



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 262 OF 1991**

**AMJAD PARVEZ MALIK**

**MAHMOUD PARVEZ MALIK**

**KENYA FINANCE CORPORATION LTD ..... PLAINTIFF**

**VERSUS**

**NYALI BEACH HOTEL LTD..... DEFENDANT**

**JUDGMENT**

I must state right from the very beginning that I have not found it easy to write this judgment. There are, in theory, two plaintiffs in the matter, but in reality, there is only one. The first plaintiffs are Amjad Parvez Malik and Mahmoud Parvez Malik both of whom are trading in the name of Leisure Car Hire Tours and Safaris which is a partnership and which, according to the plaint, is “a firm of Car Hires (sic) and Transporters” in Mombasa. The nominal second plaintiff is the Kenya Finance Corporation Ltd, but this second plaintiff took no part at all in the proceedings and the first plaintiff agreed from the outset of the suit to indemnify the 2nd plaintiff in respect of all the consequences arising from this suit. The defendant, Nyali Beach Hotel Ltd, is described in the plaint as a private limited liability company incorporated in Kenya and having its registered office at, *inter alia*, Nyali Beach Hotel, Mombasa. The dispute between the parties arises in this way.

The first Plaintiff was jointly with Diamond Trust of Kenya Ltd, the registered owners of a motor vehicle registration No KAA 850F, Pajero Station Wagon, beige in colour. On the 23rd August, 1990, the 1st plaintiff who was in physical control of the vehicle, hired out the same to the 2nd Plaintiff who in turn handed over the physical possession of the vehicle to one Hannington Habakuk Ochwada Awori (PW1). PW1 is a director of the 2nd Plaintiff and at the time of the hiring out of the vehicle, the 2nd plaintiff was holding a board meeting in Mombasa. PW1 is resident in Nairobi and for his stay in Mombasa, he needed a vehicle and the 2nd plaintiff procured for him the plaintiff’s vehicle for his use. PW1 had to drive the vehicle himself and it is agreed on the evidence before me that the 1st plaintiff handed over the vehicle to him on the 23rd August, 1990 at about 7.15 pm at the Moi International Airport Mombasa. The 2nd Plaintiff had booked in PW1 at the Nyali Beach Hotel which is said in the plaint to be one of the registered offices of the defendant. Nyali Beach Hotel is a hotel within the provisions of the Hotels and Restaurants Act, Cap 494, Laws of Kenya (hereinafter called “cap 494”). Upon being handed the vehicle, PW1 drove it into the compound of the defendant’s hotel. Before one gets into the compound, there is a gate with a barrier or boom which is operated by a watchman to allow vehicles into and out of the hotel compound. This watchman is an employee of the defendant and as far as I can make out from the evidence on record, he is always there. The gate with the barrier into the defendant’s compound is shown

in the photograph which was produced by the plaintiffs as exhibit 3 and that photograph also shows a watchman manning the gate. Not unnaturally, the defendant provides a parking bay for customers and John Kioko Mutua (DW1), the defendant's General Manager of Nyalı Beach Hotel told me that the parking area can accommodate up to 150 cars. There is what was described as "the circular parking area" which appears to be the main parking area, but there are also other parking places close to the main entrance into the reception area of the hotel. These respective parking areas are shown in the photographs produced as exhibits 5 and 6.

When PW1 drove into the hotel compound on the evening of 23rd August, 1990, he parked the vehicle in the circular parking area, and locked it before entering the hotel reception. It is agreed on the evidence that PW1 regular visitor to the hotel and I think and this factor is not insignificant in the circumstances of the case Before being given a room, PW1 signed a "Guest Registration Card" (Exhibit D1). That document contains an exemption clause in favour of the defendant. I shall revert to this aspect of the matter at a later stage. PW1 was given Room No 525. He was to book out of the hotel on the 25th August, 1990, he drove out of the hotel compound for some business and returned to the hotel at around 9.45 pm. This time, he parked the vehicle in the 2nd or 3rd bay on the right-hand side of the hotel entrance. The exact spot where PW1 parked the vehicle in the evening of 24th August, 1990 is marked with an arrow on the photograph produced and marked as exhibit 6.

When PW1 went to check on the vehicle in the morning of 25th August, 1990 at about 8.45 am, the vehicle was not there and it is agreed on the evidence it was stolen. It has never been recovered.

On the 9th April, 1991, the plaintiffs instituted this suit against the defendant, claiming from the defendant Shs1,000,000/= which is said to be the value of the stolen motor vehicle. The basis of the plaintiff's claim against the defendant is to be found in paragraphs 6, 7 and 9 of the plaint. Those paragraphs are in the following terms:-

"6. The said representative of the plaintiff No 2 [ie PW1] lawfully parked the said vehicle registration No KAA 850F in the parking bay provided by the defendant for its customers, hotel residents and travellers in the night of the 24th of August, 1990, securely locking the said vehicle and retired to his room.

7. On the 25th August, 1990 when the said representative of the plaintiff No 2 went to the said parking bay to collect the said vehicle he did not find it where it had been parked. Later it was realised that the said vehicle had disappeared from the said compound of the defendant despite the said compound being guarded by security officers of the defendant.

9. The plaintiffs hold the defendant liable for the loss of the said vehicle which was valued at Kshs 1,000,000/= and which was lost due to the breach of statutory duty owed by the defendant to the plaintiffs under the Occupiers Liability Act and also due to negligence on the part of defendant, its servants and/or its agents."

The particulars of breaches [of statutory duty] and negligence were then listed as:-

"(a) Failing to provide adequate security for the plaintiff's said vehicle after having invited the plaintiff No 2's said representative to park it in the parking bay of the defendant's compound manned by a security officer.

(b) Failing to provide or to keep adequate or any reasonable supervision system of checking over the said vehicle so as to prevent it being broken into and being driven away by any unauthorized person despite security manned entrance to the defendant's compound.

(c) Failing to warn or to give any adequate warning to the said plaintiff No 2's representative at the time of booking accommodation if any such risk was involved.

(d) The plaintiffs will further rely on the doctrine of *Res Ipsa Loquitur* under the Occupiers Liability Act. "

It is on these grounds that the plaintiffs sought. to make the defendants liable.

The defendant totally denied liability to the plaintiff and in paragraph 3 of the defence the defendant even denied that the vehicle was parked within its premises or at all or that PW1 securely locked the vehicle as alleged in the plaint. The defendant also denied that it owed any duty whatsoever to the plaintiff or that the vehicle was stolen as alleged or at all or that the alleged theft was by reason of any negligence on its part or its servants or agents or under any circumstances such as would render the defendant liable in respect thereof. In the alternative and without prejudice to the other averments, the defendant pleaded in paragraph 5 of the defence:-

“..... if, which is denied, the plaintiffs suffered the alleged loss or at all the defendant states that there was displayed prominent notices at the entrance and within the parking area of the defendant’s premises where the said vehicle is alleged to have been parked which was or ought to have been within the knowledge of the first plaintiff’s and in particular the second plaintiff’s representative who had or ought to have had notice thereof to the effect that all vehicles are parked and driven at owners risk and the defendant had specifically exempted itself from all liability in respect of any loss or damage to any vehicle or property of the defendant’s guests within the premises.”

The defendant. went on to plead in paragraph 6 of the defence that. the 2nd plaintiff’s representative (PW1) had accepted the aforesaid condition when he parked the said vehicle at the defendant’s said parking area.

Issues having been thus joined, the parties agreed and submitted for the decision of the court a total of “13 Agreed Issues”. I shall not, in this judgment, deal with each and every agreed issue but I shall try as best I can to answer them all in a general manner.

There cannot be any doubt on the evidence before me that the 2nd plaintiff hired vehicle registration No KAA 850F from the 1st Plaintiff. That conclusion is fully supported by exhibit 2 [Car Hire Contract and Declaration Form] which was produced in evidence without any objection. Again PW1 said he was given the vehicle at Moi International Airport at Mombasa and that he then drove the vehicle and parked it within the defendant’s hotel premises. It was never suggested to either PW1 or PW2 that there was, in fact no hire-contract between the two plaintiffs or that PW1 never drove the vehicle into the defendant’s premises and parked it there. It is a fact that. PW1 was a guest of the defendant at its hotel and PW1 occupied room No 525. This was proved by the defendant itself who produced the “Guest Registration Card- exhibit D1” - showing that PW1 was, in fact, a guest at the hotel between the 23rd and 25th August, 1990. As I have said, PW1 said he was using the vehicle and that it was handed to him by an agent of the 1st plaintiff. The defendant itself called no evidence to show that the vehicle was not parked in its premises or that it was not stolen from there, contrary to the evidence of PW1 that he had the vehicle in the premises and that it was stolen while parked in those premises. I find and hold that the 2nd Plaintiff hired the vehicle from the 1st plaintiff, that the vehicle was handed to PW1 at the airport and that he drove the same and parked it within the premises of the Defendant from where it, was stolen sometime after 9.45 pm when P W1 parked it there on the evening of 24th August, 1990. The denials in the defence by the defendant that the vehicle was parked there or that it was stolen from there and so on have no basis on the evidence and I reject them. There is also the question of whether PW1 securely locked the vehicle after he parked it. It was pleaded in paragraph 6 of the plaint. that PW1 securely locked the vehicle before retiring to bed while the defendant denied in paragraph 3 of its defence that the vehicle was securely locked. PW1 did not give evidence at all on the issue of whether or not he had securely locked the vehicle. Naturally, the defendant did not and could not have given evidence on this question. In the circumstances, I must hold that there is no evidence at all from which I can decide, one way or the other, whether or not the vehicle was securely locked. I do not, however, think that the main issue of whether or not the defendant is liable to the plaintiff falls to be decided on the question of whether or not the vehicle was securely locked. I am not saying that in the final analysis that issue is irrelevant or unimportant for in a proper case, it may amount to a very large contributory negligence where a defendant is held liable. What I am, however, saying is that in the circumstances of this case, I shall not decide the matter on that basis.

Mr Khanna for the defendant also raised the question of the ownership of the vehicle arguing that Diamond Trust of Kenya Ltd should also have been included in the suit as a co-owner with the first plaintiff. The evidence of PW2 on that point was that Diamond Trust of Kenya Ltd merely financed the purchase of the vehicle and that even after the theft of the same, the plaintiff continued to pay to Diamond Trust the installments as they fell due. I do not think that anything really turns on this point and it cannot be a basis for rejecting the plaintiff's claim.

I must now turn to the main issue which must be whether, in the circumstances of the claim, the defendant is liable to the plaintiffs.

The claim of the plaintiffs, as is clear from the plaint is based on two planks, namely that the defendant is liable to them either under the Occupiers Liability Act, or under the common law of negligence. I shall first deal with the claim under the Occupiers Liability Act. On this aspect of the matter, Mr Khanna submitted on behalf of the defendant that the Act does not apply to loss or theft of property on the premises of an occupier, but that it [Act] applies only where an invitee or licensee sustains a personal injury or damage to his property while on the premises. Mr Khanna first of all relied on the heading of the Act itself which is as follows:-

“An Act. of Parliament to amend the law as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there” (Underlining mine).

Mr Master for the plaintiff, on the other hand, did not seem to think that there is any difference between loss of property and damage or injury to the property so that, in his view, the Occupiers Liability Act also covers loss of property from the premises of an occupier.

I do not, for my part., think that the position contended for by Mr Master is correct. As is clear from the heading of the Act, it amends the law respecting the liability of an occupier ..... “for injury or damage resulting to persons or goods ..... from dangers due to the state of property or to things done or omitted to be done there”. “Injury” or “damage” will of course result into a loss but I doubt. whether it. can be said that a loss is synonymous with “injury” or “damage”. According to the *Concise Oxford Dictionary* “injury” is defined as “wrongful action or treatment; harm, damage .....while “damage” is defined as “loss of what is desirable; injury impairing value or usefulness; to injure (usually a thing) so as to diminish value.....”Loss” on the other hand, is defined as “losing or being lost, person, thing or animal lost, detriment, disadvantage resulting from loss .....I think “injury or “damage” as used in the Occupiers Liability Act must mean the physical impairment of person or thing and such impairment must result from “the state of the property or things done or omitted to be done there”, I agree with Mr Khanna that the Act does not cover the loss of property while such property is on the premises. There is no direct authority on the matter but *Tinsley v Dudley* [1951] 1 All ER 252 provides some useful guidance on the issue. There, it was held and I quote from the head-note, that:-

“(i) assuming that the defendant was not an inn-keeper at common law and that he would not be liable for the loss of the motor bicycle unless the inference could be drawn from the circumstances that the plaintiff had actually or constructively delivered the bicycle into his safe keeping, it was irrelevant to consider whether the plaintiff was an invitee or licensee at the material time because the validity of the distinction between an invitee and licensee bore only on matters relating to dangers arising from defects in the physical condition of the invitor's or licensors premises and personal injury resulting therefrom .....

It is difficult to see how “theft” as opposed to “injury or damage” can result from defects in the physical condition of the premises or from things done or omitted to be done there.

Accordingly, I find and hold that the Occupiers Liability Act does not cover loss occasioned by theft of property from an occupiers premises. The Act only covers injury to the person or damage to property while on the premises of an occupier. In the event the plaintiff's claim, in so far as it is based on the Occupiers Liability Act, must fail.

That brings me to the other plank of the plaintiff's claim, namely negligence under the common law. I earlier on set out the particulars of negligence alleged by plaintiffs against the defendant. On this issue the question must be whether, in the circumstances, the defendant owed a duty of care to the plaintiffs in respect of the vehicle. The plaintiffs say the defendant did and they stressed the fact that there was in fact a watchman at the gate who ought not to have allowed unauthorised person or persons to drive away the vehicle and that PW1 was never warned or cautioned that despite the presence of the guards on the Defendant's premises, the vehicles parked thereon were entirely unprotected. Mr Khanna basically agreed with Mr Master that at common law an inn-keeper was strictly liable to a guest whose property was stolen on the premises of the inn-keeper and it was Mr Khanna himself who quoted to me authorities such as that of *Aria v Bridge House Hotel (Staines Limited)* 137 LT Rep 299 where Switt J, explained the basis of the strict liability of inn-keepers as follows:

“-----The law has been framed for hundreds of years that the inn-keeper is liable for the safe custody of goods which come into his hands on his premises which are goods belonging to the guest and the reason for the rule was obvious. In the old days when inns were remote from the towns, and when highway men were rampant, it was not an uncommon thing for highwaymen and inn-keepers to be in league together and it was realised at a very early stage in our existence that the only safe thing for the general public was that the inn-keeper should be responsible for the safety of his guest and his guest's goods. The law still remains. There are exceptions which have been made by the Innkeepers Act, 1863. That Act has no application to such a case as this. The old common law rule applies that an innkeeper insures the safety of his guest's carriage when it is brought to his inn. In my view a vehicle was brought to the inn. It was lost, I do not say through any fault of the innkeeper - I do not decide any question about negligence - and because it was lost from the inn the innkeeper must make good the damage to the guest who brought it there..... “ . See page 300 to 301.

I think this rule of common law would be applicable to Kenya but as Swift J. pointed out, common law can be modified or even abolished by statute and in the present case Mr Khanna contended that Kenya's Hotels and Restaurants Act, Cap 494 has modified the

common law. Section 12(1) of that Act provides:-

“The liability of an innkeeper at common law shall be subject to the modifications hereinafter contained in this section”

and sub-section (3) specifically provides:-

“Without prejudice to any other liability or right of his with respect thereto, the holder of a hotel licence shall not be liable to make good to a guest any loss of or damage to, nor shall he have any lien upon any vehicle, any live animal or its harness or other equipment “

I would have thought that nothing could be clearer than that unless a guest is claiming under some right such as those arising out of contract or bailment, a hotel licensee is not under any obligation to compensate such a guest if the guest's vehicle is either lost or damaged on the premises. There really was no question of any bailment between the plaintiffs and the defendant. Bailment was never pleaded in the plaint. Mr Master said there was a contract between the 2nd plaintiff and the defendant and that the terms of that contract were that the defendant would give accommodation to PW1 and that the defendant would also keep in safety the property of PW1 brought to the premises of the defendant. It is true the 2nd plaintiff agreed with the defendant that PW1 would be accommodated at the defendant's hotel, but the plaintiff did not lead any evidence to show that apart from the terms contained in the Guest Registration Card (Exh D1) which PW1 signed, there were other terms covering the vehicle which PW1 took to the hotel. Clearly there were no such other terms for if there were, the plaintiff would have pleaded them and would have led evidence on them. On the contrary exhibit D1 contains a clause specifically exempting the defendant from liability and PW1 signed that card before being given accommodation. He was a frequent visitor to the hotel and it is very unlikely that he was unaware of the contents of the card he signed. Again the defendant says that it complied with section 12(5) of the Act which relates to the displaying of a

notice in prominent places warning guests about their property. Such a notice was produced as Exh D2 and DW1 swore that there was another warning on a board at the car park to the effect that vehicles were parked there at the risk of their owners. PW1 himself never said those notices were not displayed. All he would say when pressed was that he did not remember seeing them. On this point, I have no doubt that the notices were in fact displayed in the manner narrated by DW1 and that the defendant did not simply make them after the incident in order to defeat the claim of the plaintiffs. Once again I am satisfied that the defendant has statutory protection, as respects the plaintiff's claim and I can find nothing on the evidence before me to warrant my coming to the conclusion that the defendant has lost that statutory protection. The consequence of that holding must be that the claim of the plaintiffs on the head of negligence must also fail.

In case I am wrong on the view I have taken of the matter, I must assess what damages I would have awarded to the plaintiffs if I had found for them. The plaintiff of course claimed Shs 1million as being the value of the stolen vehicle and in his evidence PW2 claimed that sum as the value of the lost vehicle . Mr Khanna submitted that a valuation report or such like evidence ought to have been adduced so as to comply with the legal requirement that special damages must not only be strictly proved - see for example *Miriam Maghema Ali v Jackson M Nyambu t/a Sisera Store*. CA Civil Appeal No 5 of 1990 (unreported). Of course the question must be what amounts to strict proof but in this case PW2 said the vehicle was valued at Shs 1 million. It was a Pajero first registered on 14th December, 1989. It is common knowledge that such vehicles are expensive and in the circumstances, I do not see any reason to disbelieve the evidence of. PW 2 that the vehicle was valued at Shs 1 million. I accept that evidence and had I found for the plaintiffs, I would have awarded to them Shs 1 million as damages representing the value of the stolen vehicle. But as it is, I am satisfied the plaintiffs' claim fails in *toto* and I order the claim dismissed with costs to the defendant, such costs to be paid by the 1st plaintiff. Those shall be the orders of the Court in this matter.

Dated and Delivered at Mombasa this 7<sup>th</sup> day of July, 1993

**R.S.C. OMOLO**

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**JUDGE**