REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 99 of 2004

JAPHETH NATSE IFEDHA ……..…….....……. APPELLANT

VERSUS

COLLINDALE SECURITY COMPANY LTD …..…….....…… RESPONDENT

JUDGMENT

(An Appeal from the Judgment and Decree of Hon. E. N. Maina, PM in Nairobi Commercial Courts RMCC No 9829 of 2000 delivered on 23rd January, 2004).

On 19th October, 2000 the Appellant (Plaintiff in the lower court) then an employee of the Respondent, suffered severe injuries following an attack on him by armed thugs at Andis flats, State House Avenue, Nairobi, where he was on a work assignment by his employer. According to his evidence, he, being a supervisor, was sent to the Andis flats to "check on some people who were working there." Soon after his arrival, and while he was seated in the guard house, a group of people arrived in car; the guard opened the door, and one of the thugs held a gun to his head, and attacked him, causing injuries.

He filed a suit in the lower court claiming damages under various heads, both in contract and tort, but was unsuccessful as the lower court found that there was no basis of a claim against the Respondent employer. He has now appealed against that decision, citing nine grounds of appeal. At the commencement of the hearing of this appeal, Counsel for the Appellant indicated to this Court that the only issues for determination at this appeal were:

(1) the claim in negligence for damages for injuries sustained, and

(2) exemplary damages for "inhuman conduct".

Mr Harun, Counsel for the Appellant, argued that the lower court completely failed to consider the Appellant's claim based on negligence, but only addressed the claim based on breach of contract. He cited the Judgment (P. 71) where the learned Magistrate says "In any case what he claims in his plaint is general damages for breach of contract." He submitted that the Appellant's claim in negligence had been established because evidence showed that the panic alarm button was inside the building, and not accessible to the guard. The guard had no gadget, hence no means to communicate an emergency. He argued that the Respondent's witness (DW 1) had admitted that such gadgets were given only to

supervisors, yet the Appellant was a supervisor, as admitted in the defence. Counsel submitted that the employer's failure to provide back-up guard service, or to respond to the distress call, was an act of negligence. He complained that the lower court's preference of the evidence given by the Respondent, which in his view was based on hearsay, as opposed to direct evidence of the Appellant, was not explained in the Judgment. He cited the cases of ***Makala Mailu Mumende vs Nyali Golf & Country Club Mombasa Civil Appeal No 16 of 1989***; ***Mutua Mbai vs Riley Security Limited Nairobi Civil Case No 2604 of 1985*** and ***Charles Njuki Karema vs Nairobi City Commission Nairobi Civil Case No 5025 of 1987***.

With regard to exemplary damages, Counsel submitted that the employer's conduct in suspending the Appellant from work, and requiring the Appellant to report daily thereafter until his final dismissal, amounted to "inhuman conduct", for which the Respondent was liable for exemplary damages. Mr Harun provided no authorities to support this claim.

Mr Musyoka, Counsel for the Respondent, submitted that the Appellant had not proved his case in negligence, although the Judgment admittedly did not expressly mention negligence. He argued that negligence had not been pleaded in the Plaint. Relying on the case of ***David Ngotho Mugunga vs Mungomoini Estate (HCCC 2366 of 1989)*** he argued that an employer could not be liable to an employee for the acts of a trespasser, or criminal, and that there is nothing the Respondent could have done in the face of an armed attack. He submitted that there was no legal basis for a claim for exemplary damages for inhuman conduct.

As the first Appellate court, I am duty bound to review and re-evaluate the evidence before the lower court, which I have carefully done. Now, let me analyse the material evidence before the lower court, and which the trial court relied upon to determine this case.

In his evidence before the lower court, the Appellant testified that he was an "ordinary guard" with the Respondent, and promoted to supervisor in 1997; that on the material day he went to Andis flats "to check on some people"; a motor vehicle arrived and hooted; the guard talked to the occupants, opened the door and soon one of them held a gun on his head. He said:

"I thought it was a toy gun and took a radio to call our control room. It was then that one of the four thugs hit me … knocking me down."

With regard to the employer's liability, he testified as follows:

"I blame the defendant because it had not deployed enough guards at Andis flats. Had there been 2 or 3 we would have wrestled the thugs. The alarm at Andis flats was inside a building that used to be locked at night. The guard … was not provided with sufficient equipment like the alarm which one carries on their body."

The Respondent admitted in his evidence that the guard had no gadget, that such gadgets were provided only to supervisors, but that he had a walkie-talkie, and had indeed communicated to the central office only 20 minutes prior to this incident. According to DW 1, the guard there had never requested for additional guards at Andis flats.

Based on this evidence, the learned Magistrate delivered herself as follows, in part:

"**Submissions were received from both sides. These and the evidence have been considered carefully. I find no evidence upon which I can find the defendant liable for what befell the plaintiff. Although he alleges to have been a supervisor at the time this incident occurred he produced no proof. Indeed we are told by DW 1 that he was a guard.**

Moreover even were we to take it that he was a supervisor there would still be no evidence against the defendant. This unfortunate incidence occurred because some people were let into the compound without ascertaining what their motive was. The plaintiff was there and as a supervisor

he ought to have prevented the guard from letting them in before confirming who they were or what they were going to do there.

If he was a guard then he was on duty and he could have prevented the thugs from getting in. From his description the alarm was right where he was yet he did not use it. Evidence shows that he was properly equipped. He had a radio call so he cannot say that he was not provided with sufficient equipment.

The company learnt about the incident long after he had been taken to hospital so it cannot be said that it failed to respond."

Having reviewed the evidence before the lower court, I am satisfied that the Magistrate came to the correct decision. This unfortunate incident happened too fast, it was a criminal act, the intruders had a gun, and the guards, even if there was a back-up, could not have done anything to prevent the incident.

The Respondent's Counsel's argument that the claim in negligence had not been pleaded has no merit. Indeed it had been, in paragraph 7 of the Plaint. However, the Appellant's Counsel's argument that the trial court failed to consider the claim in negligence is equally unmerited because the first line in the lower court's Judgment shows that the court recognized that this was a claim "for general and special damages in respect of injuries sustained …."

In any event, I have come to the conclusion, as did the lower court, that the claim in negligence had not been established on a balance of probability. Counsel's argument that the Appellant had no gadget to communicate to the central office, and failure to give the same to the guards, even though the Respondent was a Supervisor, was an act of negligence is not consistent with the evidence before the lower court. The Appellant did indeed have a walkie-talkie, and this was of no help given the circumstances of this incident. So, how would an additional gadget have helped?

It is neither here nor there that the Appellant was a "Supervisor". I do not believe that the duty of care owed to a Supervisor is any more or less than it is to an ordinary guard.

The employer's duty of care at common law is "to take reasonable care for the safety of his employees in all the circumstances … so as not to expose them to an unnecessary risk." (See ***Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 560***).

I believe this duty of care at common law is relative to the nature of an employee's work. The job of a watchman is inherently risky especially in this country. No person taking on such a job may claim that it is a risk-free job. Of course, the employer must take care to provide the employee with the necessary tools – according to the evidence here, a "gadget" and more guards should have been provided. But as I have noted, he did indeed have a walkie-talkie. Because of the nature of the incident this did not help, nor would two additional guards have helped in the face of robbers armed with a gun.

In the ***David Ngotho Mugunga case (supra***), Justice Shah noted as follows:

"**I do not see how a defendant can be liable for acts of robbers even if the employee had no implements of defence. It would be very simple for a gang of robbers to overwhelm one or two guards and take away all such implements and beat them up. This is where I think the doctrine of violent non-fit injuria comes in.**

Any watchman who takes such a job does take the risk of being attacked by robbers and being hurt, there can be no doubt about it. The employer in my view cannot be liable for criminal acts committed by trespassers (or thieves or robbers which result in injuries to the employees. I would entirely agree with what Lord Herschell said in Smith vs Baker & Sons (1891) 325 360.

"**The maxim (volente non-fit injuria) (brackets are mine) is founded on good sense and justice. One who has invited or assented to an act being done towards him cannot, when he suffers from it,**

complain of it as wrong"

Whilst the facts in Morris vs Murray & Another (1991) 2C2 B6 were different the principal that emerges is that if one takes upon himself a task which is inherently dangerous he cannot complain of injury unless there is clear breach of duty or negligence on part of the other."

I agree with those sentiments.

In the ***Makala case (supra)*** Nyarangi, JA said:

"**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 measures of protection."**

In that case the Court held the employer liable for not providing the employee a helmet while on night duty. It came to this conclusion because there was evidence of a similar previous incident, making it incumbent upon the employer to provide the safety device.

In ***Charles Njuki case (supra)***, Shields, J went a step further and said that one should be slow in applying the maxim "volente non-fit injuria" where a person had to take on an unsafe job because nothing else was available. However, in the case before this court, "volente" was not pleaded, nor relied upon, and the conclusion I have come to does not in any way suggest that no duty of care was owed to a person who voluntarily took on an unsafe job. The duty as I said before is relative to the job, and at the least is one to take reasonable care for the employee's safety so as not to expose him to unnecessary risk.

There is nothing in the evidence before the lower court to show how the Respondent breached that duty of care with regard to the incident that caused personal injury to the Appellant.

Finally, with regard to exemplary damages for "inhuman conduct", this court was not guided on the validity of such a claim at common law. No authorities were cited, nor was it shown how, simply asking the Appellant to report to the office after suspending him, amounted to "inhuman conduct".

Accordingly, and for reasons cited, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 22nd day of February, 2005.

ALNASHIR VISRAM

JUDGE