REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 178 OF 2011

BRINKS SECURITY LTD. …… APPELLANT

VERSUS

JAMES NYAGA MWANIKI ……..…… RESPONDENT

(Being an appeal from the judgment of the Senior Resident Magistrate's Court at Kithimani of Hon M.A.O. Opanga DM II (Prof.) in Senior Resident Magistrate Case No. 96 of 2007 dated 9th November 2011)

****

(Before B. Thuranira Jaden J)

J U D G M E N T

1. The Respondent, **James Nyaga Mwaniki** who was the Plaintiff in the lower court was at the material time working as a security guard for the Appellant, **Brinks Security Company Limited**. The Respondent sued the Appellant for damages arising from injuries sustained while the Respondent was working as a security guard under the employ of the Appellant. The Respondent contended that he suffered injuries as a result of the Appellant's negligence and/or breach of duty.
2. The Appellant in his statement of defence denied the Respondent's claim and blamed the injury on what he alleged was the Respondent's negligence.
3. During the hearing in the lower court, the Respondent testified that he was at the material time working for the Appellant as a security guard on night duty at **Kengen offices**, **Yatta.** That the said offices comprised of four blocks and his duty was to guard two of them. Another guard was assigned duties to guard the other two blocks. That at about 2.30 a.m. the Respondent was attacked by thugs and hit on the head and lost consciousness. The Appellant was taken to **Embu Provincial Hospital** where he was admitted for about one week. The Respondent blamed his employer for failure to provide him with a helmet, alarm/whistle or any boots. According to the Respondent, the helmet could have protected his head and he could have used the alarm/whistle.
4. **Dr Charles Musyoka Kasuki** (PW1) testified that he examined the Respondent. His evidence was that the Respondent had suffered head injuries and X-rays taken revealed simple fractures of the skull bones. That the Respondent also complained of lack of sense of smell. According to the doctor the fractures had healed and the sense of smell would progressively return as the same had been caused by the slight damage to the brain. The doctor charged Kshs.2,000/= for making the medical report (Exh.1) and Kshs.3,000/= for attending court and produced the receipts (Exh.2 and 3).
5. The Appellants through its supervisor, **Peter Kimanzi Nguku (DW1)** admitted during the hearing

of the defence case that the Respondent was their employee. It was the supervisor's evidence that he had three guards who included the Respondent on duty at the **Gitaru Power Station** on the material night. That there were intruders at the power station and the other two guards escaped but the Respondent had struggled with the thugs.That the Respondent was taken to hospital and after recovery he continued with his work. The supervisor testified that the company was not to blame for the injuries. He stated that the guards were provided with uniforms, boots, whistles, *rungus*, cap and sometimes helmet. He further testified that the guards were expected to be alert and not to engage the thugs.

6. After hearing the case, the trial magistrate found the Respondent 50% liable for the accident. Judgment was entered for the Respondent against the Appellant for Kshs.180,000/= General Damages, Kshs.2,000/= specials and costs.

The Appellant was aggrieved by the judgment and appealed to this court on the following grounds:-

i. **The learned Senior Resident Magistrate erred in law and in fact in holding that the Defendants were liable to the extent of 50%.**
ii. **The learned trial magistrate erred in law and in fact finding that the defendants were in any way negligent.**
iii. **The learned trial magistrate erred in law and in fact in awarding damages when no negligence had been proven.**
iv. **The learned trial magistrate erred in law and facts in awarding unjustified damages which were in any event excessive.**

7. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings.
8. The appeal was canvassed by way of written submissions which I have duly considered.
9. It is common ground that the Respondent was at the material time employed by the Respondent as a guard. It is also not disputed that the Respondent was injured by thugs while in the course of duty. The Respondent's evidence was that he was not provided with a helmet, whistle/alarm or boots. The defence witness did not deny that it did not provide the Respondent with a helmet at the material time. Indeed the supervisor's evidence is that "sometimes" helmets were provided to the guards. I am satisfied on a balance of probability that the Respondent was not supplied with a helmet.
10. The main issue for determination is what duty, if any, did the Appellant as the employer owe the Respondent as an employee? If there was such a duty, was the Appellant in breach of the same? If there was breach, what quantum of damages was reasonable in the circumstances?
11. As held by the Court of Appeal in **Mwanyule –vs- Said t/a Jomvu Total Petrol Station (2004) KLR**:-

> **"It is an implied term of the contract of employment at common law that an employee takes upon himself the risks necessarily incidental to his employment. An employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which could be prevented by taking reasonable precaution."**

12. The Respondent was employed as a watchman. The Respondent was attacked by thugs while in the course of his duty as a watchman. The injury incurred was on the head. I agree with the holding by the trial magistrate that the helmet is one of the crucial items that the Respondent ought to have been provided with. A helmet could have prevented the injury or at least reduced the severity of the same. There was therefore breach of duty by the Appellant. I am fortified in this view by the passage from **Halsbury's Laws of England 3rd Edition Vol. 28 paragraph 88**:-

> **"Where the relationship of master and servant exists the defence of** *volenti non fit injuria* **is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service a servant is not generally in a position to**

choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer."

13. Further, as stated by the Court of Appeal in **Civil Appeal No. 16 of 1989 (Mombasa) - Mumende –vs- Nyali Golf & Country Club (1991) KLR**:-

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

14. The evidence by the doctor outlining the injuries sustained by the Respondent shows that the Respondent suffered simple fractures of the skull bones which lead to a brain concussion leading to loss of the sense of smell. There was no surgery and the Respondent was expected to recover fully. The Respondent's counsel had submitted in the lower court for an award of Kshs.200,000/= as General Damages. The Respondent's counsel relied on two authorities which were over 20 years old and the injuries sustained therein were not comparable to the Respondent's injuries but which nevertheless gave the court some guidance. On the other hand, the Appellants did not refer the lower court to any authorities on quantum. None of the parties in their submissions before this court dealt with the issue of the amount of General Damages awarded. However, I have considered the Respondent's injuries and the following authorities on similar injuries:-

1. **Mumende case** (supra) where in the year 1989 the award of Kshs.80,000/= was made for a cut on the forehead, fracture of the jaw, loss of consciousness and the plaintiff could not see clearly and suffered from headaches and dizziness as a result of the injuries.
2. **John Mukura Karari –vs- Nicholas Kinyua mbui (2005) e KLR** where in a 2005 judgment, the High Court awarded Kshs.100,000/= as General Damages for multiple cuts to the head, bruises to the limbs and blunt injuries to the chest and back.

15. Taking into account that some of the authorities cited are over twenty years old, I am satisfied that the award of Kshs.180,000/= as General Damages was reasonable and this court will not interfere with the same. As held by the Court of Appeal **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727 at page 703** that:-

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**
>
> **The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

16. With the foregoing, I find no merits in the appeal and dismiss the same with costs to the Respondent.

……

B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 28th day of March 2014.

……

B. THURANIRA JADEN

JUDGE