REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 150 OF 2010

BONIFACE AGANDE AKONGO.....APPELLANT

VERSUS

ROBINSON SECURITY GUARDS LTD.....RESPONDENT

J U D G M E N T

1). The appellant herein was employed as a security guard by the respondent. On 24th November 2005 at around midnight while guarding the premises situate at Channan Jaggery with 4 others he was attacked by about 20 armed robbers. They were assaulted and he sustained the following injuries:

a. **Deep cut on the head.**
b. **Abdominal pains**
c. **pain on the neck.**

2). He was rushed to the hospital where he was treated and discharged after one week. Subsequently, he sued the respondent claiming damages as a result of the above injuries sustained during the ordeal. He attributed negligence on the respondent namely that it failed to provide him with the necessary working tools and to ensure a safe working environment.

3). The appellant proceeded to call two other witnesses who included a colleague they were together that night as well as a doctor who produced the treatment documents. PW2 attributed the injuries sustained to the lack of adequate working tools as well, namely torches, helmet and other gadgets.

4). The suit was dismissed by the trial court on the grounds that the appellant failed to establish negligence on the part of the respondent. The said dismissal led to this appeal which is premised on the following key grounds:

a. **that the learned trial magistrate erred in law by failing to critically examine and analyse what owing a duty of care to an employee by an employer entails in law.**
b. **that the respondent failed to provide the necessary working tools to the appellant.**

5). Having perused the record of appeal as well as the parties submissions, it is not contested that the appellant was not employed by the respondent despite the absence of documentary proof to that effect. Equally it is agreed by both sides that indeed robbers struck on the fateful night and injured the appellant who was on duty. What is in contention however is whether the respondent had done enough to ensure

that the appellant's risk is mitigated.

6). The respondent on its part has submitted in agreeing with the finding of the trial court that it had done all that was within its power to mitigate the injuries; that the appellant knew the risk that it entails the nature of his job and went ahead to take it anyway. The respondent relied on legal maxim of ***volenti non fit injuria.*** It argued therefore that no negligence was proved against it.

7). The appellant on the other hand argues that by failing to provide helmet, torches and other gadgets, the respondent was indeed negligent as the said items formed part of the working tools of the appellant. He further contends that the respondent owed him a duty of care to ensure that he worked in a safe environment.

8). I have perused the proceedings at the trial court carefully. The respondent did not offer any evidence to controvert the appellant's who told the court that:

> **"I blame the company for the injuries. It did not take care of our safety. No protective gear like Radio call, whistle or gun were supplied to us. It was only a club. We were guarding an area of about 3 acres. The industry was under construction. About 10 guards the place. There was no electricity. I was not given a torch".**

On cross examination the appellant said:

> **"I don't know how to use a gun. I know from the beginning that I required a torch for my work. I did not ask for it. I did not ask for the other items either. I personally felt that the items were necessary for my work. I knew that the job was risky. On other occasions I worked at night. I was protecting property as assigned by my employer. I knew that thugs could attack. I applied for the work. The company ought to have provided the protective gear. I did not ask for the items. It was upto them to provide the items".**

9). There is no evidence by the respondent to deny that the appellant was not provided with the working tools. It is therefore presumed that the only item given to the appellant was a rungu. The respondent's line of argument is that the appellant did not ask for those items. I find this to be extremely laughable. These are tools of trade of a watchman. They ought to be provided as a matter of course. Infact they do not need to request for them. No record was produced to that effect. Some of the common items which an ordinary watchman expects from his employer are a club popularly known as "rungu", a torch, panga or knife, whistle, radio call wherever available, and in most cases a back up vehicle as well as an helmet. These items may not of necessity stop thugs from invading a premises but they are ordinarily expected to be a deterrent. It is not therefore a sound argument that one needs to ask for the same.

10). Equally, it is common knowledge that this work entails known and unknown risks. Robbers or thieves do not announce in advance that they will attack a premise. Consequently, it is not expected that a watchman shall not be ready, but at least they are expected to have the usual rudimentary protective gadgets.

11). In this regard therefore it was incumbent upon the respondent to have provided the appellant with the necessary basic working items. The appellant testified that the place had no electricity, a fact which was not controverted. However, he said that he did not have a torch and even those with torches did not have batteries. Again this position was not challenged. I find therefore that a torch is part of the critical items expected to have been provided by the respondent.

12). As much as the appellant exposed himself to the expected danger, the respondent had a duty of care to mitigate this danger. I have perused the authorities relied on by the parties herein. **Mumende -VS- Nyali Golf & Country Club [1991] KLR at Page 20** the Court of Appeal had this to say:

> **"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 measure of protection".

13). The reasonable minimum measure of protection is what I have stated earlier on. All that the respondent ought to prove is that in the circumstances in which the appellant worked it has fulfilled the necessary requirements to ensure his safety in the event of any eventual risk. It is truly possible that these working tools may not help much in some attacks but that does not mean that they ought not to be available. The adage "prevention is better than cure" is clearly applicable here.

14). Consequently, I do find that the trial court failed to evaluate this evidence despite the overwhelming authorities available. On the question of quantum I find that given the nature of the injuries sustained by the appellant and the authorities relied on an award of Kshs. 251,500/= is reasonable in the circumstances and I need not interfere with the same.

The upshot thereof is that the appeal is allowed as follows:

a. **Judgment of the lower court in respect to liability is set aside.**
b. **The award of Kshs. 251,500/= is upheld and order that the interest shall be paid on the above sum from the date of judgment in the lower court.**
c. **Costs of this appeal to the appellant.**
d. **This judgment shall apply to the Kisumu HCCA No. 151 of 2010 Mutatis Mutantis.**

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

H.K. CHEMITEI
JUDGE