No. 2779

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE APPEAL NO. 230 OF 2005

SECURICOR SECURITY SERVICES LTD.....APPELLANT

-VERSUS-

JOYCE KWAMBOKA ONG'ONG'A Suing as the Personal and Legal Representative of FRANCIS ONG'ONG'A MOGIRE (DECEASED).....RESPONDENT

JUDGMENT

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Kisii, Hon. C. G. Mbogo

in Kisii CMCC No. 547 of 2007 delivered on the 8th day of September, 2005

According to the amended plaint lodged in the Principal Magistrate's Court at Kisii on 14th May, 2004 by **Joyce Kwamboka Ong'ong'a**, hereinafter ***"the respondent"*** against Securicor Security Services Ltd, hereinafter ***"the appellant",*** the respondent prayed for special and general damages, compensation under the **Workmen's Compensation Act**, costs and interest.

The respondent alleged that at all material times, **Francis Ong'ong'a Mogire**, deceased who was her husband and for whose estate she had mounted the suit as a personal and legal representative was an employee of the appellant as a security guard. On that basis it was the duty of the appellant towards the deceased to take all reasonable precautions for his safety while he was engaged upon his said work, not to expose him to risk of damage or injury which it knew or ought to have known, provide and maintain adequate and suitable measures to enable him to carry out his work in safety and to provide a safe and proper system of working.

It would appear that the appellant failed in this endeavours according to the respondent for on 16th May, 1998, the deceased while in the course of his employment aforesaid at the appellant's customer's premises was attacked by thugs in consequence whereof he sustained fatal injuries and passed on. According to the respondent that death could have been avoided but for the breach of statutory duty as well as common law negligence by the appellant towards the deceased. The respondent proceeded to give the particulars of breach of statutory duty and common law negligence by the appellant towards the deceased.

The deceased was at the time of his death aged 52 years, in good health and lived a happy and vigorous life with his family which apparently consisted of only his wife, the respondent. The deceased was the sole bread winner for the family but for his death; he would have continued to provide for the family. As a result of his death, his estate had suffered great loss and damage. In terms of special damages, the respondent claimed a total of Kshs.8,150/= on account of a police abstract, death certificate and costs of obtaining a grant of letters of administration ***ad colligenda Bona***.

The appellant denied the respondent's claim vide a statement of defence filed on 14th June, 2004. It denied existence of contract of employment between it and the deceased and that it owed the deceased, any statutory, contractual or common law duty. It denied that the deceased was on duty on 16th May, 1998 and or that he was attacked by thugs. It averred that the deceased was provided with a spotlight, club, whistle and other suitable protective clothing as the circumstances of the case demanded. In the alternative, the appellant pleaded that if the deceased was attacked by thugs, then the same was solely and substantially caused by the negligence and or breach of duty on the part of the deceased. The appellant proceeded to enumerate the particulars of negligence it attributed to the deceased. It also contended that the attack by the thugs could not in any event have been controlled by it and the same was a normal risk expected by the deceased in the nature of work he assumed voluntarily and no more duty was bestowed on the appellant and as such the attack could not be avoided and was unforeseen in the circumstances especially regarding the magnititude and brutality of the tugs. Regarding the claim under **Workmen's Compensation Act**, the appellant pleaded that the same was far fetched and had in any event been settled. Claims of the respondent under the **Law Reform Act** and **Fatal Accidents Act** were similarly denied.

The case was heard by **C.G. Mbogo**, the then Senior Principal Magistrate, Kisii Law Courts. The respondent's evidence was that on 17th May, 1998 whilst at home, a person came from Nairobi where the deceased used to work with the appellant as a Security Guard and informed her that the deceased had been killed at his place of work. She left for Nairobi immediately and confirmed the death. The mortuary bill at **Chiromo** was paid by the appellant. She tendered in evidence the certificate of death. The deceased was aged 52 years at the time and in good health. She had been paid Kshs.240,000/= under the Workmen's Compensation Act though she ought to have received Kshs.330,240/=. The deceased used to earn Kshs.6,000/= per month and tendered in evidence his pay slip. The deceased left 5 children behind. The eldest was aged 32 years old. The youngest was aged 16 years. The deceased used to give her Kshs.3,000/= from time to time. She was aged 50 years old and had obtained a limited grant for purposes of filing the suit. Her evidence in cross-examination was that she had nothing to show that the children she had mentioned were hers. She added that the appellant did not explain to her why it paid her Kshs.240,000 instead of Kshs.330,240/=. That the deceased used to send her Kshs.3,000/= three times a year but she did not know when the deceased would have retired. Re-examined, she disclosed that the deceased used to send her Kshs.9,000/= every after three months.

When it came to the appellant to offer evidence in support of its defence, it elected not to offer any such evidence. Indeed its counsel indicated that he would not call any witness.

Parties thereafter elected to file written submissions. In a reserved judgment delivered on 8th September, 2005, the Learned Magistrate found for the respondent holding thus:

"…I have read the authorities cited to me. I do agree with the plaintiff's counsel that compensation paid under section 6 of the Workmen's Compensation Act is not be deducted as was held in the case of HALL VRS OLE MAIYA (E 1983) KLR 105 at page 109.
I do note that the plaintiff was aged 52 years at the time of death. I have taken judicial notice of the fact that workers in Kenya generally retire upon attaining the age of 55 years. I will therefore apply a multiplier of 3. Thus the damages for loss of dependency will be Kshs.5000 X 12 X 2/3 amounting to Kshs.120,000/-

A copy of the Workmen's Compensation marked Ex No. 3 whows that the plaintiff was to be paid Kshs.330,240. However, a copy of the cheque produced as Ex. No. 2 shows that what she received was Kshs.240,000/-. There is therefore, an outstanding amount of Kshs.90,240/- but since the plaintiff has asked fo re Kshs.60,000/-, she gets no more that Kshs.60,000/-. As for pain and suffering Kshs.10,000/- is reasonable. Consequently, there shall be judgment for the plaintiff as hereunder.

a.	***Loss of Expectation of life***	***Kshs.100,000.00***
b.	***Pain and suffering***	***10,000.00***
c.	***Loss of Dependency***	***12,000.00***
d.	***Compensation under the Workmen's Compensation Act***	***60,000.00***
		182,000.00
	Less 25%	***45,500.00***
		137,000.00

Costs and interest of the suit are provided for…".

The judgment and decree aforesaid triggered this appeal. In a memorandum of appeal dated 21st September and filed in court on 22nd September, 2005, the appellant complains as follows:

"…1. The learned trial Magistrate erred in law and fact in basing his finding on irrelevant matters.

2. The learned trial Magistrate failed to deduct payments hitherto made to the Respondent under the Workmen Compensation Act notwithstanding the legal Principals requiring such deductions from any award of damages to the Respondent under common law.

3. The learned trial Magistrate erred on all points of law in as far as award of damages is concerned…".

When the appeal came up for directions on 25th May, 2010 before **Musinga J**, parties agreed amongst other directions that the appeal be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them.

From the record of appeal, it is apparent that the issue of liability had been agreed by consent of the parties at 25% as against the respondent and 75% as against the appellant. So that at the end of the day, what the trial court was concerned with was assessment of damages. It is also common ground that the appellant did not tender any evidence in rebuttal to the respondent's evidence and in support of its defence. The appellant has however attempted to introduce such evidence through its written submissions which is inadmissible as it amounts to evidence from the bar.

With regard to the award under the **Workmen's Compensation Act**, now repealed, the respondent was awarded Kshs.60,000/= by the learned Magistrate. This was on the basis of the respondent's testimony and exhibits tendered. Ofcourse the respondent admitted that she had previously been paid Kshs.240,000/= as compensation under the said **Act**. However, the learned Magistrate justified the subsequent award on the basis that the workmen's compensation form presented to court showed that the respondent was entitled to be paid Kshs.330,240/=. However, she ended up being paid Kshs.240,000/=. There was need therefore for someone to explain the discrepancy. That explanation could only have come from the appellant. Unfortunately, the appellant did not offer that evidence. Confronted with such situation what was the learned Magistrate to do? He had to act on the unchallenged and unrebutted evidence before him. The appellant attempted to give the explanation in its written submissions before the trial court. It has done the same before this court. However, submissions written or otherwise are no substitute for evidence. I do agree that the **Workmen's Compensation Act** provides for the mode of compensation of the amount payable. According to the appellant, section 6 thereof was invoked by the labour office in assessing the amount payable to the deceased to the tune of Kshs.240,000/=. That is all fine. However, where is the evidence to that effect. Courts act on evidence in arriving at a decision. They do not act on suppositions, speculation or assumptions. Yet this it is what the appellant expected the trial court to do.

The appellant claims that it is trite law that payment made under **Workmen's Compensation Act** ought to be deducted from the sum awarded to the respondent. But in the instant case the learned trial Magistrate neglected to subtract the amount earlier paid thereby conferring upon the respondent cumulative sum in compensation in excess of what would be lawfully due. That may well be so. Indeed the learned Magistrate addressed his mind on the issue and the authority of **Hall V Maiya (1983) KLR 105**. But I think in holding that ***"…the compensation paid under section 6 of the Workmen's Compensation Act is not to be deducted as was held in the case of HALL VRS OLE MAIYA (1983) KLR 105 at page 109…",*** he clearly misapprehended the purport of that authority. The Court of Appeal judges in that decision were all in agreement that:***"…section 25 of the Act allowed him to do so (file suit) provided he established that the injury was caused by personal negligence or willful act of his employer, and if he succeeded the award under the Act (Workmen) would be taken into account when computing the damages to be awarded to him in the suit…".*** Again in the case of **Ngare V Kwale Rashid Ngare saw mils (1991) 2 KAR 280**, the court of appeal held ***"… the appellant admittedly received Kshs.21,384/- (not Kshs.22,770/-) under the Workmen's Compensation Act, Cap 236, which would have been deducted from any damages recovered by the appellant…"***. Indeed even section 6 of the same act is categorical that ***"… if the workman leaves any dependants wholly dependent on his earnings, the amount of compensation shall be a sum equal to sixty months' earnings or thirty-five thousand shillings whichever is the greater; but where in respect of the same accident compensation has been paid under the provisions of section 7 or section 8 there shall be deducted from the sum payable under this paragraph any sums so paid as compensation…'.*** From all the foregoing, it is clear that the learned Magistrate should have deducted the sum of Kshs.240,000//- from the awards he made under the **Law Reform Act** and **Fatal Accident Act**. Thus in failing to do so, was an error on the part of the learned Magistrate which if not corrected will occasion injustice on the appellant whilst amounting to unjust enrichment on the part of the respondent. There was no basis for the learned Magistrate to hold that

the aforesaid amount was not deductable. To my mind, the combined effect of sections 6, 7 and 8 of the **Workmen's Compensation Act** then in force was that if compensation is made under the **Act**, the same shall be deducted from subsequent compensation.

With regard to the awards under loss of expectation of life, I do not think the award of Kshs.100,000/- can be faulted nor Kshs.10,000/- for pain suffering and loss of amenities. There was however, a problem with calculation with regard to loss of dependency. The amount of living expenses is conventionally assessed at no more than 1/3 of the net earnings. That principle should apply in assessing earnings for ***"lost years"***. This is with exception of course of cases where the deceased expended the whole or part of his net earnings on living expenses for the joint benefit of himself and his dependant, in which case, a different principle would apply. See **Mohamed V Salim & 4 others (1990) KLR 356.** Yet in this case, the learned Magistrate chose to apply the ration of 2/3 for no apparent reason or justification. The respondent admitted that she was the only dependant as per her pleadings and testimony. The appropriate dependency ratio ought to have been 1/3. From the foregoing loss of dependency should have worked out thus 3,000 X 12 X 3 X 1/3= 36,000/-. This amount again by conventional practice should have been factored into the amount awarded for loss of expectation of life.

In the upshot, if the learned Magistrate had addressed his mind to all the foregoing, the respondent's claim would have worked out as follows:-

- **Loss of expectation of life** **100,000.00**
- **And loss of dependency** **36,000.00**
- **Pain suffering** **10,000.00**

Sub-total **146,000.00**

- **Less the amount of loss of expectation of life** **100,000.00**

46,000.00

- **Less 25%** **11,500.00**
- **Add unpaid claim under the Workmen's Compensation Act** **60,000.00**

71,500.00

- **Less amount already paid to the respondent Under Workmen's Compensation Act** **240,000.00**

Grand total **-(168,500.00)**

It is clear from the foregoing that the respondent was not entitled to any payment from the appellant. Accordingly, the learned Magistrate ought to have dismissed the suit.

On that basis, the appeal is deserved. It is allowed with the consequence that the judgment and decree of the learned Magistrate is set aside. In substitution, I order that the respondent's suit in the subordinate court be and is hereby dismissed with costs. The appellant shall also have costs of this appeal.

Judgment dated, signed and **delivered** at Kisii this 20th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE