REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL APPEAL NO. 23 OF 2006

(From the original civil suit no. 55 of 2002 of the Chief Magistrate's Court at Malindi before J. Kiarie - PM)

SECURICOR SECURITY SERVICES.....APPELLANT

VERSUS

BRYCE W. COWAN.....RESPONDENT

JUDGMENT

1. This appeal emanates from the decision of the learned principal magistrate delivered on 19th July, 2006. The respondent had in the month of May 2000 contracted security services from the appellant. The appellant was required under the contract to deploy a night guard at the respondent's house at Mtangani, Malindi. The respondent's suit in the Lower Court was based on negligence (although particulars thereof were not pleaded) and breach of the agreement.

2. It was the respondent's case that on the night of 12th and 13th May, 2000 the respondent's premises were burgled and goods worth Shs. 163,000/- carted away, as a consequence of the appellant's failure to post a guard at the premises. The respondent had prayed for special and general damages. The appellants admitted the contract for security services but denied the allegations of negligence and breach, and in addition raised a defence based on the limiting clause in the contract. At the end of the trial the learned magistrate found in favor of the respondent and awarded both special and general damages.

3. The appellants have raised 12 grounds in their memorandum of appeal dated 8th August, 2006. Grounds 1-5 and 11 challenge the decision of the trial magistrate with respect to whether or not the limiting clause in the agreement provided a defence to the appellant. Grounds 6, 7, 8, 9 attack the findings of the trial court as regards the issue of negligence, the appellant's failure to provide a night guard and the award of special and general damages to the respondent. Grounds 10 and 12 generally accuse the trial magistrate of failure to properly appreciate the parties' evidence and to come to proper conclusions.

4. The appeal was disposed of by way of written submissions. The appellant's contention was that the respondent having signed the contract was bound by the exclusion clause defining and limiting the extent of the appellant's liability at Kshs. 25000/-. The said clause is more of a limiting clause rather than an exclusion clause, in my view. The appellants submitted that the clause is clear and unambiguous and that the trial magistrate erred in failing to take the same into account.

5. Further that the court's finding that the appellant was precluded from relying on the limiting clause due to its fundamental breach of the terms of the contract was erroneous as no such breach had been established. Moreover, the appellant's contend that no evidence had been tendered to prove that the appellants had been negligent or failed to deploy a night guard at the respondent's premises on the night in question. With regard to the award of general and special damages, the appellants contend that the awards were not based on evidence and are therefore erroneous.

6. The respondent reiterated the evidence adduced by the respondent regarding the burglary through production of the Occurrence Book (OB) extract and placed reliance upon the respondent's alleged conversation with one Wilfred Charo the guard who allegedly confirmed not having been on duty on the material night. The respondent asserts that his evidence was not challenged. The respondent further contended that the appellant failed to bring the existence of the limiting clause to his notice and that the same could not avail a defence to the appellants. That the appellant having failed to deploy security services under the contract on the night of the alleged burglary was liable to make good the respondent's proven losses.

7. I have carefully considered the submissions made in light of the proceedings in the Lower Court. As the first appellate court, this court is under a duty to re-valuate the evidence tendered at the trial and to draw its own conclusions. While so doing the court must bear in mind that it did not have the advantage of hearing and seeing witnesses testify (see **Selle v Associated Motor Boat Company Ltd. [1968] EA 123.**

8. The question as to the defence available to the appellant under the limiting clause dominated the proceedings in the trial and also the submissions made before me. As important as it is however, that question could only be properly be gone into upon consideration of the basic issue whether negligence and breach had been proved, and perhaps, whether the breach was so fundamental as to preclude the appellant from relying on the limiting clause. The latter issue is not straight forward.

9. From the pleadings and record of the proceedings, it is evident that the respondent's assertion that the appellant failed to deploy a night guard and was guilty of negligence resulting in the alleged burglary and loss, was contested. In his judgment the trial magistrate recounted the evidence of the police officer who produced the police abstract and concluded:

> **"PW1 police officer in charge of station testified that it is true from the records of the police that such a burglary did occur and the items stolen listed. There was no evidence to the contrary. The court has no basis in light of such evidence upon which to find that no burglary occurred that these items said, were not stolen. On a balance of probability I find that indeed a burglary occurred and items herein cited stolen, worth the sum claimed." (sic)**

10. As the respondent has corrected submitted, the term burglary refers to a night break in and/or theft. The police officer merely produced a police abstract dated 13th May, 2006 and recorded at 12.45pm. The author thereof did not testify. It is true the report refers to a burglary and a Mrs. Spyratos who was taking care of the respondent's house during his absence. However, this abstract cannot take the place of direct evidence and be relied upon as proof that the burglary occurred. This was a critical issue disputed by the parties, because the contract was for provision of a night guard only.

11. Neither Ms. Spyratos nor the respondent's brother said to be his neighbor were called to give evidence as to whether the break in occurred during the day or at night (the period covered by the contract). During cross-examination the respondent had clearly stated that he was away at the time of the incident and that he did not know the time when the incident occurred. His workers who apparently had access to the house during the day were not called to testify. The trial magistrate's conclusion that the evidence established burglary in my considered view was based primarily on hearsay evidence. The respondent having lodged a claim was duty bound to adduce evidence in proof thereof.

12. The foregoing observations also apply to the question whether the appellants deployed a guard in the compound on the material night. Since the plaintiff was away from home, he could not tell whether or

not the guard reported on duty on the material night. He claimed that the designated guard later admitted to him that he was not deployed to the house on the material night. The guard was not called as a witness but the plaintiff built his case upon the guard's alleged absence from duty on the night of the burglary. He stated that the defendant failed to perform the duty of guarding his house. In cross-examination he reiterated:

> **"…the guard told me he was not in at the time of the incident….the door and locks were smashed to access inside the house unless somebody were deaf, they would have heard it…I would not know if any private guard came to my home as I was not there…"**

13. The trial magistrate in his consideration of this piece of evidence stated:

> **"Defendant contended that there was no evidence to suggest that the guard deployed at the plaintiff's premises cannot (sic) present thereof at the time of burglary. The evidence of the plaintiff is:**
>
> **"The door and locks were smashed to access the house. Unless somebody were deaf, they should have heard it. That is to say, the guard was not present and that is why he did not hear the burglars smash the door and locks to access inside the house. Plaintiff testified the guard told him he was not present as he had gone to relief another guard. The defendant did not tender any evidence that a guard was present. The extract of police occurrence book (….) produced by PW1 shows that police did not find the watchman …they were unable to trace him. This fortifies the plaintiff version that the guard was absent….I am not convinced as a fact that a guard was present at the premises when the burglary occurred. Because a burglary occurred it was necessary for defendant to explain how it occurred."**(sic)

14. With respect, this was a serious misdirection. The plaintiff's evidence hardly established a burglary let alone the absence of the guard on the material night. The burden could not properly be shifted upon the appellant to explain how the burglary occurred when the time of the break in had not been established in any conclusive manner.

15. In the case of **Wareham t/a A. F. Wareham and 2 others v Kenya Post Office Savings Bank [2004]2 KLR 91** the Court of Appeal held as follows:

> **"1. In our adversarial system of litigation, cases are tired and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities.**
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> **2. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."**

16. I have observed earlier on that no particulars of the alleged negligence were pleaded in the plaint. During the trial it seemed that the question of negligence was tied up with the alleged failure by the appellant to deploy a guard at the respondent's residence on the material night. Upon my own fresh appraisal of the respondent's evidence, I think there is merit in the appellant's complaint that the trial magistrate failed to properly evaluate the evidence before him and therefore fell into error. His finding that the appellant was guilty of breach of a fundamental term of the contract or indeed any breach at all or negligence had no evidential basis. These findings appear to be based on conjecture and surmises.

17. For the foregoing reasons, it would be academic to consider whether or not the limitation clause offered any defence to the appellants in the circumstances of this case. The appellant pleaded negligence and breach against the respondent but failed to prove it.

18. On the issue of general and special damages awarded, the onus lay on the respondent to prove his claim. Special damages must be pleaded and strictly proved. All that the respondent tendered as evidence of his stolen goods was a receipt for the purchase of a carpet rug. It is true that receipts for households purchased over time may not be easily assembled, but the respondent could have done better even if through production of evidence of current replacement value of stolen goods.

19. It is not clear from the judgment what informed the court's decision to award damages at five times the value of the contract after stating that none of the parties addressed this matter before him. There was no basis for the award of general or special damages as no negligence or breach had been established. In **Peters v Sunday Post Ltd [1958] EA**) the court stated:

> **"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern African to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs Manyoka [1961] EA 705 709, 713; Lukenya Ranching and Farming Co-operatives Society Ltd v Kavoloto [1970] EA, 414, 418, 419. This court follows the same principles."**

20. This appeal must be allowed for all the foregoing reasons. The judgment of the trial magistrate dated 19th July, 2006 is set aside and an order substituted therefor dismissing the respondent's suit in the Lower Court. In light of the nature of the dispute and age of litigation, each party will bear its own costs in the Lower Court and on appeal.

Delivered and signed at Malindi this **18th** day of **July, 2014** in the presence of: Mr. Ole Kina for the respondent, Mr. Shujaa holding brief for Mr. Gor for appellant. Court clerk – Samwel

C. W. Meoli

JUDGE