REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 205 OF 2018

TOTAL SURVEILLANCE SECURITY LIMITED.....PLAINTIFF

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD.....DEFENDANT

RULING

Background

1. There are two applications before the court for determination. The first is a Chamber Summons dated 27th February, 2020 filed on 3rd March, 2020 by Total Surveillance Security Limited (hereafter "Total Security"). It is filed under the provisions of Section 36 (1) of the Arbitration Act, 1995, Rules 3, 4 and 9 of the Arbitration Rules, 1997 and all other enabling provisions of the law. It seeks to adopt the Arbitral Award published on 6th February, 2020 by Patterson Munene Kamaara, LL.B, FCIArb. The prayers sought are set out as follows;

> **a. THAT the Honourable Court be pleased to recognize and adopt the Final Award delivered by Mr. Paterson Munene Kamaara, LL.B FCIArb, on 6th February, 2020 as a judgment of this Honourable Court.**
>
> **b. THAT judgment be and is hereby entered in favour of the Claimant/Applicant as against the Respondent in terms of the final Award published on 6th February, 2020 by Mr. Patterson Munene Kamaara.**
>
> **c. THAT the Honourable Court be pleased to grant leave to the Applicant to enforce the said Award as a decree of this Honourable Court.**
>
> **d. THAT the costs of this Application be borne by the Respondent.**

2. The Application is supported by grounds on the face of it as well as an Affidavit sworn on 27th February, 2020 by Daniel Bunei, the Applicant's General Manager.

3. It is opposed by way of a Replying Affidavit sworn on 19th June, 2020 by John Ngetich.

4. The second application is a Notion of Motion dated 23rd March, 2020 filed on 24th March, 2020 by the National Cereals and Produce Board (hereinafter "NCPB"). It is filed under the provisions of Section 1A, 1A and 3A of the Civil Procedure Act, Sections 35 (2)(a)(iv) and (b)(ii) of the Arbitration Act, 1995, Rules 6 and 7 of the Arbitration Rules and all other enabling provisions of the law. It seeks to set aside the Arbitral Award dated 6th February, 2020. It is supported by grounds on the face of it as well as Affidavit sworn on 23rd March, 2020 by John Ngetich, Acting Corporation Secretary of NCPB. The main prayers are set out as follows;

> a. **THAT pending the inter-parties hearing of this application, this Honourable Court be pleased to stay hearing and determination of the Chamber Summons dated 27th February, 2020 being an application for enforcement of the arbitral award, which is slated for hearing on 26th March, 2020.**
>
> **b. THAT pending the hearing and final determination of this application, the Honourable Court be please to stay hearing and determination of the Chamber Summons dated 27th February 2020.**

c. THAT this Honourable Court be pleased to set aside the entire arbitral award dated 6.02.2020 given by Sole Arbiter Patterson Munene Kamaara.

d. THAT costs be provided for.

The dispute

5. Total Security, as a result of Tender No. NCPB/SEC/01/2013-2015, entered into a contract dated 10th July, 2013 with NCPB for the provision of security services. The Contract was extended, as a result of tender No. NCPB/SEC/01/2015-2016, on 31st May, 2015 for a further period of two years. The new contract was dated 25th June, 2015 and was to commence on 1st July, 2015 to 30th June, 2017.

6. A dispute arose on payment with Total Security contending that NCPB unlawfully and unjustly withheld a sum of Ksh.29,722.499.69 which it contended it had earned, was due and payable. Total Security further contended that it was owed interest for the delayed payment at a rate of 14% p.a. Clause 17 of the first Agreement and Clause 18 of the second agreement provided that disputes between parties would be solved by negotiation failing which, the dispute would be referred to arbitration. The clause provides as follows;

"RESOLUTION OF DISPUTES

The Board and the Security Firm shall make every effort to resolve amicable by direct informal negotiation any disagreement or dispute arising between then under or in connection with the Agreement.

If after thirty (30) days from the commencement of such information negotiations both parties have been unable to resolve amicably an agreement dispute either party shall refer the dispute to be referred to resolution to the formal mechanism specified in the SCC."

7. Clause 18 in the Special Conditions provides as follows;

"Resolution of Disputes

a. Resolve amicable by direct informal negotiations any disagreement or dispute.

b. If after thirty (30) days from the commencement of such informal negotiations both parties have been unable to resolve amicably an agreement dispute by the parties hereto, such dispute shall be settled by a sole arbitrator under the Arbitration Act. The Arbitrator shall be appointed by agreement between the parties or in default of Agreement by the Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators."

8. The parties referred the matter to arbitration and vide a letter dated 12th October, 2018 jointly appointed Mr. Patterson Munene Kamaara as sole arbitrator. The Arbitrator accepted the appointment in his letter dated 7th November, 2018.

9. The matter proceeded for hearing which culminated in the award published on 6th February, 2020, in which the following orders were issued:-

"Accordingly and in full and final settlement of the claim and counterclaim, I PATTERSON MUNENE KAMAARA, LL.B, FCIArb, sole arbitrator, HEREBY AWARD and DIRECT as follows;

a. I order and direct that the Respondent shall pay to the Claimant a sum of Ksh.28,646,198.69.

b. I order and direct that the Respondent shall pay interest on the said sum of Ksh.28,646,198.69 at the rate of 14% p.a. from 1st July, 2017 until payment in full.

c. I further order and direct that the Respondent's counterclaim is hereby dismissed.

d. I further award, order and direct that the party and party costs of this arbitration shall be paid by the Respondent to the Claimant.

e. I further award, order and direct that the arbitrators costs of this arbitration shall be borne equally by both parties but the Claimant's share shall be recoverable from the Respondent. The Arbitrator's costs of this arbitration are hereby assessed at Ksh.750,000/- plus 16% VAT."

Analysis and determination

10. The two applications were canvassed by way of written submissions. The Court directed that the two applications be argued together. This is in view of the fact that an order for the setting aside of the arbitral award shall have a direct bearing on that for the enforcement of the award. The two applications could not be separated, rather they had to be twinned.

11. Arbitral process is a consensus, voluntary procedure through which parties choose to resolve their dispute. The court can only intervene in that process as set out under Section 10 of the Arbitration Act which provides that:

> **"Extent of court intervention**
>
> **Except as provided in this Act, no court shall intervene in matters governed by this Act."**

12. Section 32A of Arbitration Act states:`

> **"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."**

13. In the case of ***Prof. Lawrence Gumbe & Another vs. Honourable Mwai Kibaki & Others, High Court Miscellaneous No. 1025 Of 2004***, Nyamu, J. held that:

> **"Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation-oriented..."**

14. The Court of Appeal in the case ***Nyutu Agrovet Limited v Airtell Network Limited (2015) eKLR*** in regard to Limited intervention by the courts of arbitral process stated:

> **"The rationale behind the limited intervention of Court in Arbitral proceedings and awards lies in what is referred to as the principle of party autonomy. At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them. Where the parties therefore have consciously opted to resolve their dispute through Arbitration, intervention by the Courts in the dispute is the exception rather than the rule..."**

15. Section 36 on recognition and enforcement of an award provides:

> **"36. (1) An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.**
>
> **(2) Unless the High Court otherwise orders, the party replying on an arbitral award or applying for its enforcement shall furnish-**
>
> > **(a) the duly authenticated original arbitral award or duly certified copy of it; and**
> >
> > **(b) the original arbitration agreement or a duly certified copy of it.**
>
> **(3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language."**

16. Grounds for refusal of recognition or enforcement contained in Section 37 are by and large similar to those for setting aside an award contained in Section 35 save for one ground. Section 35 of the Arbitration Act stipulates:

> **"(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).**
>
> **(2) An arbitral award may be set aside by the High Court only if—**
>
> > **(a) the party making the application furnishes proof—**
> >
> > > **(i) that a party to the arbitration agreement was under some incapacity; or**
> > >
> > > **(ii)the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
> > >
> > > **(iii)the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
> > >
> > > **(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**

(v)the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

17. Section 37 on the other hand as regards grounds for refusal or recognition or enforcement of the award reads:- .

"(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only-

(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that-

(i) a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(b) if the High Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."

18. Courts have taken the position that the grounds for setting aside of an arbitral award as set out under the above section are strict and spell out the jurisdiction of the court in setting aside an Arbitral Award. This is the position that was taken into ***Midco Holdings Limited v Summit Textiles (EA) Limited [2014] e KLR*** where it was held:

"[36] Section35(2) of the Arbitration Act circumscribes the grounds upon which an arbitral award can be set aside, and an applicant seeking to set aside an arbitral award must bring himself strictly within the legal bounds of that Section. See the case of TRANSWORD SAFARIS LTD V EAGLE AVIATION LTD & 3 OTHERS NBI MISC APPLICATION NO. 238 OF 2003, Nyamu J. (as he then was)."

19. The Application for setting aside the arbitral award is predicated on two main grounds, that the Arbiter went beyond the scope of reference issued to him by the parties and that the award goes against public policy.

20. NCPB submits that the terms of reference were to determine the following issues;

a. Whether there was negligence and breach of duty by the Plaintiff as far as the two contracts go.

b. Whether the Plaintiff indemnified the Defendant for the loss incurred due to the Plaintiff's negligence in undertaking their duties as provided in the contracts.

c. Whether the Plaintiff was entitled to interest on the amount owing.

21. It submits that the Arbitrator rewrote the agreement by imposing new terms upon the Defendant that were not agreed upon by the parties. That parties are bound by their contracts and a court or tribunal cannot rewrite a contract willingly entered into unless fraud, coercion or undue influence is pleaded and proved. Further that the primary duty of an arbitrator or court is to construe and enforce the contract and any other terms implied.

22. On the issue of indemnity NCPB submits that the same flows from the terms of the contract and Clause 9 provided that Total Security was to indemnify it on any claim or losses incurred. It contends that a robbery took place and one of the security guards employed by Total Security indicated that he had 'passed out' after being given some bread by his collegues and only woke up to find that theft had occurred. NCPB contends that it was clear that employees of Total Security were involved in the making the environment for the theft to occur and that this indicated negligence on the part of Total Security. That the Arbitrator failed appreciate that the Plaintiff as provider of security failed to provide an explanation as to how theft occurred and the fact that the security guards involved remain at large is an indication that Total Security was aware of the circumstances leading to various thefts.

23. It is NCPB's contention that the Arbiter noted that no conviction on the part of the guards who had been arrested and charged had been made in court and he arrived at the conclusion that no culpability could attach on the Plaintiff's guards. It submits that the position is flawed on account of majority of the guards escaped and were never found to be charged in court, the standard of proof in criminal cases is higher than that in civil proceedings, that the criminal case was against the individual guards but the responsibility remained with Total Security.

24. NCPB contends that the Arbitrator attempted to raise the liability threshold from what was agreed between the parties and inserted an extra condition that for liability to accrue there must be a guilty verdict entered against the Total Security or against its employees. That Clause 9 did not state that for Total Security to indemnify it, there must be a guilty conviction entered against any suspect and it was unjust for the Arbitrator to impose such a condition.

25. It avers that the parties did not make a conviction a prerequisite for Total Security to indemnify NCPB for any loss suffered due to theft. That the security guards were employees of Total Security itself and thus, it could not have the guards prosecuted in criminal court for theft.

26. It concludes that the arbitrator not only went beyond the reference but also re-wrote the contract between parties. That the Arbitrator added the ingredient of negligence which was not provided in the contract. They assail the Arbitrator's findings that he did not think the security firm would give assurances such as the one claimed by the Plaintiff.

27. NCPB concludes that the arbitrator, based on the afore stated, went against public policy. It relied on the decision in **Christ For All Nations Vs. Apollo insurance Company Limited (2002) EA 366** where Ringera J. held as follows;

> **"Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."**

28. It also relies on the case of **Kenya Bureau of Standards v Geo Chem Middle East [2019] eKLR** where the Court of Appeal held as follows;

> **"65. This finding can resolve this appeal. We nonetheless find it necessary to determine the other two issues we have identified earlier. Did the tribunal deal with issues that were outside the terms of the Contract? We appreciate that in Arbitration agreements, party autonomy must be revered and just like in any other contract, the court has no business rewriting the terms of the agreement for the parties. Without going into the details of the Contract, parties in their submissions confirmed to the Court that the fees levied on inspection was to be paid directly by the importers to the respondent which would in turn remit 0.2% of the fees so collected to the appellant. There was no clause in the Contract placing any obligation on the appellant to collect the fees and pay the same to the respondent."**
>
> **67. In other words, the Contract did not impose any obligation on the appellant to make good any default in payment. Could the tribunal determine the question of liability to pay on the part of the appellant when no such liability was provided for in the contract? This was in our view a matter outside the scope of the tribunal and falling under Section 35(2) (iv) of the Arbitration Act."**

29. Clause 9 of the contract provides as follows;

"The Security firm undertakes to indemnify the Board against all claims and all costs arising here from, where such claims shall (have) resulted from any Act or omission of the said Security Firm.

The Board shall within fourteen (14) days of such an Act or omission give the Security Firm a written assessment of the loss or damage occasioned thereon together with the monetary value thereof. The Board shall be entitled to recover the full value of the said loss or damage.

The Security Firm shall have an obligation to settle the claim within thirty (30) days from the date of such notification. Where no settlement is made within the 30 days the Board shall have a right to offset the claim against any moneys or other property due to the Security firm until the said claim is settled in full."

30. The Court of Appeal decision in ***Nairobi Golf Hotels Ltd vs Linotic Floor Company Ltd (2015)eKLR*** held thus:-

"We do not agree that the learned Judge erred in giving a narrow interpretation of misconduct. The interpretation he gave was the correct one even under the repealed Arbitration Act. We agree with the finding of the High Court of Tanzania in DB Shapriya and Co Ltd v Bish International BV (2) (2003)2 EA 404, (cited by learned counsel for the appellant) to the effect that;

"Courts cannot interfere with findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct."

31. Ransley J., in ***Mahican Investments Limited and 3 others vs Giovanni Gaida & Others NRB HC Misc. Civil Application No. 792 of 2004 [2005] eKLR*** held that:

"A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

32. The case of ***Kenya Sugar Research Foundation v Kenchuran Architects Limited HCCC No. 695 of 2012 [2013] eKLR*** adopted what the Supreme Court of India stated in **Associated Engineering Co v Government of Andhra Pradesh [1991] 4 SCC 93 (AIR 1992 Sc. 232)** as follows:

"An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency. He commits misconduct if by his award he decides matters excluded by the agreement. A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part but it may be tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiated the award."

33. After theft occurred at the NCPB's warehouse in Changamwe and its DAP Fertilizer stolen, two of the Plaintiff's guards were arrested and charged in court. The Arbitrator held as follows;

"78. ……..It is stated that the Plaintiff's guards were arrested and charged in court in connection with this incident. No conviction is reported and no explanation from the Plaintiff's guards or even from Multiship's guards has been offered. I am left with scanty and inadequate evidence as to the culpability of the guards."

34. It is evident that the parties did not lead evidence to show whether or not the guards were not found guilty of being part of the theft that occurred.

35. It is trite law that the court or arbitrators cannot interfere with any terms of a contract unless any term(s) is contrary to the law. (See ***Samuel Chacha Mwita v Kenya Medical Research Institute [2015] eKLR***). The Court and in this case the Arbitrator was called upon to interpret the agreement between the parties and in order to do so, he must consider whether such interpretation aligns with established principles of law.

36. It is a well-established principle of law that an employer is vicariously liable for the tortuous acts of its employees where they occur *"in the course of employment."* This principle is enshrined in the common law doctrine known as "let the master answer." (See ***Kenya Power & Lighting Co.Ltd v Kenneth Lugalia Imbugua [2016] eKLR*)**

37. Further, 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."

38. The scope of the application of the doctrine of vicarious liability between a master and servant was enunciated by the Court of Appeal in the case of ***Tabitha Nduhi Kinyua Vs Francis Mutua Mburi & Another CA 186 of 2009(2014) eKLR*** where it was stated;-

"In Kenya Bus Service Ltd. –vs- Kawira- Civil Appeal No. 295 of 2000, this Court held that the existence of master/servant relationship gives rise to vicarious liability.

The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.

…..

11.The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986 as follows:-

'In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.'

39. See also ***Morgans –vs- Launchbury & Others (supra)***. Waki, J.A in ***P.A Okelo & Another t/a Kaburu Okello & Partners –vs- Stella Karimi Kobi & 2 Others- Civil Appeal No. 183 of 2003***, expressed himself as follows regarding the assignment of vicarious liability:

"In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises when the tortious act is done in the scope or during the course of his employment."

40. In the matter of ***Minister of Police –vs- Rabie, 1986 (1) SA 117 (A),*** the Appellate Division held that the determination of whether an employee acted within the scope of employment incorporates both a subjective and an objective enquiry. At paragraph 134 the Court held as follows:

"It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorized provided that they are so connected with an act which he has authorized that they may be regarded as modes – although improper modes – of doing them."

41. The alleged actions of the security guards being involved in a theft were not tortious in nature but criminal. The question then arises; would the actions of the guards still bind Total Security as their employer?

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 – vs- 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.

45. I opine that the Arbitrator did not rewrite the contract between the parties, neither did he misapply the law, nor go beyond the scope of reference issued to him. It would be unsafe to conclude that he went against public policy, and I so hold.

Consideration of evidence adduced

46. The Respondent contends that the Arbitrator failed to consider the evidence it adduced. It submits that it filed a Counterclaim and

adduced evidence but that the Arbitrator dismissed it all. It pointed to its letter dated 21st November, 2016 which was sent to the Plaintiff informing it of its claim, the circumstances leading to the claim and the value of loss. That the Arbitrator implied that the Defendant should have obtained statements from the guards or from the police, in complete disregard of the aforementioned letter which stated that the matter was being investigated by the police and one of the Total Security guards had been arrested while the rest were still at large.

47. It submits that the contents of the letter were not disputed by Total Security and the Arbitrator did not consider that in arriving at its conclusion that the evidence was scanty.

48. It is trite law that he who alleges must prove. Sections 107, 108 and 109 of the Evidence Act, Cap 80, Laws of Kenya, place the burden of proof of any fact on the person who wishes to rely on the same. They read as under:

> **"107. Burden of proof**
>
> **(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person**".
>
> **108. Incidence of burden**
>
> **The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
>
> **109. Proof of particular fact**
>
> **The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

49. NCPB asserted that the security guards employed by Total Security were involved in the theft that occurred at its warehouse. The onus of proving their culpability was on NCPB who relied only on their letter dated 21st November, 2016. The Arbitrator found this to be insufficient to prove criminal liability. On the basis of the aforementioned provisions of law, the Arbitrator did not misapprehend the law or fail to consider the evidence adduced by NCPB.

Conclusion

50. It follows from the foregoing that NCPB has failed to demonstrate that there exist sufficient grounds to warrant the setting aside of the Arbitral Award. It has failed to meet the threshold for the conditions provided under Section 35 of the Arbitration Act for the relief sought to set aside the award. It is my view therefore, that its Notice of Motion application dated 23rd March, 2020 filed on 24th March, 2020 is not merited and I accordingly dismiss it with costs.

51. Total Security submits that it has satisfactorily met the requisite conditions under Section 36 of the Arbitration Act and NCPB has not assailed the application for adoption on form.

52. Flowing from this conclusion, nothing stands in the way of recognition and enforcement of the said Award Arbitral Award dated 6th February, 2020 and the NCPB should proceed accordingly. I allow the Chamber Summons application dated 27th February, 2020 and filed on 3rd March, 2020 in terms of prayers 1, 2 and 3 which are that;

> **a. THAT the Court hereby recognizes and adopts the Final Award delivered by Mr. Paterson Munene Kamaara, LL.B FCIArb, on 6th February, 2020 as a judgment of this Honourable Court.**
>
> **b. THAT judgment be and is hereby entered in favour of the Claimant/Applicant as against the Respondent in terms of the final Award published on 6th February, 2020 by Mr. Patterson Munene Kamaara.**
>
> **c. THAT leave be and is hereby granted to the Applicant to enforce the said Award as a decree of this Honourable Court.**

53. Each party shall bear its own costs of the latter application. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD NOVEMBER, 2020.

G.W.NGENYE

JUDGE

In the presence of:

1. Mr. Mugisha for the Plaintiff.

2. Mr. Odhiambo h/b for Mr. Gikera for the Defendant.