REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 487 OF 2014

SECURITY 7...APPELLANT

-VERSUS-

CHARLES ANYANGA...........................RESPONDENT

(*An appeal from the judgment and decree of Hon. D. Ole Keiwua (Mr) Principal Magistrate, delivered on 10th day of October, 2014 in Nairobi, CMCC NO. 5063 of 2011*)

JUDGEMENT

1) Charles Anyanga, the respondent herein, filed an action against Security 7, the appellant herein, before the Chief Magistrate's Court in which he sought for both general and special damages vide the plaint dated 4th October 2011. It is said that on 31.7.2011, the respondent had lawfully parked his car registration no. KBB 493A at the Nairobi Simba Union Club wherein a tyre complete with the rim and nuts valued at ksh.104,400/= was ripped off and removed under the watch of the appellant's guards at the aforesaid club.

2) The respondent alleged that the loss was due to careless and or negligence of the appellant's servants/guards. The appellant filed a defence to deny the respondent's claim.

3) The appellant argued that its guards were under no duty or obligation to take care of the aforesaid motor vehicle since there was unambiguous notice indicating that motor vehicle were parked at the owner's risk. Hon. Ole Keiwa learned Principal Magistrate, heard and determined the case in favour of the respondent.

4) The appellant being aggrieved preferred this appeal and put forward the following grounds:

> ***i. THAT the learned trial magistrate erred in law and in fact by delivering the judgment herein in entering judgment for the respondent when the respondent did not proof his case on a balance of probabilities.***
>
> ***ii. THAT the learned trial magistrate erred in law and in fact by failing to consider that the respondent did not prove his case.***
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> ***iii. THAT the learned trial magistrate erred in law and in fact in awarding judgment at the ratio 40:60% when there was no any proof by the respondent.***

iv. THAT the learned trial magistrate erred in law and in fact in entering judgment for the respondent when there was no receipt produced by the respondent of ksh.104,400/= to proof his claim.

v. THAT the learned trial magistrate erred in law and in fact in not considering that the respondent had no authority bringing the suit herein as there was no resolution under the seal of the company as the motor vehicle KBB 402A was registered in the name of a company.

vi. THAT the learned trial magistrate erred in law and in fact by failing to consider the appellants pleadings and submission in his judgment.

vii. THAT the learned trial magistrate erred in law and in fact in not considering the letter of disclaimer issued by the union club which provides cars parked at owners risk.

viii. THAT the learned trial magistrate erred in law and in fact in not considering that the respondent did not have any cause of action against the appellant.

ix. THAT the learned trial magistrate erred in law and in fact in not appreciating that the police did not find the guard of the appellant liable for any debt hence no criminal charges were preferred against the representative (guard) of the appellant.

5) When the appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions. I have considered the rival written submissions after re-evaluating the case that was before the trial court. Though the appellant put forward a total of nine grounds of appeal, the main issue which commends itself for consideration is the question as to whether or not the appellant could be held liable.

6) It is the submission of the appellant that the respondent failed to prove his case on a balance of probabilities. It was pointed out that the appellant's guard was not found criminally culpable by the police who investigated the respondent's complaint. The appellant further argued that the respondent failed to tender evidence showing that he actually handed over his motor vehicle to the security guards manning the club.

7) The appellant also argued that there was an existing disclaimer issued by the club stating that cars are parked at the owner's risk. It was further pointed out that the trial magistrate failed to take note of the fact that the appellant did not tell the security guard that there were spare parts in the motor vehicle.

8) The respondent opposed the appeal arguing that he gave cogent evidence proving his claim on a balance of probabilities. He pointed out that he presented evidence showing that at the time of the loss, his motor vehicle was within the premises of Nairobi Simba Union Club where the appellant guarded. He also stated that he drove in while the spare tyre was strapped to his car and that it was stolen while the car was within the aforesaid premises.

9) The recorded proceedings indicate that the appellant summoned one Kennedy Swanya Nuyganyi (DW1) to testify in support of its defence. DW1 confirmed that he was on duty as guard at Simba Union Members Club on the fateful day having been stationed at the club by the appellant. He said that he came to learn that a wheel belonging to the respondent had been stolen from the club and reported the theft to the management. DW1 said police were called in to investigate the complaint but none of the appellant's guards were charged for theft.

10) He also said that there was a board which indicated that motor vehicles would be parked at owner's risk. In cross-examination DW1 said that watchmen guard the customer's property. He also stated that the guards recorded the motor vehicles entering the premises and the respondent's motor vehicle was recorded by his colleague. DW1 also stated that the disclaimer notice was fixed after the theft had taken place.

11) The respondent (PW1) testified alone before the trial court.

PW1 said that on 31.1.2011 he drove his motor vehicle registration no. KBB 403A, Land Rover Defender into Simba Union Members Club where the guard showed him where to park.

12) PW1 stated that at that time there was no disclaimer notice given or shown to him. PW1 said that when he came back to pick his car he discovered that the spare wheel had been removed prompting him to make a report to the management who in turn denied responsibility. PW1 claimed that he was not checked by the guards when he drove in.

13) The respondent averred that despite filing a complaint with the police, there was no cooperation with the police in the investigation. PW1 claimed he went to check with the dealer over the price of the stolen spare at 100,400/=. PW1 stated that appellant had an obligation to protect his car.

14) Having set out the sort of evidence presented by both sides, I now turn my attention to the substance of the appeal. The question is whether the appellant can be held liable in the circumstances of this appeal. I have already set out the arguments of both sides. The appellant's witness stated that during games within the club, cars are allowed entry without strict check.

15) It is also stated by the appellant's witness that the guards were under no obligation to take care of the motor vehicle since there was a display of a disclaimer notice that cars are parked at the owner's risk. However, during cross-examination, the appellant's witness conceded that the disclaimer notice was put in place after the respondent's spare wheel was stolen.

16) The respondent's claim was based on the tort of negligence, ie occupiers liability. The substantive law is the Occupiers Liability Act which imposes a duty on the land owners to those who come into their land to ensure their reasonable safety while on their land.

17) It is apparent that the appellant owed a duty of care to the

respondent as a visitor to the premises its guards were guarding. The appellant's guards did not ensure the safety of the respondent's car. The appellant cannot rely on the disclaimer notice because it was not there at the time of theft.

18) Upon reviewing the evidence presented before the trial court, I am convinced that the respondent was able to establish the four ingredients necessary to establish negligence vizly:

i. Duty of care

ii. Breach of duty of care

iii. Causation

iv. Loss arising therefrom.

19) In the end, the learned Principal Magistrate cannot be faulted.

Consequently, the appeal is found to be without merit. The same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

……………………………. for the Appellant

……………………………. for the Respondent