REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1517 OF 2002

SANYA HASAN & ANOTHER ……..…… PLAINTIFF

VERSUS

SOMA PROPERTIES LIMITED……..…… DEFENDANT

JUDGMENT

A most tragic case that began on the morning of the 13th of November 1999, when Rehema Hssanati Yusuf took her children shopping at the Sarit Centre. She was in the company of four children, two - others a niece and nephew and a maid. The rest went into the vehicle but she returned to the Text Book centre with her son and daughter, both minors. This shop is situated on the ground level and is in the vicinity of the Kenya Commercial Bank.

At around noon as they left the Text Book Centre, her daughter walking out first followed by her and her son behind her there was a sudden open of gun fire shots. Like other shoppers, they all laid down on the floor, when the gun fire shots stopped they got to their feet but her daughter Sanya Hassan had been injured and wounded.

It transpired that there had been a robbery at the Kenya Commercial Bank. Six to ten robbers had entered the bank when a considerable large sums of money had been brought in to be banked and believed to be in the region of Ksh.17 million. The money was brought in by one of the tenants in the premises and had been unescorted by the police who would normally be armed. The banks staff took three hours counting the money. The robbers gained entry by posing as customers. They had ordered the customers to lie down and thereafter proceeded to place the money in bags.

According to Mr. Sokhi (DW(2) who made investigation thereafter the amount in the sacks/bag was Ksh.12 million. There was an alarm raised by the bank staff that communicated to the police and thereafter to two armed police officers who were on the 1st floor of the Sarit Centre building. They came down a ramp and hid between the pillars to shield themselves. As the robbers walked out they opened fire and a gun battle took place.

It was therefore from the bank entrance to across the corridor to the ramp where the firing occurred.

This was in the path of shoppers who would come out of the Text book Centre.

The whole process was instantaneous and could not be avoided. The robbers shot at the police. Mr. Sokhi believes that a bullet hit the pillar then splinted in different directions wounding the shoppers. They were in fact three persons injured, the late Sanya and two others who were rushed to the M.P. Shah hospital.

The robbers had left the bag of money outside the bank. It was taken inside the bank but found to have Ksh.5 million missing. It was suspected that this amount may have been stolen by the bank staff.

A shop keeper employee came out of one of the shop and soon after the shooting.

On spotting Sanya and her mother, he quickly carried her. A friend of his, helped rush her to the M.P. Shah hospital where she was admitted.

II: ADMISSION OF FACTS

Prior to the start of this trial the parties admitted to the following facts that was indeed not disputed:-

> "1) That Sanya Hassan was hit by a bullet on the 13.11.99. 2) That the bullet was fired by armed robbers whilst escaping from Kenya Commercial Bank Sarit Centre Branch which they had just robbed.
>
> 3) That the deceased Sanya Hassan incurred paraplegic injuries
>
> 4) That the deceased was admitted at M.P. shah, Nairobi and later to South Africa for treatment.
>
> 5) At [the] time of [the] incident it is an admitted fact that the proprietors of Sarit Centre had guards from B.M. Services and police armed generally patrolling the centre"

The effect of the admission of facts is that issue 1,2,3,4,5 and 6 are determined.

What the parties require me to determine are issues on liability, quantum, Law Reform on lost years, special damages and the issue of costs.

III: LIABILITY

(Issue 7,8,9 & 9).

> "7 Whether the injuries sustained by the deceased were as a result of negligence and a breach of common law duty of care on the part of the defendant and or its servants and agents?
>
> 8) Whether the defendant took adequate care by employing a professional security company at the premises to prevent injuries to the visitors thereto?
>
> 9) Whether the defendant as the owner of the Sarit Centre Premises would or could or did guarantee that robberies would take place at the premises?
>
> 16) 16) Whether the doctrine of *volenti non fit injuria* is applicable in this case?

The parties agreed to put in a report by Mr. Sokhi as evidence. This report was really to the Insurance Company and contains a considerable amount of information that has assisted this court in cristallizing the facts before court.

According to the plaintiff (the father of the deceased minor) the defendants, Soma Ltd (trading as Sarit Centre) and owners of the shopping complex would have taken reasonable care to ensure that any visitor in the premises were safe. They could have done this by having a screening device, by ensuring that dangerous persons do not enter the centre armed.

At the time of shooting, there ought to have been some warning to the public of the presence of armed robbers.

Perhaps metal dictators survaillance, search of motor vehicles, as they come into the centre would have

been undertaken. Further the year before, 1998 Nairobi experienced a bomb blast that should have alerted the defendants to the issue of security. To make matters worse, the year 1999, in August, there had been an attempted robbery at the very same bank that was foiled by the police who were at the time armed escorts for the cash delivery.

The defence on the other hand relied on the defence of the incident not being foreseeable (Golley v Sutton London Bough Council) ((2000) 3 ALL ER 409) The doctrine of volendi non fit injuria and that reasonable precaution had been taken by them. They are therefore not liable.

It is the defence case that Sarit Centre is one of the largest shopping complex in Kenya. It has seven entrances and is well guarded. DW1, Mr. Kasmani from Sarit Centre said that the year 1999 the Centre was under additional Construction and this had not yet been complete. They were therefore unable to stop persons carrying building equipments, suppliers to the tenants besides the shoppers from entering. They had indeed taken precaution on security by employing the services of B.M. security Guards. The supervisor of the guards DW3 confirmed this. There were about 50 guards employed and 35 on patrol on all the given floors, car park areas and at the entrances. It is a security firm that is highly reputed according to Mr. Sokhi and he says so because he knew the late proprietor personally when they were in the police force together. These guards were not permitted to be armed according to law.

They only carried trouchents to defend themselves. On the material day there were two armed police officers within the building.

It was therefore not possible to foresee that the said incident would occur. Indeed Mr. Shoki said it was rare and as such happened only that once, though he admitted there had been an earlier attempted robbery.

Further reasonable precaution had been taken and to Mr. Shoki's mind the number of guards were enough and adequate.

Both Mr. Shokhi and Mr. Towett (DW3) stated that the Sarit Centre had a considerable amount of visitors. It thus means that in the month of November and December the visitors reach a total of number of 30,000. To control such crowd by stopping and physically checking them with a metal detector is not feasable. To fit a metal detector at the entrance of the various seven doors would also not be helpful as anyone could still slip by with a hidden gun. There was a time, checking of customers was tried but unfortunately it was very unpopular and had to be discontinued. To this effect it was seen that the screening of members of public would result to loss of business as no one would wish to shop at the said complex.

There was the suggestion from the plaintiff that circuit cameras be fitted but the expense to this would have been enormous.

The defence under volenti non fit injuria, basically implies that the deceased had voluntarily abandoned her rights thus exempting the defendants from 'his duty of care."

I wish to turn to what it means by the 'duty of care' being owned.

In the book referred to me of Charlesworth and Percy on negligence 9th Edition 1977.

Under the English Act seciton 2 it provides that:-

> "1 An occupier of premises owes the same duty the "common duty of care" to all its visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by a agreement or otherwise.
>
> 2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonable safe in using the premises for the purposes of which he is invited or permitted by the occupier to be there."

The above section 2 is identical to the Kenya Act on the occupiers liability Act Cap.34 Laws of Kenya and is found in Seciton 3(1) and (2).

The defendants do not deny that they are 'a duty of care' to their various visitors to their premises; be they customers; suppliers or other lawful persons on the premises. This fact is not disputed and I would find that in creating a shopping mall for the intention of the public at large to enter thereon for purposes of trade, entertainment and conducting business that the deceased is indeed owned a duty of care as other members of public do.

The defence of non fit injura may be pleaded by the defence. This defence was dealt with in the case of:-

Osborne v London & North Western Railway (1888) 21 QBD 220 Willies J discussing the rule at common law

> "If the defendant deserve to succeed on the ground that the maximum "volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

Under the Kenyan Occupiers Liability took this principle (and most certainly from the 1957 English Act Seciton 2(5)). The Kenyan act is under section 3(5) that states:-

> "The common duty of care does not impose on our occupier any obligation to a visitor in respect of risks willingly accepted as his being the visitor (the question whether a risk was so accepted to be decided on the some principles as in other cases in which one person owes a duty of care to another)

An example, which really does not touch on similar facts of this case but would suffice as to explain the "maxim of volenti non fit injura"

Is the case of Buck Pitt and Oates 1968 I ALL ER 1145

Both the plaintiff and defendant were minors and aged 17 years old. The plaintiff rode in a vehicle driven by the defendant knowing it had no insurance cover against risk of injury to passenger. The defendants vehicle had a notification sticker on the dash board stating, any passenger ridding in the vehicle was doing so at his own risk. The defendant being negligent in his driving struck a wall thus causing the plaintiff injury.

The plaintiff sued the defendant. The defendant raised the plea of volenti non fit injuria.

It was held that the plaintiff (though an infant) could not enforce a right which he himself had voluntarily waived or abandoned. The defence was made available to the defence and succeeded.

By using the above illustration the defendants through their advocates tried to say that the minor in this case was in the company of a parent. That the parent was negligent and as a result presumably negligent in walking onto the corridor public area of the shopping complex and voluntarily agreed to be shot at.

I believe what the defendant requires to establish is whether the deceased agreed to waiver that right.

Under the same case law it relied on the text book of Salmond on Torts 14th Ed page 47.

> "A waiver by a plaintiff of an admitted breach of duty but the better view is that consent here means the agreement of the plaintiff, express implied, to exempt the defendant from the duty of case which he otherwise would have owed."
>
> (Emphasis my own).

Did the deceased voluntarily consent to be shot at? I believe if someone hears gunshots and rans towards where the shooting is being done he may have volunteered and waived his rights of duty of case by the occupier.

In this case a 12 year old child was leaving a shop. She happened to be ahead of her mother and brother. Without warning gunshots were released by the robbers and police. She went to the floor like everyone else. Mr. Shoki thinks she may have crouched and the robbers bullet that hit the pillar at that lower lever caught her by the neck.

I find that the deceased did not voluntarily nor deliberately went shopping to be shot at. She was already outside the text book centre when the shooting begun. Instead, if she had been inside and ran out there is an implication from the Act that minors are said to be those visitors that:-

> "an occupier must be prepared for children to be less careful than adult."

See Section 3(3) 9a) Occupiers Liability Act Cap.34 laws of Kenya.

As Mr. Sokhi said and as confirmed by Mr. Towett the incident was spontaneous was instantaneous and no warning could have been adequately given of the firing of the gun shoots.

What preventive precaution measure could the defendant had taken? The defendants had an earlier incident and were in the process of having a security meeting between the police, the management and B.M. Securities to address the issue of insecurity at the same centre.

The bank whose customers were mainly the tenants receive large amounts of money. They count this money without a counting machine. On that material day it took 3 hours to count the money. A separate counting hall should have been provided instead of placing moneys on the floor.

The close circuit cameras are the most effective way to enhance security. This really would have alerted the security long before, to assist contacting each tenant not to allow their customers to leave the shop.

A fire drill practice would have also have been of assistance to allow the staff and members of the public practice how to vacate the premises in the event there may be a hazard, such as a fire so that in an emergency, such as this, members of public would not have panicked.

The advocates referred to me case laws on liability which really concerns the occupiers premises an the condition or state of such premises, such as the slippery floors or steps. The facts here concerns shooting by robbers nonetheless the principles though are the same namely the maximum.

> "Volenti non fit injuria" affords no defence to an action of damages for personal injuries due to the dangerous condition of premises which the plaintiff has been invited to on an errand of business" unless he freely voluntarily agreed to incur it.
>
> Letang v Ottawa Electricity Railway supra

I find in this case that the plaintiff was owned a duty of care by the defendant and I would hereby hold that the defendant t/a the Sarit Centre are 100% liable for the liability.

IV) QUANTUM

The plaintiff abandoned the claim under the Fatal accident Act

The parties had agreed before trial that the issues on quantum left to be determined is that under the Law Reform Act, Special Damages and Costs.

a) Law Reform Act

It was agreed by the parties subject to confirmation of the issues on liability that the award under the law Reform (partially) be as follows:

i) Pain and suffering Ksh.20,000/-

ii) Loss of expectation of life Ksh.80,000/-

The parties wished I assess the claim under lost years.

Before I do so I wish to first comment on the aspect of the claim under Pain and suffering under the Law Reform Act.

At the time the deceased was shot she was 12 years old. For 4 months she has been in hospital under going serious treatment to try and save her life. The pain this child had under gone would not have been equivalent to Ksh.20,000/- a sum I would normally award for someone who dies soon after the accident. To this extent noting that the deceased was seriously injured with a gun shot wound through her neck, and the injuries to C5,C6,C7 which information the court could not have confirmed before hand and before seeing the doctors medical report evidence I would hereby award a further Ksh.980,000/- for pain and suffering. I would thus enter judgment for a total of Ksh.1,000,000/- under this head.

iii) Lost years

The advocate for the plaintiff prayed. I award a total of Ksh.600,000/- whilst the advocate for the defendant prayed for Ksh.408,000/-.

Both advocates relied on the case law of:-

Sheikh Mustaq Hassan

v

Kamau Mwangi & Another

(1982 – 88) I KAR 946

Where a 17 year old (deceased) minor estate was awarded 17 years as a multiplier and a multiplicand equivalent to that earned by an Architect – as that was that he wished to be.

The advocate both took a multiplicand of Ksh.3,000/;- as a minimum wage.

From the evidence before the court, both parents stated their daughter wished to be an interior designer. That she wished that she would persue that career.

PW1 admitted that his daughter was an average student in school. She had first been transferred to the Aga Khan school and after a couple of years was picking up. There was complaints by the teachers that the said student failed to attend school but this, the father explained as the child being fond of his sister living in Mombasa and would often go there for the holidays. I would in the circumstances note that the deceased was indeed an average student.

At the time of death she was aged 12 years old. The plaintiff prays for a multiplier of 25 years whilst the defendant seeks 17 years.

I would find that 20 years would suffice and to cater for marriage. I would accept the multiplicard at Ksh.3,000/- as envisage by both advocates.

From the aspect of lost years I would award Ksh.720,000/- (3,000/- x 20 x 12).

I now turn to Special Damages.

V) SPECIAL DAMAGES

This must be pleaded and particularized. The plaintiff amended his plaint to provide for such particularizing which this court allowed him to do.

I shall deal with them as follows:-

a) Hospital bills incurred

M.P. Shah hospital Ksh.2,309.159/60

The plaintiff called the hospital administrator who confirmed the payments made Ext 14(a – e) exht 15 (a-e). He nonetheless confirmed that there was a balance of Ksh.578,000/- that was not paid for. The law requires that the sum not paid for, must first be paid before it is claimed to court. Thus, a claim for special damages where only invoices are produced but no receipts issued cannot be claimed. I therefore deduct the sum of Ksh.758.000/- from the claim. I award under this claim ksh.1.551.159.60.

2) Air Ambulance expenses to South Africa by Amref Ksh.1.273,300/- This receipt was not in the plaintiff name Evidence showed it was paid by another who did not attend court.

3) Hospital bills Milpark Hospital South Africa

A sum of US$2,000 was claimed.

The plaintiff said that is all he had and on fearing that he would incur more expenses returned to Kenya with the child the following day.

4) C.T. Scan imaging expenses Ksh.52,400/-,

5) Air fare transportation expenses Ksh.309,422/-

I have no supporting document for this

6) Medical expenses Bombay, hospital and research Centre Ksh.785,302/-

I have no supporting document for this claim

7) Pharmacy and medical purchases IR 781.40. I have no document

8) Special Nursing Care IR 7,550/-

9) Accommodation R 24,473.15

10) Hire off ease IR 150

11) Police abstract 20/-

I had no supporting document. This would normally have been 100/- in Kenya.

From the foregoing I would allow the sum of Ksh.1,772.159/60 as having been established.

(The advocate for the defendant states that there must be the issue of mitigating ones costs. He relied on

the case of Hahn V Singh 1985 KLR 716). I do not think that the plaintiff was extravagant, I believe that he thought of his special damages claim too late in the day that he was not able to prove them.

I dismiss the rest of the Special Damages claim I am required by law to award any other relief I may think should be given. I have done this within the claim or pain and suffering and would not make any further award.

I accordingly enter judgment for the plaintiff on the proved sum.

I wish to further state that the plaintiff should have realized that the child – his daughter belonged to Kenya. She was shot and he took the burden to himself. The Austrian Embassy would have assisted and offered to do so to save his daughter. I believe his state of mind did not allow him to think rationally.

The defendants failed to raise to the occasion that would have set up an appeal for and on behalf of the deceased within the Sarit Centre to raise awareness and funds for the child. They missed a golden opportunity to show their compassion as a company that does not only make money from its customers but a company that cares. This is a clear indication that they did not do so.

In Summary

1) Minor aged 12 years shot buy robbers through necks died four months later

2) Injuries

i) Quadrilateral

ii Fatal

3) Liability 100% against the defendant

3) Quantum:-

I: Law Reform Act

i) Pain and suffering Ksh.1.000,000/-

(20,000/- agreed)

980,000 court)

ii) Loss of expectation of life (agreed) Ksh.80,000/-

iii) Lost Years 3,000 x 20 x 12 = Ksh.720,000/-

II: Fatal accident - abandoned not pleaded Ksh1.800,000/-

III: Special Damages

i) Hospital bills (proved) Ksh1,551.159.60

ii) Air ambulance)

iii) Hospital bill Milpark hospital) Nil

iv) CT scan injuries)

v) Air fare Bombay)

Medical expenses)

vi) Medical and Pharmacy) Nil

expenses

vii) Special Nursing)

viii) Accommodation and meals)

ix) Police abstract)

Total Ksh3.351.159/60

I award the costs of this suit to the plaintiff. I award interest on special damages from the date of filing suit. Interest on General damages from the date of this judgment.

Dated this 2nd day of December 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Lutta & Co. Advocates for the plaintiff

A.F. gross & Co. Advocates for the defendant