



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 158 OF 2013

G4S SECURITY SERVICES (K) LTD.....APPELLANT

VERSUS

FRED WANYONYI SIMIYU MUTINYO.....1ST RESPONDENT

PROFESSOR STEPHEN AGONG.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Hon. A. Nditika (Mr)

Senior Principal Magistrate in Milimani—CMCC NO. 2630 of 2007

dated 13th March 2013)

JUDGMENT

This appeal arises from the decision of the lower court delivered on 13th March, 2013. The appellant was the defendant in the lower court in which 1st respondent was the plaintiff while the 2nd respondent was brought in as a Third party at the instance of the appellant.

The appellant had been sued by the 1st respondent in the lower court for damages resulting from injuries sustained while the 1st respondent was on duty and blamed the appellant for breach of contractual obligations. The 1st respondent was employed as a guard when in the course of his duties he was bitten by dogs at the premises he was assigned to guard. The appellant denied the 1st respondent's claim and blamed him for the negligence that led to the injuries he sustained from dog bites. The premises the 1st respondent was guarding belonged to the 2nd respondent. The appellant sought and obtained leave to join the 2nd respondent to these proceedings through a Third party notice and blamed him for the injuries sustained by the 1st respondent.

After a full trial, the lower court found in favour of the 1st respondent, exonerated the 2nd respondent and blamed the appellant for the 1st respondent's claim holding that the appellant was 100% liable. The lower court proceeded to award the 1st respondent Kshs. 150,000/= general damages plus Kshs. 2000/= for the medical report as special damages.

Aggrieved by the said judgment, the appellant filed this appeal. The lower court was faulted for finding the appellant 100% liable and also in dismissing the Third party notice despite the evidence tendered. It is the appellant's position that the court arrived at an erroneous finding on liability, by failing to consider that the evidence pointed to the Third party as the person to blame for the injuries suffered by the 1st respondent. Further, the lower court was faulted for failing to consider the submissions and authorities cited by the appellant. The appeal is opposed and parties have filed written submissions and cited some authorities which I have considered.

As the first appellate court it is my duty to evaluate the evidence adduced before the lower court and arrive at independent conclusions.

The 1st respondent was assigned to guard the 2nd respondent's premises by the appellant. He had been in the employment of the appellant since 2004 as a guard. At the premises of the 2nd respondent, he was dropped outside the house. There was another guard inside who opened the gate for him. This other guard was an employee of the appellant. Unknown to him, the 2nd respondent kept a dog which was released by the guard on duty when he entered the compound. He had not been trained as a dog handler. He was bitten by the dog and taken to hospital on the same day where he was admitted for 4 days.

It was his evidence that he had no contract with the 2nd respondent whom he did not blame for the injuries he sustained, but the appellant

herein. On the other hand, the appellant's witness who gave evidence blamed the owner of the house for the injuries sustained by the 1st respondent.

The person who released the dog when the 1st respondent entered the compound was one Josphat Owino who was also an employee of the appellant. This person did not warn the 1st respondent of the presence of the dog. The Third party also gave evidence in the lower court. He denied the allegations of negligence attributed to him and added that there was a guard assigned by the appellant who should have ensured that the guard taking over was also trained. He did not release the dog although he admitted the dog was his.

The lower court in its judgment stated as follows,

“I have carefully considered the evidence before me. I have had occasion to consider the defence as filed. It is contradicted by the evidence tendered; therefore the issue of indemnity must have been an afterthought. The 3rd party had no contractual obligation to the plaintiff. The defendant did not have a contract and nowhere was it shown that the 3rd party was aware of the plaintiff being in the compound. Having been not aware then the issue of indemnity cannot arise. It was the duty of the defendant to have alerted the plaintiff about the dog. The defendant ought to have supplied the plaintiff with gloves. It is therefore clear that having no contractual duty the 3rd party cannot be liable. From all the evidence adduced it is clear that the defendant is 100% liable.”

The appellant knew of the presence of dog on the premises assigned to the 1st respondent. The guard who was employed by the appellant, and who was to be relieved by the 1st respondent, used to cage the dog. It was the evidence of the 2nd respondent that whenever there was a new guard, he would be trained and the appellant had a duty to ensure the relieving guard was trained. He denied that he released the dog as he was not at home on that day. He had been provided with security before, and assessment would be done before then.

The evidence of the appellant's witness did not blame the 1st respondent for any act or omission leading to the injuries he (the 1st respondent) sustained. The allegations in the defence therefore remain a hollow platitude. If anything, all the blame was directed to the 2nd respondent which he denied.

In the Third party notice addressed to the 2nd respondent, the appellant stated as follows,

“It is the defendant's contention that the said incident was solely caused by your own negligence in the manner you handled the said dogs by letting them loose when you knew or ought to have known that it was dangerous so to do at the time of the incident and which in law you ought to indemnify the defendant.”

The evidence on record shows that it was the guard on duty who released the dog and the 2nd respondent was not present. He therefore cannot be blamed for letting the dog loose in the circumstances of a case. The 1st respondent was not trained to handle dogs. It was the duty of the appellant as the employer to do so. Having failed in its duty of care to the 1st respondent, liability attributed to the appellant cannot be faulted. I so find.

On the award of damages, the lower court considered that the 1st respondent's sustained soft tissue injuries. It is true that he did not refer to the cases cited. I have looked at the authorities cited which were all decided in 1990. The awards ranged from Kshs. 15,000/= to Kshs. 50,000/= in terms of general damages. This judgment was delivered in 2013 which is 23 years thereafter. The award of Kshs. 150,000/= is not unreasonable by any standards; considering the time that has gone by and depreciation of currency. I am unable to fault the trial court in that regard.

The end result is that this appeal is dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 14th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE