REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 574 OF 2017

LAVINGTON SECURITY LTD.....APPELLANT

VERSUS

FLORA KAMENE.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable Senior Principal

Magistrate D. W. Mburu Delivered on 28th October, 2016 in CMCC No. 1795 of 2015)

J U D G M E N T

The Appellant herein was the Defendant in Milimani Chief Magistrate's Court Case Number 1795 of 2015 whereas the Respondent was the Plaintiff.

The Respondent moved the court by way of a plaint dated the 26th day of March, 2015 in which she claimed Kshs.257,000/- general damages, interest and costs of the suit. Her claim was based on an agreement with the appellant for provision of security services to her house number A. 18 within River View Apartment.

In her plaint, she claimed that, on or about the 5th day of March, 2014 her aforesaid house was broken into and valuable goods and assets worth Kshs.257,000/- were stolen. She averred that at the time of the incident the Appellant had been contracted to provide security and therefore, it was in breach of the security service contract and she holds them liable for the break in and loss as they or their agents were not vigilant. She averred that by reason of the aforesaid, she suffered loss and damage totaling to Ksh.257, 000/- which was the total value of the items stolen from the house as itemized in paragraph 7 of the plaint. She claimed the said sum and also general damages for loss of use of the items and the inconvenience.

The Appellant filed a statement of defence on the 11th June, 2015 in which it denied the Respondent's claim but in the alternative, it averred that it had always been vigilant in carrying out its duties; that it did everything reasonably practicable to protect the Respondents property and that the Respondent ought to have taken reasonable care of her property by safeguarding it.

The Appellant denied the particulars of special damages as pleaded but in the alternative, it averred that the Respondent has not produced any documentary evidence to prove the value of the assets allegedly stolen.

During the hearing, the Respondent testified as PW 1. She stated that her apartment is guarded by the Appellant for 24 hours and she produced a contract to that effect which was marked as exhibit 1(c). It was her evidence that, on 5th March, 2014, she left the house for work and on coming back at 6.30 pm, she found her door locks had been tampered with, and upon entering the house, she found several items missing. That, she called the manager of the Appellant who sent the supervisor to her house. She also made a report to Kileleshwa Police Station and she was issued with an abstract. She stated that the receipts for the stolen items were in a brief case that was also stolen.

On the part of the Appellant, a Mr. Hezekiel Oduma Oyua testified as DW 1. He adopted his witness statement dated the 19th June, 2015 and filed in court on the 22nd June, 2015. He introduced himself to the court as a supervisor working with the Appellant, at Nairobi West Zone A, at the material time. He stated that on 5th March, 2014, he was directed by the operation Manager one Mr. Kennedy Ouma to visit the Respondent's apartment to assess the situation after she complained of theft in her house.

Upon arrival he noted that the house was opened using a key and he advised the Respondent to report to the Police Station and once issued with an Occurrence Book Number, to inform the Appellant so that they could follow up with the police. The Respondent was required to notify the Appellant of the claim pursuant to the security service contract which, she did not. It was his further evidence that the Respondent used to leave her house keys with the day guard, and in doing so, she breached the terms of the service agreement.

After hearing the matter the learned magistrate entered judgment for the Respondent in the sum of Ksh.257,000/- together with interest at court rates from the date of filing the suit until payment in full.

The Appellant being dissatisfied with the judgment of the learned magistrate, moved to this court vide a Memorandum of Appeal dated 17th day of October, 2017 in which it has listed five (5) grounds of Appeal which can be collapsed into four main grounds as follows: -

> ***1. The learned Magistrate erred in law and in fact in awarding special damages for Kshs. 275,000/- which damages were neither specifically pleaded particularized nor proved;***
>
> ***2. The learned Magistrate erred in law and in fact by failing to take into account and consider the evidence adduced on behalf of the appellant.***
>
> ***3. The learned Magistrate failed to appreciate the submissions of the learned counsel for the appellant by finding in favour of the Respondent herein.***
>
> ***4. The learned Magistrate erred in fact and in law by failing to take into consideration that the suit was premature having emanated from a criminal complainant which is still pending under investigations.***

The Appeal was disposed of by way of written submission, which this court has duly considered.

With respect to the first ground of appeal it is trite law that special damages have to be specifically pleaded and strictly proved.

I am guided by the decision of the court of appeal in the case of Richard ***Okuku Oloo Vs. South Nyanza Sugar Co. Limited (2013) eKLR*** wherein it was observed that;

> ***"we agree with the learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that the degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.***

I also wish to rely on the following passage which partly quotes

> ***Coast Bus Services Limited vs. Murunga & others Nairobi CA No. 182 of 1992 (ur) as it appears in the Jivanji case;***
>
> ***"It is now trite law that special damages must first be pleaded and then strictly proved".***

The Respondent claimed a sum of Ksh.257,000/- as itemized in paragraph 7 of the plaint as special damages being the total value of the items that were stolen from the house. It was her evidence that the receipts for the stolen items were in a brief case that was also stolen and therefore, she did not produce any. Whereas the Respondent submitted that the said sum was pleaded and that DW 1, admitted that the Respondent's house was broken into, there was no evidence tendered before the trial court to proof that indeed these items were in the house, and their total value. The fact that DW 1 visited the Respondent's house after the theft and noted that the house was opened using a key and some items stolen therefrom, he could not have known what was stolen or the total value of the stolen items.

It is unfortunate that the receipts were stolen but in as much as the court sympathizes with the Respondent, there would be no basis for awarding the sum of Ksh.257,000/- as claimed in the plaint, without evidence in the form of receipts.

In her judgment the learned magistrate stated: -

> ***"the Plaintiff's claim is straight forward and has not been contested. The Defendant admits that there was a break-in. I view of the security services contract, I find that the Defendant is liable to compensate the Plaintiff for the lost goods to the tune of Ksh.257,000/".***

In my view the learned magistrate made an error in arriving at that finding. The fact that the Defendant admitted that there was a break in, did not necessarily entitle the Respondent to a judgment in her favour without sufficient proof.

I will now proceed to consider grounds 2 and 3 together. During the hearing, the Appellant called one witness who adopted his statement as his evidence in chief. He was cross-examined on the contents of the same. In the said statement, DW 1 stated that the Respondent was in breach of the terms of security service contract, clause 1(b), in that she used to leave her house keys with the day guard and in doing so, she breached the terms of service agreement and that made her vulnerable to having her house opened and her valuables stolen.

I have carefully gone through her evidence under oath and also her statement, though she did not apply for it to be adopted as her evidence in chief. The court has noted that she did not deny the assertion by the defendant that she used to leave her house keys with the day guard. That notwithstanding, the learned magistrate failed to consider that evidence which in my view was very material to the case and especially on the issue of negligence. He proceeded as if the matter had proceeded ex parte which was erroneous on his part. The same argument applies for the Appellant's submissions in the lower court. The record reveals that the Appellant filed its submissions on the 7th day of April, 2016. The learned magistrate delivered his judgment on the 28th day of October, 2016 and in his judgment he stated as follows: -

"the Defendant did not file any submissions."

This obviously, was not the case as the Appellant's submissions were already on record and by failing to consider them, he fell into a serious error.

In the said submissions, the Appellant had submitted that the house of the Respondent was opened and not broken into. It was further submitted that this meant that the Respondent did not take reasonable care of her property by safeguarding it. If the learned Magistrate had considered the Appellant's aforesaid submissions, he could have arrived at a different decision.

On the fourth ground of appeal, the appellant has argued that the suit was premature in that the complaint is still pending under investigations. An issue was also raised that the Respondent did not make a report to the appellant on the theft. According to the evidence on record, the Respondent made a report to the Police. In addition to that report, she wrote a letter dated 6th March, 2015 to the appellant to formally notify them about the theft. She stated that she personally delivered the letter to the offices of the Appellant and handled it to the secretary who received the same though it was not stamped.

In this regard, the court has perused the security service contract and according to the same, the Appellant shall not be liable in any circumstances or any extent whatever, for breach of contract or negligence, unless written notice is received by the company at its head office within seven days of the happening of the default by the company alleged to give rise to any liability. From the evidence of the Respondent the court forms the opinion that the letter was delivered to the offices of the Appellant and therefore, the Respondent cannot be said to have been in breach of the contract on that account.

The court also notes that the Respondent also made a report to the police at Kileleshwa Police Station and she was given occurrence book number. There is no requirement in the security service contract that she was supposed to give the Occurrence Book Number to the Appellant. She cannot, therefore be said to have breached the contract for that failure, if at all. In my view, the fact that the police had not completed their investigations by the time she filed the suit herein did not bar her form filing this suit. The two processes though related are different and she was at liberty to pursue them at the same time or any of them as she choose. There is no specific clause in the service contract that barred her from so doing and/or requiring the criminal investigations be concluded first before filing the civil suit.

With regards to whether the Respondent's claim was based on contract or negligence, the plaint is not clear on what cause of action the Respondent was pursuing. Though the same refers to the security service contract, the particulars of breach of it were not alluded to, in the plaint. In fact, the appellant was not accused of breaching the same, looking at the plaint and the facts as pleaded. The Respondent only state how there was an agreement between them and how her house was broken into and items stolen.

In his submissions, counsel for the Respondent submitted that the contract was not disputed and so is the fact of break-in and theft and he seemed to suggest that this was an admission of liability on the part of Appellant. With all due respect to the counsel, I do not think that is so. As rightly submitted by counsel for the Appellant, the Respondent had the burden to proof her case on a balance of probability which she failed to do. Whether the cause of action was on contract or negligence, she failed to discharge that burden. She failed to prove special damages in the sum of Ksh.257,000/- as claimed.

On the claim of general damages, no evidence was adduced to proof the same. In her plaint, she pleaded damages for loss of use of the listed items and inconvenience. I did not see such evidence on record and no wonder the trial court declined to make any award under that head.

In the end, I find that the learned Magistrate failed to properly evaluate the evidence on record thus arriving at an erroneous decision.

As a result, I have no alternative but to interfere with his finding by allowing the appeal and setting aside the judgment and replacing it with an order dismissing the suit. Due to the nature of this appeal, each party shall bear its own costs of the appeal.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 3rd day of April, 2019.

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L. NJUGUNA

JUDGE

In the presence of:-

…….. For the Plaintiff

…… For the Defendant