



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 22 OF 2019

(From original civil suit Kitale CMCC No. 269 of 2014

delivered by Hon. C.M. Kesse –SRM on 12th March 2019)

CHARLIE AGENCIES LIMITED.....APPELLANT

VERSUS

EXAKTA AGENCIES LIMITED.....RESPONDENT

JUDGMENT

The Appellant is a company that offers security services, the respondent is a business entity conducting business in Kitale Township. Its main business is the sale of motor vehicle spare parts and tyres. The Appellant and the respondent entered into an agreement on 29th of April 2010 whereby the Appellant agreed to supply the Respondent with two security guards, one for the day and another for the night for a consideration of, initially the sum of Kshs 14,800/=. A written agreement was prepared but it was not signed by the Respondent due to the fact that it had issues with some clauses in the agreement. According to the Respondent, it was not in agreement with a clause in the agreement that the liability of the Appellant be limited to the sum of Kshs 50,000/= in the event that there was loss in the Respondent's premises. This sticking point led to the agreement not being signed at all. However, the agreement was performed when the Appellant provided the Respondent with two security guards who guarded the premises.

The agreement was performed until on 1st July 2013 when the Respondent's premises were broken into and several tyres, in the estimation of the Respondent, worthy Kshs 760,872/- were stolen. Investigations were conducted by the police leading to the arrest of the security guard who was guarding the premises on the previous night. He was charged with the offence of breaking and stealing contrary to Section 306(a) of the Penal Code. He denied the charge and after full trial he was acquitted. The respondent filed a civil suit seeking to recover the said sum of Kshs 760,872 plus VAT.

In his plaint, the Respondent averred that he had lost the sum of Kshs 895,165.10 as a result of the negligence of the Appellant's employee in failing to guard the premises on the material night. The Respondent based its claim on negligence and partly on contract. The Appellant in its defence, denied that it was liable to the Respondent in the manner that the respondent averred in his plaint. The Appellant averred that its agreement with the Respondent was subject to a contract which specifically limited liability to the sum of kshs 50,000/= in the event that the Respondent suffered any loss. The Appellant denied that it owed liability to the Respondent on negligence.

The case was heard before the Chief Magistrate's court and in a judgment delivered on 12th March 2019, the court found for the Respondent. It held that the Respondent has established its case that its goods were indeed stolen from its premises as a result of the appellant's negligence. The Appellant was ordered to pay the said amount plus costs and interest. The judgment provoked the present appeal before this court. From the memorandum of appeal, it was clear to the court that the issue for determination by this court is whether the Appellant and the Respondent were bound by the terms of the contract (which was unsigned) or whether the appellant was liable to the respondent in tort.

During the hearing of the appeal, this court heard oral rival submissions made by Mr Wekhomba for the appellant and by Mr. Nyakundi for the Respondent. This court has carefully considered the said submissions. It has also had the benefit of perusing through the record of appeal. As a first appellate court, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's court so as to arrive at its own independent determination noting that it neither saw nor heard the witnesses as they testified and therefore give due regard to that fact. **(See Selle –Vs- Associated Motor Boat Company Ltd [1968] EA 123)**

As stated earlier in the judgment, the issue for determination in this case is whether the appellant and the respondent were bound by the unsigned agreement given that the agreement was performed. According to the appellant, whether or not the respondent signed the contract, it was bound by its terms when it accepted the Appellant's security guards in its premises in performance of the agreement. On the other hand, it was the respondent's case that since it did not sign the contract, it was not bound by its terms, and specifically, the term that limited

the appellant's liability in the event that there was loss as a result of the performance of the said contract.

On the re-evaluation of the evidence, this court formed the view that the appellant and the respondent indeed entered into a service contract. There was performance of the contract whether or not the contract was signed. The issue for determination is whether the parties were bound by the terms of the contract or whether there were bound by other terms (the Respondent asserts that the contract was oral). This court is of the view that the Appellant and the Respondent were indeed bound by the terms of a contract which is usually applicable in the security industry whether or not the Respondent signed the agreement. An agreed practice in the security industry is that when a security firm offers its security services to its clients, its liability is limited. It is upon the client to insure its premises in the event of any loss. Such contract will not attract liability in negligence unless it is established, to the satisfaction of the court, that there was absolute dereliction of duty on the part of the security firm. In the present appeal, no such evidence was presented before the court.

In the premises therefore, the decision by the trial court in holding the Appellant liable on negligence cannot stand. The agreement between the Appellant and the respondent was that of a service contract. By entering into such contract, the Appellant did not assume the responsibility of insuring the Respondent in the event of loss. The relationship between the Appellant and Respondent was purely a contractual relationship. It did not attract any liability in negligence unless such negligence was established to the required standard of proof.

The appeal has merit it is hereby allowed. The judgment and the decree of the trial court is hereby set aside together with all the consequential orders and substituted by judgment of this court on the following terms;

- i. Judgment is entered for the respondent for the sum of kshs 50,000/= plus interest from the date of filing suit.
- ii. There shall be no orders as to costs both before this court and in the trial court.

It is so ordered.

DATED AT KITALE THIS 13TH DAY OF JULY, 2021

L. KIMARU

JUDGE