

**THE REPUBLIC OF UGANDA****IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA****COMMERCIAL COURT DIVISION**

HCT-00-CC-CS-0134-2003

Kenkom Limited  
Plaintiff

Versus

Saracen Uganda Limited  
Defendant**BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE****JUDGMENT**

1. This is an action brought in the names of the plaintiff by Jubilee Insurance Company of Uganda Ltd seeking to recover from the defendant the sum of Shs.13,500,000.00 which it paid to the plaintiff under an insurance contract, a cash in transit policy. The plaintiff by a deed of subrogation, dated 25<sup>th</sup> September 2002, in favour of the Jubilee Insurance Company of Uganda Ltd subrogated its rights to bring an action to Jubilee Insurance Company of Uganda Ltd.
2. It is contended for the plaintiff that the defendant at all material times was providing the plaintiff with cash in transit security services under a written agreement. On the 12<sup>th</sup> June 2002, the defendant's employees, Mr. Walembe Ayineyi and Mr. Atwala Osman came to the plaintiff's premises on Plot 3B Namirembe Road to pick up cash to be delivered to the Standard Chartered Bank of Uganda Ltd, 5 Speke Road for banking. They received a sum of Shs.44,173,900.00 from the plaintiff's cashier. Travelling in the defendant's motor

vehicle no.UAA 832G, they drove to the said Bank.

3. On arrival at the Speke Road branch, the said defendant's servants entered the bank with the cash box, through the back entrance, and instead of waiting and handing over to the plaintiff's cashier in the banking hall, walked through and exited through the front exit, and disappeared with the plaintiff's money to this day. It is averred that these actions of the defendant's servants were in breach of the security agreement, and the plaintiff was entitled to indemnification, in accordance with clauses 2 and 6.1 of the said agreement.
4. The plaintiff under its cash in transit policy with the Jubilee Insurance Company of Uganda Ltd was compensated Shs.13,500,000.00 hence this action to recover the same from the defendant on account of subrogation.
5. The defendant denied liability for the plaintiff's claim. It contended that clauses 2 and 6.1 were inapplicable to the facts of this case. It further contended that the defendant was not liable for the acts of its employees, as the said employees committed the act of taking the money in question outside the ordinary course of their employment and without real or ostensible authority of the defendant. The defendant further contended that the action of its employees in taking the money was beyond the control of the defendant for which it is not liable under clause 5 of the agreement.
6. The hearing commenced before my brother Lugayizi, J., before whom the plaintiff closed its case. The judge left this division before hearing of the case was completed. I took over the hearing of the case. Following the provisions of Order 18 Rule 11 (1) of the Civil Procedure Rules, I treated the evidence taken before him, as evidence taken before me, and I proceeded to hear the case at the stage my brother had left it.
7. At scheduling stage the parties agreed to the following facts:
  1. Parties herein entered into an agreement on 10/6/2002 for security services for cash in transit.
  2. The defendant made services available to the plaintiff for two months.
  3. The plaintiff's money was stolen on 12/8/2002 at Standard Chartered Bank

Speke Road, as the defendant's employees brought that money to the bank.

4. Insurance company compensated the plaintiff for loss in the sum of Shs. 13.5 million.

5. The plaintiff subrogated its right to the Insurance Company.

8. Exhibits P1, P2, P3 were admitted by consent into evidence.
9. PW1 was Angela Timugibwa, a claims adjustor with Jubilee Insurance Company, since 1995. She processes claims assigned to her by senior staff. She explained that when the company receives a claim, it establishes first whether there was insurance cover for the period in question, and whether the loss claimed is within the policy. She knew the plaintiff company who had a cash in transit policy with her employers. They made a claim on 18/8/2002 for Shs.44 million but the policy limited payments to Shs.15 million for cash in transit. She satisfied herself that the plaintiff had insurance, and exhibited as Exhibit P4, the Insurance Policy. She processed the claim in the ordinary way, including appointment of loss surveyors, examination of available evidence and reports and eventually paid the plaintiff Shs.13.5 million. In cross examination she stated that the insurance policy should be signed by two parties.
10. PW2 was Kenneth Kiiza the managing director of the plaintiff. He testified on that on 12/08/2002 he was at the plaintiff premises on 23 Namirembe Road. The defendant's guards came to pick up the money for banking. They picked the money and drove to Standard Chartered Bank. This was at about 1.30PM. At about 3.00PM, one of the defendant's servants at the bank rang him up. He proceeded to the bank where he found the plaintiff's cashier and defendant's security officer in the parking yard. The other two defendant's employees had disappeared. The defendant's Supervisor came and arrested their officer. PW2 went to CPS to make a statement.
11. PW2 further testified that the plaintiff did not recover the stolen money. Shs.13.5 million was paid by Jubilee Insurance Company and the defendant paid Shs.28 million, being the difference between the sum recovered from insurance and the sum stolen. In cross examination he stated that the insurance policy with Jubilee

Insurance Company was Exhibit P4, and noted that the plaintiff did not sign the policy.

12. DW1 was John Mugisha, and the only witness for the defence. He testified that he was the general manager of the defendant company, a company offering private security services. He knew the plaintiff company. It was a client of the defendant with a written agreement, exhibit P2. The defendant was offering cash in transit services as well as guarding one of the premises of the plaintiff. He recalled the incident where the plaintiff's money was stolen by 2 defendant employees, Mr. Walembe Arinai and Mr. Atwala Osman. These two employees were attached to the cash in transit crew of the defendant.
13. On the day in question the witness was notified by the driver of the cash in transit truck that the money had gone missing. He went to Standard Chartered Bank and found him in the parking yard. The incident was reported to the police. He testified that the defendant did not authorise its employees to steal the money nor did it benefit from the theft. The defendant has never seen the two guards since the incident.
14. The following issues were framed by counsel for the parties. 1. Whether or not the plaintiff lost Shs.44,173,900.00 on 12/8/2002 to the defendant's employees? 2. Whether or not at the material time the defendant's employees were acting in the course of their employment? 3. Whether or not the defendant is vicariously liable for actions of its employees? 4. Available Remedies.
15. The defendant did not contest issue no.1 and learned counsel for the defendant, Mr. Okua conceded that the answer to the same must be in the affirmative.
16. With regard to issues no.2 and no.3 Mr. Okua submitted that in stealing the plaintiff's money the defendant's employees were not acting in the course of their employment. He referred to an Indian Textbook, Ratnalal and Dhirajlal on the Law of Torts, 25<sup>th</sup> Edition 2006 to support that proposition. As the defendant's employees were not acting in the course of their employment the defendant was not vicariously liable for their actions.
17. Lastly Mr. Okua submitted that there was no proof that an insurance contract

existed between plaintiff and the insurance company on the basis that the plaintiff had not signed the insurance policy. Since this was a claim in subrogation, and there was no proof of the existence of an underlying contract of insurance between the plaintiff and Jubilee Insurance Company, this claim could not in law succeed against the defendant. The insurance company had made only a gratuitous payment for which the defendant cannot be liable for. He prayed that this suit should be dismissed with costs.

18. Mr. Luswata, learned counsel for the plaintiff submitted that evidence of the existence of an insurance contract had been adduced, in the form exhibit P4, and the sum of Shs.13.5 million had rightly been paid to the plaintiff by the insurers. Secondly under clause 6.1 of the contract between the plaintiff and the defendant the plaintiff was entitled to recover from the defendant the sum claimed. He submitted that the defendant's employees were acting within the scope of their employment at the time of committing the theft. He referred to the case of *Morris v C.W. Martin and Sons Ltd* [1966] 1 Q.B. (page not provided) and *Administrator General v Bwanika and others* Supreme Court Civil Appeal No. 7 of 2003 (unreported).
19. It has been contested, outside the issues framed by the parties, whether there existed a valid insurance between the plaintiff and Jubilee Insurance Company upon which the plaintiff may have been entitled to indemnity and for which by way of subrogation the sums paid there under could be recovered from a defendant. It is contended that as exhibit P4, the insurance policy, in this case was not signed by the plaintiff, it was not valid. No authority has been advanced for this proposition, save for the testimony of PW1, that the insurance is signed by 2 parties.
20. I have examined exhibit P4, and it purports to be signed by an authorised officer of Jubilee Insurance Company of Uganda Ltd, the company that issued the policy. It is Jubilee Insurance Company of Uganda Ltd that was undertaking to insure the plaintiff upon certain terms and conditions. I am not aware of any proposition of law that for this contract to be valid, it must be signed by the insured. However,

since the party to charged, or the party that undertakes to perform is the insurance company, it is sufficient, in my view, that such company has signed this document.

21. I can conceive of so many documents that form parts of or constitute the actual contract between the parties that are not signed by one of the parties. This alone does not invalidate the same. What is important is that there was acceptance of the document as constituting the contract or part of the contract documents between the parties. I am therefore satisfied that there was a valid a contract of insurance between the plaintiff and Jubilee Insurance Company of Uganda Ltd.
22. It has been contended for the defendant that clause 5 absolves it from liability. I presume reference is made to the second paragraph of the said clause which states, 'Neither party shall be liable for failure to perform its obligations under the agreement if the failure results from anything beyond the party's reasonable control.'
23. As the defendant asserted this claim, it was under a duty, to prove the same on a balance of probabilities. In my view, it has adduced no evidence to support a claim under this provision. The claim that the defendant did not authorise the acts in question is no proof that it is beyond the defendant's reasonable control. In the result I find that clause 5 of the agreement did not absolve the defendant of liability in this case.
24. Clause 6 of the parties agreement, exhibit P2 states,
 

'Saracen (U) Ltd hereby indemnifies the client against the loss or damage to property or injury to persons caused through any act or omission of the contractor or it's employees in the course and scope of their employment but otherwise accepts no liability whatsoever for any loss or damage which may be suffered by the client out of Saracen's services.'
25. Were the defendant's employees acting in the course and scope of their employment when the acts or omissions complained of occurred? Before this question is answered perhaps it is important to clarify that the acts or omissions of the defendant or its employees for which liability may arise need not themselves

- be specifically authorised by the defendant or be such that they bring benefit to the defendant as contended by Mr. Okua for the defendant. That is not a requirement that can be read from clause 6. Neither can it be implied there from.
26. What is important is that those acts or omissions from which liability may arise must be committed or omitted from being performed while the defendant or its employees are acting in the course and scope of their employment. The defendant's servants in this case were authorised, nay, required by the defendant to offer cash in transit services to the plaintiff. They went to pick up the cash in question for this purpose. They drove to the Bank, as they were meant to do. To this extent the servants were acting in the course and scope of their employment. It is while the servants were so acting, in the course and scope of their employment that they omitted to deliver the cash box to the plaintiff's cashier in the banking hall, and instead disappeared from the banking hall and the bank with the plaintiff's money. Clearly in my view, the theft, though unauthorised by the defendant, was committed in the course and scope of the defendant's employment.
27. It is such acts and or omissions that that the defendant undertook to indemnify the plaintiff should they occur in clause 6 of their agreement. Such acts or omissions put the plaintiff out of the whole sum intended to be delivered to the Bank. The defendant, in my view, is rightly liable under clause 6 of the agreement for the damage suffered by the plaintiff. Accordingly I allow the claim for Shs.13,500,000.00.
28. The plaintiff claimed interest at the rate of 30% per annum. No evidence was adduced as to why interest should be due on this sum from the time it was paid out, and at the rate claimed. I disallow the claim for interest for 30% per annum. However, since the sum in question was paid out before filing of this claim, and it has been resisted by the defendant, I shall allow interest on the sum of Shs.13,500,000.00 from the date of filing this claim till judgment at the rate of 8% per annum, and thereafter at court rate till realisation of the decretal amount.
29. In the result I enter judgment for the plaintiff in the sum of Shs.13,500,000.00

together with interest as aforesaid, and costs of this action.

Signed, dated and delivered this 18<sup>th</sup> day of July 2007

FMS Egonda-Ntende  
Judge