REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 466 of 2004

THE AGA KHAN EDUCATION

SERVICE, KENYA……..……....APPELLANT

VERSUS

KUTOLA CHILLO KOTOT……..RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Courts at Milimani, by Kutola Chillo Kotot hereinafter referred to as the respondent, against The Aga Khan Education Service, Kenya hereinafter referred to as the appellant. The respondent who claimed to be an employee of the appellant sued the appellant for general damages for personal injuries suffered by him during the cause of his employment. The respondent maintained that he suffered the injuries as a result of the appellant's negligence and/or breach of contract or breach of statutory duty.

2. The appellant filed a defence to the respondent's claim, denying the respondent's claim and all particulars of negligence attributed to it. In the alternative the appellant maintained that if the respondent suffered injuries then the same was caused or substantially contributed to by the respondent's own negligence. The appellant claimed that it took all reasonable precaution and care to ensure the safety of its workers, including providing the respondent with all reasonable implements for his protection, and providing and maintaining a safe system of work. The appellant further contended that the incident in question was caused by acts of third parties, who were neither agents nor servants, nor employees of the appellant, and for whose activities the appellant is not responsible.

3. During the hearing of the suit, the respondent testified that he was employed by the appellant as a security guard. On the material night he was assigned to guard the Aga Khan High School. He was in the company of another employee called Johnson, when a gang of ten people entered the premises through the fence and attacked them. The respondent confronted the thugs but was overpowered, hit on the forehead, his back and right hand and was tied up. Later the Police came and untied him.

4. The respondent testified that as a result of his injuries, his right thumb lost sensitivity. The left shoulder and the ribs were at the time of testifying still aching, while the legs were aching and swelling. His forehead had also to be stitched. The respondent produced a medical report prepared by one Dr. Kuria. He also produced a P3 form and another report prepared by Dr. Ashwain Madhiwala.

5. Under cross examination, the respondent stated that he has been a security guard for 30 years, but had never been attacked before, although he knew the danger associated with the job. The respondent conceded that there was nothing the appellant could have done to avoid the attack. When re-examined, the respondent claimed that there were no security lights in the school, that the security in the school was lax and poor, and that there was no alarm.

6. The appellant testified through Afrab Rahimtulla Premji, who is the school's administrator. The witness stated that he had been working at the school for 19 years. He maintained that the school had adequate lighting and proper fencing. He conceded that the respondent was a watchman at the school and had sufficient experience.

7. Both counsel filed written submissions in the lower Court, each urging the Court to find in favour of his client. For the respondent it was submitted that the appellant did not provide a safe system of work. Counsel for the respondent urged the Court to find the appellant 100% liable to the respondent. Counsel for the respondent urged the Court to award

the respondent general damages of Kshs.120,000/= for pain and suffering.

8. For the appellant it was submitted that assuming that the respondent was employed by the appellant as a night security guard, the respondent took the job knowing and appreciating the risks and dangers attached thereto. Counsel for the appellant relied on Halsbury's Laws of England 3rd edition Vol. 28 paragraph 87 & 88, which states as follows:

"Where a plaintiff relies on the breach of a duty of care owed by the defendant to him, it is a good defence that the plaintiff consented to that breach of duty or knowing of it voluntarily incurred the whole risk entailed by it. In order to establish the defence the plaintiff must be shown not only to have perceived the existence of danger, for this alone would be insufficient, but also to have appreciated it fully and voluntarily accepted the risk."

9. Counsel maintained that in this case the respondent appreciated the danger and was warned of the risk which was beyond the control of the appellant. Counsel for the appellant further relied on the case of *David Ngotho vs. Mugomoini Estate Nrb HCC 236 of 1999* wherein Justice A.B. Shah (as he then was) stated:

"*Any watchman who takes such a job does take the risk of being attacked by the robbers and being hurt, there can be no doubt about it. The employer in any view cannot be liable for the criminal acts committed by trespassers or thieves or robbers which result in injuries to the employee."*

10. Counsel relied on the maxim of *volenti non fit injuria,* arguing that the respondent cannot complain of injury, having taken upon himself a task which was inherently dangerous. Counsel for the appellant maintained that the respondent did not demonstrate in what way the appellant was negligent. Counsel submitted that to construe the duty of care owed to a watchman such as to include keeping off thieves would be overstretching and clearly misconstruing the duty of care. Counsel for the appellant further submitted that the respondent failed to take care of his own safety by confronting the thugs. He could not therefore blame the appellant. Counsel maintained that there was adequate security in the compound, given that the compound was fenced and that there was adequate light.

11. With regard to quantum, counsel for the appellant maintained that the plaintiff's injuries were minor, and an award of Kshs.60,000/= would be adequate. Counsel however urged the Court to dismiss the respondent's suit maintaining that the appellant was not liable.

12. In her judgment, the trial Magistrate found that the respondent suffered injuries during the cause of his duties as he attempted to intervene when the thugs broke in. She found the appellant 100% liable to the respondent. Relying on the medical reports prepared by Dr. Kuria Kamau and Dr. Ashwain Madhiwala, she awarded the respondent general damages of Kshs.80,000/= together with costs and interest.

13. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:

(i) That the learned Senior Resident Magistrate erred in both law and fact for failing to take into consideration the whole evidence put before the court in reaching at her judgment.

(ii) That the learned senior resident magistrate erred in both law and fact in failing to appreciate the full extent of the doctrine of *volenti non fit injuria* in the circumstances of the case.

(iii) That the learned Senior Resident Magistrate erred in both law and fact in basing her findings on liability solely on the ground that the plaintiff was injured while in the course of his duty.

(iv) That the learned Senior Resident Magistrate erred in both law and fact in finding the appellant liable for the criminal acts of trespassers.

(v) That the learned Senior Resident Magistrate erred in both law and fact in misinterpreting the duty of care in the circumstances of this case and misdirected her mind in assessing liability of the parties herein.

(vi) Other grounds and reasons to be adduced at the hearing hereof.

14. Mr. Rimui who argued the appeal in favour of the appellant, submitted that the trial Magistrate failed to properly interpret the duty of care owed by the appellant to the respondent. Mr. Rimui contended that the respondent's suit ought to have been dismissed, because the respondent did not establish any of the particulars of negligence which were alleged against the appellant. Counsel submitted that the respondent as a watchman knew of the dangers of his job, and conceded that there was nothing that the appellant could have done to avoid the attack. Counsel argued that no negligence or blame could be attributed to the appellant. Counsel urged the Court to reject the respondent's attempts to blame the appellant

for poor security light or lack of an alarm, as these were not among the particulars of negligence pleaded against the appellant. It was maintained that in any case, the incident occurred at 6.15 pm. Moreover, the appellant's witness did testify that there was sufficient light in the school.

15. Counsel for the appellant further submitted that the trial Magistrate wrongly shifted the burden of proof to the appellant. Counsel contended that the respondent having conceded that he was working for the Aga Khan High School, the appellant's defence that it had been wrongly sued ought to have been upheld.

16. In support of his submissions counsel for the appellant relied on the following authorities:

(a) Mwanyule vs. Said t/a Jomvu Total Service Station (2004) I KLR 47

(b) David Muganga vs. Mugumoini Estate (unreported) 2366 0f 1989

(c) Associated Battery Manufacturers E.A. Limited vs. Julius Mutunga HCCA.No.452 of 1999

(d) Eastern Produce Kenya Ltd vs. Christopher Atiando Osiro HCCA.N (Edoret) No. 43 of 2001

17. Mrs. Njiru who appeared for the respondent fully supported the judgment of the lower Court. She submitted that there was evidence showing that the security provided by the appellant was not adequate. She maintained that the duty of care on the appellant was provision of minimum reasonable measures of protection for the respondent, failure of which was a breach of duty on the part of the appellant.

18. Mrs. Njiru relied on the case of *John Mukara Karari vs. Nicholas Kinyua Ngui HCCA No. 254 of 1997*. Mrs. Njiru argued that the Aga Khan High School was a learning institution, and if the appellant did not own the school it only needed to provide the appropriate evidence. She maintained that the High School was not an autonomous body. She therefore urged the Court to dismiss the appeal.

19. In response to Mrs. Njiru's submissions Mr. Rimui urged the Court to distinguish the case of John Mukara Karari on the grounds that, in that case, the failure to provide a helmet was clear evidence of negligence, whereas in this case, no such failure was established. Mr. Rimui maintained that there was no requirement in law for the appellant to provide electrical fencing. Mr. Rimui further submitted that the burden of proof was upon the respondent and not the appellant.

20. I have carefully reconsidered and evaluated the evidence which was adduced in the lower Court, as I am expected to do in this first appeal. I have also taken into consideration the grounds of appeal, the submissions made by counsel and the authorities which were cited. In his plaint, the respondent alleges that he was injured as a result of the appellant's negligence and/or breach of contract, or breach of statutory duty.

21. The particulars of the alleged negligence and/or breach were given as follows:

(a) Failing to take any or any adequate precautions for the safety of the plaintiff while he was engaged on the said work.

(b) Failing to provide a safe system of work

(c) Exposing the plaintiff to danger

(d) Failing to provide the plaintiff with safe and/or adequate gear and equipment for work

(e) Failing to warn the plaintiff of the danger likely to arise as a result of the work system.

22. In his evidence in chief, the respondent did not allege any fault on the part of the appellant, but claimed that he was simply overpowered by the thugs. During cross-examination, the respondent in fact conceded that there was nothing that the appellant could have done to avoid the attack. It was only during re-examination that the respondent attempted to lay blame on the appellant, when he maintained that there were no security lights or alarm and that the security was poor.

23. In his judgment the trial Magistrate did not make any clear finding of negligence or breach of statutory duty or contract on the part of the appellant. The trial Magistrate appears to have found against the appellant, because of the appellant's inability to establish negligence on the part of the respondent. However, the burden of proof was upon the respondent to establish that the injuries that he suffered were caused by the appellant's negligence and/or breach of statutory duty. While it is evident that the respondent suffered injuries, the evidence adduced by the respondent fell short of proving any negligence or breach of contract/statutory duty. Nor has it been established that the respondent's injuries

were caused by any negligence on the part of the appellant.

24. The allegation that there were no security lights or alarm was never pleaded in the particulars given in the plaint. Moreover, the allegation did not form the backbone of the respondent's evidence but was made as a mere afterthought. In the circumstances, there was no justification for the rejection of the evidence of the appellant's witness that there was adequate lighting and proper fencing. Indeed the respondent did concede that there was nothing that the appellant could have done to avoid the incident, but that he (i.e. respondent) was simply overpowered by the thugs.

25. In paragraph 2 of the defence the appellant did deny paragraph 3 and 4 of the amended plaint, thereby laying the burden upon the respondent to establish that he was indeed employed by the appellant. In his evidence the respondent stated that he was employed by the appellant and was assigned to guard the Aga Khan High School. The respondent did not however, produce anything to confirm his oral assertions.

26. Counsel for the respondent submitted that the Aga Khan High School was not an autonomous institution, and that the appellant only needed to adduce evidence to show that it did not own the school. However, it was for the respondent to prove his allegation that Aga Khan High School were premises of the appellant. The appellant was not under any obligation to offer any evidence to advance the respondent's case. Further if the respondent required any information that was solely in the possession of the appellant, then appropriate information ought to have been obtained through discovery of documents.

27. I do note further that medical reports prepared by Dr. Kuria and Dr. Madhiwala, which were relied upon by the respondent were produced in evidence irregularly. This is because none of the doctors was called to testify nor were the documents produced by consent. While the Court has no reason to doubt the respondent's evidence that he was examined by these doctors, the Court cannot accept the reports as evidence of the doctor's findings without the doctors being called to produce the documents.

28. For the above reasons, I find that the trial Magistrate was wrong in finding the appellant liable. Accordingly, this appeal must succeed. I do therefore allow the appeal, set aside the judgment of lower Court and substitute thereof an order dismissing the respondent's suit.

Dated and delivered this 27th day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mr. Rimui for the appellant

Mrs. Njiru for the respondent