IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:TUNOI, O'KUBASU JJ A & ONYANGO OTIENO AG JA)

CIVIL APPEAL NO. 211 OF 2002

BETWEEN

ABADALLA BAYA MWANYULE .....APPELLANT

AND

SAID T/A JOMVU TOTAL SERVICE STATION.....RESPONDENT

(Appeal from a decision and order of the High Court at Mombasa (G A Omwitsa CA) dated 14th May, 2002

in

HCCA No 82 of 1999)

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JUDGMENT

The appellant in this second appeal Abadalla baya Mwanyule was the plaintiff in the Senior Resident Magistrate's Court at Mombasa in Civil Suit No 910 of 1999. He was an employee of the respondent, Swalahadin Said who was then operating a business at Jomvu Service Station in Mombasa. He (appellant) sued the same employer. He was at all material times employed by the respondent as a pump attendant. On 5th day of December 1996, at about 1.30 pm, the appellant was on duty at the service station when a gang of more than twenty men attacked him. He was injured on the right hand, back, ribs, head and his three fingers of left hand were cut off. The respondent was informed about the incident and he (appellant) was taken to Makadara Hospital and later to Mewa Hospital for treatment. He was admitted at the latter hospital for one and half weeks. He was thereafter released from the hospital but he was left with what he called very ugly scars on the right hand, back and ribs where he was stabbed with a knife and he was still feeling tired at the time. He filed forms for Workman's Compensation and he was awarded Kshs 26,250/ for the injuries he sustained. As a result of the serious attack and the injuries received he sued the respondent in the Senior Resident Court by way of a plaint dated 15th February 1999. In the same plaint, the appellant averred that the said attack occurred as a result of the negligence on the part of the respondent/his servants and/or agents in that respondent, being his employer, failed to employ guards to protect him while on duty; that he failed to arm him (the plaintiff) in order to protect himself in case of attack; that he failed to install alarm systems to enable the plaintiff secure help; that he failed to provide the plaintiff with protective wears like gloves, and that in the process the respondent exposed the plaintiff to harm or risk or danger. He prayed for judgment against the respondent for general damages, special damages of Ksh 1,500/= being the cost of medical examination report and costs of the suit.

After full hearing of the case, the learned Senior Principal Magistrate found in favour of the appellant holding *inter alia* as follows:

"It is my findings that plaintiff has proved that the defendant did not exercise due care and skill as required by common law. In giving adequate security, the defendant exposed his night workers to great risk. I find the defendant fully liable in this case and enter judgment in favour of plaintiff against defendant."

Having made that finding the learned Senior Principal Magistrate then proceeded to consider the quantum of damages and awarded the appellant general damages in the sum of Ksh 320,000/= and special damages of Ksh 1,500/=. She ordered the amount of Ksh 26,250/= given earlier on as workman's compensation to be deducted from the same amount. The respondent felt aggrieved and lodged Civil Appeal No 82 of 1999 in the Superior Court. That appeal was heard by the learned Commissioner of Assize G A Omwitsa and was, in a judgment delivered on 14th May 2002 allowed on liability and the judgment of the learned Senior Principal Magistrate was set aside. The learned Commissioner also considered the quantum of damages awarded and felt that subject to liability; a sum of Ksh 250,000/= would have been appropriate in the circumstances of the case. The appellant felt aggrieved by that decision and hence this appeal.

The appellant cited nine grounds of appeal in his Memorandum of Appeal but at the hearing, he abandoned grounds 4,5, 6, and 7 preferring to argue grounds 1,2,3,8, and 9 only.

We have considered this appeal. It is a second appeal as we have stated above and that being the case only points of law are available for consideration. We have also considered the submissions made before us by the learned counsel. In our minds, two matters of law were canvassed before us. These were first whether the learned Commissioner of Assize was right in allowing the appeal and setting aside the subordinate court's orders whereas the relevant Memorandum of Appeal before him did not pray for such appeal to be allowed and did not seek setting aside the subordinate court's orders. Second point, which we think is more important is whether in the circumstances of this case the respondent ie employer had exercised due care and skill in ensuring the safety of the appellant while engaged in his work or had he exposed the plaintiff to a risk of damage or injury of which he (respondent) knew or ought to have known.

On the first point, the respondent filed two Memorandum of Appeal in the Superior Court. These were original Memorandum of Appeal and amended Memorandum of Appeal. It thus goes without saying that the amended Memorandum of Appeal superseded the original Memorandum of Appeal. In that amended Memorandum of Appeal, dated 17th September 1999, the respondent did not make any prayers such as that the appeal be allowed together with costs. In fact it appeared to us that it was badly drafted. This omission is also in the original Memorandum of Appeal. The learned counsel for the appellant did not raise this omission when he argued the appeal before the Superior Court. Before us however, it was a ground of appeal and the learned counsel did refer us to the case of *Nairobi City Council vs Thabiti Enterprises Limited*, Court of Appeal Civil Appeal No 264 of 1996 in support of the contention that as there was prayer in the pleadings seeking an order that the appeal be allowed and judgment of the subordinate court set aside, the learned judge of the Superior Court should not have allowed the appeal and set aside the judgment of the trial magistrate. As we have said the amended Memorandum of Appeal did not have a prayer seeking that the appeal be allowed and judgment of the magistrate be set aside. However, we cannot, with respect, agree that the Superior Court faced with that situation could not have allowed the appeal and set aside. The magistrate's judgment if that was the inevitable conclusion arrived at after hearing and considering the appeal. There was an appeal before the Court, which had been canvassed by the two learned counsel. The learned counsel for the appellant in the Superior Court addressed the Court in chief and ended his submissions as follows:-

"I urge your lordship to allow appeal with costs." The learned counsel for the respondent in the Superior Court ended his submissions as follows:-

"May the appeal be dismissed with costs."

The effect of these submissions was that the parties expected the Commissioner of Assize to reach a

certain decision at the end of his judgment. If he felt the appeal had merits; he could allow it with costs and if he felt the appeal had no merit then he could dismiss it with costs. If on the other hand he felt there was need to take any other action on the appeal then he would say so but he could not leave the judgment hanging in the air without any specific order simply because the Memorandum of Appeal did not pray for the same.

In our view, the learned commissioner was plainly right in making an order setting aside the lower court's judgment because the appeal before him having been heard in its merits without the omission being raised and being made an issue, he had a duty to reach a decision on the merits of that appeal and had to express the same decision. We do not see and we were not told of any prejudice suffered by the present appellant as a result of that decision. We may add here that there have been several occasions when an appellate Court has had to order a retrial after hearing an appeal. The Court would order retrial even the same because the Court has powers to do so. Likewise, in the case where the appeal was fully argued before the Court, the Court had powers to make orders setting the Lower Courts judgment aside because that was the natural result of the judgment, which had allowed the appeal. The case of *Nairobi City Council vs Thabiti Enterprises Limited* Civil Appeal No 264 of 1996, was a case where the plaintiff Thabiti Enteriprises Limited had filed a suit of trespass against City Council. City Council's defence was struck out and the suit was set down for assessment of general damages. On the date set for assessment of general damages the advocate of the plaintiff claimed in court that the claim was for compensation of the plot into which the defendant had encroached thereby seeking the ascertainment of the value of the suit land allegedly exploited by the City Council. That was not pleaded and this court stated as follows in the case.

"It is now settled law that the only way to raise issues for determination by the Court is through pleadings and it is only then that a claimant will be allowed to proceed to prove them. See the case of *Charles C Sande vs Kenya Co-operatives Creameries Ltd* Civil Appeal No 154 of 1992 (unreported). In this instance compensation was never pleaded and should not have been tried. The Court was obliged to dismiss that relief."

It is in or humble opinion, a case when a party relied in what is not pleaded in the plaint. In the case before us whether to allow the appeal or dismiss it are matters that are implied particularly as to this appeal where the parties fully argued the appeal and one sought that the appeal be allowed with costs while the other sought that the appeal be dismissed with costs. The two cases are clearly distinguishable. We find no merit in this ground of appeal.

The second main ground of appeal as we have stated above is on the common law duty of an employer in the circumstances of the case, we feel this ground covers grounds 2,3 and 8 of the Memorandum of Appeal.

These grounds state as follows:

"2. The learned Commissioner of Assize erred in law and misdirected himself in; arriving at the conclusion that the common law duty of an employer of a petrol station pump attendant is limited to providing such facilities as are necessary to protect him from injuries which he is likely to sustain from operation of service station such probable injuries would include injuries arising from fire outbreak…" thereof restricting himself.

3. The learned Commissioner of Assize erred in law and in fact in failing to appreciate that the law in all cases exerts a degree of care commensurate with risks created, and consequently failing to find that the defendant/respondent had failed to discharge their commensurate duty by care owed to the plaintiff/ appellant who was engaged in handling money collections at night thereby being exposed to attacks by gangs of robbers among others:

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4. The learned Commissioner of Assize erred in law and misdirected himself in law and fact, by drawing a direct analogy between bank employees and pump attendants in respect of the nature of safety

precautions required thereby taking into consideration extraneous matters in his judgment."

The starting point is what common law duty did the respondent owe to the appellant to ensure that his condition of work was safe and secure? The learned Senior Principal Magistrate, in arriving at the findings we have reproduced above stated in her judgment that as the petrol station business is risky in that workers handle money and particularly at night when the stations are prone to acts of thuggery, the employer needed to employ four guards particularly as the petrol station, the subject matter of this case was "situated in the scantly populated outskirts of town." She also found that the night attendants should be provided with helmets and other protective clothing like heavy gloves. Before us, the learned counsel of the appellant referred us to the decision of this Court in the case of *Makala Mailu Muwende vs Nyali Golf and Country Club* Civil appeal No 16 of 1989 (Mombasa) (unreported) where this Court awarded an employee damages against his employer who had failed to supply a helmet to the employee. The employee was a watchman and had been attacked in the course of his duty and incurred injury to the apex of his head.

Armed with that authority, the learned counsel for the appellant submitted that the degree of care owed to the employee by the employer is an absolute duty.

We have anxiously considered the decision of the learned Senior Principal Magistrate and the submissions by both learned counsel. With respect we do not agree with the learned counsel for the appellant in his contention that the degree of care owed to the employee by the employer is absolute, we also do not agree with the learned Senior Principal Magistrate that the appellant was entitled to a helmet and heavy gloves by virtue of his trade. *Halsburys laws of England* 4th Edition volume 16, paragraph 562 discusses the law on the extend of employer's duty and it states:-

"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 consequence of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damages suffered 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 only to his person."

In our view the above reflects the common law position and that is the law applicable in Kenya. This Court's decision in the case of *Makala Mailu Muwnede vs Nyali Golf & Country Club* Civil Appeal No 16 of 1989(Mombasa) followed the same legal proposition. In that case it must be born in mind that the appellant was employed as a guard. Not only did his trade require that his employer give him a helmet, but his trade union had, prior to the attack upon him demanded that he be given a helmet for protection. Further, there was evidence that other employers in the same category were given helmets by their employers and lastly there was also evidence that there had been an attack upon him at his place of work earlier on. It will be seen from the above that this Court applied the same principles spelt out in *Halsbury Laws of England*, part of which we have reproduced herein above and awarded damages against the employer. In the case before us, the appellant's 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 helmet and heavy gloves for the employee. The appellant stated in his evidence in cross-examination in the subordinate court as follows:

"There were two guards on duty at night. There was an alarm system of KK Guards but the guards were from another firm Galel Security Service. There was security but the gang was too large to be repulsed by the two watchmen. There are times we use the office for renting when there is no such work.

It is not necessary to wear a helmet or gloves when on duty as a pump attendant. The employer had done his best to provide security. I cannot blame security guards for the attack."

That evidence makes it clear in our mind that the respondent had done his best to provide security to the employee. We note that the appellant was a pump attendant and was not the cashier at the time he was attacked. The learned magistrate felt that four guards would have been required at night as the petrol station was situated in the scantly populated outskirts of the town. The appellant himself said that the gang was too large to be repulsed by two guards. We have no guarantee that four watchmen would have repulsed the gang as the learned magistrate suggested. In any event it would be possible for an employer in that category to employ enough watchmen at any given time as none can anticipate the number of thugs that might attack such an employee at any given time. Further, we note that the learned Senior Principal Magistrate, in considering the need of four guards, a helmet and heavy gloves relied on the ground that the service station was situated in the scantly populated outskirts of the town. No evidence was adduced before the Court as to the density or otherwise of the area where the petrol station was and as to whether it was on the outskirts of the town. We are of the view that even in a civil case, the court should only rely on the evidence, pleadings, and matters canvassed before it by counsel, or parties but should not constitute itself as a witness on certain matters and having done so rely on the same for a decision.

We think, what we have stated above is enough to show 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. We are satisfied that in this case, the employer (respondent) in employing two watchmen and providing security alarm did discharge his duty to the appellant. The learned Commissioner of Assize was perfectly right in finding as he did that the respondent did discharge his duty of care and skill to the appellant. We find no reason to disturb that finding and it will stand.

On the quantum, we need not say more as this is now a matter of academics only in view of our decision above. We feel however that the learned Commissioner of Assize made an arbitrary decision in rejecting the amount of Ksh 320,000/= which the learned magistrate had arrived at after careful consideration of some cases to which she has referred. If this aspect of the appeal was still available, we feel the figure preferred by the learned magistrate would have reflected the correct position in law. But as we have stated, this is now no more than mere academic.

In conclusion, we find that this appeal lacks merit. It is dismissed with costs to the respondent. Judgment accordingly.

Dated and Delivered at Nairobi this 29th day of January 2004.

P.K.TUNOI

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JUDGE OF APPEAL

E.O.O'KUBASU

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JUDGE OF APPEAL

J.W.ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR