IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 426 OF 2006

STATEHOUSEGIRLSHIGH SCHOOL…....……..1ST APPELLANT

THE BOARD OF GOVERNORS, STATE

HOUSEGIRLSHIGH SCHOOL….……2ND APPELLANT

VERSUS

EVANS MOSE……...…….……..RESPONDENT

(Appeal from the judgment of Honourable M.K. Kiema, Resident Magistrate on 22nd June, 2006 in CMCC No.13436 of 2004)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Magistrate's Court at Nairobi by Evans Mose (hereinafter referred to as the respondent). He had sued State House Girls High School and the Board of Governors of State House Girls High School, (hereinafter referred to as the 1st and 2nd appellants). The respondent had sued for general and special damages for personal injuries suffered by him whilst working as a security guard in the appellants' school compound. The respondent claimed that he suffered these injuries as a result of negligence and or breach of terms of employment on the part of the appellants who were his employers.

2. The appellants filed a joint defence in which they denied the respondent's claim. In particular, the appellants denied having been negligent or in breach of any terms of employment or breach of common law duty of care. The appellants maintained that they provided a safe working environment and took all reasonable precaution for the safety of its workers including the respondent. The appellant contended that the respondent suffered injury as a result of occupational hazards. In the alternative, the appellants maintained that the accident was caused by negligence on the part of the respondent.

3. During the trial in the lower court, the respondent and Dr. Kiama Wangai testified in support of the respondent's case. The respondent explained that he was employed by the appellants as a watchman in the year 1995. On 28th December, 2003, he was on duty patrolling the Teachers' Quarters within the appellant's premises. At around 2.00 a.m. the respondent was attacked by 3 people. The respondent was injured and had to be taken to the hospital. The respondent blamed the appellant for his injuries contending that the compound he was assigned to guard was big, and that he was not provided with any dogs or helmets which would have assisted him in the event of an attack. The respondent produced a card from Kenyatta National Hospital where he was attended. Under cross-examination the

respondent explained that although there were 6 watchmen guarding the school, he was alone at that particular area when he was attacked.

4. Dr. Kiama Wangai who is a medical practitioner examined the respondent and prepared a report on the 22nd November, 2004. Dr. Wangai noted that the respondent sustained the following injuries. A cut wound on the scalp, fractured scalp, and multiple soft tissue injuries. As a result of the injuries the respondent suffered amnesia and was at risk of developing epilepsy.

5. During the hearing, the defence offered to call no evidence. The respondent filed submissions in which the court was urged to find the appellants liable and award general damages of Kshs.500,000/=. The appellants also filed written submissions in which the court was urged to find the appellants not liable for criminal acts committed by trespassers. The appellants relied on the following authorities:

· ***David Ngotho Mugunga vs Mugumoini Estate HCCC.No.2366 of 1989***.

· ***Eastern Produce (K) Ltd vs Christopher Atiando Osiro HCCA.No.43 of 2000.***

· ***Dismas Ouma Didongo vs Tudor Security Services HCCC No.75(RD) 1967***.

The appellants urged the court to dismiss the respondent's case.

6. In his judgment the trial magistrate found the appellants 100% to blame. He awarded the respondents general damages of Kshs.300,000/= and special damages of Kshs.2000/=.

7. Being aggrieved by that judgment, the appellants have lodged this appeal citing 7 grounds as follows:

(i) That the learned trial magistrate erred in law and in fact by finding the defendant liable for acts that were committed by criminals.

(ii) That the learned trial magistrate erred in law and fact by awarding general damages where as the plaintiff had not proved his case as required of standard.

(iii) That the learned trial magistrate erred in law and in fact in not considering and or ignoring the submissions of the defendants.

(iv) That the learned trial magistrate erred in law and fact by not considering the defence filed and specifically paragraph 8 of the defence.

(v) That the learned trial magistrate erred in law and fact in not considering the evidence before him to the fact that the defendant had been provided with protective devices and extra guards.

(vi) That the learned trial magistrate erred in law and fact by awarding general damages which were inordinately excessive.

(vii) That the learned trial magistrate misdirected himself on all points of law.

8. Following an agreement by the parties, written submissions were duly filed. This court is now invited to determine the appeal based on those submissions. For the appellants, it was argued that the trial magistrate erred in finding the appellants liable for criminal acts committed by thugs. It was noted that the respondent voluntarily took up the job of a guard and ought to have known the inherent danger of his assignment. It was noted that the possibility of the respondent being attacked by thugs was real, and the trial magistrate therefore erred by not finding that the case before him was one of *volenti non fit injuria*. It was further submitted that negligence on the part of the appellants, was not established as the respondent conceded that he was provided with protective devices such as a bow, arrows, torch and whistle. The

respondent also conceded that there were other guards guarding the appellants' premises on the fateful night. It was submitted that the trial magistrate failed to consider the submissions that were filed on behalf of the appellants. It was further maintained that the general damages awarded to the respondent were excessive considering the injuries sustained.

9. For the respondent it was submitted that the evidence before the trial magistrate was clear that the respondent was injured during the cause of his employment, and that the respondent was not careless in the performance of his work. It was noted that the respondent did not call any witness to testify on their behalf, although they had an opportunity to do so. Counsel for the respondent distinguished the case of ***David Ngotho Mugunga vs Mugumoini Estate*** (Supra) on the ground that in that case, the court found that the respondent had been provided with the requisite protective devices. He pointed out that in this case, the respondent was never provided with any helmet. It was further submitted that the appellants failed to prove the allegation of negligence which it alleged against the respondent. It was submitted that in the absence of any other evidence the trial magistrate was right in relying on the only evidence on record to arrive at his decision.

10. As regards the plea of *volenti non fit injuria*, it was submitted that there was no evidence that the respondent acted freely and voluntarily, or that he had full and complete knowledge of the risk that he is alleged to have assumed. Nor was there evidence that the risk was one for which the respondent and not the appellants undertook responsibility. Reference was made to ***Mumende vs Nyali Golf and Country Club [1991] KLR 13,*** where the court of Appeal observed that just because an employee agrees to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum measures of protection. Further, the court was urged that the plea of *volenti non fit injuria* should be applied very sparingly in cases of an employer and employee relationship.

11. On the issue of quantum, it was submitted that the award made by the trial magistrate of Kshs.300,000/= was not excessive bearing in mind the injuries which the respondent sustained. The court was therefore urged not to interfere with the award.

12. I have carefully reconsidered and evaluated all the evidence which was adduced before the lower court. I have also considered the judgment of the lower court, the memorandum of appeal, the submissions filed and the authorities cited. The first thing I have noted is that the finding of the trial magistrate on liability appears to have been based only on the fact that the defendant did not call any evidence. This was a clear misdirection on the part of the trial magistrate. Section 107 and 108 of the Evidence Act states as follows:

"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

13. In this case the burden of proof was clearly upon the respondent who was alleging negligence, to establish such negligence on the part of the appellants. The fact that the appellants opted to call no evidence did not make that burden any lighter. It was necessary for the trial magistrate to examine the evidence adduced before him with a view to establishing whether the respondent had established breach of duty of care or common law duty or terms of the respondent's employment. This, the trial magistrate failed to do.

14. The respondent's evidence was simply that he was attacked by 3 people whilst patrolling the appellants' compound. The respondent claimed that a dog would have assisted in preventing the kind of attack which he suffered. There was however, no evidence at all that the respondent ever requested for a

dog. The respondent also complained that he was not provided with a helmet and that although he was provided with a bow and arrow, he was not trained on how to use these implements. Nonetheless, there was no evidence that the respondent had complained about not being trained on how to use the bows and arrows. His allegation that he was not trained in this regard, cannot therefore be taken seriously.

15. As regards the helmet, the respondent's evidence that he was not provided with any helmet was not contradicted as no evidence was adduced on behalf of the appellant. Indeed, the fact that the respondent suffered injuries on the head, confirms his allegation that he had no helmet. Although it is evident that the work of a night watchman is inherently dangerous, it was the duty of the appellant to provide the respondent with reasonable protection to minimize the danger to which the respondent was exposed to as a night watchman. I am fortified in this finding by the decision in the case of ***Mumende vs Nyali Golf and Country Club [1991] KLR 13***, where the Court of Appeal held that just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or an excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection. The Court of Appeal found that failure to provide a plaintiff, who was employed as a night watchman with a helmet, was evidence of negligence.

16. Although the appellants pleaded negligence on the part of the respondent the appellants offered no evidence in support of their averment that the respondent was negligent. Therefore, the appellants have to bear full responsibility for the respondent's injuries.

17. I find that notwithstanding the fact that the trial magistrate misdirected himself on the burden of proof. There was no prejudice caused to the appellant. The trial magistrate would have still come to the same conclusion, that the appellant was liable to the respondent, had he properly directed himself on the burden of proof.

18. As regards the issue of quantum, Dr. Wangai's report revealed that the respondent suffered a cut wound on the scalp, fractured skull and multiple soft tissue injuries. Dr. Wangai was of the opinion that the respondent was at risk of developing epilepsy as a result of the injuries. In awarding the sum of Kshs.300,000/= as general damages, the trial magistrate took into account the 3 authorities which were cited by the respondent's counsel. The appellants did not refer either this court or the trial court to any awards of comparable injuries. Therefore, the appellants' allegations that the award made to the respondent was excessive, was not substantiated.

19. As was held in ***Shabani vs City Council of Nairobi [1985] KLR 516***, as an appellate court, this court can only disturb an award made by the trial court where it is established either that the award was so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or misapprehension of the evidence. No such circumstances were demonstrated before this court to justify this court interfering with the award made by the trial magistrate.

20. For the above reasons, I come to the conclusion that this appeal must fail. It is accordingly dismissed with costs. Those shall be the orders of this court.

Dated and delivered this 28th day of October, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Kisya for the appellants

Advocate for the respondent absent

B. Kosgei - Court clerk