Searite Holdings Ltd v Abeid & another (Civil Appeal 113 of 2015)
[2023] KEHC 18113 (KLR) (Civ) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 113 OF 2015

JN NJAGI, J

MAY 18, 2023

BETWEEN

SEARITE HOLDINGS LTD ..... APPELLANT

AND

WAHEEDA SAID ABEID ..... 1ST RESPONDENT

TESFALIDET M. KELATI ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. A. Lorot, SPM, in Nairobi Chief Magistrate`s Court Civil Suit No.3425 of 2011 delivered on 26/2/2015)

JUDGMENT

1. The Respondents who are wife and husband respectively were tenants at a premises known as Mitco Forest Road Apartments owned by a company known as Mitco Ventures Ltd. The Appellant herein was the security company contracted by Mitco Ventures Ltd to provide security at the premises. The Respondents` motor vehicle went missing from the premises and they sued both Metco Ventures Ltd and the Appellant to recover the cost of the motor vehicle. The trial court found the Appellant liable for the loss and dismissed the case against Metco Ventures Limited. The Appellant was dissatisfied with the judgment and filed the instant appeal.

2. The grounds of appeal are that:

    1. That learned Magistrate erred in fact and in law in allowing the plaintiffs'/respondents' suits while no sufficient evidence and materials were tendered in support of the same.

    2. The learned Magistrate erred in fact and in law in holding that the appellant/2nd defendant was contracted by the plaintiffs to provide security services at Mitco Forest Road Apartments.

3. The learned Magistrate erred in fact and in law by ignoring that the plaintiffs/respondents were under an obligation to insure motor vehicle registration number KBH 959X in the unlikely event of loss as well as fit it with safety equipment such as an alarm.

4. The learned Magistrate erred in fact and in law in insinuating that motor vehicle registration number KBH 959X was stolen by the 2nd defendant's former employee and imposing an impossible burden on the appellant /2nd defendant to recover it and or duty of care.

5. The learned Magistrate erred in fact and in law in ignoring that no criminal proceedings were preferred as against the 2nd defendant/applicant former employee and proceeded to infer guilt based on his disappearance.

6. The learned Magistrate erred in fact and in law in allowing the plaintiff's claim despite it not being specifically proven.

7. The learned Magistrate erred in fact and in law in disregarding the 2nd defendant's/appellant's unshaken evidence.

8. The learned Judge erred in fact and in law by completely disregarding the 2nd defendant's/ appellant's submission on the evidence, facts and issues before court.

Case for Respondents –

3. It was the case for the Respondents/Plaintiffs at the lower court that on the night of 30th May/1st June 2011 they had parked their motor vehicle registration No. KBH 959X at its designated parking lot at Mitco Forest Road Apartments. That on the morning of 1st June 2011 at 7 am, they found the vehicle missing. The night watchman was missing. He had left the gate open. The day watchman had reported but did not find the night watchman. The 2nd Respondent reported the matter to Mitco Ventures Ltd and to the Appellant. He also reported to the police. The vehicle was never found nor was the night watchman traced. The respondents sued both Mitco Ventures Ltd and the Appellant seeking to recover total damages of Ksh.475,200/= made up as follows:

   Value of the motor vehicle.....Ksh.425,000/=

   Value of new tyres .....Ksh. 25,000/=

   New battery .....Ksh. 4,500/=

   Cost of hiring taxi to and from work

   at the rate of Ksh.400/= per day from

   1/6/2011 to 8/7/2011.....Ksh.15,200/=

   Total .....Ksh.475,200/=.

4. The Respondents contended that the terms of the tenancy agreement were that the rent of Ksh.40,000 was inclusive of provision of security for both day and night watchmen. That the claim was for breach of contract for security and bailment and/or negligence in failing to prevent the loss or theft of the vehicle.

5. Both Mitco Ventures Ltd and the Appellant denied the claim. The Appellant in its defence denied having entered into any contract with the Respondents or that it was in breach of any contract with them. It denied that it owed them any duty of care.

6. The trial magistrate dismissed the case against Mitco Ventures Ltd. He found that it was the duty of the Appellant to secure the premises and that their employee compromised that duty. That the Appellant was solely responsible for the loss and was vicariously liable for the acts of omission or commission of its employee. The trial court thereby entered judgment for the Respondents against the Appellant as prayed in the plaint.

7. The appeal was canvased by way of written submissions.

Appellant`s Submissions -

8. The Appellant submitted through their advocates that the Respondents` suit was rooted on both contract and tort. That there was no evidence that the Appellant was contracted by the Respondents to guard the Respondents` motor vehicle. That the agreement between the respondents and Mitco Ventures did not entail security for the respondents` motor vehicle nor did the said agreement obligate the Appellant to compensate the respondents in the event of loss of their vehicle. That the respondents in their evidence admitted that they had no agreement with the Appellant. They did not produce any agreement to show that their tenancy with Mitco also included provision of security services. It was thus submitted that there was no contractual relationship between the respondents and the appellant and as such the respondents could not enforce an agreement that was never entered into. In support of this proposition, the Appellant relied on the doctrine of privity of contract and cited the case of *Securicor Guards (K) Ltd v Muhamed Saleem Malik & another* (2019) eKLR where Githua J. while addressing a similar issue where there was no privity of contract between the parties held that:

> Given the foregoing, it is my finding that since there was no privity of contract between the appellant and the 1st respondent, though he was benefiting from the security services offered through the 2nd respondent, the 1st respondent could not in law maintain an action against the appellant based on the contract since being a third party, he did not have any rights under the contract which he could lawfully enforce.

9. The Appellant consequently submitted that since there was no privity of contract between the Appellant and the respondents though the respondents were benefiting from the security services offered through Mitco, the respondents could not in law maintain an action against the appellant based on the contract for security services, since being a third party they did not have any rights under the contract. That the agreement with Mitco did not provide for compensation in case of loss. Thus, it was submitted that the finding by the trial magistrate that the Appellant was liable to the respondents based on their contract for security services with Mitco was in error of law and fact.

10. The Appellant also cited the case of *Intercity Secure Homes Limited v Jane Njeri Miringu t/a Mango Bar & Restaurant* (2019) eKLR where Korir J. (as he then was), when addressing a similar issue held that:

> 24. The only question is whether one of the terms of the contract was that the Respondent would be compensated for any theft that occurred during the subsistence of the contract. It was the duty of the Respondent to prove the existence of such a term. What was produced was a letter of introduction which is a brochure stating the services that the Appellant was offering. What is referred to as a security sale contract is a customer profile detailing the Respondent's particulars, the number of guards to be provided and the amount of money to be paid.
>
> 25. The Respondent did not produce any other document detailing the terms of the contract she entered into with the Appellant. She did not mention in her testimony the existence of an oral contract. The contract between the Appellant and the Respondent simply provided that the

Appellant would provide a night guard to the Respondent at Kshs.12,500 per month for a period of one year from the date of the signing of the contract. There was nothing agreed on as to what would happen should any party breach the agreement.

26. A contract can either be express or implied. An express contract is one in which the parties agree either orally or in writing, or a combination of both, on the terms of their contract at the time the contract is made. Sometimes terms are read into a contract. The terms though not explicitly or expressly stated are deemed to be fairly obvious to the parties to the contract. Terms that can be implied in a contract are sometimes created by the law. For example, the *Sale of Goods Act*, Cap. 31 provides terms to be implied into a sale in the course of a routine business transaction.

27. In a claim for breach of contract the plaintiff must establish the existence of a contract and the express term of the contract allegedly breached. If the plaintiff relies on an implied term then there is need to state what that implied term is and the basis of reading it into the contract.

28. The Respondent did not adduce any evidence of an express term showing that the Appellant was to compensate her for any theft that was to occur in her premises. She did not point to any legal provision from which it could be implied that a person who contracts to provide security services is liable for any loss or damage that occurs at the premises of the consumer of the security services.

29. Even assuming that the Respondent's claim was based on negligence, the evidence adduced did not support such a claim. When the Respondent who testified as PW1 was cross-examined, she testified that it was true that she had stated in her plaint that the watchman had been taking alcohol with the customers. The Respondent here thus detected a dereliction of duty and took no action. The Appellant was never informed about the misbehavior of the guard. In the circumstances negligence could not be attributed to the Appellant.

30. In awarding the Respondent money equivalent to the value of the items stolen on the night the bar was broken into, the trial magistrate read into the agreement between the parties a term that the parties had not agreed on. The trial magistrate therefore applied the wrong principles of law in reaching her decision. This court therefore has a duty to interfere with that decision.

11. The Appellant submitted that the mandate of the court is to interpret the agreement between the parties and not to re-write the same.

12. The Appellant submitted that the Appellant could not be held liable for any criminal conduct on the part of their guard under the principle of vicarious liability as criminal liability is personal in nature

In support of this proposition the Appellant cited the case of *Surveillance Security Limited v National Cereals and Produce Board* (2020) eKLR where guards of the appellant stole some gunny bags that they were employed to guard. Justice G.W. Ngenye (as she then was) considered the issue and held that:

42. The general rule is that vicarious liability has no place in criminal law as criminal responsibility is personal in nature. The rational being that the criminal act (actus reus) and the state of mind (mens rea) whilst committing the offence is personal. (See *Republic v Joseph Muhia Mwaura & another* [2017] eKLR and *Gerishon Gioche Macharia v Republic* [2017] eKLR).

43. However, there will be occasions when an employer takes up vicarious liability on a civil plane arising from the criminal conduct of his employee. The Court of Appeal for East Africa in the case of *Mungowe v Attorney-General of Uganda* [1967] EA 17, Newbold P stated at page 18–

> "The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. .....
>
> Each case must depend on its own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."

44. I understand the above authority to be stating that if a criminal act is committed by a servant under the command of an employer, then the master should be held vicariously liable for the act of the employee. So then, are the circumstances herein such that Total Security can be held liable for its employees criminal actions? I would think not. Actions of theft or being an accessory to theft cannot be considered remotely close to being within the scope of employment. They are actions which an employee undertook without the command of his employer and of course, for his benefit. The employer in my view cannot be held vicariously liable. To hold in the contrary would definitely deviate from the known legal principles.

13. In the instant case it was submitted that since the alleged stealing of the motor vehicle by the guard was criminal in nature the question was whether his actions would still bind the Appellant as his employer. It was submitted that the appellant was not vicariously liable for such actions.

14. The Appellant submitted that the nature of the Respondents` claim was in the form of special damages. That it is trite law that special damages must be specifically pleaded and strictly proved - see *Capital Fish Kenya Limited v Kenya Power & lighting Co. Ltd* (2016) eKLR (COA). It was submitted that the Respondents did not produce any documentary evidence in support of the alleged loss and damage. The claim for specials ought to have been disallowed. That the trial magistrate made an error in failing to address his mind to the issue.

15. The Appellant submitted that in condemning the Appellant for the alleged loss of the motor vehicle was tantamount to forcing the Appellant to enter into a contract to secure the respondents` vehicle and pay for the same in the event of loss contrary to the evidence on record which did not place any contractual or legal liability on the Appellant. The agreement between the Appellant and Mitco Ventures was to man the gate which involved control and exit of people and motor vehicles. In that case there was no agreement with the respondents that they would secure their vehicles and compensate them in the event of loss. The Appellant urged the court to allow the appeal with costs.

Respondents` Submissions –

16. The Respondents submitted that there was a tenancy agreement between them and Mitco Ventures Ltd. That Mitco had contracted the Appellant to secure the demise premises. That there was no dispute that the Respondents` motor vehicle was stolen from the premises. That the trial magistrate was correct in holding the Appellant vicariously liable for the loss of the motor vehicle as the law is that a master is

liable for the acts of his servant committed in the course of employment. The Respondents relied on the case of *Patriotic Guards Ltd v Great Rift Transporters Ltd* (2010 eKLR where it was held that:

> 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 *Barwickv 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 perpetuated by their servant for his purposes, the Bank was held liable for his acts. In the case of *Morrisv 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.

17. The Respondents also relied on the case of *Express (Kenya) Ltd Manju Patel* (2001) e KLR in which the court quoted with approval the case of *Securicor (Kenya) Limited v. E.A. Drapers Limited & another* (Civil Appeal No. 67 of 1985) (unreported) which quoted with approval the English case of Morris v C.W. Martin & Sons Ltd (1965) 2 All E.R.725 wherein Lord Denning M.R. put it as follows:

> " When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depradation, then, if he entrusts that duty to a servant or agent , he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them."

18. The Respondents further relied on the case of *Urmila w/o Mahendra Shah v Barclays Bank International & another* (1979) eKLR where the Court of Appeal quoted with approval the case of *Muwonge v Attorney-General of Uganda* (1967) EA 17, 18 where it was held that:

> ... the legal position is quite clear and has been for some considerable time. A master is liable for the acts of his servant committed within the course of his employment ... The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is: were the acts done in the course of his employment...

19. The Respondents urged the court to affirm the judgment of the lower court and dismiss the appeal herein with costs.

Analysis and Determination –

20. This being a first appeal, the duty of this court is as was stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the

principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

21. The court has also to bear in mind that the standard of proof in civil cases is on a balance of probabilities. This standard was stated by Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 to be as follows:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

22. It was therefore the duty of the Respondents to prove their case on a balance of probabilities.

23. I have considered the grounds of appeal, the grounds in opposition thereto and the submissions of the respective advocates for the parties. The issues for determination are:

    (1) Whether there was a contract between the Appellant and the Respondents for the Appellant to provide security duties to the Respondents.

    (2) Whether the Appellant were vicariously liable for the acts or omissions of their employee.

24. The Respondents in their evidence stated that they were paying rent of Ksh.40,000/= which sum included provision for security. The case for the Respondents was therefore based on breach of contract by the Appellant. They were under duty to prove the terms of the contract. The Respondents however did not produce any agreement between them and Metco Ventures Limited to show that the latter were under the terms of the contract supposed to provide security for the property of the Respondents that was on the premises.

25. The 2nd Respondent admitted in cross-examination that they did not have any agreement with the Appellant. It is then clear that the Respondents sued the Appellant simply because it was contracted by Metco to provide security at the premises. It would seem that they were invoking the contract between the Appellant and Metco to support their claim of loss of the motor vehicle. It is however trite law under the doctrine of privity of contract that a contract only binds parties to it and cannot confer rights or impose obligations on a party who is not part of it. This was succinctly stated by the Court of Appeal in the case of Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakombe & Another (2015) eKLR, where the Court rendered itself thus: -

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop*

Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus:

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation v Lendetia Ltd (supra), *Kenya National Capital corporation Ltd v Albert Mario Cordeiro & another* (supra) And *William Muthee Muthami v Bank of Baroda*, (*supra*).

Thus in *Agricultural Finance Corporation v Lendetia Ltd* (*supra*), quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

26. The same Court also discussed the doctrine in the case of *Aineah Likuyani Njirah v Aga Khan Health Services* [2013] eKLR, and stated thus:-

> " 4. Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscont Haldane LC as one of the fundamental principles of the English Contract Law. See *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd*. The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

27. There was no contract to provide security between the Appellant and the Respondents in this case. The Respondents could not rely on the contract between the Appellant and Metco to support their case as they were total strangers to the contract. The trial court in its judgment did not consider whether there was a contract to provide security between the Appellant and the Respondents. Had it done so it would have found that there was none. The court erred in failing to consider the issue.

28. It was the case for the Appellant that they were only engaged to man the gate. The Respondents did not adduce evidence to contradict this. They did not produce the contract between the Appellant and Metco and therefore the terms under which the Appellant was proving security at the premises remain known to them and Metco. In view of the foregoing, I hold that there was no contract between the Respondents and the Appellant for the Appellant to guard the Respondents` motor vehicle. As such there was no breach of contract by the Appellant. The case for the Respondents against the Appellant was thus untenable.

29. The other issue is whether the Appellant was vicariously liable for the acts of its guard. The trial court held that it was the duty of the Appellant to secure the premises. That their employee compromised that duty and therefore they were vicariously liable for the acts of omission or commission of its employee.

30. The *Black's Law Dictionary* defines vicarious liability as:

> " Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

31. There was no dispute in this case that the guard was an employee of the Appellant. However vicarious liability would only have attached to the Appellant if there was privity of contract between the Appellant and the Respondents. Having found that such a relationship did not exist the issue of vicarious liability does not arise. Additionally, an employer would only be held vicariously liable for the acts of its employee where the acts are committed in the course of employment – see the *Urmila w/o Mahendra Shah v Barclays Bank International & another case*, *supra*. The guard in this case was not employed to secure the respondents` motor vehicle. His employer therefore could not be held vicariously liable for the stealing of the motor vehicle by the guard. If the guard did steal the motor vehicle, that was purely a criminal act for which the employer was not responsible. I therefore do not agree with the trial court on its finding on liability.

32. The upshot is that the respondents did not prove that the appellant was liable for the loss of the motor vehicle. The appeal is allowed with costs to the appellant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH MAY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Makumi for Appellant

Miss Murigu for Respondents

Court Assistant – Amina

30 days Right of Appeal.