision of the trial magistrate and contending that:
 1. The Honourable Magistrate erred in law and fact in finding that the appellant was attacked outside the defendant's company premises hence no liability on the part of the defendant arose.
 2. That the Honourable magistrate erred in law and fact by finding that the appellant was not handling the money, was merely driving and therefore the appellant was not exposed to any danger.
 3. That the Honourable magistrate erred in law and fact by finding that the attack, injuries sustained by the appellant could not be prevented by the defendant.
 4. That the Honourable magistrate erred in law and fact by finding that no liability accrued on the part of the defendant under common law.
 5. That the Honourable magistrate erred in law and fact by ignoring and failing to consider the appellant's uncontroverted evidence in entirety.
 6. That the Honourable magistrate erred in law and fact by relying upon hearsay evidence adduced by the defendant's witness.
 7. That the Honourable magistrate erred in law and fact by dismissing the suit with costs.
 16. The appellant urged this court to allow the appeal, set aside the judgment of the trial court and award him damages of shs 600,000 and specials of shs 2000/- with costs in the court below and this appeal.
 17. The parties agreed to dispose of this appeal by way of written submissions. The appellant's counsel Ms Achola Jaoko & Company Advocates filed submissions dated 16th July 2015 on the same date. The respondent's counsel Malonza & co filed submissions on 9th September, 2015.
 18. On liability it was submitted on behalf of the appellant relying on the case of **Peter Ndungu Kinyanjui V EA Sea Food Ltd and Another Nairobi HCC 2905/96** where Lady Justice Mary Angawa held that an employer owes an employee a duty of care to provide a safe working environment and mechanism, which case involved a driver who sustained gunshot wounds in the course of purchase and sale of fish.
 19. The appellant's counsel submitted that it was highly probable that Mr Rakesh collected both cash

- and cheques as a sales representative. That the attack occurred outside the respondent's premises but inside the respondent's motor vehicle which the appellant was employed to drive and therefore it was his "work station" hence, it was wrong for the trial magistrate to hold that the incident did not happen within the respondent's premises and therefore no liability attached.
20. The respondent's counsel also faulted the respondent for failure to call their Mr Rakesh who was an eye witness.
21. On quantum of damages the appellant's counsel submitted that the appellant's injuries were grievous hence he should have been awarded shs 600,000/- based on the decisions of **Peter Njoroge Gichu V Bernard Thimangu & Attorney General HCC 92/2000 Nakuru** and **Kennedy Mutinda Nzoka V Basco Product (K) Ltd Industrial cause No. 98/2011** wherein the claimants sustained similar injuries and were awarded kshs 409,135.70 and 231,418 respectively. He also prayed for costs and interest.
22. In their submissions dated 8th September 2015 and filed on 9th September 2015, the respondent's counsels Malonza & Company Advocates supported the trial magistrate's findings, urging this court to dismiss this appeal with costs.
23. In their view, the evidence by the appellant was totally inconsistent especially during cross examination. Further, it was submitted that the respondent's witness evidence was not challenged or rebutted. Further, it was submitted that the appellant had in any case, failed to analyze the evidence to show how the trial magistrate was wrong. That the appellant never proved any of the pleaded particulars of negligence against the respondent and neither was that aspect of negligence mentioned in the submissions. It was contended that the appellant had failed to discharge the burden of proving his legal obligation of persuading the appellate court that the trial court was wrong and that in this case the appellant had not made any input and had thrown the appeal to the court to make a blanket decision. That in the absence of any submission pointing out any misdirection or wrong doing by the trial court, the appeal should be dismissed with costs.
24. I have carefully considered this appeal, the grounds, the evidence tendered before the trial court, submissions therein, the submissions in support and opposition to this appeal and the authorities relied on by the parties' advocates.
25. In my humble view, there are only four issues for determination namely:
1. Whether the trial magistrate erred in law and fact in dismissing the appellant's suit with costs on account that the appellant had not proved negligence on the part of the respondent on a balance of probabilities.
 2. What should have been the appropriate quantum of damages payable in the circumstances of this case.
 3. What orders should this court make?
 4. Who should bear the costs of this appeal?
26. On the first issue, it is clear that the appellant's suit and claim was premised on the claim under common law for negligence/ breach of statutory/contractual/duty/obligations of the respondent as particularized in the plaint and reproduced in this judgment.
27. The extent of the employer's duty under common law towards its employee is captured in **Halsbury's Laws of England, 4th Edition Volume 16 paragraph 562** as hereunder:-

" It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee to compensate him for any injury which he may sustain in the cause 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 damages suffered in the cause 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 damages 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 any employee to take reasonable care of the employee's goods; the duty extends only to his person."

28. The above common law position was adopted as the law applicable in Kenya in the case of **Mwanyule V Said t/a Jomvu Total Service Station [2004] 1 KLR 47**, by the Court of Appeal. In that case, the Court of Appeal concluded that *the employer owes no absolute duty to the employees, and that the only duty owed is that of a reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.*
29. In the instant case, it is not disputed that the appellant was at the material time in the course of his employment with the respondent when he was accosted and shot by thugs who asked him to produce money. It is also common ground that the appellant was at the material time of the shooting by thugs an employee of the respondent and that he was inside the motor vehicle which he ordinarily drove a Mr Rakesh who was a sales executive. It is also not disputed that the shooting occasioned the appellant grievous injuries to his hand, thighs, and abdomen. It is also not disputed that the attack by thugs took place at or about 4.00pm which was day time and at the respondent's gate as the appellant approached while returning from his daily work of driving the Sales Executive.
30. The question is, was such risk of being attacked by thugs a reasonably foreseeable risk, such that it could be prevented by the respondent, taking reasonable precaution? And if so, whether the respondent failed to take adequate precautions for the appellant's security and safety while he was engaged upon his work.
31. The appellant's main complaint was that the respondent did not provide him with bullet proof vest and or security although his work involved in or dealing with money. That on the material day, they had taken money for banking at Unga House, Westlands. In cross examination, however, the appellant could not remember the banks dealing with the respondent company and or the banks they went to in Westlands on that day. He also denied being given money to bank. He also stated that he had never seen a civilian driver being given bullet proof vests. He reiterated that he was never assigned banking duties.
32. In my humble view, in the absence of any evidence by the appellant that he was involved in collecting and or banking his employer's sums of money as to require special security measures to be put in place to protect him and the property of this employer, or the money that he alleged he was involved in collecting and or banking, such security measures as proposed by the appellant would only have been necessary to counter armed attack. In this case, police escort and or the use of security firms and guards would have been available to provide escort services to the appellant while carrying money for banking purposes. However, on the evidence adduced by the appellant, this court is not persuaded that the appellant and Mr Rakesh could have left the respondent's premises at 9.30 am to go to Westlands to bank money in an unknown bank and return at 4.00 pm nearly seven hours later noting that Imara Daima and Westlands are both within the City of Nairobi. This court is aware of the risks of motorists, whether involved in carrying money or not being carjacked by armed robbers, which incidents are common place especially in Nairobi. In that regard, and in the absence of any evidence to the effect that the appellant was involved in the collection and or banking of the respondent's money, it cannot be inferred and there would be no basis for concluding that the attack on the appellant was targeted because he was involved in dealing with money, which money he could not prove at the hearing.
33. In my humble view, reasonable precautions against such risks would mean that each motorist would require an armed guard or bullet proof vest to protect them against any anticipated armed robbers, which would be a near impossibility.
34. I therefore find that in the circumstances of this case, providing bullet proof vest or security to the appellant against the risk to which the appellant was exposed was not practically possible and the respondent cannot be held to have been negligent in failing to provide the same. (See also **Mini Bakeries Ltd V Reuben Kaloki Muindi [2010] e KLR Okwengu J** (as she then was).
35. In the **Mini Bakeries Ltd** (supra) case the respondent was involved in the job of moving around in vehicle selling bread, and collecting about shs 50,000/- per day for his employer. He was shot at and injured by armed robbers and sued his employer in negligence/breach of statutory/common law duty of care. The trial court found the employer liable. On appeal, the learned Judge

overturned the trial court's decision and dismissed the employee's suit. She held inter alia:

“ This is clearly a situation where the respondent having accepted the job assigned to him by the appellant, which involved moving around in a vehicle selling bread, voluntarily undertook upon himself the risks which were incidental to his employment and indeed to any other motorist. That risk included the risk of being car jacked, injured or robbed by armed robbers. The respondent did not need to be advised by the appellant not to resist armed robbers.

.....the respondent was on the right track when he filed his claim partly under the Workmen's Compensation Act, Cap 236 where he would have been entitled to compensation without proof of negligence on the part the appellant. That limb was however not pursued nor any evidence adduced in that regard.”

36. The above decision by Okwengu J (as she then was) is on all fours with the present case. I have no hesitation in finding that the trial magistrate was correct in finding that the appellant should have pursued his claim under the Workmen's Compensation Act. This is so because no legal obligation arose under common law or tort for employers to provide bullet proof vests or armed escort to their drivers engaged upon their duties, in circumstances where no risk of injury was foreseeable like in the present case.
37. Accordingly, I find that the trial magistrate did not err in finding that the appellant did not prove any liability in negligence or breach of statutory/common law duty of care against the respondent to warrant a finding in his favour. That ground of appeal on liability therefore fails.
38. Furthermore, as correctly submitted by the respondent's counsel, the appellant's submissions were too generalized and made no specific mention of what error the trial magistrate made requiring correction by this court. The submissions threw the appeal at this court to investigate and which this court has endeavoured to investigate and has found that there was no error of fact or law committed by the trial magistrate. The appellant could safely get compensation under the Workmen's Compensation Act which requires no evidence of negligence or breach of common law or statutory duty of care on the part of the respondent employer in cases where there is proof of injury by an employee while he is engaged upon his duty.
39. On quantum of damages, it should be noted that the appellant never raised any ground of appeal challenging quantum of damages that the trial magistrate held he would have awarded the appellant had he proved liability against the respondent employer. However, in his prayers and submissions, he urged the court to set aside the award of kshs 300,000 and award him kshs 600,000 general damages. The law is clear that parties are bound by their pleadings. On appeal, grounds of appeal form the basis of pleadings and arguments and no party is allowed to sneak in a new ground of appeal that was not pleaded in the memorandum of appeal.
40. In this case, the appellant did not lay any basis for seeking out on this court to interfere with the discretion of the trial court in awarding kshs 300,000 general damage had he found the respondent liable. There are established principles for the appellate court interfering with the award of general damages made by the trial court. None of those principles were claimed to have been ignored by the trial magistrate. For example, the appellant did not claim that the award of kshs 300,000 general damages was premised on wrong principles or that the award was inordinately or excessively low compared to the injuries sustained by the appellant and taking into account other factors such as awards in comparable cases, and inflationary trends. The trial magistrate considered the proposed shs 600,000 by the appellant based on the case **Gerald Nakweya Shijenda v Attorney General HCC 2181/2001**.
41. In my view, therefore, there being no basis for interfering with the trial court's award of damages, and bearing in mind the injuries sustained by the appellant which involved gunshot wounds on the left index finger, abdomen and left thigh with residual scars, pain and numbness of the injured areas requiring physiotherapy, analgesics and nerve generation drugs, the sum of kshs 300,000 general damages awarded by the trial magistrate was appropriate compensation for those injuries suffered by the appellant. I therefore would uphold that award and the proven specials of kshs 2000/- cost of medical report by Dr Kinuthia.
42. The upshot of all the above is that this appeal is dismissed. The judgment of the trial court both on

liability and quantum is upheld. On costs, bearing in mind the circumstances of this case where the appellant was an employee of the respondent and taking into account the fact that he suffered grievous injuries as a result of the gunshots by the thugs, I would, in the circumstances not find it appropriate to award any costs against him. Accordingly, I order that each party shall bear their own costs of this appeal and of the trial court.

Dated, signed and delivered at Nairobi this 17th day of March 2016.

R.E. ABURILI

JUDGE