



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 97 OF 2013

1. TASNEEM ABDEALI ADAMJI

2. ZEHRA ABDEALI ADAMJI.....PLAINTIFFS

VERSUS

THE JUBILEE INSURANCE COMPANY OF

KENYA LIMITED.....RESPONDENT

JUDGMENT

1. On 31st July, 2013, the plaintiffs filed a plaint in which they claim the sum of Kshs.11,976,980/= being the value of jewellery that was stolen under the custody of the defendant. The plaintiffs allege that the loss occurred as a result of negligence on the part of the defendant. Particulars of negligence are outlined in paragraph 7 of the said plaint. The particulars of special damage claims by both plaintiffs are set out in paragraph 9 of the plaint.

2. The plaintiffs also claim damages (general damages), costs of and incidental to this suit, interest on the sum of Kshs.11,976,980 at market rates. Interest on general damages and costs from the date of filing the suit until payment in full; and such other and further relief as this court may deem just and fit to grant. The defendant filed its statement of defence on 3rd September, 2013 and denied any negligence on its part and put the plaintiff to strict proof of their allegations. The plaintiffs filed a reply to the statement of defence on 6th September, 2013.

3. PW1, was Tasneem Abdeali Adamji. She is a tour operator who has been running a company known as African Quest Safaris for 24 years, with her brother. Its head office is in Mombasa, with branch offices in Nairobi, Dar-es-salaam and Arusha. It was her evidence that in the year 1996, her mother had a vault No.156A (safe deposit box) at Jubilee Insurance (defendant). It was located in an underground passage of the Jubilee Insurance building along Moi Avenue. She recounted that the safe deposit box was in the basement of the said building which was highly secured by way of gates and a watchman. PW1 produced her list of documents as plf. exhs. 1-13.

4. She testified that on 31st December, 2012 they were informed by a Manager of the defendant that there had been a break in of the safe deposit boxes in the building and a lot of jewellery had been stolen but some things were strewn all over. She went to Jubilee building accompanied by her husband and brother. She noted that construction was ongoing. They were taken to the 1st floor by the Manager where they found safe deposit boxes in a room. She observed that they had been broken into and that a wall which

had been broken had been repaired with coral blocks. She stated that there were no CCTV cameras but a technician from Texas Alarms was installing the said cameras. She referred the court to photograph No.64 which shows that the door to the safe deposit box was tampered with. She explained that the safe deposit box would be opened by two keys, one which was in their custody while the 2nd key was in the custody of a representative of the defendant. She made reference to photographs No.61,63,65,76 to 79 in her bundle of documents to show the state of the room on the 1st floor of the defendant's building, the repairs made to the wall between the records room and the room where they found their safety deposit box and the jewellery they found in the room on the 1st floor.

5. It was her evidence that they picked jewellery that they knew was authentically theirs and prepared a list of recovered items. She referred to pages 43 to 46 of their bundle of documents to show the jewellery they recovered in the room on 1st floor in the defendant's building. She recorded a statement with the police who were on site. A copy of the said statement is at pages 50 to 52 of their bundle of documents. A copy of the notes recorded by a Police Officer are contained on page 53 of the said bundle. PW1 was issued with a police abstract containing a list of the items they lost.

6. PW1 further testified that she had a note book where she had recorded her jewellery, as captured in pages 38 to 42 of their bundle of documents. She stated that the said jewellery were gifts from her husband and relatives. She explained that the safe deposit box was used for storage of valuables and the pieces stored therein were large ceremonial pieces of gold. She indicated that her mother (2nd plaintiff) had custody of the key to the safe deposit box.

7. PW1 testified that there was no request from the defendant for them to give an inventory of what they had stored in the safe deposit box. The witness explained that the basement door was secured with a grill with strong iron bars and CCTV cameras. A watchman would open the grill door and she would walk down the stairs to another room where Mrs. Almasi would open the door by remote control. PW1 would then register her name in a record book and the safe deposit box number that she would be accessing.

8. She stated that in September, 2012 they went to access their safe deposit box when they were told that there was an ongoing construction and that the safe deposit boxes would be moved but they would be told when that would happen. The witness said that she had receipts for some items but not all. In reference to item No. 2 on page 2 of their bundle of documents, she informed the court that it was a wedding gift from her husband. PW1 testified that she recovered part of the item marked (j) which was a gift from her friends in India. Items (l) and (c) were wedding gifts from her brother and husband, respectively. PW1 had a receipt No. 67605 for 2 gold bars. For the solitaire diamond, she had the receipt marked as No. 34. She also had receipt No. 07 for a set of Turkish gold which she bought at Kaaz. In this regard she referred the court to items Nos. 4, 5, 6 and 7 on the receipt at page 33 of her bundle of documents. She informed the court that she did not have a receipt for the item marked (e) which she bought in Egypt. PW1 testified that she only recovered an earring out of a set comprising a bracelet, necklace, ring and 2 earrings. She referred the court to the photograph at page 71 which shows the items recovered. She explained that item (g) was made of gold and zircons, but she had no receipt for it. She had acquired it in Madina in 1993 while on pilgrimage.

9. PW1 testified that item (h) were 2 gold bangles and relied on the invoice in Arabic marked as No. 54 and a translation of it marked as No. 55 in their bundle of documents. She informed the court that item (i) was a large yellow handcrafted bangle that she bought in Egypt. She described item (j) as a gold and rose shaped coral necklace and bangle which was a gift from her friends in India.

10. In her evidence, PW1 stated that item (k) was a pair of long earrings in yellow gold studded with rubies bought in India, which she wore on her wedding day as per the photograph on page 58. She referred to the authenticity certificate for the said item on page 37 of her list of documents. PW1 referred to pages 11 and 12 of her bundle of documents containing 2 valuation reports by Sonara Budha, for her jewellery.

11. PW1 further testified that she lost US dollars 50,000.00 in cash which she had put in the safe deposit box as the nature of her work required her to have dollars at hand to pay for tours, accommodation or a

holiday. She stated that she had no evidence that the money was there. She testified that they had signed an agreement for hire of a safe deposit box which is at pages 4 and 5 of their bundle of documents.

12. It was her view that the defendant was negligent as the 1st floor room where the safe deposit boxes were relocated to, was not safe. There were no CCTV cameras, no heavy grill doors, there was a coral wall instead of a fortified wall and the storage was next to a records room. She testified that they were not told whether it was the police or security guards who moved the safe deposit boxes.

13. PW1 testified further that gold has appreciated in value by 60% since the year 2012 and that it is the best investment in the world today due to its intrinsic value. She urged the court to take into consideration the appreciation in the value of gold since then.

14. On cross examination, PW1 stated that her mother was the main locker holder whereas she started using it in the year 1996. She indicated that the agreement was entered into in the year 1996 and she signed it with her mother and sister-in-law. The witness was referred to clause 12 of the said agreement that states that the company shall not be liable for any loss or damage to the contents of the locker arising from any cause beyond the control of the company.

15. PW1 indicated that they were told that some people had broken in and stolen some items. She found some items on the table or on the floor. On being referred to photograph 77 she said that there is a CCTV camera which is visible but she does not know if it was installed before or after the theft. She reiterated that they found technicians from Texas Alarms installing CCTV cameras. She indicated that they had not insured their jewellery. On being referred to clause 13 of the agreement, she indicated that money was not mentioned there as one of the items for storage.

16. PW1 stated that pages 38 to 42 of their bundle of documents contains an inventory of her jewellery which she wrote down after her wedding in the year 2009. She informed the court that she could recall from memory the items that had been stolen and she had items that were recovered. About the valuation report dated 21st January, 2013 by Sonara Budha, PW1 indicated that it was done without the jewellery. She indicated that by taking the recovered items to the family jewellers, they were able to establish the cost of the entire set. She stated that they had not taken their jewellery for valuation before the theft.

17. PW2 was Zehra Abdeali Adamji. She was a 74 year old housewife and PW1's mother. She recalled having written a statement which she signed on 9th December, 2013. She testified that she used to store her jewellery with the defendant due to theft of such items from their home. She would also deposit money therein. She had her own key to the safe deposit box and the 2nd key was kept by Almasi of the defendant company. She would sign a register and access her jewellery or money. She stated that in the course of time, PW1 also started storing her jewellery in the safe deposit box. She explained that she was married in the year 1959 and kept the gold Jewellery for her wedding, money and other pieces bought over the years in the said box. They would only collect the jewellery when attending important functions.

18. She recounted how she was shocked when PW1 told her that her gold pieces had been stolen. All that was recovered was a bangle and a pair of earrings. She testified that a list of her jewellery that was stolen is outlined in her statement. She added that Sonara Budha has been her jeweller since the year 1960. She informed the court that she was not told that her jewellery would be moved to another storage area.

19. On cross- examination, she indicated that a memorandum of agreement was read to her before she signed it. She stated that she had no insurance for her jewellery. Sonara Budha who issued the valuation report dated 21st January, 2013 did not have her jewellery with them when they did the valuation. She had no receipts for the stolen jewellery.

20. PW2 indicated that she had a lot of jewellery some being wedding gifts from her parents and her in-laws. Her wedding gift was a gold set. She also lost a Rado watch for which she had no receipt. She gave a description of her other jewellery that was stolen.

ANALYSIS AND DETERMINATION

A list of agreed issues was filed on 31st January, 2014. The said issues are:-

- (i) What was the legal nature of the relationship between the plaintiffs and the defendant arising from the plaintiffs' hire of the safe deposit locker No.516 class A from the defendant?
- (ii) Between the 28th and 31st December, 2012 what was the value of the items placed by the Plaintiffs in locker No.516 class A?
- (iii) Were the plaintiffs' items stolen between 28th and 31st December, 2012 from locker No.512 class A?
- (iv) Is the Defendant liable for the loss occasioned to the plaintiff as a consequence of the break-in and/or theft between 28th and 31st December, 2012?
- (v) Were the plaintiffs under an obligation to disclose the contents and value of the items in the Locker No. 516 class A?
- (vi) Are the plaintiffs entitled to the suit sum of Kshs. 11,976,980.00?
- (vii) Are the plaintiffs entitled to a claim for damages?
- (viii) What are the orders on costs?

Legal relationship between the plaintiffs and the defendant arising from the plaintiffs hire of a safe deposit locker No.516 class A from the defendant.

21. The plaintiffs through PW1 produced a memorandum of hiring of a locker executed between them and the defendant. It was dated 26th September, 1996. The said safe deposit box was rented by PW2, PW1 and Fahana Adamji, they signed the said agreement and also appended their specimen signatures thereon. As per clause 16 of the agreement, the relationship between the plaintiffs and the defendant was that of a lessor and lessee, respectively. Clause 18 of the agreement provides that the relationship was subject to the lessor agreeing to abide by the rules and regulations and to pay such yearly rental as the safe deposit department of the company adopted and fixed. No evidence was called to show that the plaintiffs had defaulted in payment of the rental for the safe deposit box and therefore the agreement between them was legally binding on the plaintiffs and the defendant.

The value of the items placed in the plaintiffs' locker No. 516 class A as between the 28th and 31st December, 2012.

22. On the above issue, the 1st plaintiff (PW1) relied on her witness statement filed on 10th December, 2013 where she gave a schedule of the gold jewellery that was stored in the safe deposit box and the value for each item. She gave the sum of Kshs. 4,222,280/= as the total aggregate value for the said jewellery. She produced receipts for some of the jewellery to prove the element of cost. She however testified that some of the gold jewellery were gifts from her brother, husband, relatives and her friends in India and she therefore had no receipts for some of the items.

23. PW1 testified that she had stored US dollars 50,000 in the safe deposit box. The exchange rate then was Kshs. 87.00 which gives the value of Kshs. 4,350,000/=. The total value of her items and cash stored in the safe deposit box was Kshs. 8,682,280.00, which amount is reflected in the plaint.

24. The 2nd plaintiff (PW2) in her witness statement gave a breakdown of the gold jewellery that she had stored in the safe deposit box and the value of each item. On cross-examination she stated that she had a lot of gold jewellery but no receipts for them. She explained that some items were gifts for her wedding

from her husband and her in-laws. Among the items that were stolen were 3 big sets and 5 small sets of gold jewellery. She explained that a set comprises a pair of earrings, a chain, a bangle, and a ring. It emerged from her evidence that some gold items were bought by PW1 for PW2 and therefore the receipt was in the name of the former. Although PW2 did not give the value of her lost jewellery in her witness statement, their value is given as Kshs. 3,294,700/= in the plaint filed on 31st July, 2013. The plaintiffs also relied on the valuation reports from Sonara Budha who gave the value of the stolen jewellery.

If the plaintiffs' items were stolen between 28th and 31st December, 2012 from locker No. 512 class A and if the defendant is liable for the break in/or theft.

25. On issues No. 3 and 4, the defendant called no evidence and as such, the evidence of the plaintiffs was not controverted. It therefore holds true that a theft did occur in the defendant's premises between 28th and 31st December, 2012. PW1 testified at length of how she was called by a member of staff from the defendant who informed her of theft of their jewellery. On visiting the defendant's premises she was shown a room on the 1st floor where she found some of their gold jewellery strewn all over. She found their safe deposit box open, it had been broken into. She observed that the wall between the room she was taken to and the records room next door had been repaired with coral blocks. She recovered part of her jewellery and very little of PW2's jewellery. It was her evidence that she could recall from memory, the gold items that were missing as they were valuable pieces that they wore on important occasions. She referred to them as ceremonial jewellery which comprised large pieces of gold.

26. PW1 in her evidence stated that in September, 2012 when they went to access their safe deposit box, they were told that there was an ongoing construction and that the safe deposit boxes would be moved but they would be told when that would happen. She described the basement as a dungeon that was well secured with gates and a watchman. She also explained that access to the safe deposit box before the theft was only through registration in the defendant's premises. Mrs. Almasi, an employee of the defendant would open an automatic door to give the plaintiffs access to their safe deposit box. She would then open the said box with her key and one of the plaintiffs would open with their key. It was the PW1's evidence that PW2 was the custodian of their key to the safe deposit box, which she stored safely at home. When PW1 visited the defendant's premises, she found security officers from Texas Alarms installing CCTV cameras on the 1st floor. Although she saw a CCTV camera which was already in place, she could not tell if it had been installed on the day the theft was discovered.

27. An analysis of the evidence adduced by PW1 and PW2 leaves me in no doubt that the defendant is liable for the loss occasioned to the plaintiffs. PW2 in her evidence stated that she had faith in the safe deposit box. They gave a clear description of the safety nets that were in place before they could access their jewellery and other valuables in their safe deposit box.

28. Clause 8 of the rental agreement provides that the renter shall have no right of property in the locker but only an exclusive right of user thereof and access thereto during the period of the agreement and in accordance therewith. The clause provides that *the Renter shall not assign or sub-let the locker, or any part of it, **nor permit it to be used for any purpose other than the deposit of documents, jewellery or other valuables***, nor shall the renter use the locker for the deposit of any property of an explosive or destructive nature. (emphasis added).

29. The provisions of the foregoing clause indicate that the defendant was aware of the use to which the safe deposit box was being put into and was specific that it was for storage of **documents, jewellery or other valuables**. The defendant was therefore expected to exercise prudence in the storage of the safe deposit boxes by moving them to a strong room. I am in agreement with the submission by the plaintiffs' Counsel that the defendant owed the plaintiffs a duty of care to ensure their jewellery and cash were secure at all times. It is my finding that the defendant acted with utmost negligence when it moved valuable items that had hitherto been stored in a secure lock up to the 1st floor of its premises which was apparently not secure.

30. In her submissions, the defendant's Counsel invites the court to find that the plaintiffs were not

coherent in their evidence and as such failed to prove the items they had lost, their ownership thereof and the value of the alleged lost items. The court being the one that determines the coherence and demeanour of witnesses found PW1 and PW2 forthright and truthful in their evidence. PW1 had a vivid memory of the jewellery that she lost. PW2 was 74 years old, her memory could not have been as sharp as PW1's. Counsel for the defendant put a spirited fight during the cross-examination of the said witnesses where it emerged from PW1's evidence is that there was a mix up in the numbering of the stolen jewellery in her witness statement as against the schedule in the plaint. PW1 was however categorical that she lost all her jewellery as described in the plaint. PW2 explained the inclusion of some of her jewellery in receipts produced by PW1. PW2 testified that she was given some of the gold jewellery in the year 1959 during her wedding, I do take judicial notice of the difficulty in retention of receipts for items bought five (5) decades ago. This court was shown photographs that were taken of the jewellery that was recovered after the theft in the defendant's premises. PW1 produced photographs taken before the theft, in which she was wearing some of the gold jewellery. Some photographs clearly depict an ongoing construction at the defendant's premises. Had PW1 not been a truthful witness she could simply have stated that she recovered no jewellery at all and claim an amount higher than that in the plaint. She however had photographs taken of the jewellery recovered and she gave a graphic description of her lost pieces of jewellery. PW2 did the best she could to describe her jewellery that was stolen.

31. In her written submissions, Counsel for the defendant relied on clause 12 of the memorandum of hiring of a locker which stated that **the company shall not be liable for any loss or damage to the contents of the locker arising from any cause beyond the control of the company.** (emphasis added). Inasmuch as the breaking into and theft of the plaintiffs' jewellery from the safe deposit box occurred in the hands of criminals, which Ms. Gichira submitted was beyond the defendant's control, it is this court's finding that the movement of the plaintiffs' safe deposit box from the secure basement floor to the insecure 1st floor were acts within the defendant's control. It is this act that led to the theft of the plaintiffs' jewellery. The foregoing reasoning is well illustrated by the case of **Cork vs Kirby Maclean Ltd** [1957] 2 ALL ER 402, Denning L.J, in his judgment stated as follows:-

"Subject to the question of remoteness, **causation is, I think, a question of fact. If you say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage....it is always a matter of seeing whether the particular event was sufficiently powerful a factor to bring about the result as to be properly regarded by the law as a cause of it.**" (emphasis added).

32. In advancing the plaintiffs' case on the relationship between the plaintiffs and the defendant, their Counsel relied on the case of **Consolidated Bank of Kenya Limited vs Securicor Security Services Ltd** [2013] eKLR where Kimondo J., stated that to uphold those unreasonable and oppressive exemption and limitation clauses in the contract would be to turn a blind eye to the negligence of the defendant. I am persuaded by the argument by Counsel for the plaintiffs that the relationship between his clients and the defendant was akin to that of a bailor and bailee, respectively. The plaintiffs therefore expected to get back their goods in the same condition as when they handed the same over to the defendant. This is a clear case of negligence and I find that the particulars of negligence pleaded in paragraph 7 of the plaint have been proved.

Whether the plaintiffs were under an obligation to disclose the contents and value of the items in the Locker No. 516 class A?

33. On the 5th issue of whether the plaintiffs were under an obligation to disclose the contents and value of the items in locker No. 516 class A, the answer is the negative. The memorandum of agreement did not require the plaintiffs to disclose the contents of their safe deposit box. The agreement was signed on 26th September, 1996 and up to the time of the theft of the jewellery in December, 2012 the plaintiffs were at no time required to disclose the said contents. As earlier said, Clause 8 of the agreement however shows that documents, jewellery and other valuables were permitted for storage in the safe deposit box.

Are the plaintiffs entitled to the suit sum of Kshs. 11,976,980.00?

34. On the 6th issue on whether the plaintiffs are entitled to the sum of Kshs. 11,976,980.00 the answer is in the affirmative. The plaintiffs produced receipts which they had for some of the items that were stolen and valuation reports were produced that gave the value of some of the stolen jewellery. PW1 had an inventory of the jewellery that she had stored in the safe deposit box which she used to verify the stolen items. PW1 informed the court that their jeweller, Sonara Budha, knew their gold items as he had cleaned and repaired their jewellery for over 30 years. This was supported by the evidence of PW2 who informed the court that Sonara Budha had been their jeweller since the year 1960. The first valuation report was for 5 items whose total value was Kshs.1,532,000/= . A second valuation report gave a value of Kshs.1,722,700/= for some stolen items. Counsel for the defendant submitted that special damages must not only be pleaded but proved and relied on several authorities to support the said point. She cited **Hahn vs Singh** [1985] KLR 716, **Obel & another vs Attorney General and another** [2012] EA 258, **Telcom Kenya Limited vs John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telcom Kenya Limited)** [2014] eKLR and the Tanzanian case of **Kiteto District Council vs Tito Shumo and others** [2012] 2 EA.

35. This court notes that it is not in all instances that receipts must be produced to prove a special damage claim. There are exceptions such as in cases of material damage claim whereby assessors reports are relied upon by courts as estimates of the cost of repairs and in some fatal accidents cases, courts have awarded costs for funeral expenses even where no receipts were produced to show the costs incurred. In the case of **Garishon Christopher Odari vs James Omari and others**, [2014] eKLR, where the plaintiffs cows were seized on 23rd January, 2009 and thereafter unlawfully auctioned, Judge J. R. Karanja relied on a valuation report of a Livestock Officer who gave the estimated cost of a cow as at 3rd February, 2009, to award special damages to the plaintiff therein. It is worth noting that the said valuation was undertaken after the sale of the cows. The Livestock Officer used the prevailing market rates to arrive at his estimates. Consequently, this court finds credence in the valuation reports from Sonara Budha in support of the plaintiffs case in that being a jeweller who was well acquainted to the plaintiffs' jewellery, he was best suited to give an assessment of the value. Although the valuation reports by Sonara Buddha were dated 21st January, 2013, which was after the theft of the jewellery, in the circumstances of this case, I find that they are admissible in proving the value of the jewellery that was not supported by receipts.

36. In **Zahir Habib Jiwan & Another vs Jubilee Insurance Company of Kenya Ltd** [2015] eKLR, Judge Kasango relied on the case of **Jacob Ayiga Maruja & Another vs Simeon Obayo** [2005], where the court of Appeal rejected the contention that only documentary evidence can prove some things.

37. PW1 gave evidence that she runs a tour company by the name of African Quest Safaris with business interests in Kenya and Tanzania. She testified that she had deposited US dollars 50,000 in the safe deposit box for use in case she required it urgently to pay for tours or accommodation or to go on holiday. This being a civil case, the balance of proof is on a balance of probabilities. It is my finding that the plaintiffs have discharged this burden and I hold that they are entitled to the claim of Kshs.11,976,980.

If the plaintiffs are entitled to a claim for damages.

38. The theft in issue occurred in December, 2012, as at the time of writing this Judgment it is October, 2017. This means that the plaintiffs have been denied the opportunity to use their ceremonial jewellery for 4 years 10 months since the theft occurred. It was evident that the jewellery was of sentimental value to the plaintiffs who had it for many years. In the case of **Zahir Habib Jiwan & Another vs Jubilee Insurance Company of Kenya Ltd.** (supra), which involved theft of gold jewellery and other valuables in the same transaction as in the present case, Judge Kasango awarded the plaintiffs general damages in the sum of Kshs. 500,000/= on 21st August, 2015. The claim therein was for the sum of Kshs.7,639,000. Going by the said judgment and taking into account the time of delivery of this judgment, depreciation of the Kenyan shilling over the years and that the claim herein is for the sum of Kshs. 11,976,980.00, I award the plaintiffs the sum of Kshs.700,000/= as general damages.

39. The plaintiffs are entitled to the costs of this suit, which I hereby award. Interest is awarded at court rates.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of October, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mrs. Nyange holding brief for Mr. Nyongesa for the plaintiffs

Mr. Wafula holding brief for Ms. Gichira for the respondent

Mr. Oliver Musundi - Court Assistant