IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 172 OF 2023

BETWEEN

SGA SECURITY TANZANIA LIMITED..... APPELLANT

AND

AKM GLITTERS CO. LTD.....RESPONDENT

JUDGMENT

25th August 25th September, 2023

MWANGA, J.

In the Resident Magistrate Court of Kivukoni at Kinondoni, the respondent filed a suit in Civil Case No. 218 of 2019 against the appellant, **SGA SECURITY TANZANIA LIMITED**, claiming an order for payment of monetary compensation of Tshs 135,380,400/= for the stolen Kroiller Chicken parent stock. She also claimed general damages for breach of contract, interest, and cost of the suit.

The respondent successfully sued the appellant at the trial court. Subsequently, she was awarded to pay Tshs 40,113,800/= plus the cost of the suit. In this reasoning, the resident magistrate, Hon. J. H. Mtega, held that the appellant is liable for losing the number of hence, as shown in the auditing report. He added that the appellant is vicariously liable for the offense of theft committed by the security guards as per item S. 4 of exhibit "P1".

The decision of the trial court aggrieved the appellant and, therefore, preferred the present appeal on the following grounds;

(i) The honorable trial Magistrate grossly erred both in law and fact by her failure to properly analyse and evaluate the contents of "exhibits P3" the auditing report and make a finding that it was mode by an offer thought.

(ii) The honorable trial magistrate grossly erred in law and fact by her failure to consider that the respondent breached the contract in three fundamental areas, that is, by the respondent's failure to issue notice of the detected loss to both police Authorities and the appellant, failure to put the farm under insurance cover and

failure to attempt setting the matter amicably before resorting to court.

(iii) The honorable trial magistrate grossly erred in law and fact by failing to consider, analyse, and evaluate evidence on record, thus arriving at an unfair decision.

(iv) The honorable trial magistrate grossly erred in law and fact by ordering the appellant to say the respondent Tshs 40,118,800/= without adducing means and reason for how that some arrived.

(v) The honourable trial magistrate grossly erred in law and fact by her failure to consider that the appellant's liability for any loss incurred by the respondent herein was subject to the terms and conditions set out in exhibit "P1," which is the contract between the parties.

(vi) The honorable trial magistrate grossly erred in law and fact by holding in favour of the respondent. There were gross contradictions and discrepancies between the claim presented in the plaint and the evidence adduced; hence, the respondent's claims were unproved to the balance of the probability.

(vii) That the honorable trial magistrate gross erred in law and fact by holding the appellant vicariously liable for acts unrelated to the Appellant's employee's employment contract.

Because of the above, she invited this court to allow the appeal, quash, and set aside a judgment and decree of the District Court of Kivukoni at Kinondoni decided on 13th September 2022 plus cost of the Appeal. Before examining and analysing the grounds of Appeal, I wish to state the brief facts of the case as herein.

The respondent owns a poultry project or business in two-parent stock farms in Mbopo Madale Dar es Salaam and Yombo Bagamoyo in the Coastal Region. For proper security of the premises where the project is located, the respondent, on 14th July 2017, engaged the appellant as a security company to provide security services. One of the terms of the contract was to ensure the farm is not trespassed into and that nobody was trespassed with product items on the farm.

It occurred that the respondent discovered the unaccounted loss of 291 laying chickens/hens and 17 breeding cocks at the Mbopo parent stock farm while PLAKA Associate was putting up controls a total of 1393 laying

chicken/hens and 61 breeding stocks were missing in Mbopo parent stock farm. Thereafter, they deployed external security, and two thieves were caught. The matter was reported to the police RB No. MDL/RB/2908/2018 WIZI. The judgment of the Primary Court of Kawe in exhibits P-2, Criminal Case No. 221 of 2019 between **George Kerya K.N.Y Akm Glitters Vs Maganga Kisoka & Mhimbo Daudi** shows that the value of five chickens stolen valued at Tshs. 250,000/=.

In her claims, the respondent contended that the appellant had been negligent and caused considerate Kroiller chicken stock to be stolen. Pursuant to the agreement entered for security in Exhibit P-1 in clause 5.3, the client (Appellant) ought to protect the properties against loss, damage, theft, fire, burglary, and other reasonable risks.

In clause 5.4, the company shall accept liability only if any such loss or damage is proved to have been directly caused by the negligence or wilful default of the company or its employees in the performance of their duties; the maximum compensation shall be aggregated sum of 10% of the contract value per annum.

According to clause 5.5, it was agreed that no liability on the company shall arise in (5.4) unless the client has;

(i) Made in the 1st instance a formal report to the police authority of the event giving rise to claim and police abstract obtained therein.

(ii) Given notice of the claim to the company a copy of the abstract within seven days of the event's occurrence.

The appellant, in his submission, being represented by Josepha B. Tewa, contended that exhibit P3, the so-called, independent report on physical verification of parent stock at Mbopo farm managed by the respondent, was objected to by the reasons stated on page 26 of the proceedings. That the farm supervisor was not a competent witness to tender the exhibit. The court ruled that sections 63 and 69 of the Evidence Act relied on were inapplicable in the circumstances.

According to her, exhibit P3 does not constitute an auditing report in the eyes of the law. Her reasons were that there was no evidence of the handover of stock to the appellant for guarding in support of the report. Also, the appellant was not involved in the making of the report. Again, a

qualifying person did not sign the report as per the Accountant and Auditors (Registration) Act, Cap 286 of 2019.

The counsel referred to page 2 of exhibit P3 that it does not comply with the accounting rules because it is not signed, not stamped, and does not indicate any title suggesting having been made by the certified public accountant in public practice. Therefore, it was improperly relied upon.

Furthermore, the counsel argued that exhibit P3 is not a report contemplated in clause 5.5 of the security service contract. The clause provides a reporting procedure in case of a vicarious event where the respondent ought to report to the police and give the appellant the notice of the claim in writing and a copy of the police abstract.

On top of that, the counsel referred to exhibit P3 as an afterthought because it was not attached to the plaint when filing a suit. Likewise, she argued that exhibit P3 is not signed, does not indicate the maker's name or title, and is, therefore, unauthentic. Again, an auditor is incompetent to determine the value of chicken for not being his area of professionalism. Instead, he was a veterinary officer.

Based on the above, the counsel argued that exhibit P3 was wrongly or improperly relied on by the trial court because there is no letter of appointment of the said auditor, indicating the addressee in the said exhibit being AKM, thus not knowing how it came by. Also, evidence of receipt of AKM of the said exhibit affects the competence of PW2 to tender because it is not stated how it came to be in possession.

More or so, the counsel contradicted the evidence of PW2 who stated different dates, as seen on pages 34 & 36, referring to the evidence of PW2, the report was prepared on 25/11/2018, and the covering letter was prepared in December 2018, while on page 36, PW2 said the covering letter was written in July 2018, 23/11/2018, and 24/11/2018.

The respondent's counsel asserted that exhibit P3 is a report from the auditor as testified by PW1, PLAKA Associate, a certified public accounting firm. According to him, the appellant's cited provision of Section 2 of the Accountants & Auditors Registration Act is misconceived and irrelevant.

The counsel submitted that the phrase "public practice in Section" 28 prohibits the employment of uncertified person to the position of Auditor, and Section 14 of the same law, as quoted on page 4 of the appellant's

submission, prohibits a firm from practicing as a certified public practice unless they are registered. It was argued that all these cited provisions have nothing to do with the ground that the court has not adequately analysed or evaluated exhibit P3.

Given the above, the counsel stated that the appellant's counsel is confused about exhibit P3, and the financial statement exhibit P3 is a report by the audit firm to physical verification of chicken stock submitted to the individual. Therefore, exhibit P3 is not a financial statement.

He argued that Exhibit P3 was not made under the security service agreement. The contention that exhibit P3 is not a report contemplated under the security service agreement does not make it incompetent as evidence. He argued that the appellant never raised the arguments of incompetence of exhibit P3. Therefore, this is not the right place to challenge the competence of the document as it was not challenged at the trial court. Further, it was submitted that exhibit P3 was addressed to the respondent's offices at Sinza Ikangaa Street. Therefore, the mere fact that there is no proof of receipt by the addressee does not disqualify the document as evidence.

Moreover, it was submitted that the allegation of breach of the security service agreement by the respondent is from the bar because it was not pleaded anywhere, and there is no record showing that the appellant sued the respondent for breach of contract.

Again, the fact that the farm was not insured does not exonerate the appellant from its obligation to Guard the farm dutifully. Contrary to what has been submitted by the counsel for the appellant, it was submitted that the matter was mediated unsuccessful, as shown on page 9, paragraph 2 of the trial court proceedings. That being the position, he said, the issue brought by the appellant counsel that the matter was no amicable settlement is an afterthought and should be ignored.

On top of that, the counsel argued that after being served with a plaint and replied with a written statement of defense, the appellant surrendered his right to amicable negotiation. To support the arguement, he cited the case of **Trade Union Congress of Tanzania (TUCTA) Vs Engineering System Consultants Limited and two others,** Civil Appeal No. 51 of 2016, page 21; therefore, the dispute resolution clause in the contract does not oust the jurisdiction of the court.

Also, the respondent counsel argued that the trial court considered the evidence of both parties, referring to page 13 para 2 of the trial court judgment, which stated that the court considered exhibits P1 & D3, of which the appellant brought D3. According to him, the case of Hussein, as cited by the appellant's counsel, is irrelevant since the circumstance differs from the one at hand. Since, in this case, delivery of security services by the defendant to the plaintiff was a fundamental term, the defendant cannot hide behind any exemption clause when its guards stole from the farm that he was supposed to guarantee its safety. He argued that the security service agreement is a standard contract the appellant uses; therefore, it cannot be amended because all other customers use it. The terms therein are unreasonable; consequently, it is read against the defendant who made it cited the case of **Fredy James Massawe Vs Andrea Jumanne Ntibulera & G4S Security Solution Tanzania Limited** Civil Case No. 37 of 2016. His Lordship Hon. Luvanda J invoked the doctrine of the law of contract known as contra pre ferendum Rule when held that no financial institution would indemnify the security company against its own failure.

Similarly, referred to the case of **NCBA Bank Tanzania Limited Vs. UAP Insurance Tanzania Limited,** where Mteule J held that,

"having found that the plaintiff is responsible for what resulted in the relief sought should not be entitled to any of them to benefit from her own wrong. Consequently, the suit is at this moment dismissed with cost."

The counsel contended that she notified the appellant. As a result, her officer was arrested and arraigned in court.

Submitting on specific damages, it was submitted that in granting specific damages claimed, the court can grant, less the amount claimed as they claimed Tshs. 135,380,450, but the court granted Tshs.40,113,800/=. The 10% percent was not considered because it is unreasonable to have a clause that limits the appellant's liability to only 10% when theft has occurred while it has the primary duty to ensure security at the premises. He refused the appellant's argument that the trial court was wrong to punish it for the acts of its employees because stealing from the respondent is not one of the responsibilities of Kisaka Maganga & Daudi Miambo. He said the argument is misconceived since a person can be liable for the wrong or action of another. The respondent counsel cited **the KK Security Tanzania vs Richard John Buswelu**, Civil Appeal No. 73 of 2020(unreported), defined vicarious liability as the imputation of liability upon one person for the action

of another. In tort, it is the responsibility of the master for the acts of the servant or against the driver during or during his employment.

The counsel believed that, based on the cited authority above, an employer can be held vicariously liable for a tort committed by his employees.

The appellant's counsel, in rejoinder, reiterated what has been submitted in submission in chief. It was added that as long as this court is the 1st appellant, it is empowered to exercise powers and duties as the original/trial court. The learned counsel cited the provision of Section 76 of the Civil Procedure Code [Cap 33 R.E 2019] referring to the cited provision stating that this court has powers to determine the competence of witnesses to tender exhibits, appropriateness of admissibility of exhibit evidence, their validity and weight and as well as to expunge exhibits improperly admitted in evidence. Supported his argument by the case of **Tauta Kikoris Vs Republic**, Criminal appeal No. 94 of 2009 (Unreported), where the Court of Appeal stated

"This is because, as righty contended by the appellant in the appeal, the learned appellate judge did not subject the

evidence to any objective analysis he was duty bound to do, the appeal being the first appeal. This was an error of law which gives the jurisdiction to interfere with the concurrent findings of fact by the two courts bellows."

Following the position of the authority above the learned counsel prayed to subject the said exhibit P3 to objective analysis by testing if it is against the arguments made by the appellant's advocate. Therefore, it was argued that the 1st ground of Appeal is erroneous and unfounded.

In response to the 2nd ground of appeal, the learned counsel for the appellant argued that referring to paragraphs 4, 6, and 12 of the pleading, the issue of breach of contract by the respondent was right pleaded; therefore, the argument by the respondent counsel was misleading.

Also, on insurance, the respondent never tendered any letter or documentary evidence from any insurance company in Tanzania. In that regard, the respondent is the one who breached the security contract.

Regarding amicable dispute resolution, the learned counsel stated that the court mediation was not meant by the parties under the security service contract. In that respect, the cited case of the **Trade Union Congress of**

Tanzania TUCTA Vs Engineering System Consultancy & 3 others(supra) is highly misconceived and meritless. Because the case is distinguished from the present case, parties do not dispute the existence of the contract; therefore, without evidence of the said letter in record, the position remains the same.

Again, responding to the 4th, 5th & 6th grounds of appeal, the Appellant's counsel stated that the respondent never proved what constituted specific damages,no evidence of the acquisition of stock by the respondent. There is evidence of the handed over of the acquired stock to the appellant for security purposes and no procedure set not his exhibit P1 and the value of the stock at the time of loss. That being the position, it is the submission that the court failed to state why such an awarded sum of money was explicitly provided.

Further, it was argued that all of the clauses in exhibit P1 are reasonable since both parties freely participated in making terms and clauses and voluntarily signed by them to constitute a binding contract. The learned counsel referred to page 22 of the trial court proceedings, where PW told the court of her participation. Since both parties entered into the contract freely, the respondent has no light to deny the appellant the exercise of the

10% liability clause. The appellant's advocate invited the court to involve Section 123 of the Evidence Act (Cap 6 R.E 2019) by rejecting the respondent's claim that the 10% liability clause is unreasonable 5th covered in the submission in chief.

Lastly, the counsel re-joined the allegation by the respondent that, since the employee committed theft during their employment, the appellant is liable for loss as highly misconceived, misleading, and without merits. Theft is a criminal offense, while vicarious liability is a tortious liability; each has its ingredients. They have added that the award of a sum of Tshs. 40,113,800/= awarded by the trial court as specific damages are inconsistent with the award with the award of general damages ordinarily reserved for tortious liability.

I have reviewed the trial court's proceedings and submissions of the parties. In my analysis, it can be seen that the highly contentious issue is for the respondent being awarded Tshs 40,113,800/=. This amount was awarded as specific damages arising from the pleaded amount of 135,380,400/=. The appellant opposes such an award, contending that the same was unjustified and unproven.

As rightly observed by the counsel for the appellant. The law is settled that specific damages must be specifically pleaded and proved, as it was provided in the cited case of **Zuberi Agustino vs Anicet Mugabe** (Supra)

Now, let me examine and analyse exhibit P-3, the center of controversy. This exhibit was objected to because PW2 was not competent to tender the document; it was not dated and signed. It was also challenged as to whether exhibit P3 was an auditing report.

As the Appellant Advocate rightly argued**,** exhibit P3 does not comply with the accounting rules because it is not signed, not stamped, and does not indicate any title suggesting having been made by a certified public accountant in public practice. I hasten to concur with the learned counsel that such a report is incredible in the following areas: -

i. It did not take into account the appellant. For instance, what was existing stock handed over to the Appellant after signing the agreement and handing over the project for security services?

ii. Noncompliance with the services agreement on the following: -

a) clause 5.3, the client (Appellant) ought to insure the properties to be practiced against loss, damage, theft, fire, burglary and such other reasonable risk, and it was not done.

b) clause 5.4, the company shall accept liability only if any such loss or damage is proved to have been directly caused by the negligence or wilful default of the company or its employees in the performance of their duties; the maximum compensation shall be aggregated sum of 10% of the contract value per annum.

c) clause 5.5, it was agreed that no liability on the company shall arise in (5.4) unless the client has;

(i) made in the 1st instance a formal report to the police authority of the event giving rise to the claim and police abstract obtained therein.

(ii) Given notice of the claim to the company a copy of the abstract within seven days of the event's occurrence.

Based on the above, exhibit P3 was not something to be accorded weight and relied on by the trial court in reaching its decision. This court exercises its jurisdiction as 1st appellate court in that it can evaluate and analyse all the evidence. I, at this moment, Expunge exhibit P3 from the record.

On top of that, from the record, the respondent's claim was in breach of contract. Breach of contract was adequately explained by Nangela J in the case of **Sikem Real Estate Developers Ltd vs Serengeti Breweries Ltd** Commercial Case No.3 of 2020, which stated that-

> ***"Essentially, a breach is wrong, a failure to comply with a legal obligation arising from the contract for which the innocent party has bargained for and provided consideration. Where a party to a contract repudiates or fails to perform one or more of his obligations under that contract, that repudiation or failure is what constitutes the breach."***

Again, it is settled law that parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract. This position was provided in the case of **Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No 160 of 2018[2021] TZCA. In the present case, as it can be seen, the respondent's failure to comply with the contract's clauses, as shown above, marks that he is the one liable for the breach of the contract. That being the position, the respondent loses his legal right to claim compensation if it had been proved to the court's satisfaction. The argument raised by the respondent's submission that the contract was a standard

contract becomes immaterial since it revealed from the record that both parties entered the agreement freely without any undue influence.

Having said that and looking at the remaining grounds of appeal, I am inclined to say that they depend on the first ground of Appeal. The same are counted as disposed.

For the preceding, the appeal is allowed. The decision of the trial court is quashed and set aside. Each party should bear its costs.

Order accordingly.

H. R. MWANGA

JUDGE

25/09/2023

COURT: Judgment delivered in Chambers this 25th day of September 2023 in the presence of Ms. Agnes Ndusyepo, learned counsel for the Appellant, and Mr. Robert Mesi, learned counsel for the Appellant.

H. R. MWANGA

JUDGE

25/09/2023