



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 223 OF 2011

SECUREX AGENCIES (KENYA) LTD..... APPELLANT

VERSUS

PHILIP WANGILA KIMOI MUNIALO RESPONDENT

JUDGMENT

By a Plaint dated the 29th January, 2007 and filed in the Senior Resident Magistrate's court at Nairobi on the 23rd February, 2007, the Respondent lodged a claim against the Appellant, Securex Agencies (K) Limited, claiming general damages for pain, suffering and loss of amenities, costs and interest and any other or further relief that the Honourable Court may deem fit and just to grant.

The Respondent who was employed by the Appellant as security guard pleaded that on or about the 8th day of March 2004, he was in the lawful course of his employment with the Appellant when the Appellant provided him with unsafe system of work. That while he was in the course of his duties, he was injured while attempting to foil a robbery and as a consequence thereof, he sustained severe injuries to wit, fracture tibia fibula to the left leg.

The Respondent further pleaded that it was a term of the employment contract between him and the Appellant that the Appellant would take all reasonable precautions for the safety of the Respondent while he was engaged upon his work, not to expose the Respondent to a risk of damage or injury of which it knew or ought to have known, to provide and maintain a safe and adequate plan to enable the Respondent carry out his work in safety, to take all reasonable measures to ensure that the place where the Respondent carried out his work was safe and to provide and maintain a safe and proper system of work. The particulars of negligence are particularized in paragraph 6 of the Plaint.

The Appellant filed a statement of defence on the 16th April, 2007. In the defence the Appellant admits that whilst it is bound by the law to provide adequate and safe system of work, it is not bound to provide protection against gun wielding thugs. It avers that the Respondent was under duty not to carelessly expose himself to the risk of the injury.

The Appellant further pleaded that the Respondent was injured by a bullet shot by thugs (armed gangsters) over which the appellant has no control over and that it was an exigency of the Plaintiff's job

that he could be shot at.

According to the Appellant, it provided all the protective gear that it could in law have provided but certainly it could not provide bullet-proof clothing or articles. It denied that the injuries suffered by the Respondent were occasioned by reason of any negligence or breach of duty or breach of any contract of employment. The injuries were suffered on account of actions of third parties over which the Appellant has no control. It denied the particulars of special damages and those of injuries.

The Appellant avers that the Respondent's injury was caused by the Respondent's negligence in failing to heed the instructions of his supervisors, failing to adhere to the safe system of work in regard to situations involving armed thugs and carelessly exposing himself to the risk of injury.

A reply to the defence was filed on the 18th day of April 2007 which basically denies all the contents of the defence.

The matter dragged on in court until the 17th February, 2011 when the same proceeded to hearing. On the material day, the Respondent testified and gave his account of how the accident occurred. He told the court that he was on duty at Westlands and at 8 p.m. him and one Daniel Kaikai went to attend to an alarm activation from R. P Shah's house. They were three of them including the driver and he was the group commander.

On reaching at Mr. Shah's gate, they knocked and the watchman who was inside opened the gate for them following which they entered leaving the driver outside the gate. They asked the watchman if there was any problem to which he said yes and as they were inspecting the compound to ensure it was safe, the Respondent was shot on the left leg by a thug who had entered the compound from the rear. He was rushed to Nairobi West Hospital where he was admitted until 26th March, 2004. He said he blamed the Appellant for injuries sustained because the job he was assigned ought to have been assigned to more than 2 people, he ought to have been given a trained dog, he did not have a torch and that the appellant never gave them police back-up.

On cross examination, he said he was the "**commander**" or supervisor and that he had been trained. He said he had been given a helmet, a club, boots and a jacket. He said the police came after he had been shot which was one hour later. He was shot ten meters away from the client's front door and he did not have a torch and there were no lights. He admitted that they entered the compound blindly and that they were not ready for the robbers.

On their part, the Appellant called one witness in defence of their case namely Daniel Kaikai who was an employee of the Appellant at the material time. He was working with the Respondent at the Appellant's place of work. He, together with the driver accompanied the Respondent to R.P Shah's house to answer a distress call and on entering the compound the Respondent was shot. He confirmed that the compound was dark and they did not have any torches and that they did not have the dog back-up.

The learned magistrate entered judgment for the Respondent for a sum of Ksh.700,000 plus costs of the suit and the Appellant being dissatisfied with the said judgment filed an Appeal on the 19th May, 2011 wherein he has listed 7 grounds of Appeal as hereunder:-

1. The learned magistrate erred in law and in fact in finding that the Appellant breached its duty of care and/or was negligent towards the Respondent
2. The learned magistrate erred in law and in fact in holding that the Appellant was 100% liable for the Respondent's injuries.
3. The learned magistrate erred in law and in fact in failing to appreciate that the Appellant had no control over the robbers who shot the Appellant hence the doctrine of vicarious liability could not apply in the circumstances.
4. The learned magistrate erred in law and in fact in finding that the Respondent had not been provided with protective gear.
5. The learned magistrate erred in law and in fact in failing to appreciate that the Respondent should

- have returned to the crew vehicle on being informed that there was a problem.
6. The learned magistrate erred in law and in fact in failing to appreciate that there was no need on the part of the Respondent to remain on the premises and look for intruders when told that there was a problem.
 7. The learned magistrate erred in fact in awarding the Respondent the sum of Kshs.750,000/- as general damages which was too high for the injuries suffered by the Respondent.

Parties agreed to dispose of the appeal by way of written submissions and when the Appeal was mentioned on the 11/11/2015, the Appellant informed the court that it had already filed its submissions but the Respondent had not. The court gave him a further 14 days within which to do so but by 10th December, 2015 when the court gave a date for judgment he still had not yet filed.

I have considered the grounds of appeal and the submissions filed by the Appellant in support of the Appeal. It is trite law that an employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against the risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution. Halsbury's Laws of England 4th edition Volume 16, paragraph 562 discusses the law on the extent of employer's duty and it states:-

“It is an implied term of the contract of employment at common law that an employee takes upon himself risks necessarily incidental to his employment. Apart from the employer's duty to take reasonable care; an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee to compensate him for any injury, which he may sustain in the course of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered in the course of his employment in consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working conditions, nor is he an insurer of his employee's safety' the exercise of due care and skill suffices.”

The Appellant blames the Respondent for the shooting because according to him the job that he was assigned ought to have been assigned more than 2 people and that they had not been given a trained dog and that he did not have a torch. In my opinion, even if the appellant was in the company of more than three people, that would not have made a difference. In the case of **Muwende Makala Malu vs Nyali Golf Club Ltd Civil Appeal 264 of 1996** the Court of Appeal held:-

“The learned magistrate felt that the four guards would have been required at night as the petrol station was situated in the scantily populated outskirts of Nairobi..... We have no guarantee that four watchmen would have repulsed the gang as the learned magistrate suggested.”

As was rightly submitted by the Counsel for the Appellant even if the Respondent had been given a trained dog and a torch, they would not have prevented the Respondent from being shot at and it is also true that security companies do not provide their guards with armed police officers when they are called upon to answer a distress call. The nature of the Respondent's work was inherently risky and when he took up the job, he is assumed to have taken upon himself the risks necessarily incidental to his employment. By proceeding to enter the compound unarmed to carry out inspection after they had been informed that there was a problem, the Respondent took a great risk.

Accordingly, I am satisfied in the circumstances of this case that the Appellant did discharge its duty of reasonable care to the Respondent with the result that I allow the Appeal. The Respondent's suit in Nairobi CMCC No. 1405 of 2007 is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at Nairobi this 10th day of March, 2016.

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L. NJUGUNA

JUDGE

In the presence of:-

None appearance for the appellant.

Miss Wanene for the respondent.