



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT ELDORET**

**Civil Appeal 97 of 2007**

**PATROTIC GUARDS LTD:.....APPELLANT**

**VERSUS**

**GREAT RIFT TRANSPORTERS LTD:.....RESPONDENT**

**JUDGMENT**

The Appellant was the employer of some two guards named Isigi and Makhoha. The Appellant was contracted by the Respondent to provide two guards at night and one during the day to guard the Respondent's premises. The Appellant provided the two guards above, Isigi and Makokha to guard the Respondent's premises at night. The Respondent had its own night guard who manned the gate with one of the guards provided by the Respondent while the other guard provided guard services at the office and compound of the premises. The Appellant's guard named Isigi had a key to the gate and so did the guard provided by the Respondent. Isigi drugged his co-guard from the Appellant as well as the guard provided by the Respondent and the duo lost consciousness and the said Isigi facilitated the theft of a motor vehicle parked at the premises and some goods loaded into that motor vehicle. The two drugged guards remained unconscious for three days while admitted at the hospital. Isigi disappeared without trace but the stolen motor vehicle was later recovered with part of the merchandise missing. Two suspects were arrested and charged with the criminal offence. The trial court found the Appellant 100% liable and hence this appeal. The grounds of appeal are five and they are that:-

- 1. The Learned Senior Resident Magistrate erred in Law and fact in arriving at the said decision without taking into consideration the Appellant's evidence in totality.**
- 2. The learned Senior Resident Magistrate erred in law and fact in arriving at the said judgment without taking into consideration the submission by the Appellant.**
- 3. The learned Senior Resident Magistrate erred in law and fact in failing to appreciate the law of vicarious liability.**
- 4. The learned Senior Resident magistrate erred in law and fact in not attributing negligence on the part of the Respondent.**
- 5. The learned Senior Resident Magistrate erred in law and fact in arriving at the said decision unfairly and on a biased opinion and judgment.**

At the hearing of the appeal grounds 1 and 2 above were argued together and it was submitted that liability was not properly apportioned between the two sets of guards provided by the Appellant and that provided by the Respondent.

On grounds 3 and 4 it was submitted that the trial court did not appreciate that criminal liability of the agent cannot be made the vicarious liability of the principal. On the final ground there was submissions that the evidence and submissions on behalf of the Appellant were disregarded by the trial court.

In opposing the appeal there was submissions on behalf of the Respondent that it was the Appellant's duty to provide security services

but instead the guards provided by the Appellant facilitated the theft of the goods they were meant to guard and hence vicarious liability attached.

I will start by considering the last ground of appeal. Nothing was shown of the trial court's bias. On the contrary the trial court analysed the evidence and authorities and submissions by the Plaintiff and Defence and gave reasons for her decision. That is clear from the proceedings and judgment. The defence evidence by the sole defence witness was very brief and it was by a witness who did not challenge the fact of the events of the date of the loss by the Appellant. No submission by counsel could fill the gap of the defence case and the trial magistrate covered that in the judgment.

On the issue of vicarious liability it was not denied that it was the act of Isigi one of the guards provided by the Appellant that led to the loss incurred by the Respondent. It was not denied that Criminal liability is of a personal nature. It has to be appreciated that the Appellant was not found by the trial court to be criminally liable for the acts of its guard Isigi. The issue of whether vicarious liability arises in a case where the agent is criminally liable was discussed in the case of **BARWICK –VS- ENGLISH JOINT STOCK BANK (1867) LR 2 Exch at Pg 259** where the fraudulent misrepresentations by a bank manager were held to be in the cause of employment and although the bank derived no direct benefit from the frauds perpetrated by their servant for his purposes, the Bank was held liable for his acts. In the case of **MORRIS –VS- CW MARTIN & SONS LTD (1966) 1 GB 716** it was held that a firm of cleaners to whom a furrier had entrusted the Plaintiff's mink stole were liable to the Plaintiff for the theft of the stole by one of their employees whose duty it was to clean the stole. Bearing that in mind and further that it was an accepted fact that Isigi an employee of the Appellant was the one who drugged his fellow guards and facilitated the theft and himself disappeared without trace, his liability became the vicarious liability of the Appellant and the trial court made no error either of fact or law in so finding. In my humble opinion this appeal is devoid of merit and the same is dismissed with costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF JUNE 2010.**

**P.M.MWILU**

**JUDGE**

**IN THE PRESENCE OF:-**

No appearance - Advocate for Appellant

Mwetich - Advocate for respondent

Andrew Omwenga - Court clerk.

**P.M.MWILU**

**JUDGE.**