REPUBLIC OF KENYA

AT NAIROBI

CIVIL APPEAL 452 OF 1999

ASSOCIATED BATTERY MANUFACTURERS EAST AFRICA LIMITED.....APPELLANT

VERSUS

JULIUS MUTUNGA.....RESPONDENT

(An Appeal from the Judgment of Hon. N. Matheka, RM in Milimani Commercial Courts

Suit No. 7806 of 1997 delivered on 27th September, 1999).

JUDGMENT

On 23rd December, 1994 the Respondent (Plaintiff in the lower court) then an employee (security guard) of the Appellant, suffered injuries following an attack on him by armed thugs at the Appellant's premises at Athi River, where he was a night guard together with two other guards. According to his evidence in the lower court, at about 3.30 am on that material day, he and his two work mates were patrolling the premises when a gang of robbers, who had cut their way into the premises through the fence, set upon him, and attacked him, causing severe injuries. He filed a suit in the lower court claiming general and special damages, and the trial court, in a brief one page ruling, found for him, and awarded him Kshs.201,500/= in general and special damages. With regard to liability, the lower court, in a brief four-line Ruling found as follows:

"I agree with the defendant (DW 1) entirely. The defendant failed to provide enough protection for PW 1 in that they were too far (few?) to guard the premises and the electric fence would have helped ward intruders, I find the defendant 100% liable for the said injuries."

It is against that Judgment that the Appellant has appealed to this Court, on the following six grounds of appeal:

1. The learned trial Magistrate erred in both fact and law in finding that failure to have an electric fence around the Appellants premises amounts to negligence on the part of the Appellant.

2. The learned trial Magistrate erred in both fact and law in basing her finding of negligence on the part of the Appellant on the ground that the number of guards employed by the Appellant was insufficient without at all making a finding as to what number of guards would have been sufficient and for what size of premises.

3. The learned Magistrate erred in law in failing to appreciate that she was on the issue of liability bound by the clear decision of the High Court in the case of DAVID NGOTHO MUTUNGA VS MUGUMOINI ESTATE HCCC NO 2366 OF 1989

(Unreported) which was cited to her on behalf of the Appellant and a copy of the full judgment availed to her.

4. The learned Magistrate erred in law in completely ignoring the doctrine of stare desisis.

5. The learned Magistrates finding on liability was against the weight of the evidence.

6. The learned Magistrates award of general damages to the Respondent is so manifestly high in the circumstances as to amount to an erroneous estimate of the loss suffered by the Respondent.

Both liability and quantum are in issue. Mr Mega, Counsel for the Appellant, argued that the Respondent had not discharged the onus of establishing negligence on the part of the Appellant; that the finding of negligence based on the Appellant's failure to secure the premises with electric fencing was inconsistent with the pleadings **(See Galaxy Paints Company vs Falcon Guards (Nairobi C. A. No. 219 of 1998);** and that the Appellant's defence of volenti non fit injuria was disregarded by the lower court. Mr Mege relied on the cases of **David Ngotho Mugunga vs Mugomoini Estate (Nairobi HCCA No 2366 of 1989)** and **Japheth Natse Ffedha vs Collindale Security Company (Nairobi HCCA No. 99 of 2004).** Finally, Mr Mege submitted that the award of damages was excessive having regard to the injuries suffered.

Mr Kiriba, for the Respondent, argued that the Respondent had proved his case on a balance of probability; that the finding relating to electric fencing was based on the testimony of the Appellant's witness; and that the award was fair.

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 analyze the material evidence before the lower court, and which the trial court relied upon to determine the case.

In his evidence before the lower court the Respondent stated that he was one of the six guards at the premises. He was with two colleagues at the time of the incident. When he was attacked, his colleagues fled, leaving him alone. He was overpowered. He only had a rungu and torch.

This is all the evidence hegave in his examination-in-chief before the lower court. There is absolutely no evidence of any negligence on the part of his employer, the Appellant. He did not say how, or what the employer could have done to prevent the incident. He did not prove any of the particulars of negligence outlined in his Plaint – such as exposing him in a dangerous zone, or failing to provide him with a devise to raise alarm; or failing to come to his rescue; or to provide him with necessary "arms" to "repulse" the attackers.

The Respondent's only evidence, it would appear, is that he was "attacked". But he does not say how the Appellant was negligent or failed in his duty of care to him.

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, he had a rungu and torch. 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 crude weapons.

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.**
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> **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.**
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> **"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"**
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> **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."**

The lower court's finding of negligence based on the failure of the Appellant to provide electric fencing is completely inconsistent with the pleading. There was no such allegation in the Plaint, and to find so, was to deny the Appellant the opportunity to answer that allegation, and to rebut such evidence. As the Court of Appeal held in the **Galaxy Paints** case (supra) it is trite law that the issues for determination in a suit flow from the pleadings, and Judgment may be pronounced only on those issues, or on issues framed by the parties for determination.

Equally, to find that there were "too few guards" to guard the premises was not based on any evidence – it was a conclusion reached by the Court without any basis at all. In summary, therefore, there was no evidence of any negligence, or breach of duty on the part of the Appellant, and the finding of liability was erroneous and based on no evidence at all.

Accordingly, and for reasons outlined, this appeal is allowed with costs to the Appellant, both here and in the lower court.

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

ALNASHIR VISRAM

JUDGE