REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 20 of 2004

SECUREX AGENCIES (K) LIMITED.....APPELLANT

VERSUS

BERNARD OCHIENG OLUTE.....RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi by Bernard Ochieng Olute, (hereinafter referred to as the respondent), against Securex Agencies (K) Ltd, (hereinafter referred to as the appellant). The respondent, who was at the material time employed by the appellant as a security guard, sued the appellant for general and special damages, arising from injuries suffered by the respondent on 5th March, 2002, during the course of his employment with the appellant. The respondent contended that he suffered the injuries as a result of the appellant's negligence and or breach of duty.

2. The appellant filed a defence to the respondent's claim, in which it denied the respondent's claim, but contended in the alternative that if the respondent was injured, the same was as a result of unlawful and criminal activity on the part of total strangers, for which the appellant is not vicariously liable. The appellant claimed that the injuries were otherwise, a result of negligence on the part of the respondent. The appellant further relied on the doctrine of *volenti non fit injuria* contending that the respondent having accepted the job of a guard, voluntarily assumed the risk of injury.

3. During the hearing in the lower Court, the respondent testified that on 3rd March, 2002 he was on duty when in response to an alarm; he was directed to the scene of a robbery at a shop along Hakati Road. On arrival at the scene, three people came out of the shop, and shot the respondent on the waist. The respondent claimed that he did not have any formal training. Under cross-examination however, the respondent conceded that he was drilled and understood the work, and was given all the uniform and equipment. In re-examination, the respondent explained that his training for 4 days was not enough and that he was not provided with any gun.

4. The appellant called two witnesses. These were Alfred Odhiambo Moti (Moti), and Johannes Onalo Ongwedo (Ongwedo), both of whom were working with the respondent on the material day. Moti explained that he was with the respondent when the alarm sounded. The respondent and Moti were instructed to go to the shop where apparently there was a robbery. On arriving, some robbers came out, one of whom hit Moti. The robbers then ran away. Johannes Onalo Ongwedo who is a security officer with the appellant also proceeded to the scene where there was the alarm. He testified that he heard a shot and saw the respondent fall down as the gunmen walked away. The respondent was later taken to hospital. Both Moti and Ongwedo testified that the guards employed by the appellant were trained and were provided with the necessary uniform including a club, whistle and head helmets.

5. 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 argued that the training given to the respondent of only four days was not adequate. It was contended that no special training was given to the respondent on how to handle dangerous assignments. It was further submitted that the appellant was negligent in not calling the Police to give the necessary backup, to the respondent in dealing with the robbers.

6. Further, it was contended that the appellant failed to provide the respondent with protective clothing like bullet-proof jacket despite being aware of the hazards of the duties assigned to the respondent. With regard to the appellant's plea of *volenti non fit injuria*, *Halsbury's Laws of England 3rd Edition Vol.28 at Pg 84,* was cited, it being maintained that the plea could not apply as the respondent could not be said to have assumed the risk voluntarily, the appellant having used the respondent's desperate position of being unemployed to expose him to great danger. The lower Court was urged to find the appellant 100% liable.

7. On the issue of quantum, it was submitted that the respondent suffered serious injuries which have left him with physical and psychological effects. The lower Court was urged to award the respondent general damages of Kshs.850,000/= and special damages Kshs.2,500/=.

8. In support of the respondent's submissions the following authorities were cited:

· *Cisco E. Murunga Ndanyi & 2 Others vs. Coast Bus Services Ltd HCCC No.4425 of 1990.*

· *Warui Kanju vs. Kenya Ports Authority HCCC No.519 of 1997.*

· *Serah Wangui Kingori vs. Andrew M. Nguni HCCC No.403 of 1986*.

9. For the appellant it was submitted that there was undisputed evidence:

(a) That the respondent knew that the job he was doing was a dangerous one and accepted it knowing its hazards.

(b) That the respondent and his colleagues had undergone basic training on how to do their work before deployment.

(c) That the respondent and his colleagues had been provided with all the basic apparel and equipment necessary for the proper performance of the job, namely, cap, uniform, *rungu*, boots, whistle, radio and plates.

(d) That the respondent and his colleagues had adequate backup on the next street, whom they could call by radio if need arose.

(e) That the respondent was injured by criminals who were not within the control of the appellant.

10. Counsel for the appellant submitted to the lower Court that the appellant, as an employer was only under a duty to take reasonable care and not strict care of employees. It was submitted, that there was no negligence on the part of the appellant, as the appellant could not have done anything to avert the incident. It was maintained that the appellant could not be blamed for failure to provide guns or bullet-proof vests as that was unlawful.

11. Relying on the case of *David Ngotho Mugunga vs. Mugumoini Estate HCCC No.2336 of 1989 (UR),* it was submitted that the appellant could not be held liable vicariously for criminal acts of trespassers. It was contended that the respondent having accepted knowingly to do a hazardous job, he is estopped under the doctrine of v*olenti non fit injuria* from bringing this kind of claim.

12. With regard to quantum it was submitted that the respondent sustained soft tissue injuries from which he has fully healed, and that his complaints of pain on urination and during sexual intercourse were not supported by any medical evidence. Relying on *HCCC No.5497 of 1990 Margaret Njeri Njiri vs. Mohamud A. Mohamed & another*, and *HCCC No.4801 of 1989 John Njuguna Mungai vs. Poseidon*

Investment Co. Ltd, the lower Court was urged to find a sum of Kshs.100,000/= adequate compensation to the respondent for the injuries suffered.

13. The relevant portion of the judgment of the trial Magistrate, which was fairly brief, was as follows:

"*Plaintiff testified that upon employment he was only trained for four days. This was confirmed by DW1. He was only provided with a club and whistle plus boots without any clothing which would shield him from bullet injuries like bullet proof jackets. As regards the injuries sustained by him plaintiff/defendant should take full responsibility. Defendant had failed to provide plaintiff with protection gear. The medical report reveals gunshot wounds to both thighs and pelvis, numbness and paraesthesia to both limbs, weak urinary system and perineal pain on erection. There are serious injuries which have both physical and psychological effects. They are long term and may never change as indicated in the medical report. Plaintiff now asks for general damages and keeping in mind the injuries plaintiff sustained and the trauma he suffered an award of Kshs.400,000/= is adequate as general damages, special damages pleaded and proved are Kshs.2,500/=. I also award plaintiff costs and interest at court rates."*

14. Being aggrieved by that judgment, the appellant has lodged this appeal raising 5 grounds as follows:

(i) The learned Principal Magistrate misdirected himself by ignoring well settled legal authorities and precedents cited by counsel for the appellant by virtue of which no liability ought to have been attributed to the appellant for acts of strangers.

(ii) The learned Principal magistrate erred in law and in fact in reaching conclusions without adducing any or any reasonable grounds for so doing.

(iii) The learned Principal Magistrate erred in holding the appellant to be guilty of negligence in total disregard of the evidence before him and judicial precedent.

(iv) The learned Principal Magistrate erred in law and in fact in not appreciating and/or considering the medical evidence in making an assessment of damages with the consequence that the award made was manifestly high.

(v) The learned Principal Magistrate misdirected himself by not considering legal precedents cited by counsel for the appellant by virtue of which the quantum of damages ought to have been much lower.

15. Justice (Rtd) A.B. Shah, who argued the appeal on behalf of the appellant submitted that the respondent admitted that he was provided with uniform and necessary equipment. Counsel maintained that the appellant could not supply the respondent with the bullet-proof jacket as that needed permission from the Police. It was submitted that the appellant was not in breach of duty as it could not provide protection against trespassers who were shooting. It was contended that even if the respondent was provided with a bullet-proof jacket, it would not have assisted because respondent was shot in the thigh.

16. Referring to the case of *Mwanyule vs Said t/a Jomvu Total Service Station [2004] 1 KLR 147*, counsel submitted that the appellant did not owe an absolute duty to the respondent, but only a reasonable care against risk of injury caused by foreseeable events. Counsel distinguished the case of *John Mukura Karari vs. Nicholas Kinyua Mbui, HCCC (Nyeri) 254 of 1997*, contending that unlike the present case, where the respondent was provided with all implements and equipments, the plaintiff was not provided with a helmet.

17. Counsel similarly distinguished the case of *Makala Mailu Mumende vs Nyali Golf and Country Club, Civil Appeal No.16 of 1999*, maintaining that there was a specific finding in that case that the helmet was not supplied and that the injury would have been less severe if the helmet was supplied. On the issue of quantum, counsel urged the court to consider the authorities which were cited to the trial magistrate, and award a sum of Kshs.200,000/= as general damages.

18. Mr. Kabaiko who appeared for the respondent, opposed the appeal maintaining that the facts and

circumstances of the present case were peculiar and different from the cases referred to. Mr. Kabaiko submitted that in this case, the respondent was exposed to more than ordinary danger. It was contended that the appellant knew that the respondent's job entailed difficult and dangerous encounters and therefore the respondent should have been provided with minimum safeguards such as protective clothing, Police backups and proper training. Counsel submitted that at the time when the respondent was injured, there was no Police backup. It was maintained that since an alarm had been triggered, Police backup would have given an added measure of protection.

20. Referring to the case of *Makala Mailu Mumende vs. Nyali Golf & Country Club* (supra), counsel maintained that the circumstances of this case required that the appellant provide more than a helmet and a *rungu* as an armed attack was anticipated. Bullet-proof vest therefore ought to have been provided. The Court was therefore urged to uphold the judgment of the lower court on liability.

21. On the issue of quantum, counsel for the respondent submitted that the authorities which were cited to the trial Magistrate, though relevant, were fairly old. It was therefore maintained that an award of Kshs.400,000/= was reasonable.

22. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also given due consideration to the pleadings and the submissions which were made before me, and before the trial Court. Although there was some contradiction between the plaint and the respondent's evidence regarding the date of the incident, it is apparent that this was a minor contradiction probably caused by a slip of the pen or tongue. This is so because both the defence witnesses testified that the incident occurred on the 5th March, 2002 which was consistent with the pleadings in the plaint. It was also not disputed that the respondent was employed by the appellant as a guard, and that he suffered injuries during the cause of his employment. The main issues for determination were as follows: what duty if any, did the appellant as an employer have towards the respondent as an employee? If there was a duty, was the appellant in breach of such duty? And if there was breach, did the respondent suffer his injuries as a result of that breach?

23. The relationship between an employer and employee is described in *Halsbury's Laws of England 4th Edition, Vol.16 par.562,* as follows:

"*It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for any injury which he may sustain in the course of his employment in consequences of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his employee's safety; the exercise of due care and skill suffices."*

24. The above passage which reflects the common law position, was adopted by the Court of Appeal in the case of *Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47*, as the Law applicable in Kenya. In that case the Court of Appeal concluded that the 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 would be prevented by taking reasonable precaution. Thus, in order for the respondent in this case to succeed in his claim, he had to establish that the appellant failed to exercise reasonable care for his safety against risks which were reasonably foreseeable.

25. It was common ground that the respondent was employed by the appellant as a guard and that he sustained his injuries during the course of his employment with the appellant in that position. In his plaint the respondent had alleged negligence on the part of the appellant, particulars of which were given as follows:

a) Failing to take any adequate precautions for the safety of the plaintiff while he was engaged in his duties.

b) Exposing the plaintiff to the risk of damages or injury of which they knew or ought to have known.

c) Failing to give the plaintiff adequate training commensurate to the hazards posed by his job.

d) Failing to provide or maintain safe working devices.

e) Failing to provide any or any safe or proper system of work.

f) Failing to provide any protective implements.

26. The thrust of the appellant's defence was that it was not liable for the respondent's injuries as the same were either a result of unlawful and criminal activity on the part of strangers, or negligence on the part of the respondent or was a risk voluntarily assumed by the respondent. With regard to the negligence alleged against the respondent, the particulars were given as follows:

(a) the plaintiff was negligent in failing to take care of himself;

(b) failed to escape and run away from the assailants;

(c) failed to wear appropriate protective gear provided by the defendant;

27. In this case, the evidence which was adduced before the trial Magistrate though fairly sketchy was essentially not in dispute. It would appear that the appellant is a security firm which provides *inter alia* alarm services to clients. In answer to an alarm the respondent and another were directed to proceed to the client's premises from where the alarm had originated. The only implements provided to the respondent and his colleagues were a uniform, a club, whistle and head helmet. The respondent was also exposed to some training the period of which was variously stated as 2 days, 4 days and two weeks to a month.

28. From the evidence that was adduced, it is apparent that the respondent and his colleagues arrived at the scene just as the robbers were running out of the client's premises. The robbers immediately shot the respondent in their bid to escape. The respondent had no opportunity to run away, or take cover as he was apparently taken by surprise. No evidence was adduced of any specific instructions that the respondent was given, as to how to take care of himself whilst attending to such an emergency. With regard to the protective gear, there was no evidence adduced nor was any allegations made that the respondent failed to wear any of the protective clothing or gear provided by the appellant. Moreover, neither the uniform nor the club nor the whistle or head helmet could protect the respondent from the gunshots. Thus there was no evidence in support of the appellant's allegation of negligence on the part of the respondent.

29. The question is whether the danger that the respondent was exposed to of being shot, was a danger which was reasonably foreseeable, and if so whether the appellant had taken reasonable precaution or care, against risk of injury to the respondent. It was part of the appellant's contractual obligation to protect its clients from acts of trespassers. It was pursuant to this obligation that an alarm system was installed in the client's premises and the respondent assigned to respond to the alarm. The possibility of trespassers invading the client's premises was not a remote possibility as that is precisely what the appellant was contracted to guard against by the client. Given the security situation in the country, the possibility of such intruders or trespassers being armed with dangerous weapons including guns was not unforeseeable. The action of the trespassers cannot therefore be looked at in isolation, as the trespassers were not trespassers shooting at random, but trespassers whose aim to steal from the appellant's client, had been foiled, and the shooting was to enable the trespassers escape. The trespassers' action must be looked at in the context of the appellant's duty to protect the client's property and the respondent's role in fulfilling that duty as an employee of the appellant.

30. It is evident that when an alarm rings in the appellant's security system, it is an indication not just that there is an intruder at the client's premises, but also possibility of criminal activity. In sending a guard to the client's premises in response to the alarm, the danger is therefore not just imminent but real. This is not a case of a watchman who is simply guarding premises, but a case of a guard responding to a

situation which is potentially dangerous.

31. With all due respect, I find the circumstances of this case different from those in the case of *David Ngotho Mugunga vs. Mugumoini Estate* (supra), in which a watchman who was guarding a farm was attacked and injured by a gang of robbers. In this case the respondent was sent to the scene when there was already signs of danger. The nature of the danger to which the respondent was exposed to, required the appellant to provide more care than ordinarily availed to a watchman. Indeed the security alarm service is a service which is complimentary to the provision of ordinary guard services. Again, with all due respect, although the work of a watchman/guard is inherently dangerous the maxim of *volenti non fit injuria* cannot exonerate the employer from the duty of care to protect the employee from risks which are reasonably foreseeable, and which the employer could eliminate or minimize.

32. I am fortified in this view by the passage from *Halsbury's Laws of England 3rd Edition Vol.28 para.88* (which was cited by the respondent's counsel):

"*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."*

33. The following statement made by Nyarangi, J.A. in *Civil Appeal No. 16 of 1989, Makala Mailu Mumende vs. Nyali Golf & Country Club* which involved considering a similar case concerning the duty of an employer to a plaintiff employed as a guard, also supports the above position:

"No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in. But, however inherently dangerous, an employer is expected reasonably to take steps in respect of the employment, to lessen danger or injury to the employee."

34. I find that although the respondent took upon himself the risks incidental to his employment this was subject to the appellant's duty to take reasonable care. The question is, can it be said that the appellant exercised due care and skill, or took reasonable precaution to protect the respondent against risk of injury when the respondent was assigned to respond to the alarm? As already observed, the protective clothing provided to the respondent which were a uniform, club, whistle and head helmet were not adequate to protect the respondent against the risk to which he was exposed to whilst responding to the alarm. There was need for the appellant to address the risk of the respondent having to deal with intruders who may be armed with dangerous weapons. From the evidence before the trial Magistrate, the reasonable protection that could have been provided by the appellant to the respondent in this regard was twofold: Firstly, to provide the respondent with a bullet proof jacket to protect him against bullet wounds; and secondly, to provide a backup system possibly with police assistance.

35. It was submitted by the appellant's counsel that the provision of bullet proof jackets required permission from the police. However, no evidence was adduced before the trial Magistrate to show what efforts if any, that the appellant made to obtain this permission. One of the appellant's witnesses talked of, there having been "backup on Ronald Ngala Street". Nonetheless, no evidence was adduced to show what kind of backup system the appellant had in place either on Ronald Ngala Street or anywhere else, or why the backup system was not used in this case. Further, although the respondent was said to have been exposed to some training, it is evident that he does not appear to have been given adequate training on how to approach a dangerous assignment such as the one he was engaged in. This resulted in the respondent being ambushed by the robbers. For the above reasons, I find that the appellant failed in its duty of providing reasonable care for the respondent's safety against risks reasonably foreseeable. Accordingly, I find the appellant liable.

36. With regard to the appeal against quantum of damages, the principles upon which an appellate Court can disturb the quantum of damages awarded by a trial Judge were stated in *Kemfro Limited t/a Meru*

Express Services [1976] vs. Lubia and Another as follows:

"*that it must be satisfied that either that Judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage*."

Two medical reports were produced in evidence. According to the report of Dr. Wambugu P.M. who examined the respondent on the 17th February, 2003, the respondent suffered gunshot wounds on both thighs and pelvis, for which he was admitted at Kenyatta National Hospital for 8 days. His complaints at the time of examination included numbness on lower limbs, weak urinary stream and perennial pain on erection. The doctor's opinion was that in addition to the physical injuries, the respondent had suffered severe psychological trauma.

37. Dr. R.P. Shah examined the respondent on the 10th June, 2003. He noted that the respondent had a half pitched long scar on the upper part of the right thigh and a similar scar on the upper part of the left thigh. He concluded that the respondent suffered simple soft tissue injuries caused by a bullet, and that there were no injuries to any nerve or any other vital organ. Dr. Shah concluded that the respondent had no long term or permanent disability.

38. In his judgment the trial Magistrate appears to have addressed his mind only to the report of Dr. Wambugu. In awarding the sum of Kshs.400,000/= the trial Magistrate did not refer to any comparable decisions. Counsel for the appellant has urged the Court to reduce the award to a sum of Kshs.200,000/=. Counsel for the respondent on the other hand, maintained that the award of Kshs.400,000/= was reasonable and should be upheld.

39. I have considered the authorities which were cited to the trial Magistrate by the respondent's counsel. In *Sisco E. Murunga Ndanyi & 2 Others vs. Coast Bus Services Limited HCCC No.4425 of 1990,* the plaintiff suffered multiple injuries involving fractures of the pelvis, hip joint and injury to the bladder and urethra. In *Warui Kanju vs. Kenya Ports Authority HCCC No. 519 of 1987*, the plaintiff sustained fracture of the pelvis rapture of urethra and lacerations and bruises on the forearm, whilst in *Serah Wangui Kingori vs. Andrew M. Ngunyi* the plaintiff sustained fracture of the pelvis resulting in great malfunction of right leg. It is obvious that none of these cases was comparable to that of the respondent. The injuries in the cited cases were all serious injuries involving fractures. The respondent herein did not suffer any fracture. Moreover, from the more recent report of Dr. R.P. Shah the respondent's injuries had no residual effect.

40. I concur with the appellant's counsel that in the circumstances of this case, it is evident that the trial Magistrate was wrongly guided by the above cases which did not involve injuries comparable with the respondent's injuries. As a result the assessment of the damages was inordinately high such as to warrant the intervention of this Court. Accordingly, I would reduce the award of general damages to a sum of Kshs.250,000/=.

41. The upshot of the above is that I dismiss the appeal on liability but allow the appeal on quantum. I therefore set aside the award of Kshs.400,000/= made by the trial Magistrate, and substitute thereof an award of Kshs.250,000/=. The appellant having partly succeeded in the appeal, I order that each party shall bear its own costs of appeal. Those shall be the orders of this Court.

Dated and delivered this 17th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant served, absent

Ms. Mwangi holding brief for Kabaiku for the respondent