



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 147 OF 2011

DR. ANTONIS ALEXAKIS.....PLAINTIFF

VERSUS

G4S SECURITY SERVICES (K) LTD.....DEFENDANT

J U D G M E N T

1. From the plaint dated 2/6/2011 and filed in court on the 3/6/2011 the plaintiff sought to recover from the defendant general damages for breach of contract, special damages of Kshs.1,424,193.24 being cost of stolen items and medical expenses plus costs and interests.
2. The foundation of the suit is pleaded to be a contract for the provision of ‘**rapid response**’ radio alarm and back up security services between the parties which the plaintiff pleads the defendant breached when on the 25/12/2010 at about 2.00pm several robbers attacked and broke into the plaintiffs house subject of the contract and committed violent ‘robbery’ while therein for a period of about two hours despite the fact that the plaintiff guard did press the alarm some four minutes before the invaders gained entry but the defendant did not make an immediate response. As a consequence of the break-in the, plaintiffs watchmen is pleaded to have been violently killed and the plaintiff, his wife and son violently assaulted and sustained bodily injuries and lost personal goods valued at Kshs.1,255,193.24 during an ordeal lasting some fifteen (15) minutes. The plaintiffs blame the defendant for failure to make rapid response and only doing so in the company of the police some 45 minutes after the plaintiff house-help had called the police. The plaintiff, together with the plaintiff, filed a list of some 6 witnesses and a list of some 6 documents but at trial only the plaintiff gave evidence and produced exhibits including 11 photographs which had not been included in the list of documents filed.
3. In evidence, the plaintiff, PW1, told court that on the fateful day at about 2.00am, there was a knock on his door, he got up and saw three people outside shouting and when he challenged them to identify themselves they started to break the door. He took the alarm gadget in his hand and called the defendants.
4. The intruders gained entry and beat him and family inflicting on them various injuries before taking away their valuables in two sacks. They ransacked the house from about 1 hour and 30minutes and left at 4.00am. After the invaders departed the witness called one Mrs. Bolt who alerted the police who arrived after 30 minutes.
5. After 1½ days the witness went to the offices of the defendant at Ukunda and learnt that his alarm alert was received and registered as no. 158. He was then told that the defendant’s staff could not respond in a rapid manner because the robbers were armed.
6. He produced photos of his injured family members and those of the house with broken items and a list of goods and hospital bill all totaling Kshs.1,424,193.24. He also said he paid transport and related expenses for the burial of the slain askari at Kshs.50,000/.
7. He added that he paid the defendant the sum quoted to him because he was convinced that they were able to provide the services sought and that a demonstration was done on the first day and the response was immediate but not on the day of the attack on his house. He prayed for the remedies sought.
8. On cross- examination by Mr. Wafula, he said the watchman on duty on that night was not an employee of the defendant but an employee of Dana Security Services. He said there was a guard on duty and the compound was lit. He added that he pressed the alarm and the signals were received by the defendant at 1.58 and was so registered by the defendant.
9. He denied seeing any of the defendants guards who responded and said that if they ever came at 2.02am then they did not go to him upto 4.00am when the robbers left despite the fact that the defendants offices are just 2 or 3 kilometers away. In his account he was taken to hospital by the police and not a gentleman he was shown in court. He said that the defendants initial contact, one Albert, acknowledge receipt of money, promised to come back with a formal contract but did not.

10. He produced Exhibit P1-3 being quotation for alarm response and Exhibit P-5 list of the lost/ stolen property. The plaintiff's case was at that juncture adjourned to call other two witnesses but on the 28/6/2016 when the parties attended court, Ms. Kerubo for the plaintiff stated that the plaintiff would not call any further witnesses and closed the case.

11. For the defendant, a statement of defense dated 25/11/2011 was filed on 28/11/2018. In that defense, beyond the general transverse denying all the pleadings at paragraphs 3 to 11, both inclusive, the defendant pleaded without prejudice that there was indeed a contract between the parties for alarm response but the said contract had express terms and conditions which the plaintiff read and understood before execution and the plaintiff is thereby fully bound. Pursuant to the said contract, it was pleaded, there was alarm activation at 1.56 on the material date and a response team under the command of one Robert Kombe was able to reach the site within 5 minutes only to find that the attack had occurred and the attackers had left. There was a further pleading and denial of any promise to have an armed response because it is a matter of common notoriety that private security firms never own guns and that there was never any representation or promise to provide service superior to those by the police.

12. The defense reiterated that the response made by the defendant within 5 minutes was the only humanly possible and reasonable and that nothing else was possible or reasonably expected. The special damages sought and claimed was pleaded to be unmaintainable because it was never particularly pleaded by provision of particulars and in any event while the plaintiff claims Kshs.1,424,193.24 the witness statement talked of Kshs.1,255,193.24 hence the plaintiff must be taken not to be sure of what he claims.

13. Additionally, it was asserted that the contract between the parties specifically mandated the plaintiff to take out an insurance policy to secure any losses and that the loss was occasioned by acts by third parties who were acting independently in pursuit of criminal activities not attributed to the defendant and to make the defendant thereby liable would be contrary to public policy as well as rules of fair play and reasonableness as the defendant would not have been expected to have foreseen such eventuality.

14. The defendant also filed a list of documents containing two Documents being the *standard contract form* and *response print out* together with a witness statement by Robert Kombe. In evidence, Mr. Robert Kombe adopted his statement as evidence in chief and produced the two documents filed. His evidence admitted receipt of alarm activation at about 0156 hours and arrived on site, the plaintiff's premises, some five minutes later that is at 0202 hours. On arrival the compound was dead quiet. His party gained entry into the compound by climbing over the gate and opening it from inside for the police to enter.

15. In the premises, they found the night watchman down with his hands tied to the back and bleeding from the head. He was dead.

16. In the house, they found the plaintiff and his family member who had suffered various bodily injuries and they rushed them to hospital in the defendant's car while the police remained in the premises. At the premises the plaintiff wife gave to the witness' party a list of the stolen items. The witness therefore denied the contention by the plaintiff that the defendant never responded in time and that it was the police who responded and took them to hospital.

17. He then produced the unsigned standard contract form and the Computer-print-out to show when the alarm activation was received and at what time they responded. He prayed that the plaintiff's suit be dismissed with costs.

18. On cross examination by Mr. Oduor from the plaintiff, the witness said there was a contract between the parties, but there was never shown to court a signed copy. He said that the alarm was acknowledged at 0156 hours and vehicle arrived at 0202 Hours but the report of successful theft was made at 0324 hours after the injured had been taken to hospital, a report made to police and interviews taken to establish what had been stolen. He was however unable to state firmly what service the plaintiff had contracted the defendant for but said people contracted them rather than rely on police security because they are able to give personalized service.

19. He said before taking up a contract the defendant conducts a reconnaissance study but did not have that study in court but added that they have the capacity to respond to emergencies because they have more motor vehicles than one. He reiterated that they do not have armed guards but use armed police officers and that their covenant was to respond to an alarm activation which obligation the company met and discharged.

20. On re-examination by Mr. Wafula for the defendant, the witness said they responded in time took the injured to hospital and that prior to their visiting the scene nobody else had been there to assist the plaintiff's family in answer to their distress call. He confirmed that the guard on site had been killed by the time they arrived.

21. When questioned by the court the witness said that they offer alarm response services so that they can rescue and that they normally have armed police officers to their aid.

22. With that one witness the defendant also closed its case hence the case was concluded with each side calling a witness. Thereafter, there were directions that parties file and serve written submissions and attend court to highlight the same.

Submissions by the plaintiff

23. The plaintiff submitted that the robbery subject of the suit took place and was executed between 2.00pm and 4.00am without intervention by the defendant despite the fact that the alarm was triggered in time just before the robbers gained entry into the premises. Heavy premium and reliance was placed upon the provisions of the consumer protection Act and Article 46 of the constitution. The two sources of law are cited for the proposition that where there exist an exclusion clause, clause that lends itself to more than one interpretation then it ought to be resolved to the benefit of the consumer or customer. Equally cited was the decision in *Consolidated Bank of Kenya Ltd vs Securicor Security Services Kenya Ltd [2013] eKLR* for the proposition that exclusion clauses should not be construed strictly so as to completely exclude liability.

24. The provisions of Section 7 and 12 of the Consumer Protection Act were cited and relied upon by the plaintiff to support his claim that it was the duty of the defendant to bring to the attention of the plaintiff any special conditions of the written contract to be signed prior to execution and that it was contra statute for the defendant to represent that it was able to provide a service in a manner it knew or ought to have known to be incapable of provision by it.

25. On general damages, the plaintiff cited to court the decision in *A.A.A vs Registered Trustee, Aga Khan University Hospital [2015] eKLR* where the court awarded general damages against the defendant hospital for failure to properly implant a contraceptive.

26. On special damages the plaintiff sought reliance on the decision in *Consolidated Bank vs Securicor (supra)* and urged the court to award to him the sum of Kshs.1,424,193.24 as proved by exhibits P1-6. The plaintiff also made submissions on exemplary damages but I consider this to be gratis and of no assistance to court because the plaintiff does not make such a prayer. However, it is important to record it here that the plaintiff placed reliance on the provision of section 82 of the Consumer Protection Act provides that exemplary damages are recoverable over and above any other relief awarded as the court may deem fit and just. That to me is a reinstatement of the law which however is subject to a party proving entitlement to the remedy.

Submissions by the defendant

27. The defendant took the earliest opportunity to assert that the plaintiff had failed in his obligation in law to prove his case and that with such failure the only option available to court was to have the suit dismissed. Reliance was sought on the provisions of sections 107, 108 and 109 of the Evidence and interpretation given to the law by courts in the case of *JENNIPHER NYAMBURA KAMAU VS HUMPHREY MBAKA NANDI [2013] eKLR*.

28. It was the defendant's case that, for the plaintiff to succeed in his prayer for general and special damages grounded upon breach of a contract, it was incumbent upon him to prove the existence of that contract, its terms, the breach thereof and the nexus between the breach and the damages allegedly suffered.

29. Based on evidence adduced the defendant asserted that there was no evidence of who pressed the alarm button, when it was pressed and that the defendant took unreasonably too long to respond. The defendant then cited to court the decision in *MUTHUKU VS KENYA CARGO SERVICES LTD [1991] KLR 464*, for the proposition that Kenya Law has not reached the level of attributing liability without fault.

30. On general damages, the defendant cited to court the decision by the *Court of Appeal in Provincial Insurance Co. East Africa Ltd vs Nandwa Mwaga and Securicor Courier (K) Ltd vs Benson Onyango & Another [2008] eKLR* for the proposition that general damages cannot be awarded for breach of contract because damages arising from breach of contract are usually quantifiable and are not at large and that where damages are quantifiable they cease to be general damages.

31. On special damages the defendant reiterated the now established proposition of law that special damages must not only be specifically pleaded but must also be strictly proved. The plaintiff is faulted for failure to strictly plead the particulars of the sum claimed. It was contended that the plaintiff's claim of loss of items was not supported by any proof at all. There was no proof of the value of items lost and even the costs of treatment to make the total sum claimed in the sum of Kshs.1,424,193.24.

32. Finally, the defendant made reference to clause 12.1 of the standard contract from which bound the plaintiff to insure the goods against theft and burglary. On those grounds the defendant prayed that the suit be dismissed with costs for want of proof.

Issues for determination

33. That there was a contract between the parties, albeit unwritten because none was ever signed, is not in dispute. What is in dispute is what the terms of such contract were and whether the defendant did meet its obligations to the plaintiff. If it be established that the defendant had an obligation to the plaintiff which was never discharged then the next question would be whether the plaintiff ever suffered any damage as a result and if the plaintiff is thus entitled to an award of damages and quantum of such damages.

What were the terms of contract

between the parties?

34. I have said at the beginning of this analysis and in isolating issues that there is no dispute as to existence of a contract between the parties. I say so because the plaintiff pleaded so and the defendant did not deny that claim but instead asserted that it did meet its obligations under that contract. I have also stated that the contract between the parties was never in terms of the standard form of contract produced by the defendant as exhibit D1. It was not in terms of that standard form and did not incorporate its terms in total and at all because the same was never signed between the parties so as to make its terms to bind between the parties particularly upon the plaintiff.

35. The contract between the parties and its terms are thus inferable from the documents exchanged between the parties and the parties' conduct. Those documents, I find to found the contract are; the quotation for provision of alarm backup services and the handwritten calculations totaling Kshs.51,652/= said to have been written by the defendant's manager on the day he convinced the plaintiff to engage the defendant.

36. From those two documents, it is evident and inferable that the parties entered into a contract for the provision of a comprehensive 24 hour monitoring alarm system and back up to alarm activation. That is what I make of the first paragraph of the quotation for alarm and back-up produced as Exhibit P2. There being no further explicit terms of the contract negotiated and agreed, whether or not any specific obligation

was incurred and whether not or breached is a matter for the court to determine from the evidence tendered.

37. In his evidence, the plaintiff took the position that he got into a contract with the defendant for prompt response by the defendant upon the alarm system installed being activated. The necessity was due to what the plaintiff said was *the slow response by the Kenya Police*. He said that he was given a representation that the defendant maintained a car patrol every two hours around the plaintiff's house and upon activation of the alarm the guards employed by the defendant would appear and intervene.

38. His complaint was however that on the material day, 24/12/2010, he was attacked by thugs at about 2.00am he did press the alarm button, which was duly received by the defendant at about 0156 hours, but the defendant did not respond till about 4.00pm after the invaders had stolen property in two bags left, returned for more and in the course fatally injured the night guard. He said that he called one Mrs Bolt who alerted the police and arrived within 30 minutes. In his evidence the defendant did not come at all up to the time he was taken to hospital by the police. Based on that stand-point, he considered the defendant to have breached the contract by failure to respond to his distress signals.

39. Against that evidence, DW 1 took the position that at about 0158hours an alarm activation was received and a crew dispatched reached the plaintiffs premises by 0202 hours. To him, it took the crew, to which he was a member, some five (5) minutes to answer to the plaintiffs distress call by being at the scene which was quiet and serene a fact that forced them to scale the gate in order to get to the compound and open the gate for the police in their company to come in. In the compound they found the guard dead with blood oozing from the head and in the house the plaintiff and his family members gravely injured and profusely bleeding and it is his crew that rushed them to hospital.

40. From the two versions of the evidence, the fact that the attack took place at about 0200hrs is common ground, the little variation in minutes notwithstanding. That the alarm was activated and recorded by the defendant at 0156hrs is also not in dispute. What is in dispute is whether the defendant did respond within a reasonable time to merit being found to have discharged its contractual duty to the plaintiff. Resolving that dispute would entail evaluation of the evidence available and to determine which of the two versions is more credible.

41. I have taken account of the evidence by the plaintiff that the attackers did injure the guard and left him dead before they broke the door to the main house, injured the plaintiff's family, ransacked the house and carted away the stolen goods in two bags.

42. The property stolen as enumerated by the plaintiff, and not contested by the defendant, included handbags, computers, cameras, jewelry, mobile phones, clothing materials, music systems and shoes. In my assessment and appreciation, those goods could well and easily be carried away in two bags as asserted by the plaintiff.

43. However, what I find intriguing is whether such an operation could be carried out and executed without trace of the executors under five minutes so that between 0156hrs and 0202hours while the defendant's crew was on its way to the scene the attackers would have left and the compound calmed to dead silence?

44. I am not persuaded that just five minutes was enough for the attackers to do what both sides concur happened that night. For that reason, I am not fully satisfied that the defendant did respond within five(5) minutes as said by DW 1 and confirmed by the computer print-out produced as exhibit D2. I do however find that the defendant made a response but it was not within the time given by DW1

45. On the other hand, the assertion by the plaintiff that the defendant did not respond at all and that it was the police that responded well after two hours is to me displaced by the evidence by DW 1 that he did visit the scene took plaintiff to hospital reported to police and interviewed the plaintiff's wife. I do find that there was a response by the defendant even though I doubt that it was with the promptitude asserted.

46. The outstanding question is however whether that response was within a reasonable time expected of a person in the defendant's position who was contracted because of the need for prompt response due to the perception that Kenya Police are unable to respond promptly?

47. I do find that by asserting that they responded in under ten minutes As confirmed by the generated computer print-out, the defendant was intent to prove that the defendant appreciated that a response outside ten minutes in the circumstances would be unreasonable.

48. I equally find that had the response been made within the five minutes as asserted or just some ten minutes, the defendant's crew, in the company of the police officer would have disrupted the attackers' operations and would have obviated the loss of property said to have been carried away even if the personal injured could not have been avoided or evaded.

49. For that failure to respond within such reasonable time, I find that the defendant breached its duty and obligation to the plaintiff. I thus find the defendant to be liable for the loss of the property enumerated in the plaintiff bundle of documents marked Exhibit P1. Indeed the DW1 adverted to that loss when he said that he got a list of stolen items from the plaintiff's wife

Has the plaintiff suffered any damage?

50. Having held that a prompt response by the defendant could have disrupted the attackers at least from carting away the property sued upon, I find that the loss of the property is a damage suffered by the plaintiff for which the defendant must compensate the plaintiff. I find that only the value of the property lost is recoverable because any response by the defendant however prompt would not have prevented the attack.

51. I understand and take the contract between the parties to have been intended not to deflect an attack on the premises all together, because they were not offering guarding services, unless the intended attack would be discovered beforehand and the defendant be notified in advance. It was only intended to provide an interruption of a commenced or to disrupt a prolonged stay of the invaders in the event the

defendant be notified soon after such the invaders gain entry.

How much is the quantum of the loss?

52. The plaintiff claims a sum of Kshs.1,424,193.24/= while the witness statement alludes to a sum of Kshs.1,255,193.24. The variation is difficult to discern from the two documents hence a resort must be made to the document giving values of the loss. That list gives a tabulation of some 42 items said to have been lost excluding hospital bills in the sum of Kshs.80,607/= and related travelling costs and funeral expenses for the killed guard. I have taken the trouble to calculate the total of the items lost and I have ascertained the value thereof to be Kshs.1,245,510.24. That is the quantum of loss which I award to the plaintiff.

53. I find the plaintiff to have suffered that loss which I award to and therefore enter judgment as against the defendant for the sum of Kshs.1,245,510.24. That sum shall attract interest at court rates from the date of filing suit till payment in full.

54. I also award to the plaintiff costs of the suit.

Dated and Delivered at Mombasa this 25th day of May 2018.

P.J.O. OTIENO

JUDGE