REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 82 OF 2013

BETWEEN

TOTAL SECURITY SURVEILLANCE LIMITED …….. APPELLANT

AND

BERNARD BOSIRE ……..……..…..…….……..…..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Sala, RM dated

28th August 2013

at Chief Magistrates Court in Kisumu in Civil Case No. 372 of 2012)

JUDGMENT

1. At the time material to the proceedings the respondent, **Benard Bosire**, was employed by the appellant, **Total Security Surveillance Ltd**, as a security guard. He alleged that while on duty on the night of 17th October 2011, he was attacked by robbers and seriously injured. As a result, he filed a suit seeking damages for the injuries sustained. In its defence the appellant, apart from denying that the respondent was its employee or that the incident alleged took place, pleaded in the alternative that if the incident took place, the respondent voluntarily assumed the risk of injury by taking up employment as security guard which was an inherently dangerous job. The appellant also pleaded that if found liable, then the respondent should also be found liable for contributing to his own injuries.

2. After hearing the matter, the learned magistrate found the appellant wholly liable and awarded the respondent Kshs. 100,000/- and Kshs. 1,460/- in general and special damages respectively. The appellant appealed against the judgment and in its memorandum of appeal dated 23rd September 2013 put forward the following grounds;

   1. That the learned magistrate erred in law and fact in holding the defendant wholly liable when the circumstances demanded no liability on the part of the defendant.

   2. That the learned magistrate erred in law and fact in awarding Kshs. 100,000/- as general damages to the plaintiff/respondent regard being held to the injuries sustained.

   3. That the learned magistrate failed to appreciate the law and submissions made on behalf of the appellant thus reaching a conclusion that was contrary to the law.

4. That the assessment of the damages was excessive and amount to a serious error in principle.

3. Mr Odhiambo, learned counsel for the appellant, submitted that in as much as the appellant would was found liable, the liability ought to have been apportioned as the respondent was not wearing the helmet he was issued with when he was attacked. Counsel also submitted that the award of damages was excessive in the circumstances. Learned counsel for the respondent, Mr Taremwa, was of the view that liability was clearly established as the appellant did not provide the respondent with the necessary protective gear which would have prevented the injury. He submitted that the award of general damages was reasonable.

4. As this is a first appeal from the magistrate's court, I am guided by principle that the duty of the first appellate court is to reconsider the evidence, evaluate it and reach its own conclusion bearing in mind that it neither heard or saw the witnesses (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123***).

5. At the trial each side called one witness. The respondent testified that on the night of 17th October 2011 he was working at Trida Discount Wholesalers, a shop along Obote road within Kisumu town. At about 6.00am in the morning, just as he was about to leave his post, a group of thugs attacked and slashed him on the head with a machete. He told the court that he was not wearing a helmet as he had not been issued with one by the appellant. The respondent's witness, Joshua Ongere (DW 1), confirmed that the respondent was attacked while at his post of duty. He told the court that from the company records the appellant had been issued with a whistle, baton and helmet.

6. On the issue of liability both parties referred to several cases which they had cited before the subordinate court (See ***Elijah Mwangi Kanoga v Socfinaf Company Ltd*** **NRB HCCA No. 307 of 2001 (UR)**, ***Japheth Natse Ifedha v Collindale Security Company Ltd*** **[2005]eKLR** and ***Aga Khan Education Service, Kenya v Kutola Chillo Kotot*** **NRB HCCA No. 466 of 2004 [2009]eKLR**). These cases establish that the employer's duty of care at common law is, *"to take care of the safety of his employees in all the circumstances ….. so as not to expose them to unnecessary risk."* [Emphasis mine] (See ***Halsbury's Laws of England,*** **4th Ed. Vol. 16 at para. 560**). The question for consideration is whether the respondent was exposed to unnecessary risk despite the fact that he had undertaken an inherently dangerous job.

7. The Court of Appeal considered these issues in ***Mumende v Nyali Golf and Country Club*** **[1991] KLR 13**. In that case the appellant was employed by the respondent where he was provided with a rungu, torch and whistle. He had not been provided with a helmet though the trade union suggested that workers in his position should be provided with one. In the course of guarding the respondent's bar, he was attacked by thugs and seriously injured. Nyarangi JA observed that;

Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.

In deciding whether the respondent had provided sufficient protection for the appellant, Gachuhi JA, summarised the position as follows;

It is an implied term of employment that an employer will make the conditions of employment to his employee absolutely safe and will not expose his employees to any danger to avoid any negligence, but will not be responsible of the employees's own negligence in execution of such employment.…… The helmet was not, so to speak, to provide absolute protection but would minimize any injury. The employer failed to provide the appellant with the helmet and when he was attacked he was severely injured. It is submitted, and I accept it, that had the appellant been provided with a helmet, the injury he would have received would be less severe.

The tools that the appellant was provided with, ie., a rungu, a torch and a whistle were not meant to be weapons with which to fight intruders but to ward them off. A helmet would prevent an object thrown at the employee from receiving the head injury. The employer was aware of this, and in my view, it failed to what was required of it and for that reason it was negligent.

8. In this case, the respondent was injured on the head as a result of the blows struck on his head with machetes. He denied that he was issued with a helmet. DW 1 contended that according to his records the appellant was provided with a helmet which means that the appellant understood that the helmet was a necessary requirement for the job. The appellant bore the burden of establishing that fact that it issued the helmet. DW 1 did not produce any records to back the claim and the learned magistrate was entitled to draw that the appellant failed to provide the helmet. I also note that implicit in the testimony of DW 1 is the fact the appellant realised that a helmet was a necessary requirement for the job. In light of the principles set out in ***Mumende's Case*** **(Supra)**, I uphold the learned magistrate's finding on liability.

9. I now turn to the issue of quantum of damages. Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions(see ***Kigaragari v Agripina Maya Aya,*** **[1985] KLR 273.** It must also be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive.

10. According to the treatment notes produced by the plaintiff, he sustained 3 multiple cut wounds on the scalp which were stitched. The nature and extent of injuries were not disputed. The respondent proposed Kshs. 300,000/- by relying on ***James Guturu v Kamanga Warege*** **NBI HCCC No. 4133 of 1991 (UR)** where the court awarded Kshs. 150,000/- in 1997. In that case the plaintiff sustained head injuries and an injury to the left knee. The appellant proposed Kshs. 50,000/- by citing ***Roseline Kanyua v Lawrence Mbwiria & Another*** **[2006]eKLR** where the plaintiff was awarded Kshs. 50,000/- for a head injury in 2006.

11. Taking into account the nature of the injuries, the decisions cited and inflationary trends, I cannot say that the sum of Kshs. 100,000/- is excessive in the circumstances.

12. The appeal is dismissed with costs to the respondent.

DATED and **DELIVERED** at **KISUMU this 28th day of July 2016.**

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Otieno, Yogo, Ojuro & Company Advocates for the appellant.

Mr Taremwa instructed by S. M. Onyango Company Advocates for the respondent.