



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Appeal 91 of 2003

TEMBO INVESTMENTS LIMITED APPELLANT

- Versus -

JOSEPHAT KAZUNGU RESPONDENT

Coram: Before Hon. Justice Mwera

Nanji for Appellant

Mrs. Abuodha for Respondent

Court clerk – Kazungu

J U D G M E N T

This appeal followed a judgment by the learned Senior Principal Magistrate, J.S. Mushelle Esq. which he delivered on 15/5/2003. The case before him was filed by the present respondent (Kazungu) claiming damages. He pleaded that he was employed by the present appellant (Tembo Investments Ltd.), to perform, as it turned out duties of a watchman, who may more respectably be also called a guard. That in the employment contract, the appellant had a duty to take all reasonable precautions to ensure that the respondent was not exposed to any risk of injury/damage in the course of performing his duties – risks known or expected to be known. That to shield the respondent from injury/damage, the appellant was to provide “adequate plant, tackle and appliances” to ensure that the respondent worked in a secure and safe environment.

It was further averred that on 24/6/2000 when the respondent was on duty guarding the parking area of the appellant’s premises, some violent and aggressive customers, whom the respondent went to stop from what he called “their making love” in a car, grabbed him and threw him over a wall. He fell in a pit and he sustained injuries.

These injuries were not specified in the plaint but it was pleaded that they were contained in a medical report the respondent would produce at the trial. The appellant did not seem to mind this misstep in pleading when it filed its reference. It admitted the injuries! It denied the particulars of negligence set out in the plaint thus:

“7. The plaintiff avers that the aforesaid accident was occasioned to him due to negligence and/or carelessness on the part of the defendant, its agent, servant and or employee.

PARTICULARS ON (SIC) NEGLIGENCE

The defendant, its authorized servant, agent and/or employee were negligent in that they:-

- (a) Failed to take any adequate precaution for the safety of the plaintiff while engaged upon his said work.
- (b) Exposed the plaintiff to a risk of damage which the defendant knew or ought to have known
- (c) Failed to provide the plaintiff with any adequate supervision or any warning to the damages inherent in the said work
- (d) Failed to provide and maintain a safe system of working in (sic) the site.”

Both sides were represented and they called witnesses at the trial.

The respondent said that when he stopped the revelers (a woman and three (3) men) from “doing their thing” in the parked car, they seemed to have taken heed and they started leaving. But then suddenly the 3 men caught the appellant, lifted him up and threw him over the 3-4ft high wall, the appellant had erected at that point to prevent motor vehicles from falling over into the pit beyond. He fell in that pit sustaining fracture injuries on his pelvis/waist. The respondent blamed the employer for not providing/taking safety measures and precautions against such acts. He added that the appellant (employer) had not also provided him with safety boots or a helmet. That had he had other people there, meaning other watchmen, being thrown over the wall could not have happened.

The respondent also told the learned trial magistrate that he was provided with a torch, an alarm and a rungu. No boots. No helmet. That the respondent reported the incident to Bamburi Police Station. Investigations revealed that the assailants had been in motor vehicle registration No. KAB 499S Surf. And he knew that the work of a watchman was risky.

Dr. Rasik Patel produced a medical report to show that the fall caused the respondent to fracture his lumbar spine; he walked with a limp and he could no longer work as a watchman.

The appellants’ security supervisor (A Mr. Koma Michael D.W.1) said that he had in all 13 watchmen under him and when the respondent reported on duty at 10 p.m., he was assigned duties alone in the main parking. He was given a radio alarm, a rungu, a torch and a whistle. When D.W.1 was checking various duty stations, the respondent was not at his station; he was discovered in the pit beyond the parking wall which, to D.W.1, was 5ft high. The respondent narrated how he was thrown in there. D.W.1 wished that the respondent called him during the attack but that he had returned the alarm earlier due to the low charge. D.W.1 however investigated the incident and found that the assailants had arrived in motor vehicle Reg. No. KAB 499 as customers of the appellant.

Dr. H. Patel (D.W.2) examined the respondent (Exh. D3) noting that the pelvic injury was serious. This resulted in permanent backache. Permanent incapacity was put at 20%.

After the submissions the learned trial magistrate penned a judgment wherein he apportioned 30% liability to the respondent on the grounds that he decided to confront those who attacked him single handedly, instead of asking for reinforcement. The appellant was given 70% liability to carry because it should have built a higher wall round the subject spot and that the respondent was wearing open shoes which had no grip and no helmet on. It can be deduced from the above that the learned trial magistrate was of the view that had the appellant provided security boots, with grip together with a helmet the impact of the injuries would have been minimized or excluded altogether. Special damages of Sh. 4,000/= was awarded, Sh. 600,000/= for pain and suffering less contributory negligence plus costs.

The appeal was predicated on some ten (10) grounds which Mr. Nanji seemed to argue globally and Mrs. Abuodha opposed. The thrust of the appeal was that the learned trial magistrate found the appellant liable by accepting that it had built a low wall and provided no boots or helmet. That all this fell outside the pleadings especially the particulars of negligence set out.

He added that the wall was built to stop motor vehicles from falling over into the adjacent pit but not to prevent watchmen being thrown over it into the same pit. That that was not the foreseen risk and that the nature of injuries suffered, the fractured pelvis, were not either on the feet or the head which boots and a helmet could have prevented. That the respondent thus did not prove liability against the appellant wholly or contributory as found and that without referring to the medical reports or submissions in his judgment, the learned trial magistrate gave the excessive award of Sh. 600,000/= for pain and suffering without reason. Mr. Nanji put forth some authorities which Mrs. Abuodha also referred to. This court may refer to them as and if it is necessary, in the following determination.

It is an accepted principle in claims by an employee against an employer in cases like this that if the task to be performed by the former carries an element of risk or danger, the employer is not wholly or fully responsible for taking precautions to ensure the servants safety. That duty only goes as far as it is reasonable and, if it may be added to, the practical extent of taking precaution. Of course, the higher the risk, the higher the level of precaution, but never in full at all. The servant ought to share in that duty of taking precaution. Here the respondent was a watchman and he knew that his work was risky.

This court need not go over the well – beaten path that for a litigant to succeed in a claim of negligence he must establish a duty of care, a breach of that duty and the resultant loss/damage. It is also a general principle in pleadings that a party’s case is contained in its pleadings and it is from these pleadings as supported by the evidence that the court determines the issues in dispute and awards reliefs accordingly.

In the present case the respondent’s complaint, in its relevant parts setting out the particulars of negligence has been set out, notwithstanding that the incident was referred to as an “accident”, the four particulars appeared standard in such claims: failure to take adequate precaution for safety at work; exposing to known risk; lack of supervision and failure to provide a safe working system. These could as well pass for a claim arising from an industrial accident.

However had the respondent proved any or all of them here he was entitled to the reliefs sought because it was not in dispute ever that the appellant did not owe him a duty of care while on duty. But the respondent did not plead that he was injured because the appellant did not build a 7ft high wall or provide boots and helmet. That only came up in the evidence. The respondent waited until the trial only to come up with such claim and the learned trial magistrate took it up and made it a basis of finding liability against the appellant. In Galaxy Paints Co. Ltd. Vs Falcon Guards Ltd. CIVIL APPEAL NO. 219/1998 the Court of Appeal said:-

“It is trite law, and the provisions of Order XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of Order XXX rule 4 of the rules aforesaid, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination”.

Then it added:

“... parties must be confined to their pleadings, otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded, clearly amounts to an error on the face of the record.”

In the case before the learned trial magistrate, it was not part of the respondent’s case that he was injured because of the low wall or non-supply of boots and helmets. So “determining” issues on that basis, here the issue of liability, was an error on the face of the record and for that alone this appeal must be allowed. But not yet.

Now assuming that the non-supply of the boots and helmet were pleaded and it was so found, what of the injury complained of?

In measuring the care, one must balance the risk against the measures necessary to eliminate it (see

“... it is reasonable, in my view, on account of the location of the injury on the apex of the head, to hold that it is more likely than not, that the injury to the head would have been less severe, if the plaintiff was wearing a helmet which equipment would because of its structure, have covered the entire head including the apex and the forehead”.

So the club was found liable. Here the injury was on the pelvis – nothing on the feet or the head of the respondent. So even with the boots or the helmet, the injury could not have been any less severe. Anyway as said above, that was not pleaded and the lower court could not base a finding on non-supply of boots and a helmet. The same goes for the low wall. It was not pleaded. Even if it had been, it was not intended to prevent violent revellers from throwing inquisitive watchmen over it. This risk could not be reasonably foreseen when the appellant built the wall to stop motor vehicles from falling over into the pit. Our sympathies with the respondent, though.

This court is further of the view that the lower court did not properly approach the assessment of general damages. The magistrate did not refer to the medical reports or the submissions on this aspect. He excluded important aspects in reaching his award of Sh. 600,000/=. Had it not been found by this court that liability was not established, that approach would have been scrutinized leading possibly to setting aside that award and making different orders.

Next is the aspect of the assailants. They were not authorized servants, agents or otherwise of the appellant. They were revellers on its premises and the appellant cannot be taken to have been responsible for their acts – civil or criminal, including throwing the respondent over a wall and injuring him. The respondent either through the police whom he reported the incident to, or the appellant’s efforts, got to know the registration number in which his amorous assailants were travelling on that night – registration KAB 499S Surf. This gave him a lead; he should have followed it to lay his claim against them and probably recover. He did not. He did not pursue them just the way he did not consider it helpful to blow his whistle so that his mates working elsewhere on the appellant’s premises could come to his aid. He did not even call them in any other way. He went on with the task single-handedly.

In sum this appeal is allowed with costs here and the court below.

Judgment accordingly.

Delivered on 30th September 2005.

J.W. MWERA

JUDGE