



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO.224 “A” OF 2010

K.K. SECURITY.....1ST APPELLANT

KK GROUP OF COMPANIES.....2ND APPELLANT

VERSUS

HENRY NYABUTO MOSE.....RESPONDENT

(An Appeal from the judgment and decree of Hon. C. G. Mboga. Chief Magistrate, in Eldoret in C.M.C.C.No.888 of 2007 dated 22nd October, 2010)

JUDGMENT

1. The respondent was employed as a security guard by the appellants. On the 23rd November, 2006, the respondent was seriously injured whilst answering a distress call from one of the appellants' clients.
2. The respondent was attacked by armed robbers at the client's premises and was awarded a sum of Kshs.1,000,000/= as general damages for the injuries sustained. Liability was apportioned on a ratio of 85:15% with the appellant bearing the larger portion.
3. The appellants being dissatisfied with the decision of the Hon.C. G. Mbogo, Chief Magistrate, Eldoret preferred this appeal.
4. The appellants listed four (4) grounds of appeal in its memorandum of appeal *inter alia*:
 - i. That the learned magistrate erred in law and fact by holding that the respondent had proved negligence as against the appellants on a balance of probabilities and for apportioning liability at 85%:15% in favour of the respondents.
 - ii. That the learned magistrate erred in law and fact in failing to apply or applying wrong principles in assessment of general damages thus awarding damages that were so excessive in the circumstances.
 - iii. That the learned magistrate erred in law and fact by proceeding to pronounce judgment in favour of the respondent in total disregard of the appellants' submissions
 - iv. That the learned magistrate erred in law and fact in failing to find the respondent 100% liable for the accident.
5. At the hearing of the appeal, both counsel for the appellant and respondent opted to rely on their written submissions.

6. Upon consideration of the submissions made, this court finds the following issues for determination:

- i. foreseeability
- ii. liability
- iii. Quantum of damages

7. This being the first appellate court, this court is duty bound to re-access and re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to the case of **Arrow Cars Limited V. Bimomo & 2 others**, C.A. No.344 of 2004, 2 KLR.

8. On the issue of liability and foreseeability, the appellants contend that negligence was not proved and should not be held liable for an incident that was not foreseeable.

9. The appellants relied on two authorities – **David Ngotho Mungunga V. Mungomoini Estate**. HCCC No.2366 of 1989 (unreported) and **Associated Battery Manufactures East Africa Limited V. Julius Mutunga**, Nairobi HCCCA No.452 of 1999. In both cases, it was held that an employer cannot be held liable for acts of robbers even if the employee had no implements of defence.

10. The appellants submitted that they were not responsible for the injuries sustained by the respondent; that the respondent took up the job knowing the dangerous nature of the work and could not blame the appellants for injuries inflicted by the third party.

11. The appellants further submitted that it provided the respondent with proper gear, in the form of a helmet and a rungu which was sufficient reasonable care on their part.

12. The court was urged to allow this ground of appeal.

13. On liability, the respondent attributed negligence to the appellants as they had provided him with an ordinary helmet and did not discharge their duties by putting in place minimum security measures to ensure that the respondent was safe whilst discharging his duties as a security guard.

14. To support his submissions, the respondent cited the authority of **Lakala Mailu Mudende V. Nyali Golf and Country Club**, HCCA No.16 of 1989 (Mombasa) where the judges of Appeal held the employer liable as it should have ensured the existence of minimum reasonable measures of protection.

15. The respondent submitted that the apportionment of 15% contributory negligence was reasonable and should not be disturbed.

16. Having re-evaluated the evidence on record, this court states that the appellants as the employer of the respondent had a common law statutory duty of care to provide a safe working environment and a safe system of work. Refer to the case of **Clifford V. Charles & Sons Limited** (1951) All E.R. 72.

17. It is not in dispute that the appellants provided the respondent with an ordinary helmet, an arm sheath and a rungu.

18. The respondent testified that the appellants did not provide its employees with bullet proof protection.

19. The Respondent was confronted on that material date by armed robbers and was shot in the head.

20. This court opines that the core business of a security company (the appellant) is to guard and protect its clients and their property against trespassers, in the form of uninvited visitors, thieves and robbers.

21. The dangers and risks a security guard encounters whilst dealing with these trespassers are foreseeable and it was (and still is) incumbent upon the appellants to ensure that reasonable

measures of protection are in place.

22. This court is guided by the authority cited by the respondent – **Lakala Mailu Mudende** (supra) and states that the appellants are a well established company in the business of security and are capable of providing proper protective gear to its employees and also capable of putting reasonable measures of protection in place, in the circumstances, this court opines it would be providing an armed escort.

23. The court finds that by providing an ordinary helmet, a *rungu* and sheath cannot be considered as a reasonable measure of protection, particularly in the circumstances of this case.

24. The court finds that the measures put in place by the appellant to be unconscionable and that the appellants breached their statutory duty of care and were negligent in failing to provide the respondent with proper protective gear and other reasonable measures of protection which would have minimized or prevented injuries.

25. This court finds no reason to interfere with the trial magistrate's finding on liability.

26. The appeal on liability is found lacking in merit and is hereby disallowed.

27. The court finds no reason to interfere with the trial magistrate's finding on apportionment which this court finds to be reasonable.

28. On the issue of quantum of damage, this court is guided by the case of **Butt V. Khan**, [1981] KLR 349 where the principles to be taken into consideration by an appellate court before it disturbs an award.

29. The court must be satisfied that the trial court took into account irrelevant factors or omitted a relevant factor or that the amount awarded was inordinately high or inordinately low to render it an erroneous estimate.

30. The appellants submit that the award of Kshs.1,000,000/= as general damages is excessive and proposes a sum of Kshs.500,000/= as sufficient compensation.

31. The appellants urged the court to be guided by the following cases:

- i. **Laban Buyole Mamboleo V. Rift Valley Textiles** (1998) e KLR – The High Court awarded Kshs.650,000/= for a compound fracture of the right temporal bone;
- ii. **Philip Kipkorir Cheruiyot V. Nebas (K) Limited & Another** (1998) e KLR – The plaintiff was awarded Kshs.600,000/= as general damages for a fracture of the femoral head and humerus.

32. The appellants submitted that the two (2) authorities are comparable and urged the court to set aside the excessive award and to make a proper award.

33. The respondent pleaded in the plaint that he sustained the following injuries:

- a. gun shot wound on the right side of the head
- b. intra-cerebral hemorrhage
- c. left side hemiplegic

34. The respondent was examined by Dr. Sirma and Dr. V. V. Lodhai and the medical reports were both tendered to court “*By consent*” as exhibits and marked at “*P Exb. No.4*” and “*D Exb. No.1*” respectively.

35. In the earlier submissions before the trial court, the respondent had proposed an award of Kshs.1,500,000/= as general damages. In the submissions in this appeal, the respondent submits that the award of Kshs.1,000,000/= is reasonable

36. In support of the sum of Kshs.1,000,000/=, the respondent relied on the following cases:

- a. **Robinson Ndiri Gichuhi V. K.T.D.A.**, Nrb. HCCA No.1679 of 1992 – where the plaintiff was awarded Kshs.800,000/= in general damages for a fracture of the skull resulting in paralysis on the

side.

- b. **Jane Elsa Oyoo V. Lochad Bros Limited**, Nrb. HCCC No.5773/1991 – where the plaintiff sustained a fracture of the skull and was awarded the sum of Kshs.1,000,000/=.

37. The respondent urged the court not to disturb the trial magistrate's award as it was reasonable and based on the above comparable awards.

38. The trial magistrate in his judgment stated that when making the award, he considered the authorities supplied and found the sum of Kshs.1,000,000/= to be adequate compensation.

39. After careful perusal of the authorities provided by the appellants and the respondent, this court finds that the trial magistrate took into consideration relevant factors and comparable awards and finds that the award was not manifestly excessive nor was it an erroneous award.

40. This court finds no merit on this ground of appeal

41. In conclusion, this court finds the appeal lacking in merit and it is hereby dismissed.

42. The respondent shall have costs.

It is so ordered.

Dated and Signed this 27th day of June, 2013.

A. MSHILA

JUDGE

Dated, Signed and Delivered at Eldoret this 10th day of July, 2013.

JUDGE