



REPUBLIC OF KENYA



**Kaleli v Twenty-Four Security Services (K) Ltd & another (Civil Appeal E025 of 2022) [2023] KEHC 2111 (KLR) (Civ) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2111 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E025 OF 2022**

**AN ONGERI, J**

**MARCH 17, 2023**

**BETWEEN**

**SOLOMON UMBA KALELI ..... APPELLANT**

**AND**

**TWENTY-FOUR SECURITY SERVICES (K) LTD ..... 1<sup>ST</sup> RESPONDENT**

**KNIGHT FRANK KENYA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Aduke Jeal Praxades Atieno (RM) in CMCC no. 6629 of 2019 delivered on 3/12/2021)*

**JUDGMENT**

1. The appellant Solomon Umba Kaleli (hereinafter referred to as the appellant only) filed CMCC no 6629 of 2019 against Twenty Four Secure Security Services (k) Ltd and Knight Frank Kenya Limited (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively) seeking general damages for breach of duty and special damages of ksh 300,000 being the amount of money stolen from his motor vehicle registration no KBH 590R Toyota RAV4 when it was broken into while parked at the basement of T-Mall building located along Langata/Mbagathi round about.
2. The plaintiff said in his pleadings and evidence before the trial court that he had left his car at the said location on July 2019 and he went to his business and when he returned, he found the rear left window had been broken and his money kshs 300,000 was missing from the glove compartment between the two front seats.
3. The plaintiff is also seeking special damages of ksh 3,000 in respect of replacement of the rear window and a further kshs 3,000 being labour for installing the new window plus costs of the suit and interest at commercial rates from the date of filing suit until payment in full.



4. The 1<sup>st</sup> defendant entered appearance and filed a statement of defence dated October 15, 2019 denying the plaintiff's claim.
5. The 2<sup>nd</sup> defendant failed to enter appearance or file a defence and the applicant applied for judgment which judgement was entered on February 7, 2020 against both defendants and on July 29, 2021, the request for judgment was amended to reflect that judgment was entered against the 2<sup>nd</sup> defendant only.
6. The suit against the 1<sup>st</sup> defendant was heard by the trial court and dismissed on December 3, 2021 on the ground that the plaintiff did not prove his case on a balance of probabilities.
7. The appellant has filed this appeal on the following grounds:
  - a. That the learned magistrate erred in law and in fact by failing to appreciate that the interlocutory judgement entered against the 2<sup>nd</sup> defendant/respondent on February 7 by Hon AM Obura has never been set aside and or appealed against. Therefore, the 2<sup>nd</sup> defendant's liability ought to have been determined in the judgment.
  - b. That the learned magistrate erred in law and in fact by failing to take into account the audio visual recording of the basement walls produced by the plaintiff/appellant in a HP flash drive vide a certificate under the provisions of section 106 (4) of the *Evidence Act* dated September 5, 2019 evidencing that there was no signage on the walls of the basement indicating that the vehicles are parked at owner's risk
  - c. That the learned magistrate erred in fact by finding that the premises had a signage visible to all users that vehicles are parked at owner risk yet no such evidence was availed on record.
  - d. That the learned magistrate erred in law and in fact in finding that the 1<sup>st</sup> defendant/respondent's trained security personnel who held themselves out as possessing special skill, mastery and knowledge did not owe a duty of care to the ordinary plaintiff/appellant on the basis that the appellant did not specifically request for his car to be closely monitored.
  - e. That the learned magistrate erred in law and in fact in finding that a reasonable bystander of ordinary prudence in the plaintiff/appellant's position would walk around in a shopping mall with Kshs 300,000 in his hands instead of safely hiding the money in his motor vehicle's glove compartment, parking the vehicle about 30 meters from the vicinity of at least three trained security personnel and locking the doors with a fully installed and well-functioning alarm system.
  - f. That the learned magistrate erred in law and in fact by failing to consider the investigation diary signed by PC Mugo of the directorate of Criminal Investigations Department at Langata police station which confirmed that the plaintiff/appellants motor vehicle was broken into at a basement manned by the 1<sup>st</sup> defendant's security personnel and it had functioning/good alarm system as at the time when it was broken into.
  - g. That the learned magistrate erred in law and in fact by failing to appreciate that the plaintiff/appellant's claim meets the elements of *res ipsa loquitur*.
8. The parties were directed to file written submissions in the appeal. The appellant submitted that a duty of care arises between parties where there is a special relationship and there is no disclaimer. The appellant argued that there was a special relationship between him and the 1<sup>st</sup> respondent. That the special relationship arises where one possessed a special skill undertakes to apply that skill for the assistance of another person who relies such skill.



9. It was his argument that by conduct, the 1<sup>st</sup> respondent's security guards proved the existence of a special relationship. In support of his contention, he argued that the 1<sup>st</sup> respondent admitted in its website that a shopping center is unique and a highly public place that required a dedicated and adapted service provider willing to go above and beyond. The 1<sup>st</sup> respondent's security personnel were also stationed at the entrance of the basement parking of T-Mall and conducted a security check/search in and around the appellants motor vehicle before granting him access to the basement parking area.
10. The appellant submitted further that the respondent breached the duty of care owed to him and that there was no signage at the parking that indicated that cars were parked at owner's risk. He argued that the trial court erred when it found that the premises had such said signage yet no such evidence was availed or placed on record.
11. The appellant in the trial court produces photographs that confirmed that his motor vehicle KBH 590R was lawfully parked at the T-Mal basement parking and was broken onto at the said parking which was at all times under the watch of the 1<sup>st</sup> respondent.
12. It was the appellant's contention that he is entitled to damages as he produced a certified copy of a cheque in respect of the money which he withdrew on July 20, 2019 and carried in his motor vehicle. He also produced a police abstract and investigations diary that indicated his motor vehicle was broken into at the said premise and that Kshs 300,000 was stolen from it and that the respondents did not produce any evidence to counter their allegations.
13. On contributory negligence it was the appellants argument that the investigations diary expressly states that his motor vehicle had a good alarm system and that the 1<sup>st</sup> respondent's security guards should have attended to the appellants vehicle.
14. The 1<sup>st</sup> respondent in its submission maintained that the appellant had failed to establish foreseeability of the loss incurred by failing to inform the guards employed by the 1<sup>st</sup> respondent that his car contained valuables and required additional vigilance. That the appellant further failed to establish a proximate relationship between himself and the guards and this was by failing to engage them.
15. The 1<sup>st</sup> respondent submitted that the relationship could not be implied as the guards were tasked with securing as many as 300 cars and could not accord each individual car specific attention especially if the same is not requested. That it would be unreasonable to impose such a duty of care on the guards who were tasked with manning as many as 300 cars.
16. This being the first appellate court, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
17. The issues for determination in this appeal are as follows:
  - i. Whether the trial court ought to have apportioned liability between the appellant and 2<sup>nd</sup> defendant against whom an interlocutory judgment had been entered.
  - ii. Whether the trial court ought to have taken into account the audio visual recording of the basement produced by the appellant.
  - iii. Whether the 1<sup>st</sup> respondent owed the appellant a special duty of care.
  - iv. Whether the appellant proved his case to the required standard.
  - v. Who pays costs of this appeal?



18. On the issue as to whether the trial court ought to have apportioned liability between the appellant and the 2<sup>nd</sup> defendant against whom an interlocutory judgment had been entered, I find that the appellant obtained an interlocutory judgment on February 7, 2020.
19. At first the judgment was entered against both the 1<sup>st</sup> respondent and the 2<sup>nd</sup> defendant but the order was clarified on July 29, 2021 and the hearing proceeded against the 1<sup>st</sup> respondent.
20. I find that the trial court having entered judgment against the 2<sup>nd</sup> defendant in the sum of ksh 306,000, the appellant should have applied for execution since appellant was seeking a liquidated sum in terms of loss of his cash and special damages.
21. On the issue as to whether the trial court ought to have taken into account the audio visual/recording of the basement produced by the appellant, I find that it was the duty of the appellant to prosecute its case.
22. There is no evidence that the appellant endeavored to comply with section 106B of the *Evidence Act* or sought to produce the audial/visual recordings and he cannot blame the court for failure to rely on that evidence.
23. On the issue as to whether the respondent owed the appellant a special duty of care, I find that the appellant's case is based on the tort of negligence.
24. There are 3 elements which the appellant was supposed to prove as follows:
  - i. Duty of care
  - ii. Breach of duty.
  - iii. Resultant damage
25. Although the 1<sup>st</sup> respondent owed the appellant a duty of care and although the said duty was breached, the trial court was right in its finding that the loss of ksh 300,000 from the appellant's car was not a foreseeable loss or damage.
26. The law requires that the damages for breach of duty should not be too remote. The appellant's claim is in the tort of negligence where the primary rule that determines what damage is recoverable remains that of reasonable foreseeability.
27. Lord Hope of Craighead in *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61] distinguished foreseeability of damages under contract and under tort as follows:

“Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable. It is important to bear in mind that, as Lord Reid pointed out in *The Heron II* [1969] 1 AC 350, 385, the rule that applies in tort is quite different and imposes a much wider liability than that which applies in contract. The defendant in tort will be liable for any type of loss and damage which is reasonably foreseeable as likely to result from the act or omission for which he is held liable. Reasonable foreseeability is the criterion by which the extent of that liability is to be judged, and it may result in his having to pay for something that, although reasonably foreseeable, was very unusual, not likely to occur and much greater in amount than he could have anticipated. In contract it is different and, said Lord Reid, at p 386, there is good reason for the difference:



"In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event."

28. I find that the appellant failed to demonstrate that he brought it to the attention of the guard at the basement that he had valuables in his car and therefore the 1<sup>st</sup> respondent did not owe the appellant only a special duty of care.
29. On the issue as to whether the appellant proved his case against the 1<sup>st</sup> respondent to the required standard in civil cases, I find that the court was right in holding that the 1<sup>st</sup> respondent owed the appellant a general duty of care.
30. Although there was breach of the general duty of care demonstrated by the breaking into the car belonging to the appellant, the trial court found that the loss of cash ksh 300,000 was not foreseeable due to the doctrine of remoteness of damage. I find that the appellant did not prove his case to the required standard.
31. The Trial court also found out that the appellant failed to notify the 1<sup>st</sup> respondent's guard that he had valuables in the car or to seek special attention for his car.
32. I find that the appeal herein lacks in merit and I dismiss the same.
33. However, I direct that each party bears its own costs of the appeal.
34. The appellant is at liberty to execute the ex parte judgment he obtained against the 2<sup>nd</sup> defendant in default of entering appearance and filing of a defence in the Trial court unless the same was set aside.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**A. ONGERI**

**JUDGE**

In the presence of:

..... for the appellant

..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

