REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL 178 OF 2010

JOSEPHAT KAMORI MACHARIA …..... APPELLANT

=VERSUS=

KENYA KAZI SERVICES LTD …..... 1ST RESPONDENT

K.K. SECURITY LTD..... 2ND RESPONDENT

[Being an appeal from the Judgment of Hon. D.K. Kemei, Principal Magistrate, dated 14th September, 2010 at Eldoret in CMCC Case No. 597 of 2009]

JUDGMENT

This appeal is from the judgment and decree of the learned Principal Magistrate, **D.K. Kemei,** dated 14th September,2010 in Eldoret Chief Magistrate\'s Court Civil Case No. 597 of 2009. The appellant, **Joseph Kamori Macharia,** was the plaintiff and the respondents, **Kenya Kazi Services Ltd** and **K.K. Security Ltd,** were the defendants.

The learned Principal Magistrate dismissed the appellant\'s suit with no order as to costs but nevertheless, awarded him Kshs 30,000/= as ex-Gratia payment and Kshs 17,946 being two months salary in lieu of notice. The decision has triggered this appeal. In his amended plaint, the appellant pleaded that on 23rd November, 2006, while he was lawfully carrying out his duties at Eldoret as a driver, he was shot by robbers and sustained serious injuries. In the particulars of negligence the appellant alleged, among other things, that the respondents failed to arm him with a gun or rifle to counter attacks; failed to provide him with a bullet proof motor vehicle and also failed to provide him with protective wear. As a result of the said incident, so the appellant pleaded, his left elbow joint was shattered and was amputated. The appellant further pleaded that the respondents retired him on medical grounds and his terminal benefits were not paid. He also claimed loss of future earnings at Kshs 8,973/= per month.

The respondents filed an amended statement of defence in which they, *inter alia,* denied that the appellant was their employee and that he sustained the said injuries dueto their negligence. Without prejudice and in the alternative, the respondents pleaded that if the appellant sustained any injures, then he was solely and or substantially contributed to the same. They also denied that the appellant was entitled to future earnings or salary in lieu of notice.

At the trial, the appellant testified that he was the respondents\' employee upto April, 2009 when he was retired on medical grounds. At that time, he was earning Kshs 8,973/= per month. He further stated that on 23rd November, 2006, he was sent to Pioneer area in Eldoret where an alarm had been raised. He drove to the area and found robbers attacking residents. The robbers confronted his team and then shot him on the left hand shattering it completely. He was assisted to hospital where he was admitted for six

days. His arm was, during his admission, amputated at the elbow joint.

He produced, a hospital summary discharge, P.3 form and a medical report prepared by **Dr. Menga.** He was later retired on medical grounds at the age of 41. He blamed the respondent for not providing him with a gun and a bullet proof vehicle.

The respondents\' case at the trial, was presented by **Simion Some Simate** who was then a Security guard with the 2nd respondent. He confirmed the testimony of the appellant that on the material date, they received a distress call from their customer and rushed to the scene where they were confronted by robbers who shot the appellant on the hand.

In the judgment delivered after the trial, the learned principal Magistrate analysed the evidence adduced before him and concluded that the appellant accepted to take the employment of the respondents with the risks involved and that the respondents had no control over the robbers. The learned Magistrate therefore found no liability in negligence on the part of the respondents for the appellant\'s misfortune. He nevertheless awarded the appellant Kshs 30,000/= as ex Gratia payment and a further Kshs 17,946/= being two months salary in lieu of notice.

That decision provoked this appeal by the appellants. They have put forward four (4) grounds of appeal which, in the main, challenge the learned Principal Magistrate\'s findings that the respondents were not liable in negligence and did not owe him a duty of care.

When the appeal came up for hearing before me on 13th March, 2012, counsel agreed to file written submissions which were duly in place by 3rd July, 2012. Those submissions, restated the stand-points taken by the parties at the trial. I have considered the record, the grounds of appeal and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of the matter. This is a first appeal. The court should therefore subject the evidence which was adduced before the trial court to a fresh scrutiny and arrive at its own conclusion bearing in mind that it did not see or hear the witnesses testify and should give allowance for that (**See Selle and Another =vrs=Associated Motor Boat Company Limited and Others [1968] E.A. 123).** It is also trite that I am not necessarily bound to follow the trial Court\'s findings of fact if it appears either that the court failed to take into account particular pertinent circumstances or if the the impression based upon the demeanour of witnesses is inconsistent with the evidence adduced. (See **Abdul Hassan Seif -vrs- Ali Mohammed Shoran [1955] 22E.A.C.A. 270**)

I also keep in mind the principal enunciated in the case of **Peters =vrs= Sunday Post Limited [1958] E.A. 424** which was expressed as follows at page 427:-

“It is a strong thing for an appellate court to differ from the findings on question of fact of a judge who tried the case and who has had the
advantage of seeing and hearing the witnesses. But the jurisdiction (to review the evidence) should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

On the above principles, this court can only interfere with the trial court\'s findings of fact if the findings were not based on evidence or were based on a misapprehension of the evidence or if it is shown clearly that the trial court acted on wrong principles in reaching the findings (See **Ephantus Mwangi & another =vs= Wambugu [1983 & 84]2KER 100**).

Applying the above principles, I ask myself whether there is basis for interfering with the findings of the learned Principle Magistrate. Was negligence proved on the part of the respondents on a balance of probabilities? The facts are not really in dispute. The appellant was engaged as a driver by the respondents and with others, responded to a distress call from residents of Pioneer Area where they were confronted by armed robbers. The robbers ordered them to surrender and the appellant raised his hands. One of the robbers then shot him on the left arm shattering it completely below the elbow. The appellant was then assisted to hospital where the said arm was amputed below the elbow.

The appellant blamed the respondents for not providing him with a gun or rifle and a bullet proof vehicle. There is no dispute that that was indeed the case. The respondent argued that to provide the appellant with a gun or rifle would offend the provisions of the Firearms Act Cap 114 Laws of Kenya. With regard to failure to provide a bullet proof vehicle, the respondent submitted that in the circumstances of this case, such a vehicle would not have been of any help. The learned Principal Magistrate said as follows regarding that aspect of the case:-

" The plaintiff claimed he was not issued with a bullet proof vehicle or even guns for protection. However, the practice over the country is that bullet proof vehicles are few and used only for security of high ranking government officials and besides, it is expensive to install and purchase such type of vehicles. The plaintiff admitted that even the guards he used to transport only had clubs and this is the practice with all
companies offering security services such as the defendant herein."

So, the learned Principal Magistrate was of the view that provision of a bullet proof vehicle was made to a few high ranking government officials and was in any event expensive. The respondents had not made any such allegations in their pleadings or evidence. In my view, the mere fact that bullet proof vehicles are used by a few high ranking individuals or that they are expensive should not have influenced the learned Principal Magistrate\'s mind in finding no negligence on the part of the respondents.

The appellant was engaged as a driver by the respondents whose main business is to provide security services to their clients. On the material date, he transported security guards to Pioneer area from where a distress call had emanated. When they arrived at the scene, they were confronted by armed robbers. In the appellants own words:-

" As I arrived the robbers fired shots at us. I had closed my window. The robbers ordered us to surrender and I raised up my hands. One of the robbers pointed a pistol at me while the other aimed with an AK 47 rifle.

The one with the AK 47 rifle fired and the bullet pieced my left hand and shattered it completely....."

In my judgment, there cannot be any gainsaying that had the appellant been in bullet proof vehicle when they were confronted by the robbers, the bullet would not have shattered his arm. This case is clearly distinguishable from the case of **Mwanyule =vrs= Said t/a Jomvu Total Service Station [2004] 1 KLR 47**, upon which therespondent relied. In that case, the plaintiff was a pump attendant when he was attacked by armed thugs at the defendant\'s petrol station. The Court of Appeal held that his trade as a pump attendant did not in itself involve confronting thieves, and the employer was not required to anticipate that situation so as to provide helmets and heavy gloves for the employees. In the Court\'s view, the employer had discharged his duty of reasonable care by employing two watchmen and providing a security alarm.

In the case at hand, the appellant\'s trade was transporting security guards to destinations determined by the respondent. That trade necessarily involved confronting thieves unlike the plaintiff\'s trade in the **Mwanyule** (Supra) case. The respondents were therefore expected to anticipate that situation and provide for it. But they did not.

They did not allege that provision of bullet proof vehicles was expensive. They offered no other reason why they did not provide such a vehicle to the appellant. In my judgment, the fact that it is expensive to do so was not a reason to deny the appellant the said vehicle. In the premises, I find and hold that the appellant not only pleaded negligence against the respondents, he proved one of the particulars thereof on a balance of probability i.e. the failure to provide him with a bullet proof vehicle. As held in the case of **Mumende =vrs= Nyali Golf & County Club [1991] KLR 13:-**

"Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to

neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection."

The record of the Principal Magistrate shows that before the appellant set off to Pioneer area in response to the distress call, he knew that he was taking a risky undertaking. He should therefore have approached the scene with caution and sought police assistance. He was therefore partly to blame in negligence. I would attribute 50% contributory negligence to him. The learned Principal Magistrate opined that Kshs 500,000/= general damages would adequately compensate the appellant given the injuries he sustained. The respondents have not cross-appealed against that finding. In the premises, the appellant is entitled to Kshs 250,000/= after regarding the above apportionment.

The upshot is that this appeal is allowed, the judgment of the learned Principal Magistrate dismissing the appellant\'s case is set aside and is substituted with judgment for the appellant for Kshs 250,000/=. The appellant shall also have the costs of this appeal. The said sum of Kshs 250,000/= shall attract interest at court rates from the date of judgment of the Lower Court.

Interest on costs shall be applied at the same rate from the date of agreement or taxation.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA
JUDGE

Read in the presence of: **Mr. Kamau** for the appellant.

F. AZANGALALA
JUDGE

5/9/2012