



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GATEMBU, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 79 OF 2005

BETWEEN

JAPHETH NATSE IFEDHAAPPELLANT

AND

COLLINDALE SECURITY COMPANY LIMITEDRESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Visram, J) dated 22nd February, 2005

in

HCCA NO. 99 OF 2004)

JUDGMENT OF THE COURT

Background

This is an appeal from a decision of the High Court, Visram, J [*as he then was*] rendered on 22nd February, 2005.

According to the plaint, the appellant, **JAPHETH NATSE IFEDHA**, sued his former employer, **COLLINDALE SECURITY COMPANY LIMITED**, the respondent, in the Chief Magistrate's Court at Milimani, Nairobi wherein he sought *inter alia* the following orders:

“general damages for pain and suffering and for loss of amenities; general damages for breach of contract; special damages; exemplary/punitive damages for inhuman conduct, costs of the suit and interest from the respondent in respect of injuries sustained in the course of his employment.”

After hearing the parties, the trial court, (Hon. E. N. Maina), found that there was no basis of a claim

against the respondent and dismissed the appellant's suit. Aggrieved by that decision, the appellant preferred an appeal to the High Court. The High Court dismissed the appeal with costs and held *inter alia* that there was nothing in the evidence before the trial court to show how the respondent breached the duty of care owed to the appellant and that the appellant had failed to prove his case on exemplary damages for inhuman conduct.

Aggrieved by that decision, the appellant filed this appeal on grounds that the learned Judge erred in law by failing to address the question of negligence on the basis of the pleadings and the evidence; making findings of fact on the basis of hearsay evidence and a departure from the pleadings; failing to make a finding as to quantum of damages payable; failing to address the legal basis for a claim in exemplary damages and in making findings of law based on the legal doctrine of *volenti-non-fit injuria* which was neither pleaded nor arose in the course of evidence or proceedings.

The appellant also claimed that the learned Judge's findings of fact constituted grave errors of law in failing to address the appellant's double jeopardy in that he was injured and dismissed from employment and also by failing to take judicial notice of the prevalence of violent crime in Kenya. The appellant further averred that the learned Judge's decision was contrary to the authorities tendered and that the learned Judge failed to determine that a duty of care owed to a watchman in an unsafe jurisdiction such as Kenya is higher than in ordinary cases. Finally, that the learned Judge's appraisal of evidence tendered before the lower court was so gravely erroneous that it calls for this Court's intervention.

Submissions by counsel

At the hearing before us, Mr N.H Muturi learned counsel for the appellant, relied on the appellant's written submissions and the list of authorities filed on 15th May, 2013. He submitted that the first appellate court was under a duty to appraise all the evidence adduced and reach a correct finding; that the trial court failed to consider the evidence adduced; that the first appellate court failed to review and re-evaluate the evidence tendered before the trial court and to establish whether the appellant had established negligence and whether liability ensued therefrom.

Mr Njuguna, learned counsel for the respondent, opposing the appeal, relied on the respondent's written submissions and list of authorities filed on 23rd July, 2014. He supported the learned Judge who found that the respondent had discharged its duty of care to the appellant by providing the necessary appliances such as walkie talkies and alarm. He submitted that the appellant's claim for exemplary damages for inhuman conduct is unfounded. Accordingly, counsel urged us to dismiss the appeal.

Analysis and determination

We have considered the record of appeal, the submissions by learned counsel and the law. As this is a second appeal, by dint of ***Section 72 (1) of the Civil Procedure Act, Chapter 21, Laws of Kenya*** this Court is restricted to consideration of matters of law only. In ***KENYA BREWERIES LTD V GODFREY ODOYO, CIVIL APPEAL NO. 127 OF 2007***, Onyango Otieno, J.A expressed himself as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

The appellant admitted in his evidence that the respondent provided him with the necessary equipment but blamed the respondent for not providing sufficient number of guards. The appellant did not tender any evidence to prove that the respondent had been requested to avail more guards but had declined to do so. The respondent's witness testified that it was the appellant's role as supervisor to request for more guards when required. From the evidence, the appellant did not make such a request.

Halsbury's Laws of England 4th Edition, Vol. 16 par. 562, sets out the duty of an employer to an

employee as follows:

“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 his employment in consequences 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 condition nor is he an insurer of his employee’s safety; the exercise of due care and skill suffices.”

We are guided by the case of ***MWANYULE V SAID t/a JOMVU TOTAL SERVICE STATION, [2004] 1 KLR 47***, where this Court concluded that:

“... the 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.”

In the instant case, the respondent provided the appellant with equipment to carry out his duties in the course of his employment.

Accordingly, we are satisfied, in the circumstances of this case that the respondent did discharge its duty of reasonable care to the appellant and agree with the learned Judge of the High Court that ***“the claim in negligence has not been established on a balance of probability”***.

The upshot of the foregoing is that we find that this appeal has no merit and it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 24th day of October, 2014.

S. GATEMBU KAIRU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

