

TANZANIA / JUDGMENT

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IN THE UNITED REPUBLIC OF TANZANIA JUDICIARY THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CIVIL APPEAL NO. 1801 OF 2023 (From the District Court of Mbeya at
Mbeya in Civil Case No. 24 of 2022). AMKENI SACCOS LIMITED.....APPELLANT
VERSUS NEW IMARA SECURITY COMPANY LIMITED.....RESPONDENT

JUDGMENT

Date: 02 May 2024 & 19 June 2024 SINDA, J.: The appellant is aggrieved by the decision in Civil Case No. 24 of 2022 at the District Court of Mbeya (the Trial Court), hence this appeal. The brief facts of the case are that the appellant and the defendant entered into a security contract where the respondent was supposed to offer four security guards per day at the appellant's office. Two security guards were to guard during the day and the other two security guards at night in consideration of payment of TZS 865,000/= per month. It was also agreed in their contract that the appellant should have valid insurance 1 cover against theft, fire and any other destruction. The appellant engaged Britam Insurance Tanzania Limited (Britam) to fulfil the terms agreed in their contract. On the night of 31 July 2021, an incident of theft occurred at the appellant's office. It was alleged that TZS 40,376,300, two laptops of TZS 2,124,000/=:, and an internet equipment of TZS 230,000/= were stolen. After the incident, the appellant was paid TZS 18,000,000/= by Britam as compensation. The appellant alleged he was entitled to payment of TZS 35,262,982/= being the loss of cash and office equipment occasioned by theft due to the negligence committed by the respondent. The appellant then instituted the case against the respondent at the Trial Court. The respondent disputed the claim that he acted negligent. He stated that he complied with the terms and conditions in their contract concerning compensation for theft. He stated that it was the insurer who was supposed to pay the appellant and not the respondent. The respondent stated that Britam had already paid the appellant. The Trial Court found that the appellant failed to prove his claim against the respondent. The appellant, being aggrieved with the decision of the Trial Court, made this appeal on the following grounds that: 2

1. That the Trial Court erred in law and facts for failure to consider the fact that the incident of theft was negligently caused by the respondent side.

2. That the Trial Court erred in law and fact to rule out that the respondent is not entitled to indemnify the appellant while it is proved that the respondent is the one who caused negligence in performing the contract between her and the appellant.
3. The Trial Court erred in law and fact for failing to consider that respondent breached the contract.
4. That the Trial Court erred in law and fact for failure to consider all tendered exhibits (PE1-PE7) by the appellant's side.
5. That the Trial Court erred in fact and law in ruling that respondent was not responsible for appellant's claims because he was unaware of co-criminal case No. 352/2022 at Mwanjelwa Primary court.
6. That the Trial Court erred in law and fact for failure to evaluate and analyse the evidence presented before her that's the reason she reached an unfair decision.
7. That the Trial Court erred in law for failure to consider strong evidence adduced by the appellant's side and based on weak evidence adduced by the respondent. 3 At the hearing, the appellant was represented by advocate Mary Paul Gatuna. The respondent was represented by advocate Ezekiel Mwampaka. The appeal proceeded by way of written submission. Ms. Paul argued the first, second, third, sixth and seventh grounds together. She submitted that the evidence on records reveals that the respondent caused negligence to the appellant due to the incident of theft that occurred as seen in the judgement in Criminal Case No. 357 of 2022 exhibit (PE4). She stated that clause 8 of the Security Contract between the parties (PE1) provides that once it is proved that there is negligence caused by the respondent and led to the occurrence of loss, then the respondent will be liable to indemnify the appellant after that loss is proved by a state organ. She further stated that after the incident the respondent admitted to the occurrence of loss of monies of TZS 40,376,300/=, two HP laptops with a value of 2 million, a router valued at TZS 150,000/ which make the total value of TZS 42,526,300/=. Ms. Paul was of the view that the appellant proved that the properties were stolen. She submitted that at page 45 of the proceedings of the Trial Court (the Proceedings) that PW3 admitted that the stolen monies were not less than TZS 40,000,000/=. The appellant complied with clause 6 (h) of exhibit PE1 by engaging Britam 4 who indemnified the appellant a total sum of TZS 18,000,000/=. Therefore, the respondent ought to indemnify the appellant the remaining balance of TZS 24,526,300/= and other costs incurred to make a total sum of 35,262,982/=. Regarding the fourth ground, she submitted that the Trial Court erred in law for failure to consider all exhibits PE1, Security Information (PE2), Police Information (PE3), PE4, a letter dated 29 December 2021 (PE5), Meeting Records (PE6) and Demand Notice (PE7) tendered by the appellant. Hence leading to a miscarriage of justice for the appellant. She added the exhibits elaborates the contract between the appellant and the respondent. That, also show how the respondent admitted the occurrence of loss to the tune of TZS 42,526,300/= and the state organs involved. That, the exhibits also show how Britam indemnified the appellant. She further stated that the

exhibits show how the appellant tried to settle the matter amicably in vain. She added if the trial magistrate had considered all the exhibits, she would have arrived at a different decision. She contended that the respondent failed to produce any exhibit to detach themselves from this claim. She submitted that is a position of law that exhibits tendered in court must be considered, and decision of the court must be proportional to evidence on records, she referred to the case of 5 Menard Theobard Bijuka & 2 Others vs Didas J. Tumaini, Civil Appeal No. 49 of 2019 to support her argument. In relation to the fifth ground, Ms. Paul stated that the Trial Court erred in fact and law to rule out that, the respondent is not responsible for the appellant's claims because he was unaware of Criminal Case No. 352/2022 at Mwanjelwa Primary Court. She added, the appellant instituted the criminal case no. 352/2022 against respondent employee (Musa Kibona). He was charged with the offence of theft and negligence. That, he was convicted and sentenced as per exhibit PE4 for the offence of negligence. She stated further that natural persons are the ones who are criminally liable and not artificial persons. She referred to the case of Macriman Trust Fund vs National Bank of Commerce, Civil Appeal No. 330 of

2022. Ms. Paul further stated that a guard named Daniel disappeared after the incidence of theft and the facts were admitted by the respondent as per exhibit PE2. The trial magistrate ought to consider evidence on record on the facts that the guard (Daniel) was missing which amounted to the involvement of the commission of the offence. She referred to the case of The Republic vs Yohana s/o Mtitu @ Kayanda. She prayed that the appeal be allowed with cost. 6 In reply to the submission, the respondent's counsel submitted that the appellant was insured by Britam, and after the incident, the appellant was refunded. He stated that the respondent did not act negligently when guarding the appellant's property. The respondent had two security guards armed with one gun, as per exhibit PE1. Therefore, the claim by the appellant that the respondent acted negligently has no merit. However, the stolen goods and money in the appellant's premises were not proved by the appellant contrary to sections 110,111, 112 and 115 of the Law of Evidence Act Cap 6 R.E 2022. That the total claim of TZS 35,262,982 was based on special damage and was not proved. The appellant has not produced any documentary evidence to substantiate his claim. He referred to the case of Masoleta General Supplier vs African Inland Church, 1994 TLR 192. Mr. Mwampaka further submitted that it is a trite jurisprudence that once a document has been produced in court and admitted, it must be read over in court by the person producing it so as to enable the other party to know the content of it. Failure to adhere to the procedure is that exhibit admitted should not be relied upon and expunged from records. He referred to the case of Bulungu Nzungu vs Republic, Criminal Appeal No. 39 of 2018 CAT at Shinyanga to cement his argument. 7 He submitted that during the hearing, seven exhibits were produced by PW1 and admitted in court but only PE1 was read in court. In his opinion, exhibits PE2, PE3, PE4, PE5, PE6, and PE7 contravened the mandatory requirement of law and hence should be disregarded and expunged from court records. He added that the appellant failed to prove her case because no document supported her claim. He further stated it is the position of the law that a company cannot

be held criminally liable for the act of its employees. The appellant, in rejoinder, submitted that all exhibits were read over by the person who tendered them, but even if the court found that they were not read still, the argument could be disregarded for the following reasons: first, the respondent never objected to the validity of exhibits; two, the exhibits were tendered by a witness who spoke on the exhibit; thirdly, exhibits were annexed in plaint, and the respondent was aware of all exhibits for more than 7 months; fourth, the respondent never explained how she was prejudiced. She referred to the case of Kobelo Mwaha vs R, [2010] T.L.R page 196 at 210 as quoted in the court of appeal in the case of Safari Antony @ Mtelememko and 1 another vs. The republic, Criminal Appeal No. 404 of 2021 and Felician 8 Muhandaki vs. Managing Director Barclays Bank Tanzania Limited, Civil Appeal No. 82 of 2016, at page 15 to cement her argument. I have considered the court records and submissions by the parties. I find that this appeal can be disposed of on one issue: whether or not the appellant proved his case to the required standard at the Trial Court. It is a trite principle that he who alleges must prove. This principle was discussed in the case of Barelia Karangirangi vs. Asteria Nyalwamba, Civil Appeal No.237of 2027, CAT (Unreported), where the court held inter alia that: "At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove." Also, in the same case, while discussing the evidential burden in civil proceedings, the court held as follows: - "It is similarly, that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities." See also the case of Antony M. Masanga vs. Penina (Mana Mgesi) and Another, Civil Appeal No. 118 of 2014, CAT and Attorney General & Others Vs. Eligi Edward Massawe & Others, Civil Appeal No. 86 of 2002. 9 Now discussing the above issue on whether the appellant at the Trial Court proved his case to the required standard. The appellant filed a case against the defendant, claiming to be paid a total sum of 35,262,982/= being the loss of cash and office equipment occasioned by theft due to negligence committed by the respondent. He stated that they entered a security contract with the respondent; among their terms was that the respondent would provide four (4) security guards per day in the appellant's office, two during the time and two at night time. The appellant was supposed to ensure the property has valid insurance cover against theft, fire, or any other destruction that may occur during the contractual period. The appellant engaged Britam for that purpose. On the night of 31 July 2021, an incident of theft occurred at the appellant's office. As a result, TZS 40,376,300, two laptops worth TZS 2,124,000/= and internet equipment of TZS 230,000/= were stolen. To prove his case, he tendered the contract, which was admitted as exhibit PE1. He stated that the respondent breached section 8 of their contract. Section 8 of the contract concerns theft and destruction that in case an incident occurs due to a security guard's negligence, the respondent will be responsible for that loss after such negligence is proved by a state organ. 10 After the incident the respondent informed the appellant. The respondent admitted that the theft occurred in the appellant's office through a letter, which was tendered and admitted as exhibit PE2. Then, they informed the police officer. Upon inspection, the police informed the appellant that someone broke the office and theft had occurred due to the negligence of

the security guard. The report of police inspection information was tendered and admitted as exhibit PE3. Then, the appellant instituted a criminal case at Mwanjelwa Primary Court against Mr. Kibona who was a security guard on the night the incident of theft occurred. He was convicted of the offence of negligence and acquitted for theft. The appellant tendered such document as exhibit PE4. Britam paid the appellant only TZS 18,000,000/=. He tendered a price of acceptance letter and acceptance loss settlement, which was admitted as exhibit PE5. He also tendered a board resolution minutes, which was admitted as exhibits PE6, and demand note and reply, which was admitted as exhibit PE7 collectively. I have examined the Proceedings and found such irregularities, as correctly submitted by the respondent advocate in his submission that exhibits PE2, PE3, PE4, PE5, PE6 and PE7, were not read in court during the hearing. In the case of Huang Qin and Another vs. R, Criminal 11 Appeal No. 173 of 2018, the Court of Appeal, while facing similar circumstances of failure to read out the exhibits after being cleared for admission, stated that: "On our part, we agree with both parties that, indeed, the said exhibits were not read out in court after their admission in evidence. Such documents, that is, the Search Order (Exh PI), the Certificate of Seizure (Exh. P2), the Handing over Certificate (Exh P3), the witness statement of D. 3746 D/S. Sgt Gerwin (Exh. P5), the Court Exhibit Registrar (Exh. P6) and the Trophy Valuation Certificate (Exh. P8) were crucial in the determination of the case. Failure to read them in court was a fatal omission because it offended the principle of fair trial, as the appellants could not have known the contents of the exhibits tendered against them. In the case of Robinson Mwanjisi and 3 Others v. Republic, [2003] T.L.R 218, the Court emphasized the requirement of reading over the document after it has been cleared for admission and actually admitted. But again, in the case of Anania Clavery Beteia (supra) it was stated that failure to read over the exhibits after being cleared for admission and admitted in evidence was wrong and prejudicial." In the instant matter, like what happened in the above case, the exhibits PE2, PE3, PE4, PE5, PE6 and PE7 were not read out after being cleared for admission in court. Among those exhibits, especially exhibit PE4, was crucial in proving the case of the appellant on whether the respondent acted negligently or not. I am of the considered view that the omission to read the content of the said exhibits is fatal. The remedy for failure to read the contents of a document admitted in court is to expunge the said document from the court records. This position was stated in the case of Mbaga Julias vs. The Republic, Criminal Appeal No. 131 of 2015 at Bukoba, the Court stated that: "Failure to read out documentary exhibit after their admission renders the said document contained in that documents, improperly admitted and should be expunged from the records" The appellant advocate stated that the respondent never disputed the validity of that document, witnesses spoke on the exhibits, and the respondent has not explained how she was prejudiced. Also, exhibits were annexed in the plaint, so the respondent was aware of exhibits for more than 7 months. I don't agree with the appellant advocate, failure to read the exhibit was not only fatal, but the respondent prejudiced and denied his right to know their contents hence not be able to make his defense so which caused a miscarriage of justice on the respondent's side. I therefore expunge exhibits PE2, PE3, PE4, PE5, PE6 and PE7 from courts records. Having

expunged that exhibits I find the remaining evidence do not prove the appellant case that he suffered loss due to respondent 13 negligence because exhibit PE4 tendered by appellant to prove negligence on respondent side also was expunged from records. I find no need to interfere with finding of the Trial Court. The appeal is dismissed with costs for lack of merits. Dated at Mbeya on this 19 day of June 2024. A. A. SINDA JUDGE 14

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