IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, WAKI & WARSAME, JJ.A)

CIVIL APPEAL NO. 62 OF 2017

BETWEEN

GEORGE ONYANGO OYOO.....1ST APPELLANT

FLORENCE ONYANGO.....2ND APPELLANT

AND

SECURICOR SECURITY SERVICES (K) LTD.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (H.P.G. Waweru, J.) dated 24th February, 2012

in

H.C.C.C. No. 815 OF 2005)

****

JUDGMENT OF THE COURT

Is an employer liable for personal injuries suffered by a security guard in the course of his employment? Does the doctrine of *res ipsa loquitur* apply in matters of employment? What about the principle of *volenti non fit injuria*? Who bears the burden of proof and what is the standard of proof for the tort of negligence and/or breach of statutory obligations? These are some of the crucial questions raised for our decision in this appeal.

The two appellants challenge the finding of the High Court **(Hatari Waweru J.)** made on 24th February, 2012, that the respondent was not liable for the serious injuries suffered by the 1st appellant in the course of his employment. They seek to persuade us to set aside the finding on liability and enter judgment for the special and general damages assessed by that court.

The facts may be stated briefly as most of them are common ground.

The respondent is a security services provider of long standing in this country, before it changed its name to ***G4S Secuirty Services (K) Ltd***. It employs, trains and deploys security guards to various customers all over the country. In this case, the 1st appellant was employed on permanent terms as a security guard since February 1994 and had worked as such, guarding various factories and residential premises. For a period of nine months, he had been deployed at the Tile & Carpet factory on Lunga Lunga road in Industrial area, Nairobi, where he worked without any incident, until 5th August, 2002. On that day, he was on duty with another security guard known as ***Clement Masika*** **(Masika)**. The factory was surrounded by a 10ft perimeter wall with electric fencing, and there was a gate which was locked up. Their duty, as determined by the client, was to patrol the perimeter wall on the outside. As usual, they were equipped with a uniform comprising boots, caps, trousers, jackets, long coats, and standard protective items including batons *(rungus*), whistles, torches and remote alarm buttons. There was also a fixed alarm inside the wall which was accessible through the gate.

At about 7.30 pm, the Supervisor, one ***Caspa Mlama*** (**Mlama),** arrived at the work place to check on the guards. ***Masika*** had gone round the perimeter wall on patrol while the 1st appellant was at the gate. As the supervisor was completing the 1st appellant's guard book, they saw ***Masika***, about 10 meters away, being frog marched by four young men whom the 1st appellant did not recognize, but suspected they were up to no good. He left ***Mlama*** and confronted the young men, but a gun shot rang out hitting him on the chest and he lost consciousness immediately. ***Mlama*** activated the alarm system as ***Masika*** struggled and escaped from the attackers who shot him in the leg before they disappeared.

The 1st appellant was taken to hospital where he was treated for three months but ended up with paralysis as the bullet was lodged in his spinal code. After his discharge from hospital, he was confined to a wheel chair but was retained in employment and his medical expenses were paid by the respondent until 2005 when he was discharged from employment on medical grounds. He was also paid his dues under the **Workmen's Compensation Act** in the sum of KSh.416,880.

The 1st appellant was not satisfied with that compensation. In his view, the injuries he suffered were caused by the *negligence* of the respondent as well as the respondent's *'breach of express and implied contractual obligations'.* The injuries were particularized as: permanent paralysis of lower limbs; inability to control stool for life; inability to control urine for life; and sexual dysfunction. The latter was the reason for the joinder of the 2nd respondent, who is the wife of the 1st appellant, and who claimed general damages for loss of consortium.

The particulars of negligence, breach of statutory and contractual obligations were listed as follows:

> ***"(a) Failing to provide the first plaintiff with protective apparel such as a bullet-proof jacket or vestment.***
>
> ***(b) Exposing the first plaintiff to anger.***
>
> ***(c) Failing to provide a safe working environment.***
>
> ***(d) Failing to provide back-up security such as patrol guards.***
>
> ***(e) Failing to provide back-up security such as alarm system.***
>
> ***(f) Failing to train the first plaintiff in self-defence.***
>
> ***(g) Failing to adequately arm the first plaintiff to enable him perform his duties and defend himself."***

The doctrine of *res ipsa loquitur* was also pleaded in support of the negligence.

The allegations of negligence and breach of statutory or other obligations as well as all particulars of injuries and negligence were denied and the appellants put to strict proof. Instead, the respondent pleaded the doctrine of *volenti non fit injuria* and blamed the 1st appellant for his own injuries, loss and damage. It gave the particulars as follows:

> ***"(a) Failing to be vigilant in the circumstances.***
>
> ***(b) Failing to keep proper look out.***
>
> ***(c) Being inattentive of his work or otherwise exercising insufficient care of his own well being.***
>
> ***(d) Failing to take precautions of his safety as expected in the circumstances.***
>
> ***(e) Failing to raise alarm.***
>
> ***(f) Engaging in a physical combat with armed thugs contrary to instructions.***
>
> ***(g) Failing to apply safety regulations as prescribed by the defendant."***

The only liability admitted was the one arising from the **Workmen's Compensation Act** which the respondent proceeded to pay in full and final settlement. Incidentally, the Workmen's Compensation Act has since been repealed and reenacted as **Work Injuries Benefits Act** – ***Act no. 13 of 2007***.

Only the 1st appellant and the doctor who prepared a medical report testified for him at the trial and were cross examined at length. The 2nd appellant did not testify. For its part, the respondent called four witnesses including the officer in-charge of the Central Firearms Bureau; the respondent's Employees Relations Co-ordinator; an insurance investigator; and the respondent's head of Investigations, Claims & Compliance, all of whom similarly underwent intense cross examination.

Upon evaluating the evidence and the submissions of counsel, the trial court came to the conclusions that: the 1st appellant's attack and injuries cannot be blamed on the respondent; the respondent had provided the 1st appellant with all necessary equipment in accordance with the law and practice of the security industry; the provision of bullet proof vests was prohibitively expensive and was in any event restricted by the Government; issuance of firearms was restricted by strict licensing requirements ; by accepting employment as a security guard, the 1st appellant had acknowledged the inherent danger in that vocation; the doctrine of *res ipsa loquitur* was inapplicable; the respondent could not foresee or prevent the injuries suffered by the 1st appellant as a result of attempted robbery; the 1st appellant acted contrary to the training and instruction given by his employer by confronting armed robbers; the doctrine of *volenti non fit injuria* applied; and that the particulars of negligence and breach of statutory obligations had not been proved on a balance of probabilities. The suit was dismissed but the court proceeded, correctly so procedurally, to assess damages on the basis of full liability at KSh. 9, 023,000 under various heads.

It is the findings on liability which the appellants now challenge on seven grounds listed in the memorandum of appeal. In summary, it is

contended that the trial court erred in law and fact in finding that:

> ***1. the suit cannot be a serious or valid cause of action in law that by being posted as a security guard to certain premises the Respondent/Defendant exposed the 1st appellant/1st Plaintiff to danger of being attacked or failed to provide a safe working environment.***
>
> ***2. the 1st Appellant was provided with all necessary equipment in accordance with the law and practice of the security industry.***
>
> ***3. the 1st Appellant's attack and injuries were not as a result of negligence or breach of its statutory or contractual obligations to the 1st Appellant.***
>
> ***4. the 1st Appellant's evidence on res ipsa loquitor could not apply in this case.***
>
> ***5. the 1st Appellant's injuries, a result of an act of attempted robbery could not have been foreseen or prevented by the respondent.***
>
> ***6. the doctrine of volenti non fit injuria applied to the case as the 1st Appellant took up employment, volunteered himself to the dangers inherent in the job.***
>
> ***7. the 1st Appellant had not proved his case against the Respondent on a balance of probabilities."***

In urging those grounds, learned counsel for the appellants, **Mr. O.C. Jaoko,** filed written submissions which were not orally highlighted, combining grounds 1, 2 and 3, but urging the rest of the grounds as listed. Counsel urged us to consider the evidence on record that the 1st appellant was deployed to work outside a perimeter wall in a crime-prone area. According to him, the 1st appellant was exposed to danger as no safe working environment was provided. To make matters worse, counsel emphasized, the alarm switch inside the premises was only accessible with difficulty through the gate and the Rapid Response Team served too many other premises and was stationed far away thus rendering it unreliable.

He relied on the case of ***Makala Mailu Mumende vs. Nyali Golf & Country Club [1989] eKLR*** where Nyarangi, JA., with whom Gachuhi and Gicheru, JJ.A agreed, stated that an employer is expected reasonably to take steps in respect of the employment to lessen danger or injury to the employee. It was also stated that *'it is essential that employers of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen'.* The dicta in that case was applied in the High Court cases of ***Ruma Muindi vs. Kenya Beach Hotel H.C.C.C. 801/1991*** and ***James Mwilu vs. Machakos District Cooperative Union Ltd, HCCC No. 211 of 1993.***

Finally on the issue of negligence, breach of statutory obligation and cause of action, counsel relied on the common law doctrine stated in **Halsbury's Laws of England**, 4th Edition, Vol. 16 that "*a secuirty guard who suffers injuries in the course of his duties as a result of an attack by gangsters has a valid cause of action premised on negligence and/or breach of statutory obligation to provide protective apparel, safe working environment and mechanism."*

Turning to the 2nd ground of appeal on whether the doctrine of *res ipsa loquitur* applies, **Mr. Jaoko** submitted that the facts spoke for themselves that the security guards were locked out of the premises they were guarding; that the premises were in a crime-prone area; that there was only one remote portable alarm and the fixed one was not accessible. In those circumstances, he submitted that an inference of negligence can be drawn. He cited several High Court cases involving motor vehicle accidents where the doctrine was applied.

On the 3rd issue of whether the attempted robbery was foreseeable, counsel submitted that the very fact that the respondent had employed security guards proved that it had foreseen the danger. He cited the case of ***Securex Agencies (K) Ltd vs. Bernand Ochieng Olute [2009] e KLR*** where Okwengu, J. (as she then was) considered foreseeability and stated thus:

> "***The question is whether the danger that the respondent was exposed to of being shot, was a danger which was reasonably foreseeable, and if so whether the appellant had taken reasonable precaution or care, against risk of injury to the respondent. It was part of the appellant's contractual obligation to protect its clients from acts of trespassers. It was pursuant to this obligation that an alarm system was installed in the client's premises and the respondent assigned to respond to the alarm. The possibility of trespassers invading the client's premises was not a remote possibility as that is precisely what the appellant was contracted to guard against by the client. Given the security situation in the country, the possibility of such intruders or trespassers being armed with dangerous weapons including guns was not unforeseeable."***

The 5th issue was on whether the doctrine of *volenti non fit injuria* applied to absolve the respondent. Counsel submitted that the contract of employment of a security guard imposes a duty on the employer to take reasonable care for the safety of the employee. In his view, for the doctrine to apply, there must be a clear finding of fact that the employee freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it. A security guard, in his view, does not voluntarily expose himself to danger. It is for the employer to take reasonable care for his safety. For those propositions, counsel relied on the ***Makala Mailu case*** (supra); and the High Court cases of ***State House Girls High School & another vs. Evans Mose [2010] eKLR***; ***Rashid Ali Faki vs. A.O. Said Transporters [2016] eKLR***; and ***United Millers Limited & another vs. John Mangoro Njogu [2016] eKLR***.

Finally, **Mr. Jaoko** concluded that the evidence on record proved on a balance of probability that there was lack of reasonable care on the part of the respondent and the trial court was in error to find otherwise.

Responding to those submissions, learned counsel for the respondent, **Mr. F. Mariara,** also filed written submissions which he did not

highlight orally in plenary. On the first combined issue, counsel submitted that the onus was on the appellants to prove, as pleaded and particularized in their plaint, that the respondent was negligent, and was in breach of statutory duty and/or contractual obligations. He defined negligence as a specific tort connoting failure to exercise that care which the circumstances demand. Whether there was negligence, he submitted, depends on the facts of each case and the standard of reasonableness must be the impersonal one. In his view, the evidence on record supports the finding made by the trial court that the respondent had taken reasonable care for the safety of the 1st appellant as required under common law, statute, and the practice of the industry.

According to counsel, the pleading that bullet proof apparel and a fire arm was not provided to the 1st appellant was thoroughly rebutted by evidence from experts that those items were prohibited and strictly restricted. There was also unchallenged evidence that the respondent had complied with the statutory requirements in **Legal Notice No.24 of 1998** made under the **Regulations of Wages and Conditions of Employment Act, Cap 229** and provided the 1st appellant with the items stated therein. There was no requirement for a bullet proof jacket or gun under the regulations. He observed that extra security was also provided through both fixed and mobile alarm systems for calling reinforcement, and that a supervisor was always available. In this case, the supervisor was present at the scene where he used the fixed alarm to call reinforcement. Counsel further submitted that the training offered by the respondent to security guards did not include confronting armed thugs but calling for reinforcement if and when intruders struck. Counsel argued that it was safer for the security guards to be stationed outside the premises where passerby could notice them and call for help, rather than be locked up inside the factory and face the fate of bridge of the perimeter wall by thugs, as had happened previously in the same premises. There was no difficulty, according to counsel, in accessing the fixed alarm button, as indeed the supervisor readily did. He concluded that it was the 1st appellant who knowingly exposed himself to danger by acting contrary to the respondent's instructions.

As for *res ipsa loquitur*, counsel submitted that it only applies where the cause of the accident is unknown, and liability will only arise if there is no evidence to counteract the inference of liability. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves. Counsel emphasized that there was evidence on both sides in this case which established the facts and therefore the doctrine does not apply. The case of ***Flannery vs. Waterford & Limerick Rail Co.(1877) I.R 11 C.L 30, Palles C.B*** was relied on.

Turning to foreseeability, counsel submitted that there was nothing that the respondent could have done to prevent the attack on the 1st appellant. For reasons given by the expert witnesses, bullet proof jackets could not be supplied; and without the 1st appellant applying for and obtaining a licence to be armed, or the law being changed to allow distribution of guns to private security guards, the respondent could not supply a gun.

On the applicability of the doctrine of *volenti non fit injuria*, counsel recalled the evidence of the 1st respondent admitting that he had worked for ten (10) years **12** and testified to incidents which illustrated the danger involved in providing security. He submitted that the 1st appellant fully understood the risks involved in his job but still continued in employment, and so, the doctrine applies.

Finally, counsel pointed out that the authorities relied on by the appellants were from the High Court and therefore not binding on this Court. In his view, the use of guns during attacks is a breach of national security and therefore the responsibility of National Government to mop up illegal firearms. No amount of protective gear can safeguard one against gunfire.

We have considered the record of appeal, the submissions of counsel and the law in the manner of a retrial as guided by ***Rule 29 (1) (a)*** of the Court's rules, in order to arrive at our own conclusions in the matter. We are aware that a *'court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding '*--See ***Mwangi vs. Wambugu [1984] KLR.***

At the opening paragraph of this judgment, we posed some issues which may now be shortlisted for discussion and determination:

(i) Was negligence, and breach of statutory and /or contractual obligation proved against the respondent?

(ii). Does the doctrine of res ipsa loquitur apply?

(iii) Does the doctrine of volenti non fit injuria apply?

(iv) Was the trial court justified in dismissing the appellant's suit?

Before examining the issues, we must observe that the 2nd appellant though listed as a party in the appeal, never testified before the trial court to establish her case. Her case is indicated in the plaint as loss of consortium, but there were no findings made with respect to her case. There is, therefore, nothing before us to consider in respect of the 2nd appellant. The appeal, in truth, is made by the 1st appellant whom we shall henceforth refer to as the appellant.

The starting point in considering the first issue is to examine the cause of action pleaded by the appellant. The particulars reproduced above establish the cause of action is in the tort of negligence and breach of statutory obligations. The law is fairly clear that an employer owes no absolute duty to the employee and the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable or which would be prevented by taking reasonable precaution. See this Court's decision in ***Mwanyule vs. Said t/a Jomvu Total Service Station [2004] 1 KLR 47***.

The position is also clear in common law as propounded in paragraph 562, **Halsbury's Laws of England**, 4th Edition Vol. 16, which was adopted in the ***Makala Mailu case*** (supra) 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. 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 from 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. 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 employer does not owe any general duty to the employee to take reasonable care of the employee's goods; the duty extends to his person."

As always, however, the onus of proving any alleged negligence, breach of statutory obligations and/or lack of exercise of due care and skill as dictated under common law, lies on the employee. As stated in **Halsburys Laws of England** 4th Edition, Pg 662:

"The burden of proof in an action for damages for negligence rests primarily on the plaintiff who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

Further, in **Clerk and Lindsell on Torts,** 18th Edition, pg 600 paragraph 4, the essentials on an action for breach of statutory duty are outlined as follows:

"(1) The claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient to imply that the loss could not have occurred if the defendant had complied with the terms of the statute.

This rule performs a function similar to that of remoteness of damages.

(2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability.

(3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event.

(4) Finally there is the question whether there are any defences available to the action."

In this case, the appellant did not, in his pleading and evidence, specify the statutory provisions that the respondent failed to comply with. We suspect that he was alluding to the ***Occupational Safety and Health Act*** which applies to all workplaces where any person is at work, whether temporarily or permanently. In the case of ***Purity Wambui Murithii vs. Highlands Mineral Water Co. Ltd [2015] eKLR,*** this Court examined its applicability and stated thus:

"Section 6(1) of the Occupational Safety and Health Act provides:-

"Every occupier (employer) shall ensure the safety, health and welfare at work of all persons working in his workplace."

It, therefore, follows that as a general rule the employer is liable for any injury or loss that occurs to his employees while at the workplace as a result of the employer's failure to ensure their safety. Does this mean that the employer would always be liable in all circumstances regardless of what caused the accident in question? We do not think so. We say so because where an accident happens due to the employees own negligence it would be unfair to hold the employer liable. Further **Section 13(1)(a)** ***of the*** **Occupational Safety and Health Act** ***provides:-***

"13(1) Every employee shall, while at the workplace –

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace."

Therefore, the employee is also required to take reasonable precaution to ensure his/her safety at the workplace while performing his/her duties."

In light of the pleadings and the principles of law examined above, we must ask the question whether the appellant proved his case on a balance of probability?

After examining the evidence on record, the trial court held as follows:

"From the totality of the evidence before the court, the Defendant had provided the Plaintiff with all necessary equipment in accordance with the law and the practice of the security industry. The equipment did not include a bullet-proof vest. It was not the practice of the industry to provide bullet-proof vests to ordinary security guards because of two main reasons. One, it was a restricted item regulated by the Government and, secondly, it was quite expensive and it would be prohibitively expensive for a security firm to equip all its security guards with it. The Defendant could reasonably only afford to provide the item to its alarm-response crews who would be escorted by police, apparently to guard the bullet-proof vests from falling into wrong hands. There

would of course be better protection of a limited number of the gadget. The Defendant did not therefore breach any statutory or contractual obligation by not providing the Plaintiff with a bullet-proof vest.

Firearms are of course prohibited items under the law and there are strict licensing requirements for one to acquire a firearm certificate entitling him to possession and use of a firearm. There is no way under our current laws that a security firm would be able to equip all its security guards with firearms.

Given the nature of the Plaintiff's duties as a security guard, it was not unexpected that some element of danger would be involved, this element being the possibility of an attack by robbers. It must have been a danger that the Plaintiff was well aware of, or should have been aware of when he took up the employment. The fact that an attack by robbers did actually occur in which the Plaintiff was injured cannot be attributable to any negligence of the Defendant, or to breach of any statutory or contractual obligation. The Defendant had taken reasonable care to provide to the Plaintiff proper and necessary equipment for his work. The Defendant could not have warranted total or absolute security of the Plaintiff given the nature of his work as a security guard. By providing a whistle, a club for self defence, an alarm system and alarm-response teams, the Defendant had taken reasonable care for the safety of the Plaintiff as required under common law."

We have re-evaluated the evidence on the first issue and find, with respect, that there was sufficient basis for the trial court to come to that conclusion. The main complaints listed in the pleadings, which the appellant was bound to prove in evidence, were that there was a statutory or contractual duty to provide him with a gun and bullet proof apparel to prevent the kind of injury he suffered, lack of back up security, and generally, want of a safe working environment. The respondent tendered witnesses who answered those complaints and the explanation was accepted by the trial court which saw and heard the witnesses and was better placed to judge their credibility. We have no valid reason to interfere.

The ***Makala Mailu case*** (supra), which was heavily relied on by the appellant is distinguishable. There was no defence filed by the employer in that case to rebut the pleading that the employer had neglected to supply the watchman with a helmet which, according to the Court, was part of the *'minimum reasonable measures of protection'*. Nyarangi, JA who delivered the leading judgment had this to say:

"I also bear in mind Lord Wright's ruling in Wilsons & Clyde Coal Co Ltd v English, [1938] AC P 57 that:

> *"The same principle in my opinion applies to those fundamental doctrine of common employee and for the performance of which employers are absolutely responsible. The obligation is fulfilled by the exercise of due care and skill."*

No employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in. But, however inherently dangerous, an employer is expected reasonably to take steps in respect of the employment, to lessen danger or injury to the employee. Paragraph 560, Halsbury's Law of England, 4th Edition, Vol 16, states inter alia:

> *"At common law an employer is under a duty to take reasonable care for the safety of his employees in all the circumstances ... so as not to expose them to an unnecessary risk".*

Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and endure the existence of minimum reasonable measures of protection. The necessity is the greater for an employer to protect his employees from danger after a warning following a potentially dangerous incident during which no injuries are sustained."

In the case before us, there was evidence of a previous bridge of the perimeter wall and an attack on the guards inside the premises, hence the reason for the client (Tile & Carpet) choosing to have the guards stationed outside the perimeter wall. Such decision does not support the contention by the appellant that the working environment was dangerous. It is our finding that the respondent had supplied the minimum reasonable measures of protection applicable in the Kenyan security industry, in form of uniform, whistle, club, torch, alarm system, supervisor and a back up alarm team, all geared towards lessening the danger or injury to the employee and thereby discharging its duty of care under the relevant statute and common law.

The statute, as reproduced above, imposes a duty on the employee to *'ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace'.* But the appellant appears to have single handedly confronted a four-man armed gang instead of raising an alarm in accordance with his training. We agree with the following sentiment expressed by the trial court:

"There is no doubt that the Plaintiff was a man of courage, but he was also a little foolish. A more cautious or prudent person would perhaps have paused to observe first from a distance, or better still immediately reach for the alarm at the gate. It would also have been wiser thing to escape immediately in order to otherwise raise alarm. That kind of response would have been more in consonance with the training and instruction that the Defendant gave its security guards, including the Plaintiff.

But I do not find that the Plaintiff's rather foolish reaction amounted to negligence on his part, or a reckless disregard for his own safety. He just did not pause long enough to correctly assess the situation and react appropriately. He was not negligent."

The 2nd issue is whether the doctrine of *res ipsa loquitur* applies in this case and the straight answer is that it does not. The reason is that the doctrine does not apply where the facts leading to the injury are sufficiently known. In the case of ***Margaret Waithera Maina vs. Michael K. Kimaru [2017] eKLR,*** this Court discussed the doctrine and formed the following view:

"Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is

said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12th edition, appears this passage:

> *"Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine. I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.*
>
> *The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."*

The same sentiments were expressed by Hobhouse L.J. in the case of Ratcliffe vs. Plymouth & Tobay HA 1998 PIQR 170:

> *".....the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phase 'a prima facie case'. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out."*

Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of Nandwa vs. Kenya Kazi Ltd, Civil Appeal No. 91/1987 for the reason that evidence is not to be pleaded. Also see Bennet vs. Chemical Construction (GB) Ltd 3 All ER 822 where the Court emphasized that :

> ***"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable."***

In view of the evidence on record from both sides which was duly evaluated and conclusions made thereon, the doctrine is not applicable.

On the 3rd issue, the trial court found that the doctrine of *volenti non fit injuria* was applicable. The reasoning was as follows:

> ***"Is the work of a security guard inherent dangerous? There cannot be any doubt that it is. Thieves or robbers can strike at any time, and they often do! In such attack there is always likelihood that the security guard might be injured. When a security guard takes up employment as such, surely he must know all this, and he would be fully aware of the real possibility of him being injured in the course of his work. By taking up such employment he volunteers himself to the dangers inherent in the job.***
>
> ***I therefore find that the doctrine of volenti non fit injuria applies to this case."***

With respect, we beg to differ. The simple principle is that *'to no one who volunteers, no harm is done'*. But as correctly submitted by the appellant, a security guard does not freely and voluntarily expose himself to danger with the full knowledge and extent of the risk he ran. Some examples given to illustrate the doctrine are: *'intermeddling with an unexploded bomb'* or *'walking on the edge of an unfenced cliff'*. See ***Dann vs. Hamilton [1939]1 KB 509.*** In the ***Makala Mailu case*** (supra), Nyarangi, JA, with whom the other Judges agreed, had this to say:

> ***"Just because an employee accepts to do a job which happens to be inherently dangerous is, in my judgment, no warrant or excuse for the employer to neglect to carry out his side of the bargain and endure the existence of minimum reasonable measures of protection".***

He added:

> ***"The security industry is booming. In recent years there has been an increase in the number of security personnel guarding companies' premises and facilities. Banks and private homes are increasingly using security guards to protect property from theft or damage. It is no longer a luxury for a firm to have security staff. Such being the circumstances, it is essential that employers of security workmen take reasonable care to protect such employees from risks which can reasonably be foreseen. After all, the keen demand for security personnel means there is a role for them to play."***

In our finding, the level of duty of care imposed on the employer by statute, contract or common law is not supplanted by the doctrine of *volenti non fit injuria.*

Save for that finding, we find no merit in this appeal and affirm the decision of the trial court. The appeal is hereby dismissed but we make no order as to costs.

Dated and delivered at Nairobi this 11th day of October, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR