THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL NO. 001/2014

NYENDE DAVID ::APPELLANT

VERSUS

KPI SECURITY SERVICES LTD::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The appellant herein, NYENDE DAVID, being dissatisfied with the judgment and orders of Her Worship Esta Nambayo, delivered on 13/12/2013 appealed to this court on grounds that;

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion that theft was not proved.
2. The learned trial Magistrate erred in law and fact when she failed to decide the issue as to whether or not the respondent was negligent.
3. The learned trial Magistrate erred in law and fact when she failed to decide the issue as to whether or not the respondent breached the contract.

4. The learned trial Magistrate erred in law and fact when she failed to decide the issue as to whether or not the respondent was liable for the theft of the motor vehicles.

It is prayed that the appeal be allowed; the judgment of the learned trial Magistrate be set aside, and judgment be entered for the appellant; and the appellant be awarded costs of the appeal and the court below.

From the pleadings and evidence on record, the appellant sued the respondent on account of negligence and breach of contract in as far it is the appellant's case that thieves broke into the premises guarded by the respondent and stole motor bikes belonging to the appellants' tenants.

The appellant alleged in his plaint that he entered into a contract with the defendant wherein it undertook to provide guards to guard the appellant's property at Nsambya Pad on a daily basis for a period of 5 years. It was also the appellant's averment that it was a breach of contract in as a far as thieves broke into the premises and stole 3 motor bikes belonging to the appellant's tenant. Upon demand for compensation, it was alleged in the said plaint that the respondent admitted liability and undertook to pay compensation as soon as the police report was released. It was further averred by the appellant that although a police report was released on 5/09/2011 stating that the theft was due to negligence of the defendant's employee on the duty that night; the respondent denied liability to which the appellant sought to recover special; general and punitive damages; interest and costs accordingly.

On the other hand, the respondent/defendant filed its Written Statement of Defence wherein it denied the plaintiff's claim. It pleaded *ex turpi causa* non action in as the plaintiff acted illegally when he tried to bribe police officers investigating the matter on the one hand and contributory negligence in as far as the plaintiff failed to report alleged previous misconduct of the defendant's guards.

At the trial, five issues were raised for determination, that is;

a) Whether or not the alleged theft occurred at the plaintiff's premises.
b) Whether or not the defendant was negligent.
c) Whether or not there was breach of contract by either party.
d) Whether or not the defendant is liable.
e) Remedies.

In her judgment, the Trial Magistrate found in favour of the defendant/respondent in so far as she found that the evidence on the record was not enough to prove the theft of the said motor bikes, and breach of contract and alleged negligence by the respondent. As such, it was the trial Magistrate's finding that no remedies accrued to the appellant as the entire suit was devoid of any merit. In her final result, she dismissed the suit with costs. Hence this appeal.

This is a first appeal. It is the duty of the first appellate court to review the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand. It is trite that if the conclusion

of the trial court has been arrived at on conflicting testimony after seeing and hearing witnesses, the appellate court arriving at a decision would bear in mind that it has not enjoyed this opportunity and the view of the trial court as to where credibility lies is entitled to great weight: ***Peters Vs Sunday Post [1958] E A 424***.

I will now turn to the grounds of appeal in the chronology adopted by counsel on either side.

Ground 1: ***The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thus came to a wrong conclusion that theft was not proved.***

It is contended for the appellant that the trial Magistrate had a duty to analyse the evidence as presented so as to reach a proper judgment. Mr. Rwaganika (Counsel for the appellant) contended that after the theft which occurred on 5/11/2011; the defendant's General Manager in his letter to the appellant dated 29/12/2011, requested him to continue with payment of the guards awaiting the outcome of the police report. It is on this basis that the appellant contends that this was an admission on the side of the respondent and that it was wrong for the trial Magistrate to hold otherwise. Counsel further referred to the record of proceedings (pages 7 and 8) in as far as an account of the theft of the said motor bikes was given by the two plaintiff's witnesses. This evidence ought to have been believed by the trial Magistrate since it was neither disputed nor discredited in any way.

Counsel referred court to the authority of ***Habre International Co. Ltd Vs Ebrahim Alarakia Kassam SCCA No. 4 of 1999;*** wherein it was stated that whenever an opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore an omission or neglect to challenge the evidence in chief on any material or essential point by cross examination would lead to inference that the evidence is accepted subject to it being assailed inherently incredible.

In the instant case, it was Counsel's submission that it was improper for the trial Magistrate not evaluate the plaintiff's evidence in regard to the theft since the same had not been discredited in any way through cross examination; on the other hand it was contended for the appellant that it was not necessary to have the guard who was on duty on the fateful night, as a witness since the defendant had been sued by virtue of vicarious liability. For this, Counsel submitted that it was improper for the trial Magistrate to impose an obligation that the guard should have been called as a witness.

Furthermore, it is submitted for the appellant that the trial Magistrate failed to evaluate the evidence when she held that the police report was not based on any investigation in absence of any evidence to the contrary either from the respondent or otherwise.

Counsel elaborated further on instances where he believed that the trial Magistrate had erred in regard to the evaluation of

evidence and these included; failure to admit exhibits letters allegedly written by the claimants of motor bikes, the subject of the theft in issue, that is P2 and 3 for the simple reason that they were not tendered in by the authors and yet they had not been objected to by the respondent. The other instance related to the defence of contributory negligence as stated in the respondent's Written Statement of Defence. Counsel contended that this implied that the respondent admitted the negligence but put the blame on the appellant. The respondent was there're bound by its pleadings in that regard subject to Order 6 rule 7 of the Civil Procedure Rules and ***Interfreight Forwarders Vs East African Development Bank SCCS No. 33 of 1993.*** He referred to the Osborn Concise Law Dictionary page 93 for the definition of contributory negligence.

Counsel conclusively invited court to re evaluate the evidence accordingly.

In reply, Mr. Walusimbi did not agree with Mr. Rwaganika's contention that the appellant's evidence was never challenged in cross examination. He referred court to page 8 and 11 of the record of proceedings for his assertion on this point.

On the other hand, Mr. Walusimbi contended that PW1's evidence in regard to the alleged theft was hearsay evidence contrary to section 59 of the Evidence Act as he was merely told about the same and the persons that alleged to have knowledge of the theft were never brought to court to testify. He further contended that PW2 evidence was also hearsay in as far as he did not author exhibit P7, but the same had been

prepared and signed by a one Faith Norah, CID officer at Kabalagala. It was therefore his submission that PW2 testimony was marred by inconsistencies and contradictions, he referred to a letter dated 28/12/2010 and page 9 of the record of proceedings.

On the other hand Counsel submitted that the reliability on Exhibit P7 is suspect in as far as during the course of investigations, the appellant had paid unofficial monies for the final report.

Additionally, it is submitted for the respondent that no admission was ever made in regard to the theft as alleged by the appellant and that the alleged letter, Exhibit 5 was intended to place faith in the outcome of a competent report from the police which unfortunately was defeated by the appellant's payment of un official monies in the course of the investigation. Counsel conclusively contended that this ground was devoid of any merit.

It was submitted for the appellant in rejoinder that PW1 evidence was not hearsay since he received a phone call from one of the tenants who had lost the motor cycle informing him of the theft and that when he went to the scene he ascertained that the theft had indeed occurred; that the matter had been reported to the police and that he had received the letter (P5) from the respondent's Managing Director admitting liability and undertaking to pay provided the police report was out. Counsel contended that since this evidence was not challenged in cross examination; it ought to be believed.

Regarding the receipt of unofficial monies; it is the appellant's contention that no evidence of the same was adduced by the respondent and that PW2 stated during cross examination that he did not receive any such monies. The alleged unofficial money was justified to be legitimate fees, being the cost of procuring the report and other attendant expenses.

I have carefully considered the lengthy submissions of Counsel on either side on the 1st ground of appeal. The ground of appeal warranting resolution/determination by court as I see it hinges on negligence leading to the alleged loss of the motor bikes and not necessarily theft. It is not the duty of this court in this case to determine whether indeed there was theft of the said motorbikes. That would be for a criminal court in that matter which this court is not.

Mindful of the duty of the 1st appellate court, I now turn to the evidence on the record to ascertain whether there was indeed negligence and whether the trial court evaluated the evidence before it as required by law. Perusal of the plaint under paragraph 5 shows that the appellant suffered loss as a result of the respondent's negligence. An attempt to particularise the said negligence was made in paragraphs 5 (i) to (iii) that is;

i) The defendant's guard failing to protect the plaintiff's property.

ii) The plaintiff's losing their 3 motor cycles due to the negligence of the defendant's guard.

iii) The defendant's failure to supervise the guards on duty.

It is not enough for a plaintiff in his statement of claim to allege merely that the defendant acted negligently and thereby caused him damage. Particulars must be given in the plaint showing precisely in what respect the defendant was negligent. There must be sufficient particularity in regard to the claim of negligence and the resultant damage occasioned/suffered. Particulars of negligence must therefore be given in pleadings showing in what respects the defendant was negligent. The plaintiff ought to state facts upon which the supposed duty to plaintiff is founded, and whose breach the defendant is charged with. Then should follow an allegation of precise breach of that duty of which the plaintiff complains and lastly particulars of the damage sustained.

It is stated by PW2 on page 7 of the typed record of proceedings that;

> ***"I visited the scene at Nsambya. When I reached the scene, I drew a rough sketch plan and found that the Estate was well fenced. On top of the fence they had put broken bottles. I went ahead and established that the gate was a metallic lockable gate guarded by a security guard called Noah Mugisha from KPI Security Company. I found that he was armed with the gun....I went ahead and found 3 motor cycles lockable with heavy duty chains. I surveyed the place and came up with a view that there was total negligence of the guard who was armed and one wonders how the thief broke in and stole the motor cycles. As an officer, I also saw that***

there was total negligence from the guard. He should have been supervised to ensure that he reported and was alert while on duty....”

Although PW2 testified as above, he did not show how the guard at the scene was negligent; he in fact wondered how the theft could have been possible. It is however surprising that even after such a testimony; he drew an inference that indeed the defendant was totally negligent. It is important that the plaintiff must plead particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence onto the defendant. **See *Mukasa Vs Singh and others (1969) EA. 442.***

In the instant case, I do not agree that paragraphs 5 (i) (ii) and (iii) in the present plaint gave sufficient particulars of negligence.

Without prejudice to the foregoing, PW2 stated during examination in chief at page 7 of the certified record of proceedings that;

“I went ahead and found 3 motor cycles lockable with heavy duty chains*.”*

This evidence was not challenged in cross examination nor was it re- directed in re examination. This assertion from the investigating officer who went to the scene raises no other inference, save for a conclusion that no theft ever happened as per his own testimony.

I have perused Exhibit P5, letter written by the respondent’s General Manager to the appellant to ascertain the issue of

admission of liability by the respondent as alleged by Counsel for the appellant. It reads in part;

> ***"As far as compensation is concerned we are still waiting for the police final report that is expected any time and the moment we receive it we shall up date you (sic)..."***

Adopting the literal interpretation of the above; I do not see any admission made therein as the appellant wants this court to believe. The respondent was not admitting any liability therein but was merely awaiting a police report so as to determine its next course of action but not to necessarily pay. In any event, the report that was availed stated in part that;

> "...***Inquiries are still going..."***

This implies that there is no 'final' report in regard to the matter yet.

In the alternative and without prejudice to the foregoing, much as it was alleged that PW2 carried out investigations that led to the conclusion of negligence; there is no proof of the same. No statements were availed to the trial court as having been made before the police report neither is there proof as to interviewing of concerned parties for example the appellant himself, defendant's representative or the owners of the motor cycles. This omission defeats the whole notion of the right to be heard. This right flows from the rules of natural justice that require that a person cannot be condemned unheard i.e. *Audi Alteram Partem.* This rule embraces the whole notion of fair procedure and due process; thus a decision/recommendation reached in contravention is a nullity.

Additionally, the right to fair hearing is exercisable where a person affected has been availed with all or sufficient information necessary to appreciate the nature of the accusation or charge, the statement of facts in support of any such accusation or charge; an opportunity to prepare and answer the charge and the right to seek legal representation. The affected person should have reasonable notice as to time and place where he is required to attend in regard to the charges.

In the instant case, it was PW2's testimony that;

> ***"As an officer I saw that there was total negligence from the guard who was armed."***

He made this inference right at the scene without affording any of the parties concerned an opportunity to narrate what happened or be heard in any case. To my mind, this defeats the whole notion of the right to be heard.

In the circumstance, I have found no reason to fault the trial Magistrate's finding. This ground of appeal fails.

The rest of the grounds were argued together. For avoidance of doubt these grounds relate to failure for the trial Magistrate to decide on each of the issues that had been framed at the trial. It is Counsel's contention that failure by the trial Magistrate to deliberate and decide on each issue as raised was misdirection. He referred to the authority of ***Kabandize & Ors Vs KCC CACA No. 28 of 2011,*** where their Lordships held that it is good practice for a judge who has heard the evidence to determine all issues relating to the claim especially to claims relating to special and

general damages even when the suit is determined on another issue.

In the instant case Counsel maintained the trial Magistrate failed to properly evaluate the evidence and came to a wrong conclusion thereby occasioning a miscarriage of justice to the appellant. Conclusively, Counsel invited court to set aside the judgment and decree of the trial court and allow the appeal with costs in this court and below.

In his reply, Mr. Walusimbi did not agree with the appellant's contention in as far as he submitted that the trial Magistrate indeed decided all the issues as had been raised for trial. He referred court to the record of proceedings in as far as the trial Magistrate's decision was concerned.

Additionally Counsel submitted that although the appellant had claimed negligence on the part of the respondent, the claim was neither particularised nor stated with sufficient clarity. For instance the plaint mentions 6th November 2012 as the material date while Exhibit P2 referred to 5th November 2010. For this omission the claim for negligence could not stand. Conclusively, Counsel submitted that since the appellant failed to prove his case; no remedies accrued. He invited court to dismiss the appeal with costs.

In rejoinder, it is submitted for the appellant that the issues of dates is a mere typographic error which does not go to the merit of the suit before the court. On the other hand, it is submitted for the appellant that the issue of particulars of negligence was rightly dealt with through a preliminary point of

law that was raised and resolved in the trial court; the same cannot be resurrected at this point. Counsel reiterated his earlier prayers and invited court to allow the appeal accordingly.

Perusal of the record categorically shows that the trial Magistrate stated that issues 2, 3 and 4 were covered under the resolution in issue 1 in as far as the respondent could not have been to be negligent in absence of proof of theft; nor could the defendant be said to be in breach of contract in absence of any evidence.

In the circumstance, I have not seen any reason to vary this finding save for issue 5 in regard to remedies; where the trial Magistrate made no finding. I shall therefore try to address the issue of remedies, for academic purposes only.

I will start with special damages.

The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them, if they are to be awarded.

In paragraph 8 (i) of the plaint the appellant averred that the motor cycles were valued at a sum of Shs. 10,900,000=. No proof of the same was availed. This definitely falls outside the ambit of special damages. This claim would have failed in the trial court, just like it has failed in this court.

In paragraph 8 (ii), the appellant claimed a sum of Shs. 60,000= being the fees paid for the police report. A copy of the receipt was annexed on the plaint as Annexture G and the

same was exhibited at the trial as Exhibit P7. This would have been awarded had the issues/grounds of appeal above been answered in the affirmative.

As regards general damages, these are at large. The quantum would be within the discretion of court subject to the inconvenience suffered. Working on the fact that none of the victims had testified, I would award no general damages to the appellant.

As far as exemplary damages are concerned; the appellant herein ought to have shown during the trial that the respondent acted in a high-handed, insulting, malicious or oppressive manner short of which no award would be made. See, ***Esso Standard (U) Ltd Vs Semu Amanu Opio SCCA No. 3/93***.

For the reasons I have endeavoured to give, the appeal stands dismissed with costs here and in the trial court to the respondent.

I so order.

Elizabeth Musoke

JUDGE

24/09/2014