



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 426 OF 2019**

**KEVITA INTERNATIONAL LIMITED.....APPELLANT**

**VERSUS**

**WASSO SECURITY SERVICE LIMITED.....RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable K. I. Oenge (Mr.)*

*(Senior Resident Magistrate) delivered on 16<sup>th</sup> July, 2019*

*in MILIMANI CMCC NO. 6062 OF 2015)*

**JUDGMENT**

1. The appellant in this instance instituted Civil Suit No. 6062 of 2015 before the Chief Magistrate's Court at Milimani Commercial Courts by way of the plaint dated 28<sup>th</sup> September, 2015 and sought general damages for breach of contract, special damages in the sum of Kshs.2,455,000/= and interest thereon against the respondent.
2. The appellant pleaded in its plaint that on or about the 14<sup>th</sup> of August, 2014 it had entered into a contractual agreement with the respondent, where the respondent was to provide security services at the appellant's premises and that it was a term of the contract that the respondent would be liable for any loss/damage suffered by the appellant arising out of negligence on the part of the respondent.
3. The appellant further pleaded that when it closed its business on 23<sup>rd</sup> July, 2015 it left in its premises various properties including a trailer registration number ZE 9629 valued at the sum of Kshs.2,455,000/= ("the subject vehicle") at the watch of the respondent's employee/agent, but that upon returning to the premises on 27<sup>th</sup> July, 2015 the appellant's employees discovered that the subject vehicle was missing.
4. It was pleaded in the plaint that preliminary investigations revealed that the subject vehicle went missing on 26<sup>th</sup> July, 2015 and that upon alerting the respondent on the same, the respondent wrote back admitting liability for the disappearance of the subject vehicle, but has refused and/or neglected to compensate the appellant for the loss.
5. Upon service of summons, the respondent entered appearance and filed its statement of defence on 28<sup>th</sup> July, 2017 denying the appellant's claim. In its defence, the respondent denied liability for the loss arising out of disappearance of the subject vehicle.
6. At the trial, the appellant and respondent each relied on the respective testimonies of one (1) witness.
7. Upon filing of submissions by the respective parties, the trial court found that the appellant had not proved its case on a balance of probabilities and therefore dismissed it with costs.
8. That decision has precipitated the appeal presently before this court. The memorandum of appeal dated 25<sup>th</sup> July, 2019 raises one (1) ground to challenge the trial court's dismissal order.
9. The appeal was disposed of by way of written submissions. On its part, the appellant submits that the trial court erred in failing to find that there existed a contract between the parties and which contract the respondent did not honour. The appellant further submits that the trial court erred in not finding that the respondent through its agents/employees was negligent and hence liable to compensate the appellant for the loss suffered. The appellant cites *inter alia*, the renowned case of **Donoghue v Stevenson (1932) AC 562** on the neighbour principle, associated with the concept of duty of care under the tort of negligence. Consequently, the appellant pleads with this court to set aside the dismissal order and to grant the reliefs which were sought before the trial court.

10. The respondent in answer argues that the appellant failed to prove its case to the required standard, and that the trial court acted correctly in dismissing its case. More specifically, the respondent argues that the appellant did not bring any evidence to prove ownership of the subject vehicle, or to show the value of the said vehicle. It is also the contention of the respondent that the appellant did not prove that the subject vehicle was in its premises on the material dates.
11. I have considered the rival submissions on record alongside the relevant authorities cited. As required for a court sitting on a first appeal, I have re-evaluated the evidence placed before the trial court and considered the judgment in question. As earlier noted, it is clear that the appeal principally lies against the decision by the trial court to dismiss the appellant's claim. I will therefore address the sole ground of appeal hereunder.
12. The sole issue in the appeal is whether the learned trial magistrate correctly determined that the appellant had not proved its case for breach of contract arising out of negligence, against the respondent.
13. Morris Oyugi who was PW1 adopted his witness statement and averred that the parties herein had entered into a contract for the provision of security services by the respondent to the appellant, and that on the material dates, the subject vehicle was in the premises of the appellant when it disappeared under the watch of the respondent's employee. The witness also averred that the respondent had admitted liability in respect to the disappearance thereof.
14. During cross-examination the witness, who indicated that he is the General Manager of the appellant, testified that he is the one who found the subject vehicle to be missing from the appellant's premises upon return to work and that the subject vehicle belonged to the appellant. It was also the testimony of PW1 that he had no records to show that the subject vehicle was in the premises on the material dates, and that it was suspected that one of the guards who was keeping watch of the premises on the material dates had a part to play in the disappearance of the subject vehicle since he could not be traced thereafter. It was also the testimony of the witness that the guards to the premises were not left with the keys to any of the vehicles but that they had the keys to the gate. The witness stated in his evidence that he reported the theft to the police in the company of the supervisor, and that the police followed up on the matter.
15. Hussein Debaso (Managing Director of the respondent) who was DW1 stated in his evidence-in-chief that the employees of the respondent were guarding the appellant's premises at all material times when he received information on the disappearance of the subject vehicle. The witness stated that the keys to the main gate were in the custody of the appellant's employees/agents and that the respondent's employees only kept the keys to the small gate. It was the evidence of DW1 that there was nothing to show that the subject vehicle had been on the appellant's subject premises on the material dates and that the guards had not reported seeing the subject vehicle.
16. During cross-examination, DW1 stated that the guards who were assigned to the appellant were to keep watch over both the premises and the property but restated that the keys to the main gate were to remain with an employee/agent of the appellant. During re-examination, it was the evidence of the witness that the respondent was to be held liable only where negligence had been proved, which was not done in that instance.
17. In his judgment, the learned trial magistrate reasoned that the appellant had not proved ownership of the subject vehicle and had also not proved that it had taken out an insurance cover in respect to the subject vehicle. The learned trial magistrate further reasoned that the appellant had not presented any valuation report or other evidence to ascertain the value of the subject vehicle and had equally not shown that the said vehicle constituted the properties that were on the subject premises on the material dates.
18. Upon re-examination of the pleadings and evidence, I note that it is not in dispute that the parties herein had entered into a contractual agreement where the respondent was to provide the appellant with security services at a consideration. It was a term of the contract that the respondent would be liable for any loss occasioned by negligence on the part of the respondent's employees while acting in the course of their employment.
19. It is apparent from the record that on the material dates, the employees of the respondent were on duty keeping guard of the appellant's premises.
20. Concerning the issue touching on breach of the contract, I note, as the learned trial magistrate did, the appellant did not tender any documentation or credible evidence to confirm the existence of the subject vehicle or to prove that the subject vehicle was registered in the name of the appellant pursuant to Section 8 of the Traffic Act, Cap. 403 Laws of Kenya which stipulates that, the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner. Moreover, it is apparent from the material and evidence that save for the oral testimony of PW1, the appellant did not bring any credible evidence to establish that the subject vehicle was among the properties that had been in the appellant's subject premises/yard on any of the material dates.
21. In addition to the foregoing, while I note from the record that both PW1 and DW1 made mention that a report of the purported disappearance of the subject vehicle was made with the police, no credible evidence was adduced to confirm the details of such report or to inform the court of the result of the investigations. The appellant did not at the very least summon the supervisor who was referred to by PW1 as a witness in order to corroborate the testimony of PW1 regarding the report. As it stands, there is nothing to show the matter had been reported to the police and/or subsequently investigated.
22. Going by the material and evidence placed before the learned trial magistrate, and which I have re-examined, it is apparent that a guard by the name Peter Kinara who was standing guard at the appellant's premises at all material times is said to have gone into hiding shortly after the purported disappearance of the subject vehicle. In my view, while this may give rise to some unanswered questions, it is not in itself enough to cause a court of law to arrive at a finding of negligence/breach of contract on the part of the respondent. It was ultimately the duty of the appellant to discharge the burden of proof pursuant to the provision of Section 107 of the Evidence Act which stipulates that any party who wishes to have judgment entered on liability should bring evidence to support his or her assertion on the facts pleaded. Section 109 goes on to prescribe thus:

***“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

23. From my re-examination of the totality of the evidence, I am not satisfied that the appellant discharged the burden of proof to the required standard. The appellant, in my view, did not prove on a balance of probabilities that if at all the subject vehicle went missing while under the watch of the employees of the respondent, which position raises doubt in the absence of any credible evidence that the subject vehicle was on the premises at the material time, then the appellant ought to have shown that such disappearance was the result of negligence of the respondent’s employees but did not. From the foregoing, it therefore follows that the appellant similarly did not bring any credible evidence to support its assertion that it suffered loss as a result, in the absence of a valuation report or any other credible documentation to indicate the value of the subject vehicle. Upon re-examination of the fiscal receipts on page 18 of the record of appeal and which were produced before the trial court, there is nothing to link the said receipts to the subject vehicle so as to support the assertion of loss. Consequently, I concur with the finding of the learned trial magistrate that the appellant did not prove its case.

24. Accordingly, the appeal is hereby dismissed with costs to the respondent.

**DATED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29<sup>TH</sup> DAY OF JULY 2021.**

**J. K. SERGON**

**JUDGE**

In the presence of:

Mr. Charles Ayugi for Mr. Ojienda for the Appellant

Kioko holding brief for Mutua for Respondent