IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & SICHALE JJ.A.)

CIVIL APPEAL NO. 112 OF 2018

BETWEEN

WELLS-FARGO COMPANY LIMITED.....APPELLANT

AND

BISANSIO OPOLO EKODOI & SALOME ASIO EMODO

(suing as Administrators and Legal Representatives of the Estate

of the late VITALIS EBUKORO ETYAKORO.....RESPONDENTS

(Being an appeal against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Nderi Nduma, J.) delivered on 27th July 2016

in

ELRC Cause No. 776 of 2010)

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JUDGMENT OF THE COURT

1. The unfortunate circumstances giving rise to this appeal are not in dispute. Until his death on 10th January 2007, Vitalis Ebukoro Etyakoro, deceased, was employed by the appellant as a security guard. On that day, he was assigned, alongside two other guards employed by the appellant, as an escort in one of the appellant's cash in transit vehicles that was transporting cash from Molo to Nakuru. In addition, there were two armed Administration police officers in the vehicle. Along the way they were ambushed and attacked by armed robbers who sprayed bullets on the vehicle. One of the armed Administration police officers was shot outside the vehicle as he attempted to get away while the other armed Administration police officer was shot while inside the vehicle in the front cabin. The deceased was shot while in the back cabin of the vehicle.

2. RW1, Charles Ndeta, one of the deceased's colleagues who was with him in the vehicle narrated to the trial court how the attack happened. Under cross examination, he stated:

> ***"Vitalis was shot while in the motor vehicle he was in the back cabin behind me. It is a double cabin behind me people seat (3) of them. It is a big seat about 2 meters looking in front. They could not see behind. Sideways one sees it has small (sic). They had no chance to react. We were shot from all sides. AP could not even stand. They did not stand. They did not have bullet proof vests. Only normal uniform…"***

The witness stated that the deceased *"had many bullets"* and died in hospital.

3. Arising from that unfortunate incident, on 8th July 2010 the respondents, as the legal representatives of the deceased, instituted suit against the appellant before the Industrial Court on behalf of the estate and dependants of the deceased under the Law Reform Act and the Fatal Accidents Act. They contended that the appellant was liable in negligence and was in breach of its contractual obligations towards the deceased.

4. The respondents averred in the plaint that the appellant failed to provide a safe and convenient working environment for the deceased "*to the extent that even with rising statistics about ambush, way laying and armed robberies targeting cash in transit vehicles they continued sending the deceased to such assignments*." In particular, the respondents claimed that the appellant: failed to offer and ensure the deceased wore protective clothing and apparels including bullet proof vesting and helmet; failed to make cash in transit vehicles bullet proof or armour plated; kept the deceased *"in a closed up backside of the transit motor vehicle"* without ability to see outside.

5. In its defence, the appellant denied the claims and asserted that it took the necessary and adequate protection and precaution for its employees, including the deceased, and that it was not responsible for the death.

6. At the trial, Salome Asio Emodo, the widow of the deceased, testified for the respondents. The deceased's colleague, the aforementioned Charles Ndeta and the appellant's Human Resource Manager, Stephen Kangethe, testified for the appellant. After considering the evidence and submissions, the learned trial Judge found that although the appellant "*had taken some steps to ensure the safety and security of the guards involved in cash in transit*", it had not provided bullet proof vests and armoured vehicles and that:

> ***"the security guards including the deceased were placed at the back of the security motor vehicle in a locked enclosure in which movement was minimal and from which it was not possible for the guard to see the outside of the vehicle".***

7. The Judge concluded that he was not satisfied that the deceased was "*placed in a safe environment, in a pickup with square carrier from which one could not see outside while inside in view of the fact that there was only one peeping hole from the uncontradicted evidence by CW1, Salome Asio Enodo*." With that, the Judge found that the appellant was wholly liable and awarded the respondents the sum of Kshs.1,650,640.00 made up of Kshs.1200,640 for loss of dependency; Kshs.150,000.00 for loss of life; and Kshs.300,000.00 for pain and suffering; interest and costs.

8. The appellant was aggrieved and lodged the present appeal in which the principal question, based on the memorandum of appeal and submissions by counsel, is whether the Judge was right in concluding that the appellant was in breach of its duty of care and was responsible for the death of the deceased. In effect, whether by failing to provide the deceased with a bullet proof vest and placing him in a vehicle that was not armour plated and keeping him at the back of the vehicle in an enclosure constituted failure on the part of the appellant to take reasonable steps for his safety and to provide a safe environment.

9. Learned counsel for the appellant, ***Mr. Paul Ogunde***, submitted that the respondents had the burden to show that a standard of care had been breached; that it was unreasonable to expect the appellant to provide bullet proof vests to its security guards, bearing in mind that regular police officers are not ordinarily equipped with bullet proof vests; that the conclusion by the Judge that the cabin could not be opened from inside, was not supported by evidence tendered; that the Judge failed to consider the testimony of Charles Ndeta and chose instead to rely on the testimony of the widow of the deceased, who was not at the scene, that the occupants were trapped in the back cabin and could not open from inside.

10. Citing the decision of this Court in ***Mumende vs. Nyali Golf & Country Club [1991] KLR 13***, counsel submitted that the extent of the appellant's duty of care, which it discharged, was limited to taking reasonable steps to lessen danger or injury to its employees; that the appellant discharged its duty of care by providing two armed police officers trained in crime prevention to accompany the deceased and the other security guards in the vehicle and the imposition of a duty to provide bullet proof vests was not reasonable; that the respondents did not adduce any evidence to show that there was an industry standard requiring any reasonable security provider engaged in cash in transit services to provide bullet proof vests for employees and the duty of care imposed by the trial court is inconsistent with industry practice.

11. Counsel indicated that the complaint in the memorandum of appeal that the awards of damages made by the trial Judge were inordinately high was not being pursued.

12. Opposing the appeal, ***Mr. J.S. Namada***, learned counsel for the respondents, began by pointing out that the appellant has already paid the amount awarded by the trial court to the respondents.

13. Regarding the standard of care, counsel referred to an English decision in the case of ***Smith vs. Baker [1891] A.C 325*** where Lord Herchell stated that the contract between employer and employee involves a duty on the part of the employer of taking reasonable care to provide proper appliances and not to subject his employees to unnecessary risk; that the requirement for provision of bullet proof vests for cash in transit guards is a reasonable requirement to protect the guards from foreseeable dangers; that robberies were common incidents and a foreseeable danger and bullet proof vests would have protected the guards.

14. Counsel submitted that the Judge rightly found that the security guards placed in the back cabin were *"sitting ducks"* as they were in an enclosed vehicle that was locked from outside with limited sitting space and no external visibility and the vehicle was not armour plated.

15. It was submitted that cash in transit is a special assignment calling for special protection against foreseeable dangers; that the risk surrounding the nature of work the deceased was undertaking required the appellant to take steps to counter that risk; that consistently with the decision of this Court in the case of ***Abadalla Baya Mwanyule vs. Said t/a Jomvu Total Service Station [2004] eKLR***, the appellant did not discharge its duty of reasonable care against risk of injury caused by events reasonably foreseeable and which would have been prevented; that in failing to take necessary precautions, the appellant was guilty of breach of its duty of care. ***Harris vs. Bright's Asphalt Contractors Ltd, (1953) 1 QB 617*** was cited.

16. We have considered the appeal and the submissions. We have reviewed and evaluated the evidence on record as required of us on a first appeal, bearing in mind that we did not have the opportunity to hear and see the witnesses as they testified. (see ***Selle vs. Associated Motor Boat Co Ltd [1968] EA 123***).

17. The issue arising for determination is whether the learned Judge erred in concluding that the appellant was in breach of its duty of care as an employer and therefore liable for the death of the deceased. In so concluding, the Judge expressed that the evidence of the widow of the deceased, CW1, was uncontroverted that the deceased was placed *"in a position of a helpless sitting duck on the face of an armed attack by robbers"*; that cash in transit is a dangerous job and possibility of armed robbery could not be ruled out; that it is not unreasonable to expect a caged person with little space for movement *"to have protective gear including bullet proof vest, if not placed in an armoured vehicle"* if it was indeed necessary to have a person caged in the square carrier in which the money was kept.

18. The Judge went on to state:

> ***"The duty of care in the circumstances presented is not a shared one, but rests on the respondent to ensure that the deceased was not overly exposed to risk of injury or death from external attack while caged at the back of the cash in transit vehicle. The respondent has in common law a duty of care to see that the deceased and others in this position did not suffer injury or death as a result of negligent or mission to provide a suitable environment in which the deceased operated, being caged, unprotected, unarmed, and with little mobility which can hardly be said to be a safe environment and the respondent must be held responsible for the consequences, that were reasonably foreseeable and which resulted in the death of the deceased."***

19. The evidence of CW1 in that regard was that her husband, the deceased, worked for the appellant as an escort and that they used motor vehicles. She described the vehicle as *"pick up with a square carrier. One could not see outside while inside. There was only a small peeping hole."*; that she was told that the vehicle was attacked by robbers and her husband was inside; that she was suing the appellant due to their negligence leading to her husband's death. In her words, *"the motor vehicle was small. There was no bullet proof. Once inside one is locked there and may only be opened as from outside…one could not help self from inside. There was no room to make any movement."* Under cross examination she stated that the vehicle *"was escorted by police who were armed."*

20. The testimony of RW1, Charles Ndeta, who was the vehicle commandant also shows that the appellant was alive to the risks. RW1 stated in his evidence that, including himself, two other guards, one of whom was the deceased, were assigned to the vehicle. Additional measures taken by the appellant to enhance security involved procurement of two armed Administration police officers who were also in the vehicle. He testified that they were ambushed by armed robbers who sprayed bullets on them; that the administration police officers who were in the front cabin of the vehicle were shot; and that the deceased was shot while in the back cabin. He explained that the back cabin had a big seat which can sit three people; that the *"cabin was openable from inside and outside"*; that the seat faces in front and people seated could not see behind; that *"sideways one sees"* and that there was no chance to react as *"we were shot from all sides."*

21. RW2, Stephen Kangethe, the Human Resource Manager of the appellant accepted, under cross examination, that "*there is a risk all the time for security personnel*" and that non-bullet proof motor vehicles are vulnerable and that is why they provide armed escort. According to RW2, the appellant had operated cash in transit business since 1977; that before the incident in question, "*there has been no armed attack before that incidence*"; that personnel in cash in transit receive comprehensive training as escorts and the deceased had undergone such training; that the appellant has bullet proof vehicles used for high risk assignments like forex transfers to the airport and to such countries as DRC Congo, depending on risk assessment; that the guards were provided with helmets and safety boots and the appellant also hires armed escort. He equally maintained that the guards *"could open motor vehicles from inside. They were not locked in the cabin. Only the money is locked"* and that there was some maneuverability within the cabin.

22. In reaching the decision that the appellant failed to discharge its duty of care, the trial Judge relied entirely on the evidence of CW1. In his analysis of the evidence, the Judge made no reference at all to the testimony of RW1 and RW2. Had he done so, he would have found that the testimony by CW1 that the deceased was enclosed in the back cabin with no room for movement was contradicted by both RW1 and RW2. Contrary to the testimony of CW1, RW1 who was the vehicle commandant was clear that there was maneuverability; that the seat at the back cabin faced forward and passengers at the back could see sideways; and that the cabin was openable from both inside and outside.

23. The respondent's case regarding the standard of care the appellant should have exercised by providing bullet proof vests and armoured car was predicated on the premise that there were *"rising statistics about ambush, way laying and armed robberies targeting cash in transit vehicles"*. Yet the respondents did not offer any evidence to support that claim. The testimony of RW2 was to the contrary. He said that since 1977 when the appellant began operations, the incident in question was the first of its kind.

24. The decision of this Court in in ***Mumende vs. Nyali Golf & Country Club*** (above) on which counsel on both parties relied, supports the proposition that an employer's duty to an employee, is a duty of taking reasonable care not to subject the employee to unnecessary risk. In that case, ***Nyarangi, J.A.*** cited with approval a passage from **Halsbury's Laws of England**, 4th edition, volume 16 at paragraph 562 in which the editors state that 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; that an employer's duty is to take reasonable care; that an employee cannot call upon his employer, merely upon the ground of their relation of employer and employee, to compensate him for an injury which he may sustain in the course of his employment in consequence of the dangerous character of the work upon which he is engaged; that the employer does not warrant the safety of the employee's working conditions and nor is he an insurer of the employee's safety. The Judge emphasized that *"the exercise of due care and skill suffices."*

25. Without a doubt, the business of transporting cash has attendant risks. Based on the evidence, the appellant was alive to those risks and in our view took reasonable steps to protect its guards against the foreseeable dangers by engaging armed Administration police officers to join its guards in the vehicle.

26. We think the standard of care imposed by the court on the appellant to provide bullet proof vests and armoured vehicle, though seemingly prudent, was not an industry standard then and to that extent is unreasonable in the circumstances. We are satisfied that in taking the steps that it did in providing armed security personnel, the appellant discharged its reasonable duty of care. Consequently, the appeal has merit.

27. We accordingly hereby allow the appeal and set aside the judgment of the trial court. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 8th day of May, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR