



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 249 of 1995

KHIMJI'S SECONDHAND MART.....PLAINTIFF

VERSUS

TABURA SECURITY AGENCY (K).....DEFENDANT

J U D G M E N T

On the 3rd of April, 1995 a plaint was filed in the Mombasa High Court of Kenya District Registry. The Plaintiff was described as Kimji's Secondhand Mart - a business firm trading at Mombasa. PW.1 - stated that he was self employed. That he and presumably others dealt with secondhand clothing's. He had locked up his go-down on the 22nd of June 1992. When he returned after the week-end on the 24th June, 1992, he found the go-down had been broken into and items valued at Kshs.(209,700/- stolen. He sued the Defendants, Tabura Security Agency (K) Ltd., for special damages. This was because the security firm was negligent.

The Plaintiff was represented by M/s. Marende & Co., Advocates led by Miss Okumu whilst the Defendant is represented by M/s. P.S. Master & Co., Advocates.

Parties dispensed with summons for directions on the 31st of May, 1995 (filed on the 16, 6.95). This meant that they considered this a simple case and by mutual agreement were themselves to comply with form No.26 as to discoveries, further and better particulars, agreed bundles of documents to be put in without calling the maker thereof and inspections.

The parties also filed agreed issues which consisted of seven points for determination. These are:-

Issues:1) Did the Defendant enter into an agreement with the Plaintiff for provision of security services as stated in paragraph 3 of the Plaint?

Para.3 of the Plaint reads as follows:-

"By an agreement between the Plaintiff and the Defendant, it was agreed that, the Defendant was to provide a one-day and night security guards to guard the Plaintiff's go-down at Changamwe, Mombasa.

From the evidence of the Plaintiffs only witness he stated when asked about an agreement:-

"There must have been an agreement. It must be oral."

All he recalls is that since 1981, the security guards had been guarding their premises - 7 to 8 days a week.

Nothing more was said about this agreement. PW.1 produced nowritten document. He was unsure whether there was an agreement. Per chance the agreement was oral - it would have been prudent to have brought other witnesses to give evidence that they had been seeing the guards on site daily. This by their conduct would have indicated services rendered to the Plaintiff. If the Plaintiff had brought payment receipts from the Defendant's company to show that he had been paying for the services including the year June 1992 it would have sufficed as proof of an oral agreement. (The original receipt would most certainly have been with the Defendants but the plaintiff in the pre-trial stage would have issued a notice to produce the original documents to the Defendants — failure to, they have relied on the copies in their possession). The other aspect mentioned by the Plaintiff is that the Defendants had. Since changed their names. That they were known as Kenya Enterprise Private Security. No mention of this was made in the plaint, It is thus unclear whether an agreement was made with the Defendant or with Kenya Enterprise Private Security. Issue No.2: Was the Plaintiff's go-down broken into and property stolen therefrom as alleged in paragraph 4 of the Plaint? Paragraph 4 reads as follows: "On or between the 22nd and 24th days of June 1992, the Plaintiff's said go-down was broken into and the Plaintiff's goods were stolen by reason of which the Plaintiff has suffered loss and damage. Particulars of loss and special damages:

a) secondhand clothes — 225 bales — Kshs. 562, 500= b) new T-shirts — 20 pieces — Kshs. 1,000= c) secondhand: portable typewriters — Kshs. 1,500= d) secondhand accordion - Kshs. 5,000= e) accordion keyboard Kshs. 3,000= f) secondhand National radio, Kshs. 1,800= g) secondhand stand for cassettes - Kshs. 1,500= h) cash. — Kshs. 400= i) locks for filing cabinet and keys — 100 pieces — Kshs. 2,500= j) Stanley wood planners 2 pieces — Kshs. 4,800=

k) Stapling machine - 2 pieces - Kshs. 2,500= l) padlocks damaged - 2 pieces - Kshs. 700= Kshs. 609, 700=

The Plaintiff's witness PW.1 again said in oral evidence how on the 22nd and 24th June, 1992 he had left the premises locked. This was on the 22.6.92 a Friday. He returned on Monday to find that the premises were broken into. He spoke of a guard that had failed to come on duty on Sunday. He blamed the Defendant for the theft. This was on the grounds that the Defendants were negligent.

In order to prove that a theft had occurred, all the Plaintiff required to do is to produce the lower court file under section 34 of the Evidence Act. If per chance the police made any arrest then

The court case that is concluded at the subordinate courts level may be used as evidence in this High Court. The said case file would normally be produced without calling the makers thereof under paragraph 13 of form No.26.

This was not done.

The Plaintiff should have come with his inventory list so that the same may be subjected to cross-examination by the Defendant. It may have helped if the police officer who visited the scene at the time and made notes of the missing items should have come to state that indeed a report of theft was made and he visited the scene.

The Plaintiff failed to mention in evidence the items stolen save the second-hand items. It is imperative that an inventory was with the Plaintiff which was duly inspected by the Defendant. I would say, taking the Plaintiff's word that a theft may have occurred but proof of items stolen was not established.

Issue No.3: Was the break-in and theft caused due to breach of agreement and/or negligence on the part of the Defendant's security guards as alleged in paragraph 5 of the Plaint?

Paragraph 5 reads :-

The Plaintiff maintains that the said theft was due to the breach of the agreement between the Plaintiff and the Defendant and/or negligence on the part of the Defendant's security guards and the Defendant is vicariously liable.

The particulars of breach of agreement and/or negligence: ,

The Defendant's security guards were negligent and were in breach of agreement in that:

- i) They slept while on duty and failed to notice the thieves.
- ii) They failed to do anything such as whistle or raise an alarm to prevent the thieves from breaking into the Plaintiff's go-down and stealing.
- iii) They collaborated and/or allowed the thieves to break and steal from the Plaintiff's go-down.
- iv) They failed to attend duty and thereby leaving the Plaintiff's premises unguarded.
- v) They broke and stole the Plaintiff's go-down.
- vi) They aided and/or abetted the thieves who' broke and/or stole from the Plaintiff's go-down.

From the evidence given by PW.1 - there was no such statement or narration as outlined in the above particulars that was made by him. It was noted that the Plaintiff mentioned one guard who did overtime because another did not come but as it may, this evidence amounted to hearsay evidence. There is no proof at all that guards slept on the material night. If it is true that they slept it is difficult to understand how they were absent from duty. PW.1 himself was not present when this occurred. He ought to have called the guard who gave him such information. I find that negligence though implied has not been proved.

Issue No.4: Did the Plaintiff suffer loss and damages as particularized in paragraphs of the Plaintiff?

I find that the Plaintiff may have suffered loss and damage but proof of such loss is strict. It has not been established. This would have been done if the advocate complied with Form No.26 on direction para.8 and 10. As this was dispensed with actual proof of loss and damages should have been given on oath by the Plaintiff. He failed to do so.

Issue No.5: Did the Plaintiff make demand and give notice to the Defendant as stated in para.7 of the Plaintiff?

Paragraph 7 states:-

"Despite written demand having been made and notice of intention to sue having been given, the Defendant has failed to admit liability or to pay damages to the Plaintiff."

The Plaintiff never mentioned such notice nor did he produce such documents by way of letters or notices written to the Defendant that they were requested to admit liability or be sued.

Issue No.6: Is the Defendant liable to the Plaintiff?

From the evidence before me, the Defendant is not liable to the Plaintiff. In the words of his Advocate-

The burden of proof is on the Plaintiff. No notice to sue had been served. A specific amount of Kshs.609,700/- was prayed for but the basic law of evidence had not been followed to prove such claim. The issue of negligence ought to be proved and established. This was not.

"This case has been very poorly made out." I would agree that this case has been very poorly made out. The Plaintiff appears to have had a good case but it seems that his advocate by failing to follow the basic rules of evidence has failed to prove their case.

I hereby note the lack of attention given by the Plaintiff's advocate in this case when in paragraph 8 of the Plaintiff it reads:- "The aforesaid accident took place in Mombasa within the jurisdiction of this

Honorable Court. "This was not a running-down case and there was no accident. I note though the list of authorities was filed the other side was never served.

I hereby dismiss this suit with costs to the Defendant.

Dated this 17th day of June 1997 at Mombasa.

M. A. ANG'AWA

JUDGE