



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 54 OF 2013**

**ZAHIR HABIB JIWAN**

**SANGEETA JIWAH alias SANGEETA KARWAL SABHARWAL.....PLAINTIFF**

**VERSUS**

**THE JUBILEE INSURANCE COMPANY OF KENYA LTD.....DEFENDANT**

**J U D G M E N T**

1 The plaintiffs, ZAHIR HABIB JIWAN and SANGEETA JIWAN are husband and wife. Their claim is for compensation for the loss they suffered when their safe deposit box rented from the defendant was broken into and their valueables stolen.

2 THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED the defendant, although it filed a defence denying the plaintiff's claim they failed to offer evidence at the trial and accordingly their defence remained mere allegations.

3 In the process of pre trial hearing the court settled the issues to be determined at trial. They were seven issues. Now that the defendant did not call evidence those issues will be narrowed down to two issues, that is:

# Have plaintiffs proved their claim for ksh 7,639,000

# Have the plaintiffs proved their claim for damages.

**FIRST ISSUE**

4 The plaintiff gave evidence to the effect that on 21<sup>st</sup> July 1994 they entered into a hire agreement for one safe deposit box. Subsequently they hired an extra one.

5 They kept their valuable documents in safe deposit box number 251B while they kept their watches and jewelry in safe deposit box number 513A.

6 Both plaintiffs testified that up and until September 2012 the safe deposit boxes were housed in the basement of the defendant's building at Moi Avenue, Mombasa. The 2<sup>nd</sup> plaintiff described the basement as being like a vault. That it had CCTV, alarm and guards. Indeed the safety features of that basement was what gave the 1<sup>st</sup> plaintiff confidence to operate safety deposit box with the defendant in the first place.

7 The defendant by is letter date 13<sup>th</sup> mach 2012 gave the 1<sup>st</sup> plaintiff notice that there would be a move of the safe deposit boxes. This is what the letter partly communicated:

**RE: SAFE DEPOSIT VALULT**

***This is to inform you that in order to serve your better, operations of the above facility will be shifted from the basement area to the Mezzanine of shop nos. 13 and 14(14<sup>th</sup> and 5<sup>th</sup> shops on your right from Moi Avenue) with effect from 1<sup>st</sup> May 2012.***

The move in fact took place in September 2012.

8 The 2<sup>nd</sup> plaintiff stated that the new place where the defendant located the strong room was like an office space. It was in the Mazzenine floor of the defendant's building. When she saw it she said she was apprehensive. That to access that room one had to go through the main entrance and that it was situated near the defendant's record room. That the room had no grills no CCTV and no guards. This was contrary to the security features in the basement where one had to go through two gates and as stated before there was CCTV and guards.

9 On 31<sup>st</sup> December 2012 2<sup>nd</sup> plaintiff was telephoned by defendants managers who informed her that there had been a broke -in and theft of the safe deposit boxes. When the 2<sup>nd</sup> plaintiff went to the defendant's building she found boxes thrown all over the place. The place looked like a construction site because the defendants were carrying out renovation and the building was undergoing construction. The plaintiffs produced photographs showing the outer part of the building. From those photographs ones sees clearly that the windows did not have burglar proofing. The other photographs shows the construction that was taking place. It shows an area where a wall was partially knocked out to allow an entry into another room. There is a photograph that shows a hole burrowed into the wall where the safe deposit boxes were placed, seeming to have been the access used to gain entrance to that room when the theft took place. The half opened safety boxes are also seen in a photograph which the 2<sup>nd</sup> plaintiff said that they were the safety boxes that were opened and their contents stolen.

10 2<sup>nd</sup> plaintiff saw a box on the ground containing keys which on her inquiry from the defendant's managers she was told that they were the defendant's spare keys of the safety deposit boxes .The 2<sup>nd</sup> plaintiff said that she observed that the safety deposit boxes had not been broken into, but rather had been opened. She also learnt that the security firm contracted by the defendant had not been informed that the safety deposit boxes had been moved to another location. That accordingly a guard had not been posted at the new location of those boxes.

11 The 2<sup>nd</sup> defendant succinctly gave evidence of the items that were stolen from safety box number 513A she stated that in that box there were watches and jewelry. That she and her husband did not keep their jewelries at home. That from time to time they visited, but more particular herself, the safety deposit for purpose of removing some jewelry when they needed to use them. That particularly she visited the safety box when there was a cultural meeting of her community and collected whatever jewelry she required. On conclusion of such meetings she returned the jewelry. That the defendant did not require that it be informed of the content of the safety deposit boxes.

12 On 31<sup>st</sup> December 2012 when she went to the defendants building and found that theft had occurred she noted that her jewelry boxes, which she had labeled for ease of identifying the items were empty. She made a list of the items that were left behind by the thieves when the theft took place. The value of their jewelry not stolen and left behind was Ksh 15,098,000 the value of those that were stolen was Ksh 7,639,000.

13 The plaintiff described each item stolen and stated its sentimental value to her and her husband.

14 The plaintiff lost a Rado watch which he inherited from his late father who passed away in 1993. He was able to show the court a photograph of his late father wearing that watch. He gave it the value of Ksh 170,000. The plaintiff also lost a cartier watch which he bought in 1997 in Tanzania for Ksh 1.7 million. He described it as a limited edition, meaning that such watches are not being made any more.

15 The 2<sup>nd</sup> plaintiff amongst other jewelry lost a Rolex oyster date just watch valued at Ksh 1.8 million. It was made out of pure gold. This was her wedding gift from her husband the 1<sup>st</sup> plaintiff. 2<sup>nd</sup> plaintiff said that those watches are no longer being made. She also lost an Omega watch valued at Ksh 420,000 which watch was given to her by her husband during valentine. She lost golden bangles that she wore at her wedding which were valued at Ksh 468,500. A gold chain with rubbies and diamond pendent was also lost, which were a gift from her grandmother. They we valued at Ksh 275,000.

16 The plaintiffs were able to give evidence about each item that they lost in the theft, giving their value either obtained from a jeweler who prepared a report giving value to those items or from the websites. It suffices to states that the plaintiffs lost the following items:

<u>Item</u>	<u>Dollar</u>	<u>Ksh</u>
(a) Cash	1,000	85,000
(b) Cash		20,000
(c ) Ladies Oyster date just 26 mm Yellow Gold watch		1,800,000
(d) Ladies Omega steel yellow Gold constellation watch		420,000
(e) Gents Rado Watch		170,000
(f) Gents cartier gold leather strap Limited edition watch		1,700,000
(g) Gents Omega gold leather strap watch		575,000
(h) Guinea Coin 8 g		52,000
(i) Gold chain necklace 115.7g		752,000
(j) Gold bracelet bungle 58.5g		380,000
(k) Gold nuggets set 30g		210,000
(l) 6 Gold bungles 72g		468,500
(m) Gold chain 27g with ruby/diamond Pendant		275,000
(n) Gold chain 10g with om pendant		65,000
(o) Rope gold chain 24.8 gms		160,000

(p) Gold chain 11.8 gms	76,500
(q) Gold chain 12.8 gms	83500
( r) yellow/white gold chain 5 g 18 carat	34,500
(s) 4 Gold bracelets 18 carat 48 g	<u>312,000</u>
<b>Total</b>	<b><u>7,639,000</u></b>

17 The defendant has submitted that the plaintiff's claim fails because of lack of receipts. As stated before some of the items that were stolen were gifts or we inherited. In that case to expect the plaintiffs to produce receipts would be too onerous a task. In that regard I lay reliance on the on the case.

**JACOB AYIGA MARUJA & ANOHTER VS SIMEON OBAYO ( 2005) e KLR** where the court of Appeal held:-

***“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail”.***

18 The plaintiffs stated in respect to items they had purchased that they had not retained receipts, they were however able, in one case to produce a copy of warranty issued at the time purchase. In my view the evidence tendered by both plaintiffs was sufficient to meet the Civil burden of proof.

19 The plaintiffs evidence should also be received in the background that they are owners of commercial buildings in Mombasa, namely Mombasa Trade Centre, Harbour House and Fort Manson. The plaintiff did also refer to residential building that belong to them. Further the plaintiff did produce a list of the items that had been left behind by the thieves whose value was nearly Ksh 16 million. It is in that back ground that I find the plaintiff proved the loss of the items they claim, as reproduced above and why I find that they also proved their value on a balance of probability. The defendants after all chose not to adduce evidence at trial.

20 Additionally I was very impressed with the evidence of the 2nd plaintiff. She had intimate knowledge of the jewelries that she in particular and the 1<sup>st</sup> plaintiff own. She was able to state when they got the jewelry and by use of photographs she identify those jewelries

21 As stated before the plaintiffs entered into a hire agreement whereby they hired two safe deposit boxes. The defendant owed the plaintiff a duty of care to ensure that where those safety deposit boxes were was well secured. The defendant was in fact negligent in placing the boxes in a room without burglar proofing and most importantly failing to secure its spare keys which seemed to have been used to gain access into those boxes. The 2<sup>nd</sup> plaintiff when being cross examined stated the defendant's manageress told her that if there had been sufficient security where the boxes were there would not have been a theft. The defendant was culpable for the loss the plaintiffs incurred. It is for that reason that I find the defendants cannot rely on the exclusion clause in the rental agreement.

22 I find and I hold that the plaintiffs have proved that they lost items valued at ksh7,639,000.

## **SECOND ISSUE**

23 The plaintiff have also prayed for damages. Some of the items plaintiff's lost undoubtedly are of sentimental value and some were collectors items which items cannot be replaced. Doing the best that I can and bearing the plaintiffs evidence I shall award them Ksh 500,000 in damages.

**CONCLUSION**

24 **There shall be judgment for the plaintiff against the defendant as follows:**

**(a) Ksh 7,639,000 in special damages.**

**(b) Ksh 500,000 general damages.**

**(c) Costs of the suit.**

DATED and DELIVERED at MOMBASA this 21<sup>ST</sup> day of AUGUST, 2015.

**MARY KASANGO**

**JUDGE**

Coram

Before Justice Mary Kasango

C/Assistant:

For Plaintiffs:

For: Defendant:

Court

Judgment delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**