REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 301 OF 2017

BOB MORGAN SERVICES LIMITED.....APPELLANT

VERSUS

EVANS IKOMOL.....RESPONDENT

(Being an appeal from the Judgment and decree delivered on 11th January, 2017

by Hon. E.K Usui SPM in Nairobi CMCC No. 13543 of 2006

at Milimani Commercial Courts.)

JUDGMENT

This is an appeal from the judgment of the lower court, in which the appellant was the defendant while the respondent was the plaintiff in a claim for damages, following injuries sustained by the respondent while on duty.

Going by the plaint filed on 4th December, 2006 the respondent pleaded that he was employed by the appellant as a security guard. While in the course of his employment, he was attacked by thugs and sustained the injuries pleaded therein. He blamed the appellant for failing to ensure his safety and exposing him to injury or damage, and for failing to provide adequate measures to ensure that his duties were performed in a safe place. The respondent therefore pleaded negligence on the part of the appellant in failing to ensure duty of care.

The appellant denied the respondent's claim and alternatively pleaded that, all necessary tools and equipment were provided to facilitate the respondent in the execution of his duties. Further, the appellant pleaded that the nature of the respondent's duties entailed a voluntary assumption of risk and therefore, the doctrine of *volenti non fit injuria* applied.

In the lower court, the respondent testified in support of his pleadings but the defence offered no evidence in support of the statement of defence. Both parties agreed that the report by Dr. Kiama Wangai, and the receipt earlier identified in the proceedings be produced as exhibits without calling the makers. Parties were then directed to file submissions which they did.

In the Memorandum of Appeal dated 7th June, 2017 the appellant complained that the trial court was wrong to make a finding on liability that was not supported by evidence, and for finding that the appellant was negligent. The trial court was also faulted for ignoring the submissions and cited cases on the issue of liability, and that the award for general damages was inordinately high.

As the appellate court I am required to evaluate the evidence adduced in the lower court in order to arrive at independent conclusions.

In his testimony, the respondent gave an account of what transpired on the date he was on duty and attacked, leading to the injuries he sustained. Part of his evidence read as follows,

> **" I recall on 13/9/06, I was on duty at Village Estate. At around 3.30 am I was patrolling the estate when a motor vehicle arrived at the gate. The guard at the gate opened the gate and fled. The gangs caught up with me and ordered me to tame the dog and lie down. I complied and tied the dog to its kennel and laid down. I was hit with a metal bar on the left leg and left hand. The hand appeared fractured. It was loose. I was rescued by my colleague who had fled and returned……**
>
> **I have sued the defendant for not allocating enough guards to patrol the estate that had 47 flats. The security arrangements and infrastructure were not up-to-date. The premise was not well lit with security lights or with electric security walling**

reinforced."

The respondent was subjected to cross examination by the defence counsel but reiterated his position of lack of adequate provisions. He stated that an armed officer could have repulsed the attackers and that the alarm button was defective. However, guards are not licenced to carry guns. Had he been issued with a heavy jacket, the impact of the injury would have been less serious.

In the judgment of the lower court, it was observed the appellant did not call any witness in support of its defence and that the respondent's evidence was unchallenged. The court also found that the respondent was not provided with **"adequate tools to cushion him against any risk and danger posed by the nature of his work and which both parties were aware of."**

My assessment of the evidence and circumstances as related by the respondent confirms the findings by the lower court, and in addition thereto, I observe that the respondent had discharged the burden of proof required of him in such cases. If the alarm system was not working, and there was no backup system, then the appellant failed in his duty of care and exposed the respondent to the risk complained of. A statement of defence is not evidence, neither are submissions made by a party to a suit. The lower court was therefore correct in finding the appellant liable to the respondent and no evidence suggested that the respondent contributed to any negligence.

The medical report by Dr. Kiama Wangai dated 3rd November, 2006 was admitted in evidence by consent. The injuries are as set out in the lower court judgment, which however had healed well. The lower court observed that the cited cases had been considered and also that inflation had been factored in. I have also looked at the authorities that were cited by the parties in the lower court and in the submissions before me. It is now accepted that the appellate court may not interfere with an award of damages by the trial court unless it is inordinately high or low as to represent an erroneous estimate. Comparable injuries attract comparable awards.

I am not persuaded that the award of damages made by the trial court was in any way excessive and out of the bracket of comparable injuries. I see no merit in this appeal which is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 16th day of July, 2020.

A. MBOGHOLI MSAGHA

JUDGE