REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 23 OF 2015

WILFRED OKEMWA MWAMBA...................................APPELLANT

VERSUS

TOTAL SECURITY SURVEILLANCE.......................RESPONDENT

(Being an appeal from the original judgment of T. Olando, Resident Magistrate

in Eldoret CMCC No. 591 of 2012 delivered on 26th January 2015)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 26th January 2015. The appellant has lodged a memorandum of appeal dated 16th February 2015. The appeal is against the findings on liability and quantum of damages.

2. The appellant contends that the learned trial magistrate erred by apportioning liability at 50% to 50%. The appellant also takes up cudgels on the award of general damages of Kshs 250,000. The appellant's case is that the award was inordinately low. The appellant contends that the learned trial magistrate misapprehended the evidence and applied erroneous principles in his judgment. The appellant relied on written submissions filed on 4th September 2015.

3. The appeal is contested by the respondent. There is no cross-appeal. In the written submissions filed on 14th October 2015, the respondent stated that the findings on liability were sound; and, that the damages were commensurate with the injuries. I was implored to dismiss the appeal.

4. On 17th November 2015, learned counsels for both parties addressed the court. I have considered the memorandum of appeal, record of appeal, the pleadings in the lower court, the evidence in the trial court and the rival submissions.

5. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1.

6. The appellant filed a plaint in the lower court dated 16th July 2012. The appellant was employed as a security guard by the respondent. He pleaded that on 25th May 2011, he was attacked by thugs and

suffered serious injuries. He blamed the respondent for negligence. The particulars of negligence were that the respondent failed to provide a safe working environment; that it failed to set up an alarm or give the appellant protective gear such as a helmet or defensive weapons; and, allowing the appellant to work alone under dangerous circumstances.

7. By a defence dated 24th September 2012, the respondent denied the claim *in toto*. At paragraph 5, the respondent countered that the accident was caused by the negligence of the appellant. It was pleaded that he failed to have sufficient regard for his safety; was imprudent; and, he failed to avoid the attack or prevent the injuries.

8. At the hearing, the appellant (PW1) testified that at about 1:00 am on the material night, he was on patrol at Mangesoi Villas. Two persons accosted him and asked him for the keys. He told them he did not have them. The assailants attacked him using a *rungu* and *panga*. They hit or cut him on the head and hands. He screamed. He then fainted. The assailants escaped. He was then taken to Moi Teaching & Referral Hospital by employees of the respondent. The cut on the head that was stitched. At the time of the hearing, his injuries had completely healed but he complained of pain. He said the compound he was guarding was too big for one guard, was not properly fenced and was poorly lit.

9. On cross-examination, he conceded the compound has an electric fence. It is erected on a stone wall. He said the attackers must have cut the electric cables. From where he was attacked to the cables was about 5 metres. He conceded there were security lights. Although the appellant said he had been alert, he did not hear the attackers enter the compound. He said he had requested for a helmet but was only provided with a cape. During the attack, he pressed an alarm. The respondent's officers responded and took him to hospital.

10. The respondent called one witness, DW1. He was an operation manager. He said the villas are on a half-acre of land. The company received a signal from the appellant at about 2:35 am on the material night. He said they responded in three minutes. He said the appellant had been provided with a remote button, *rungu*, whistle and rain coat. There were emergency or panic switches in the compound. He said the compound was well lit. In his opinion, the guard was either asleep or not alert. He denied that the company was negligent.

11. I will deal first with the element of negligence. It was common ground that the appellant was employed by the respondent on the material day. The attack occurred in the course of his *employment*. The key question is whether the employer was negligent by failing to provide a safe working environment. Paraphrased, whether the accident was the result of either failing to provide him with a helmet or defensive weapons; or exposing him to the risk of attack. The respondent had been provided with a remote button, *rungu*, whistle and rain coat. There were also emergency or panic switches. The compound had an electric fence and was well lit. It was a half-acre compound. I thus disagree with the appellant that it was too large a compound for one guard. True, he had not been provided with a helmet. But a helmet would *not* have *prevented* the attack. At the very best, it would only have mitigated the injuries to his head.

12. The duty of the employer to ensure the safety of an employee is not *absolute*; it is one of *reasonable care* against a foreseeable risk or one that can be avoided by taking reasonable measures or precautions. It would be unreasonable to expect an employer to be his employee's insurer round the clock. See *Halsbury's Laws of England* 4th edition volume 16 paragraph 562, *Mwanyule v Said* [2004] KLR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Eldoret Steel Mills Limited v Moenga Obino*, High Court, Eldoret Civil Appeal 3 of 2011 [2014] eKLR.

13. The legal burden of proof that the employer had not provided a safe working environment was entirely on the shoulders of the appellant. See *Winfield and Jolowicz on Tort*, Sweet & Maxwell, London, 13th edition at page 23.

14. From my analysis of the evidence, I find that the respondent had put in place a *reasonably* safe working environment; and, had provided the appellant with *basic* equipment. The attackers breached the

electric fence 5 metres from where the appellant was. The company's employees responded to the alarm in about *three minutes*. If the appellant was *fully alert*, he would have pressed his remote button or any other emergency or panic buttons. The truth is that he was caught completely unawares by the two attackers. I cannot say he was asleep; but it is clear he was not alert. It is not lost on me either that it was well after 1:00 am in the night.

15. Granted the evidence, I cannot blame the respondent for the attack. I also find that the appellant contributed to his injuries by not being alert on duty. I would have arrived at a finding that the appellant was *fully* to blame. But like I stated earlier, there is *no* cross appeal on liability. The lower court apportioned liability at 50% to 50%. I decline to disturb the findings on liability in the circumstances. The appeal on liability is thus devoid of merit and is dismissed.

16. I will now turn to quantum of damages. From the report of Dr. Imbenzi, there was a crack skull fracture; and, a fracture of the proximal phalanx of the middle finger. The cut wound was sutured and dressed in the minor theatre. The fracture was fixed by a P.O.P cast. The appellant was given antibiotics and analgesics.

17. There is then the second opinion of Dr. Z. Gaya appearing at page 13 of the record. He confirmed that the x-rays showed a crack skull fracture; and, a fracture of the proximal phalanx of the middle finger. He found the scars on the scalp and the crooked middle finger to be permanent. He assessed permanent disability at 3%.

18. The lower court assessed general damages at Kshs 250,000. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See *Butt v Khan* [1982-88] KAR 1, *Arkay Industries Ltd v Amani* [1990] KLR 309, *Karanja v Malele* [1983] KLR 42, *Kemfro Africa Limited & another v Lubia & another* [1987] KLR 30, *Akamba Public Road Services Ltd v Omambia* Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

19. In *Kennedy Kosgey v Kormoto General Agencies*, High Court, Eldoret, Civil Appeal 36 of 2011 [2014] eKLR, the appellant had suffered blunt trauma to the chest, fracture of the anterior ribs and dislocation of his shoulder. Permanent disability was assessed at 5%. An award of Kshs 400,000 was upheld on appeal. In *Haron Cheron v Eastern Produce (K) Limited*, High Court, Eldoret, Civil Appeal 92 of 2013 [2014] eKLR, the plaintiff suffered a fracture on the right radius distal third; double fractures of the right ulna; and, a fracture of the right olecranon of the right ulna at the elbow joint. An award of Kshs 350,000 was upheld on appeal. In *George Kinyanjui T/A Climax Coaches v Agoi*, Eldoret, High Court Civil Appeal 29 of 2012 [2015] eKLR the appellant suffered a fracture of the left clavicle; fractures of the 4th and 5th left ribs mid shaft; dislocation of the left shoulder joint and multiple soft tissue injuries. An award of Kshs 450,000 was made.

20. The appellant submitted for an award of between Kshs 700,000 and 800,000. That is too high in my view. The respondent on the other hand submitted that the award of Kshs 250,000 was adequate. Considering the *injuries*, the *pain*, the rate of inflation and the precedents, an award of Kshs 300,000 is *sufficient* in the present case. I concur with the learned trial magistrate that the claim on special damages of Kshs 1,500 was not strictly proved. See *Kampala City Council v Nakaye* [1972] E.A 446.

21. In the result, the judgment of the lower court dated 26th January 2015 is hereby *set aside*. Judgment is now entered in favour of the appellant against the respondent as follows-

a. Liability is apportioned equally between the appellant and respondent at 50% to 50%.

b. General damages are assessed at Kshs 300,000 *less 50% contributory negligence* which is to say *Kshs 150,000.*

c. The claim for special damages is dismissed.

d. I award the appellant costs in the lower court and interest. Considering my views on liability; and, the *minimal* gains on quantum in the appeal, I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 9th day of February 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

Mr. J. M. Kimani for the respondent instructed by J. M. Kimani & Company Advocates.

Mr. J. Kemboi, Court clerk.