REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO.14 OF 2015

[FORMERLY KISII APPEAL NO.144 OF 2014]

NYANKOBA TEA FACTORY…….APPELLANTS

=VERSUS=

PLUTO SECURITY SERVICES…….....RESPONDENTS

[Being an appeal against the judgment and decree of Hon. N. Kahara-Resident Magistrate (RM) delivered on 19th November, 2014, in **Senior Resident Magistrate Court at Keroka Case No.135 of 2011]**

J U D G M E N T

This is the judgment of **Civil Appeal NO.14 OF 2015**

BACKGROUND.

1. The Appellant Nyankoba Tea Factory was the plaintiff in the Lower Court and the respondent Pluto Security Services was the defendant. The plaintiff through a plaint dated 22nd September, 2011 sued the Respondent herein seeking the following orders:

> **(a) Payment of a sum of Ksh.465,641.40/= together with interest thereon at court rates from March 2010 until payment in full.**
>
> **(b) Costs of the suit together with interest thereon at such rate and for such period as this honourable court may deem fit to grant.**
>
> **(c) Any other reliefs as this Honourable Court may deem just to grant.**

2. The respondent herein filed on 12th October, 2011 a memorandum of appearance and a statement of defence both dated 7th October, 2011. The respondent denied all the allegations of negligence.

3. After full trial, the learned trial magistrate dismissed the plaintiff's suit against the Defendant with cost on the 19th November, 2014.

4. The Appellant being aggrieved by the trial court's judgment dated 19th November 2014 provoked this appeal filed on 17thDecember, 2014 setting out the following 15 grounds of appeal;

> 1. **THAT** the Learned Magistrate erred in law and fact in holding that the plaintiff had failed to

prove its case on a balance of probability and more particularly, negligence on the part of the defendant.

2. **THAT** the Learned magistrate erred in law and fact by holding that the employees of the defendant were not negligent and thus not liable for the theft.

3. **THAT** the learned magistrate erred in law and fact by holding that failure to call a mechanical expert was fatal to the plaintiff's case and that there was a variance in the plaintiff's testimony and the pleadings.

4. **THAT** the Learned magistrate erred in law and fact by holding that the plaintiff herein had failed to prove causation when indeed theft was admitted by the defendant whose guards were on duty at the time of theft.

5. **THAT** the learned magistrate erred in law and fact by considering extraneous issues that were not among the issues for determination before him.

6. **THAT** the Learned magistrate erred in law and fact by dismissing the Plaintiff's evidence and failing to consider the fact that the plaintiff was a victim who had suffered theft and the defendant had agreed to compensate the same.

7. **THAT** the Learned Magistrate erred in law and fact by subject the plaintiff's case to a standard of proof higher than required by law when the issue determination was reimbursement of the money spent by the plaintiff in buying the stolen goods.

8. **THAT** the Learned Magistrate erred in law and fact by failing to hold that indeed the defendant had even accepted liability for the stolen goods and had even replaced the parts save that the same were old, reconditioned and unsuitable for use hence necessitating the suit.

9. **THAT** the Learned magistrate erred in fact and law by ignoring to determine the issue before him and instead framed his own issues and made arbitrary finding whichwere not sought by either party or hinged on any law.

10. **THAT** the learned magistrate erred in fact and law by failing to hold that it was a fundamental clause in the contract between the parties that the defendant shall compensate the plaintiff for all or any losses suffered resulting from any omission or commission by the defendant itself, its employees and/or agents.

11. **THAT** the Learned magistrate erred in fact and law by considering the defendant's bare denial averments in the statements of defence while rejecting the plaintiff's version of uncontroverted evidence thus demonstrating open bias and prejudice against the plaintiff.

12. **THAT** Learned magistrate erred in law by openly exhibiting partiality in favour of the defendant and enthusiastically attacking the plaintiff's case throughout his entire judgement and which attack was not supported by the defendant's evidence whatsoever or at all.

13. **THAT** the learned magistrate erred in law and fact by failing to analyze the submissions of the plaintiff and addressing the issues raised together with the evidence tendered thereby misleading himself on the findings derived therein.

14. **THAT** the learned magistrate's judgment and decree is contrary to the tendered weight of evidence and applicable legal principles.

15. **THAT** the Learned Magistrate's exercise of discretion was so injudicious and wrong so as to occasion grave injustice to the appellant, bring law into disrepute and invite anarchy and law of the jungle into dispute.

5. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 11th November 2016 whereas the Respondents filed their submissions on 19th May, 2017.

6. The appellant's advocates M/S Milimo Muthomi & Co. Advocates in their submissions urged the court to find that the appellant had proved their case on a balance of probability during trial in the lower court and therefore that the appeal is merited. He submitted that the appellant had established that the respondent owed them a duty of care which they breached. He noted that the documentary and oral evidence was more than sufficient to sustain its case on a balance of probability. He further submitted that so as long as the stolen items were identified and disclosed, which no evidence was tendered to state that they were not stolen, then there was no reason to call an expert witness. It was his submission that the appellant's evidence was uncontroverted as the respondent tabled no evidence to prove the contrary or to rebut the evidence tabled.

7. The respondents opposed the appeal and through their advocates M/S Omangi & Associates submitted that civil matters are determined on a balance of probability and that parties are bound by their pleadings. He stated that the appellant had not proved negligence on the part of the respondent. He also submitted that it is the appellant who brought the case and that, he who alleges must prove and that the court of law determines what is before it and does not assume. It was his submission that the items in the pleadings do not tally those in the documents produced, whereas the court is bound to follow what is in the pleadings.

8. This being the first appellate court, it is mandated to look on the evidence adduced at the trial court afresh, re-evaluate and re-asses it as was held in **David NjugunaWairimu .V. R. [2010]eKLR** in relying on the Holding of the court in **Okeno .V. R [1972] E.A.,32**

> ***"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to same conclusions as those of the lower court"***

9. The trial court dismissed the appellant's suit because the items claimed in the plaint and the items listed that were procured through the L.P.O and invoices did not tally, and that P.W.1 testified that one would need to call an expert to explain why the items do not tally. The court concluded that the appellant herein had not proved its case on a balance of probability.During trial in the lower court, it was apparent that the items the appellant claimed to have been stolen did not tally with the items purchased on the invoices dated 21/01/2010 and 03/05/2010, which was the basis of their claim. The appellant's witness P.W.1, during trial testified that the items on the invoices were different from the items on the plaint.

10. The court agrees with the respondent's submission that aparty is bound by his own pleadings. In **Independent Electoral and Boundaries Commission and Another .V. Stephen Mutinda Mule & 3 others [2014] eKLR.**

The Court made reference to **Adetoun Oladeji (NIG) LTD .V. Nigeria Breweries PLC S.C 91/2002** where the judge stated that;

> ***"it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does notsupport the averments in the pleading, or put in another way which is at variable with the averments of the pleadings goes on to issue and must be disregarded."***

In the present case, the appellant failed to prove which items were replaced by way of evidence. The evidence tabled showed a different set of items.

11. The amount the appellant prayed for is for special damages. An award on special damages depends on the evidence tabled before court. In **Sande Vs Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)** the Court of Appeal held that:-

> ***"As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved."***

The appellant herein failed to prove specifically the damages they incurredand this court is of the view that, the learned trial magistrate did not error in the finding that the appellant had not proved its case on a balance of probability.

11. That being the case, I find that the Appellant did not prove its claim to the standard required, and that this appeal is without merit. Accordingly, the appeal is hereby dismissed with costs.

12. Accordingly, this is appeal No.14 of 2015 be and is hereby dismissed with costs.

Dated and Delivered at Nyamira High Court this 17th **day of** November, 2017**.**

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C.B. NAGILLAH

JUDGE

In the Presence of:

Motanya hold brief for Milimo, Muthomi for the appellant.

N/A appearance for the Respondent.

Mercy Court Clerk.