



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 46 OF 2017

INTERCITY SECURE HOMES LIMITED.....APPELLANT

VERSUS

JANE NJERI MIRINGU

T/A MANGO BAR & RESTAURANT.....RESPONDENT

[An appeal from the judgement of Hon. Julie Oseko, CM delivered on 17<sup>th</sup> August, 2017 in Malindi CMCC No. 197 of 2015, Jane Njeri Miringu t/a Mango Bar & Restaurant v Intercity Secure Homes Ltd]

**JUDGEMENT**

1. The Respondent, Jane Njeri Miringu t/a Mango Bar and Restaurant, was at the conclusion of the trial in Malindi Civil Suit No. 197 of 2015 awarded Kshs.166,530 with interest at court rates plus costs of the suit having successfully sued the Appellant, Intercity Secure Homes Ltd for breach of contract.
2. The Appellant being aggrieved by the decision has appealed to this court on the grounds that:-
  - “ 1. That the Learned Chief Magistrate erred in law in entering judgment for the plaintiff as prayed in the plaint dated 25<sup>th</sup> May 2015 when there was no credible or sufficient evidence before her so to do.
  2. That the Learned Chief Magistrate erred in law in not holding that the plaint dated 25<sup>th</sup> May 2015 was bad in law and ought to have been struck out.
  3. That the Learned Chief Magistrate erred in law and in fact in not holding that the plaintiff in her testimony before the Honourable Court failed to show that the defendant owed her a duty of care and if such a duty of care was owed it was not breached by the defendant.
  4. That the Learned Chief Magistrate erred in law and in fact in failing to hold that the particulars of negligence of the defendant/agent pleaded in paragraph 4 of the plaint dated 25<sup>th</sup> May 2015 had not been proved by credible evidence from the plaintiff or her witnesses.
  5. That the Learned Chief Magistrate erred in law in entering judgment for the plaintiff in the sum of Ksh166,530.00 plus interest thereon when there was no or no credible evidence before her so to do.
  6. That the Learned Chief Magistrate erred in law in not holding that there was no clause in the security service contract dated 15<sup>th</sup> January 2014 that mandated the defendant to compensate the plaintiff for stolen or vandalized items.
  7. That the Learned Chief Magistrate erred in law in entering judgment for the plaintiff when there was no evidence adduced before her to prove that the defendant's security guard was alcoholic, sleeping on the job, conniving with vandals/thieves, drinking alcohol with revelers whilst on duty as pleaded in paragraph 4 of the plaint.
  8. That the Learned Chief Magistrate erred in law in not holding that the security agreement dated 15<sup>th</sup> January 2014 was a valid agreement entered into by the free will of the plaintiff and the defendant and that the same was not vitiated.
  9. That the Learned Chief Magistrate erred in failing:

a. To consider or properly consider all the evidence before her and/or

b. To make any or any proper findings on the aspect of damages on the evidence before her.

**10. That the Learned Chief Magistrate erred in failing to adequately consider all the evidence before her and the written submissions filed by counsel for the Appellant.”**

3. The brief facts of the case disclose that the Respondent and the Appellant entered into a contract on 1<sup>st</sup> February, 2014 in which the Appellant was to provide one guard every night to the Respondent’s bar for a period of one year at the rate of Kshs.12,500 per month. During the subsistence of the contract, the Respondent’s bar was burgled on 24<sup>th</sup> January, 2015 and assorted electronic goods and drinks allegedly stolen from therein.

4. The Respondent sued the Appellant for negligence and breach of contract, claiming compensation to the tune of the value of the stolen items. The trial magistrate at the conclusion of the trial agreed with the Respondent and awarded her Kshs.166,530 as already stated.

5. It is the Appellant’s case that the trial court erred by finding that the Appellant employed an intoxicated guard who slept on the job yet no medical evidence was adduced to confirm intoxication and neither was any eyewitness called to confirm that the guard was seen drinking on the material night.

6. Further, that PW2 George Kiiru Miringu, the son of the Respondent, confirmed that when he left the premises the guard was sober only to find him drugged and seemingly unconscious when he responded to an alert about the theft. It is the Appellant’s case that with this kind of evidence judgment should not have been entered in favour of the Respondent.

7. It is also the Appellant’s case that there being no term in its agreement with the Respondent to the effect that it was obligated to compensate the Respondent for stolen items, it was erroneous for the court to find that it had breached the contract.

8. Counsel for the Appellant submitted that in determining whether a contract has been breached, the court must consider and interpret the terms of the contract in order to establish if the breach complained of is specified in the contract.

9. It was urged for the Appellant that contractual terms are to be taken seriously and the courts cannot interfere with the terms of a contract between the parties. The decisions in **Hassan Zubeid v Patrick Mwangangi Kibaiya & another [2014]** and **National Bank of Kenya Ltd v Pipeplastic Samkolit (k) Ltd & another (2002) EA 503** were cited in support of the said submission.

10. Counsel for the Appellant stressed that there was no clause in the contract exhibited before the trial court spelling out that the Appellant was to compensate the Respondent for stolen goods in the event of the occurrence of a theft.

11. This court is urged to find that the trial court erred in law and in principle by holding that the Appellant had breached the terms of the contract by failing to compensate the Respondent for the stolen goods when such a term did not exist in the contract between the parties. It is the Appellant’s view that the trial court’s decision amounted to rewriting the contract between the parties. The Appellant consequently urged this court to allow the appeal.

12. The Respondent in opposition to the appeal submitted that the Appellant did not participate in the lower court matter and the Respondent’s case was not controverted.

13. It was the Respondent’s position that the evidence that was adduced demonstrated that the night guard was drunk and not drugged. Further, that the Appellant’s employee failed in his duty and the issue of production of medical records is neither here nor there.

14. The Respondent’s case was that the theft arose due to the failure of the Appellant’s employee to discharge his duties. The decision in the case of **William Kazungu Karisa v Cosmas Angore Chanzeru [2006] eKLR** was cited in support of the proposition that parties must perform their respective obligations in accordance with the terms of the contract.

15. The Respondent asserted that the Appellant breached the contract when its employee got drunk in the course of duty. The Respondent posited that the lack of a compensation clause in the contract between the Appellant and the Respondent does not indemnify the Appellant from a tort committed by its servant and therefore the Appellant is vicariously liable for such tort.

16. Finally, the Respondent urged this court to consider the intention of the parties and find that the Appellant breached the terms of the contract by failing to safeguard the premises.

17. This being a first appeal, this court has a duty to re-evaluate the evidence tendered at the trial in order to reach its own independent decision. This is the duty of a first appellate court as highlighted by the Court of Appeal in **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where the Court stated that:-

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”**

18. The Court of Appeal went ahead and cited its holding in **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 3 EA 212** that:-

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”**

19. A perusal of the pleadings and the submissions made at the appeal will show that the Respondent proceeded as if her case was a mixed claim for breach of contract and tortious liability.

20. The plaint at paragraph 4 provides particulars of negligence and counsel in the written submissions dated 6<sup>th</sup> December 2018 asserted that **“lack of compensation clause in the contract between the Appellant and the Respondent does not indemnify the Appellant from a tort committed by its servant and therefore the Appellant is vicariously liable to such tort.”**

21. Be that as it may everything points to the fact that the Respondent’s claim was based on the contract entered between her and the Appellant for provision of security services. The issue is whether the Appellant breached a term of the contract entered with the Respondent and if so, the compensation to be awarded to the Respondent.

22. In simple terms, a party who claims breach of contract should establish the existence of the contract, that the contract was broken, that a loss was incurred and that the defendant is responsible for the breach of contract.

23. The documents that the Respondent placed before the trial court in support of the existence of a contract were an introduction letter from the Appellant dated 16<sup>th</sup> July, 2012, a security contract sale order for contract No. ISHL/NRB/212/01/2014 which is but an invoice, and payment receipts. The fact that there existed a contract between the Appellant and the Respondent in which the Appellant was to provide a night guard for the Respondent’s bar premises for a period of one year was not disputed. There was also overwhelming evidence adduced by the Respondent establishing that her bar was broken into at night and items valued at Kshs.166,530 stolen from therein.

24. The only question is whether one of the terms of the contract was that the Respondent would be compensated for any theft that occurred during the subsistence of the contract. It was the duty of the Respondent to prove the existence of such a term. What was produced was a letter of introduction which is a brochure stating the services that the Appellant was offering. What is referred to as a security sale contract is a customer profile detailing the Respondent’s particulars, the number of guards to be provided and the amount of money to be paid.

25. The Respondent did not produce any other document detailing the terms of the contract she entered into with the Appellant. She did not mention in her testimony the existence of an oral contract. The contract between the Appellant and the Respondent simply provided that the Appellant would provide a night guard to the Respondent at Kshs.12,500 per month for a period of one year from the date of the signing of the contract. There was nothing agreed on as to what would happen should any party breach the agreement.

26. A contract can either be express or implied. An express contract is one in which the parties agree either orally or in writing, or a combination of both, on the terms of their contract at the time the contract is made. Sometimes terms are read into a contract. The terms though not explicitly or expressly stated are deemed to be fairly obvious to the parties to the contract. Terms that can be implied in a contract are sometimes created by the law. For example, the Sale of Goods Act, Cap. 31 provides terms to be implied into a sale in the course of a routine business transaction.

27. In a claim for breach of contract the plaintiff must establish the existence of a contract and the express term of the contract allegedly breached. If the plaintiff relies on an implied term then there is need to state what that implied term is and the basis of reading it into the contract.

28. The Respondent did not adduce any evidence of an express term showing that the Appellant was to compensate her for any theft that was to occur in her premises. She did not point to any legal provision from which it could be implied that a person who contracts to provide security services is liable for any loss or damage that occurs at the premises of the consumer of the security services.

29. Even assuming that the Respondent’s claim was based on negligence, the evidence adduced did not support such a claim. When the Respondent who testified as PW1 was cross-examined, she testified that it was true that she had stated in her plaint that the watchman had been taking alcohol with the customers. The Respondent here thus detected a dereliction of duty and took no action. The Appellant was never informed about the misbehavior of the guard. In the circumstances negligence could not be attributed to the Appellant.

30. In awarding the Respondent money equivalent to the value of the items stolen on the night the bar was broken into, the trial magistrate read into the agreement between the parties a term that the parties had not agreed on. The trial magistrate therefore applied the wrong principles of law in reaching her decision. This court therefore has a duty to interfere with that decision.

31. For the reasons stated, I find this appeal merited. The appeal is allowed and an order issued setting aside the decision by the trial court to enter judgment in favour of the Respondent and substituting the same with an order dismissing the Respondent’s claim.

32. The Appellant shall have the costs of this appeal and the costs for the trial at the subordinate court.

**Dated and Signed at Nairobi this 15<sup>th</sup> day of April, 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 23<sup>rd</sup> day of May 2019**

**R. Nyakundi,**

**Judge of the High Court**