WAMATO SECURITY SERVICES……APPELLANT

VERSUS

DAVID GITHUA MWANGI……RESPONDENT

JUDGMENT

By a plaint dated 2nd July 2002 the plaintiff sued the defendant claiming Kshs 63,200/= as compensation for goods stolen from his shop in the Shabab area of Nakuru District on 1st December 2002. The theft occurred while the plaintiff's shop was being guarded by a security guard supplied by the defendant under a contract of service dated 23rd May 2001.

The plaintiff claims that the defendant failed or neglected to ensure that the property was well guarded and secured against burglary or theft as stipulated in the contract. Further the plaintiff contends that it was an implied term of the said contract that the defendant would make good any loss or damage of property so guarded under an appropriate insurance cover arranged by the defendant. The plaintiff claims that, as a result of the robbery, he suffered loss and damage and holds the defendant liable for the same. After taking evidence from both sides, wherein the plaintiff and the defendant called one witness each, judgment was entered in favour of the plaintiff, the trial court having found that the guard on duty, at the material time, was negligent in not raising an alarm, thereby leading to his being tied up and the robbery being committed. The trial magistrate proceeded to find the defendant vicariously liable and therefore entered judgment in the said sum of Kshs 63,200/= plus costs and interest. In accepting the plaintiff's figure as the correct measure of damages the learned trial magistrate relied solely on an inventory produced by the plaintiff, said to have been compiled in the presence of police officers. No other supporting evidence was tendered to prove quantum.

Aggrieved by the decision of the lower court the appellant filed this appeal citing the following grounds;

1. That the learned trial magistrate misdirected her mind on the principles of law applicable to the case.

2. That the learned trial magistrate erred both in law and in fact in finding negligence when no particulars of negligence were pleaded.

3. That the learned trial magistrate failed to direct her mind and to decide as to whether the cause of action was founded in contract or in tort.

4. That the learned trial magistrate erred in both law and fact in failing to appreciate the terms and

conditions of the contract of service.

5. The learned trial magistrate erred in law fact in failing to find that the respondents claim had not been proved on the balance of probabilities.

Submitting in support of the appeal, Learned Counsel Miss Muchungi submitted that the cause of action was founded on a contractual relationship between the parties. For that reason, counsel submitted that the court ought to have considered whether there was a breach of that contract, but instead of doing so, the learned trial magistrate erroneously imported the law of tort into the case. She submitted further that for an award in negligence to be made a basis must be laid by way of pleading. According to Miss Mutungi the sum of Kshs 63,200/= was in the nature of special damages which were neither pleaded nor proved since no evidence of value of the plaintiff's stolen goods was tendered before court. She also submitted that the court's finding that the appellant's security guard failed to raise an alarm did not arise from any pleading or evidence placed before court.

Opposing the appeal, learned counsel for the respondent Ms Njoroge relied mainly on the implied terms for the provision of security and compensation for loss as pleaded in paragraph 4 and 5 of the plaint. The said paragraphs state as follows:

"***4. That it was a term of the said contract that the defendant was to ensure that the plaintiff's shop was well guarded and protected from thugery or theft through its guard.***

5. That it was also an implied term of the contract that should there be any damage and/or loss of the property the defendant's were guarding then the plaintiff's would be compensated by way of insurance cover the defendant had taken out."

Regarding quantum counsel submitted that the list or inventory tendered before court was enough prove and was properly admitted as such. She argued that the negligence alleged to have caused the breach of contract was not dislodged by the defence evidence.

It was held in the case of **Tembo Investments Ltd vs. Josphat Kazungu Mombasa Civil Appeal 19 of 2003** reported in **2005 eKLR** that a for a claim in negligence to succeed the plaintiff must establish the existence of a duty of care, a breach of that duty followed by injury or loss. In both tort and in contract the basis of claim is found in the pleadings filed and upon which the respective claim/cause of action is established inorder to find on liability and entitlement to compensation. Injury or loss must then be proved through evidence. Under **Order 6 rule 9(4)** of the **Civil Procedure Rules** any allegation that a party has suffered damage and any allegation as to the amount of damages shall be deemed to have been transversed unless specifically admitted. Secondly, and as provided in **Order 7 rule 6** of the **Civil Procedure Rules,** where a plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, the claims and/or causes of action shall be stated as far as may be separately and distinctly. The reason for the above requirement is that the onus of proof remains with the plaintiff throughout and it is upon the plaintiff to mitigate his loss.

It is not disputed that robbers broke in and entered the respondents shop premises and stole therefrom several goods on 1st December 2001. The defendant's guard was present but was overpowered. The issues that arose from the pleadings in the suit were, whether the appellant could be held liable for the loss suffered by the respondent as a consequence of the robbery. The respondent's testimony was that he had bought various supplies from a wholesaler on 30th November 2001 and placed them in the shop. On the morning of 1st December, 2001 his night guard who was the employee of the appellant herein informed him of how robbers attacked him at the shop, tied him up and proceeded to break into the shop and steal therefrom. The plaintiff testified that he blamed the said guard for not calling for help stating that "*had he screamed neighbours would have come to his assistance."* As earlier stated the respondent

did not produce any receipts or other documentation to prove the value of the goods stolen.

The administration manager of the respondent (DW1), testified that he knew the appellant as one of his employer's clients and that they supplied him with security guards. It was his testimony that on 1st December 2001 the company received information that robbers had come to the respondents premises, tied up the watchman and stole from the shop. He denied any knowledge of the value of the goods stolen or that the company had agreed to pay for the same. He testified that under the contract of service, compensation would only be made if it was proved that employees of the company failed to do their work and denied that the guard assigned to guard the respondent's premises was negligent. Under cross-examination by counsel for the respondent the witness agreed that a client would be paid by the appellant's insurance company but only if "*sole negligence"* on the part of the defendant was proved. His testimony was that this was not the case since the defendant's guard was not charged with the theft.

It is quite clear from the evidence tendered that the issue of raising an alarm was an issue brought in by the plaintiff but not proved. In the case of **Galaxy Paint Co. Ltd vs. Falcon Guards [2000] E. A. 385 (CAK)** the Court of Appeal held that the issues for determination by a court must of necessity flow from the pleadings and any judgment arising therefrom can only be pronounced on such issues as pleaded or as framed by the parties. Specifically the Court of Appeal held, inter alia as follows:

"… ***parties must be confined to their pleadings, otherwise, to decide against a party on matters which do not come within the issues arising from a dispute as pleaded clearly amounts to an error on the face of the record."***

I am in no doubt whatsoever that the respondent's cause of action, if any, would only arise from the contract of service dated 23rd May 2001, produced in evidence as plaintiff's exhibit 1. A claimant in contract can only be compensated in damages for loss of his bargain within the contract. Any recovery therefore would follow from a breach, break or nonperformance of the contract. The terms of the security contract as specified in clause 2 of the agreement were that the appellant would supply the respondent with one guard who would perform his duties at night between the hours of 6.30 p.m. and 6.30 a.m. Although the contract itself does not specify in what the situations the appellant would be held liable to compensate the respondent, in respect of matters arising out of the contractual relationship between them, clause 5 of the contract does imply that liability may attach for breach of contract or negligence, stating also that such compensation would be made upon receipt of a written notice served upon the respondent within 5 days of the 'happening of the default by the company, alleged to have given rise to liability'. It is implied under Clause 4 of the contract that such compensation would however be made under the insurance cover held by the appellants and upon proof of "*sole negligence"* on the part of the respondent. The court understands this to mean negligence caused solely by the appellant.

The trial court did not attempt to draw the issues for determination either from the pleadings or the evidence tendered before it. The same are not framed in the judgment, which appears quite vague as to what cause of action the respondents can be said to have established and what breach, if any, the appellant's had committed to warrant compensation being awarded to the plaintiff. If the negligence found by the lower court was as a result of a breach of a duty the lower court ought to have made a finding in that regard and more so, whether the appellants did owe a breach of duty of care towards the respondent which they breached. The court did not consider the contractual relationship between the parties and therefore failed to decide whether there is any breach of contractual duty. In my considered view the appellants were not in breach of the contract. The respondent had specifically contracted them to supply guarding services of one guard at an agreed cost and within specified periods. The appellant's guard was present and on duty when the theft took place and no negligence in the performance of his duties was established. That he did not raise an alarm was an issue imported into the contract by the court. Upon examining the judgment of the lower court I find that the same violates the provisions of **Order 14, Order 20 rules 4** and **5** of the **Civil Procedure Rules** as well as the well established principles of pleading. The second issue which ought to have been determined is whether the plaintiff had proved the damages as pleaded. I accept the counsel for the appellant's submission that the damages pleaded herein were in the nature of special damages. It is trite law that such damages must not only be pleaded but also proved. Unlike in the case of **Wambua vs. Patel [1985] KLR 336** where a virtually

illiterate plaintiff was found incapable of strictly proving loss of cash, wrist watch and expenditure for trips to hospital *(the court having found such expectation to be unrealistic in the circumstances)* the respondent's case herein fell within the ambit of **Hahn vs. Singh [1985] KLR 716** where the Court of Appeal held as follows:

"***Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves."***

The respondent having stated that he had bought the stolen goods only two days prior to the theft he ought to have had in his possession evidential proof of the costs of such goods, even if the same formed only part of the stocks stolen. Much as this court sympathizes with the respondent I find that he neither established his cause of action against the appellants nor did he mitigate his loss in order to prove his case on a balance of probabilities. Persuaded by the authorities hereinabove cited, I find that there exists a clear error on the face of record in the proceedings and judgment of the lower court. That being the case the appeal is hereby allowed with costs both in the lower court and in these proceedings.

Dated signed and delivered at Nakuru this 30th day of October, 2009

M. G. MUGO

JUDGE