Case Number:	Civil Appeal 466 of 2017
Date Delivered:	21 Jan 2020
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Joseph Kiplagat Sergon
Citation:	Bob Morgan Services Limited & another v Protus Mwalati [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Honourable Senior Resident Magistrate E. Wanjala
County:	Nairobi
Docket Number:	-
History Docket Number:	CMCC 1131 of 2015
Case Outcome:	Appeal awarded
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 466 OF 2017

BOB MORGAN SERVICES LIMITED.....1ST APPELLANT

SOMA PROPERTIES LIMITED.....2ND APPELLANT

-VERSUS-

PROTUS MWALATI.....RESPONDENT

(Being an appeal from the Judgment of Honourable Senior Resident Magistrate E. Wanjala at the Chief Magistrate ' Court delivered on 3rd August, 2017 in CMCC NO. 1131 OF 2015)

JUDGMENT

1. Protus Mwalati, the Respondent herein was employed by Bob Morgan services Ltd, the 1st Appellant herein, as a security guard. The Respondent's duties included inter alia, securing the premises of Soma Properties Ltd, the 2nd Appellant herein and to also patrol the property and monitor the access points.

2. On 27/4/2014 the Respondent was shot in the chest by unknown assailants who unexpectedly attacked a visitor at the Lower Kabete Road entrance where the Respondent had been assigned day shift duties to guard the aforesaid entrance. The Respondent filed a compensatory suit before the Chief Magistrate's court, Nairobi, against the Appellants...

3. Hon. E. Wanjala, learned Senior Resident Magistrate heard the suit and in the end, she entered Judgment in favour of the Respondent and against the Appellants in the sum of ksh. 1,003,000/=.

4. The Appellants being aggrieved filed this appeal and put forward the following grounds:-

i. The Honourable Court had no jurisdiction to hear and determine the matter since, on the date of the alleged accident, the provisions of the Work Injury Benefits Act No. 13 of 2007 were in effect and hence the remedies granted to the Respondent are not available in law.

ii. The learned Magistrate erred in law and fact by failing to consider that the Appellants had taken all necessary measures and precautions to ensure the Respondents' safety and the general safety of the work premises, which included inter alia induction briefing, on-the-job safety training, installation of various security apparatus and the deployment of more than 39 security guards to guard the premises.

iii. The learned Magistrate erred in law and in holding that the Respondent had not been provided with the necessary protective clothing and/or gear in spite of evidence adduced by the Appellants showing that the Respondent was provided with trousers, shirts, caps, rain coat, Whistle, boots, belt and a baton in accordance with the provisions of the security wages order. The learned Magistrate also failed to appreciate that security guards are not supposed to be armed.

iv. The learned Magistrate erred in law and in failing to consider that there was no causal link between the Respondents' injury and the Appellants. The Respondent had not provided any evidence to show that the injury he sustained was

occasioned by the negligence act or omission of the Appellants', if any. In the absence of a causal link, the Appellants' cannot reasonably be held liable for the Respondents' injury.

v. The learned Magistrate failed to consider that the Respondents' injury was as a result of acts of unknown assailants, whose acts were unforeseeable in the circumstances. The Appellants' had no knowledge or forewarning of the said accident and it was thus highly unreasonable to hold them liable for the same.

vi. The learned Magistrate erred in law and in failing to consider that the Respondent had not proved his case on a balance of probability. The fact that the injury occurred at his place of work does not ipso facto cannote that the Appellants were negligent.

vii. The learned Magistrate failed to appreciate that the Respondent's injury was solely attributed to his own carelessness and/or negligence. The Respondent had breached the safety regulations by confronting the robbers despite being fully aware that they were armed with a pistol and by failing to call for reinforcement as was required and/or as was reasonably expected in the circumstances.

viii. The learned Magistrate failed to appreciate that the doctrine of volenti non fit injuria was applicable in the circumstances. The Respondent had full knowledge of the extent of the risk that lay a head when he approached the armed robbers, contrary to the safety regulations. To demand that the Appellants ought to have done more than was required was to raise the threshold beyond that set by statute.

ix. The learned Magistrate erred in law by apportioning 100% liability on the Appellants despite evidence adduced to show that the accident was occasioned by the Respondent's blatant disregard of the safety training and regulations.

x. The learned Magistrate erred in law in his judgment and he did not differentiate between the 1st Appellant and the 2nd Appellant in determining liability and yet their relationship differed both factually and legally.

xi. The learned Magistrate's decision to award damages of ksh. 1,0003,000 was manifestly excessive and unwarranted in the circumstances.

5. When this appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions together with authorities cited. Though the Appellants put forward a total of 11 grounds of appeal, three grounds commend themselves for determination as the main grounds. In respect of jurisdiction, liability and quantum.

6. On the first ground, it is the submission of the Appellants that the trial court had no jurisdiction to entertain the suit under the Work Injury Benefits Act (WIBA). The Appellants argued that the first course of redress was to seek compensation from the 1st Appellant in accordance with the Provisions of Section 10 of WIBA and thereafter the Director of Occupational Safety and Health Services in accordance with section 26 of WIBA.

7. The Appellants are of the submission that the trial Magistrate failed to appreciate that WIBA does not accord jurisdiction to the Magistrate's court to hear and determine Work Injury claims. The case **of Longonot Horticultural Ltd Vs James Wakaba Maina [2019] eKLR** was cited, where the court held inter alia as follows:

"All industrial accidents and diseases are legally to be reported to the Director and not filed with the lower court. The shift created by the WIBA has been in place since 20/12/2017 and no reasons given as to why the Respondent failed to adhere"

8. The Respondent is of the contrary opinion that the suit was properly before the trial court. Since it is founded on breach of contract of employment and common law duty of occupiers liability. The same arguments were also made before the trial court. In her judgment, the learned Senior Resident Magistrate stated that she has never come across a provision that excludes the court's jurisdiction in entertaining the matter before it.

9. Having considered the rival submissions, I am satisfied that the learned Senior Resident Magistrate came to the correct decision. Though WIBA provided the mechanism of involving work related injury, the same piece of legislation did not expressly oust the jurisdiction of the courts to entertain such claims. Consequently, nothing turns out on the appeal as against the decision on jurisdiction.

10. The second issue which was raised and argued on appeal is the question touching on liability. It is the submission of the Appellants that the trial Magistrate erred when she failed to find that the Respondent had not proved his case on a balance of probabilities. It is pointed out that the particulars of negligence on the part of the Appellant were not established by the Respondent.

11. The Respondent on the other hand is of the submission that he proved his case on a balance of probabilities. The Respondent stated that he gave evidence showing that he was not adequately trained, thus exposing him to the danger of injury as a result. He also said that he was not adequately supervised as he performed his tasks. The Respondent stated that he was not provided with protective gears.

12. After considering the evidence tendered by both sides the learned Senior Resident Magistrate came to the conclusion that the Appellants were solely to blame. She stated that there was no well laid out security details to ward off trespassers.

13. Having re-evaluated the evidence presented before the trial court, it is apparent that the Respondent testified claiming that there was no alarm nor CCTV camera installed in the premises. He also said in cross-examination that he was not properly and adequately trained.

14. The Appellants summoned Dennis Orina (DW1) to testify in support of their defence. DW1 stated that the Respondent was given standard initial training to make him ready as a security guard. He also said that there were alarm systems in the premises. DW1 further said that the Appellants were satisfied that the security details in place were sufficient for a security guard to work in ordinary circumstances.

15. The Respondent had pleaded in his plaint that the Appellants had failed to ensure that the security apparatus installed in their premises were safe and were regularly maintained. In his evidence, the Respondent stated that there were no CCTV cameras which assertion was not disputed by the Appellants.

16. The Respondent also stated that he was not properly supervised as he undertook his tasks. DW1 merely said that there was sufficient supervision. DW1 was unable to summon any of the supervisors to come and testify. I am convinced that the Respondent was able to show that no CCTV cameras as a security apparatus were installed. He was also able to show that there was no proper supervision. I am therefore satisfied that the Respondent proved the particulars of negligence attributed to the Appellants.

17. The final ground of appeal is the question of quantum. The Appellants are of the submissions that the award of ksh. 1,000,000/= for general damages is manifestly excessive and goes beyond comparable awards. The Appellants proposed an award of ksh. 120,000/= instead.

18. The Respondent on the other hand is of the opinion that the award of damages is reasonable hence it should not be interfered with. It is not in dispute that the Respondent suffered a gunshot wounds on the left chest wall namely:

i. Haemopneumathorax and

ii. A fracture of the left 9^{th} rib

19. In the case of **Wanainchi Marine Products (K) Ltd Vs Samuel Rogers Ogola [2012] eKLR** this court awarded the claimant a sum of ksh 1,000,000/= for 3 gunshot injuries penetration of the chest, fracture of the left scapula, collapse and loss of the lung.

20. In **securex Agencies (K) Ltd Vs Benard Ochieng Olute [2009] eKLR** in which the court awarded the claimant a sum of ksh 250,000/= for gunshots wounds to both thighs and pelvis suffered while employed as a security guard.

21. Having re-evaluated the evidence tendered before the trial court and having taken into account the rival submission on quantum plus the authorities relied upon, I am convinced that the award given by the trial Magistrate is a bit excessive and not commensurate with the injuries suffered. It is also way beyond comparable awards. I find a sum of ksh 650,000/= to be a reasonable award.

22. In the end, the appeal as against liability is dismissed. However, the appeal as against quantum is allowed. Consequently, the award of ksh. 1,000,000/= is set aside and is substituted with an award of ksh 650,000. In the circumstances of this appeal, a fair order on costs is direct which I hereby do that each party meets its own costs on appeal.

23. There is no appeal as against the award of ksh 3000 as special damages. The same shall remain as awarded to the Respondent.

24. The Respondent to have costs of the suit.

25. The sum of Ksh. 650,000/= to attract interest at court rates from the date of Judgment of the trial court to the date of full payment.

Dated, Signed and Delivered at Nairobi this 21st day of January, 2020.

…….…….

J.K. SERGON

JUDGE

In the presence of:

……. for the 1st Applicant

……. for the 2nd Applicant

……. for the Respondent