



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 101 OF 2016

BETWEEN

THE JUBILEE INSURANCE COMPANY OF KENYA LTD.....APPELLANT

AND

ZAHIR HABIB JIWAN.....1ST RESPONDENT

SANGEETA JIWAN *alias* SANGEETA

KARWARLAL SABHARWAL.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Kasango, J.)

dated 21st August, 2015

in

H.C.C.C No. 54 of 2013.)

JUDGMENT OF THE COURT

[1] This is a first appeal against the decision of the High Court (Kasango, J.) wherein the respondents were granted special and general damages on account of loss of items deposited in the appellant's safe deposit locker. As such, this Court's primary role is namely, to re-evaluate, re-assess and re-analyze the evidence before the trial court and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In Kenya ***Ports Authority vs. Kuston (Kenya) limited [2009] 2EA 212*** this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

[2] By a memorandum of hiring of a locker (the agreement) dated 21st July, 1994, **Jubilee Insurance**

Company Ltd. (the appellant) leased a safe deposit locker No. 513 class A in its safe deposit vault to **Zahir Habib Jiwan & Sangeeta Jiwan** (the respondents) for an annual consideration. According to the respondents, they used the said locker to store jewelry and other valuables. On 31st December, 2012 the 2nd respondent was informed by the appellant's safe deposit vault manager, one Ms. Almas that several lockers had been broken into and she was requested to verify the status of her locker.

[3] Upon visiting the appellant's premises where the vault was situated she confirmed that locker in question was amongst those that had been burgled. She noticed that some of the jewelry and cash had been stolen from the locker. She then made a list of the missing jewelry and handed in the list to the appellant's representative. After filing a report with the police she approached her jeweler who made a valuation report of the missing jewelry. It is on the basis of this valuation that the respondents sought compensation from the appellant. In doing so, they were convinced that the appellant had breached the terms of the agreement by failing to ensure the safety of the said locker. In addition, the respondents were adamant that the said theft was due to the negligence of the appellant. In that, it failed to provide an adequate security system in or around the vault; allowing unauthorized persons to gain access to the vault.

[4] In her evidence, the 2nd appellant stated that she and her husband had agreed to hire the locker because they were satisfied with the security of the vault which was then located in a fortified strong room at the basement. Apparently, in September, 2012 the appellant moved the deposit lockers to another floor which was less secure. It was while she was verifying the status of the locker in question that the 2nd respondent noted that the appellant was frantically trying to seal a gap in the wall, install CCTV and an alarm on the said floor. Furthermore, she also noticed that the locker had been opened by a key suggesting that the appellant had not kept the spare key safely. The appellant refused and/or neglected to compensate the respondents for the loss and instead terminated the agreement. This provoked the respondents to file a suit in the High Court seeking *inter alia*, special damages being the value of the lost jewelry amounting to Kshs.7,639,000 and general damages.

[5] In its defence, the appellant averred that the loss of the unspecified items was due to criminals who broke into the vault. As a result, the said loss was beyond its control hence it was exempted from any liability. In any event, the appellant was neither aware of the contents of the locker nor was it in control of the locker.

[6] Upon considering the matter on merits, the learned Judge (Kasango, J.) in a judgment dated 21st August, 2015 found in favour of the respondents and granted special damages to the tune of Kshs.7,639,000 and general damages of Kshs.500,000. It is that decision that has provoked the appeal before this Court which is premised on the grounds that the learned Judge erred in law and fact by:-

- a) ***Failing to hold that the respondents had failed to prove the contents of the safe deposit locker.***
- b) ***Finding that the respondents had proved that they had lost items worth Kshs.7,639,000 without any iota of evidence.***
- c) ***Relying on the authority of Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR whose import wasn't applicable in the circumstances of this case.***
- d) ***Awarding the respondents general damages of Kshs.500,000.***

[7] The appeal was disposed of by way of written submissions and oral highlights. Mr. Oluga, learned counsel for the appellant, in elaborating the aforesaid grounds submitted that the learned Judge ignored the established principle that special damages should not only be pleaded but must also be strictly proved. In this regard, counsel cited the case of: - ***Kenya Bus Services & Another vs. Fredrick Mayende [1991] 232*** in which this Court underscored the importance of proving special damages in the following manner:-

"... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard, C.J. in Bonham Carter vs. Hyde Park Hotel Ltd. [1984] 64 T.R.L 177 thus;

‘Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down particulars and, so to speak, throw them at the head of the court saying, ‘This is what I have lost, I ask you to give me these damages.’ they have to prove it.’

[8] Counsel further contended that the respondents did not prove the existence, ownership or the value of the alleged stolen items. The value attached to the stolen items was based on internet print outs printed in 2012 yet the respondents’ claim that some of the items were acquired in 1983. Furthermore, there was no evidence that the respondents had actually deposited USD 1000 dollars or Kshs.20,000 in the said locker. He went on to submit that the valuation report by the jeweler was of no probative value for the simple reason that the valuation was done after the items were stolen.

[9] As far as the appellant was concerned, ***Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR (Jacob case)*** was not applicable as the facts are distinguishable from the facts of the case at hand. This Court in the said case expressed:-

“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 the 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...”

[10] By way of emphasis, counsel argued that in the aforementioned case the deceased was operating an informal setup in the village and the court took cognizance of the fact that he would not have any documents in respect of his work. It was a different case altogether in the instant case because the respondents had allegedly acquired the stolen items through purchase and should have produced receipts to that effect.

[11] Mr. Oluga also argued that the learned Judge had no basis for granting general damages because the respondents’ claim was based on breach of contract. In support of that line of argument, the Court was referred to the decision in the case of: - ***East Africa Navigators Ltd. vs. Mohanlal Mathuradas & Bros. [1968] EA 541.***

[12] Mrs. Wangari, learned counsel for the respondents, in opposing the appeal, submitted that the respondents proved ownership of the stolen items and even went ahead to produce warranties for the stolen watches as well as photographs of themselves wearing the said items. Moreover, the 2nd respondent had given a detailed explanation of how the lost jewelry was acquired and its value. According to her, the valuation report was the proper basis of determining the value of the stolen items because it was prepared by the family jeweler who had polished the same on several occasions. All in all, the learned Judge was correctly guided by the ***Jacob case*** in awarding special damages. Last but not least, Mrs. Wangari contended that the learned Judge in awarding general damages took cognizance and rightly so, that some of the stolen items were of great sentimental value to the respondents.

[13] Based on the foregoing submissions, the record of appeal and the law we have discerned two main issues for determination:-

a. Did the respondents prove their claim for special damages?

b. Were the respondents entitled to general damages?

[14] As noted herein above by the parties, it is settled that special damages must be pleaded and strictly proved. This much was restated by this Court in ***Jivanji vs. Sanyo Electrical Company Limited [2003] 1 EA 98*** thus:-

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs. Nakaye [1972] EA 446, Ouma vs. Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another vs. Chebon civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:

‘It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma vs. Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in Ratcliffe vs. Evans [1892] QB 524, an English leading case of pleading and proof of damage.’

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

However, the degree of certainty and particularity of proof required depends on the circumstances of each case. See ***Hahn vs Singh [1985] KLR 716***.

[15] It was incumbent upon the respondents to establish the items which were stolen from the locker as well as their value. The only evidence led in that regard was that of the respondents. The trial Judge in accepting the respondent’s evidence in her own words stated that:-

“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 state that the plaintiffs lost the following items:

| <i>Item</i> | <i>Dollar</i> | <i>Kshs</i> |
|--|-------------------------|-----------------------|
| <i>(a) Cash</i> | <i>1,000</i> | <i>85,000</i> |
| <i>(b) Cash</i> | | <i>20,000</i> |
| <i>(c) Ladies Oyster date just 26 mm Yellow Gold watch</i> | <i>1,800,000</i> | |
| <i>(d) Ladies Omega steel yellow Gold constellation watch</i> | <i>420,000</i> | |
| <i>(e) Gents Rado Watch</i> | | <i>170,000</i> |
| <i>(f) Gents cartier gold leather strap Limited edition watch</i> | <i>1,700,000</i> | |
| <i>(g) Gents Omega gold leather strap watch</i> | <i>575,000</i> | |
| <i>(h) Guinea Coin 8 g</i> | | <i>52,000</i> |

| | |
|---|-----------------------|
| (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 | 83,500 |
| (r) yellow/white gold chain 5 g 18 carat | 34,500 |
| (s) 4 Gold bracelets 18 carat 48 g | <u>312,000</u> |
| Total | 7,639,000 |

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 were 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 & ANOTHER VS SIMEON OBAYO (2005) e KLR...

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.

...

...Further the plaintiff did produce a list of the items that had been left behind by the thieves whose value was nearly Kshs 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.

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 1st plaintiff own (sic). She was able to state when they got the jewelry and by use of photographs she identify (sic) those jewelries."

[16] We see no reason for interfering with the trial Judge's findings regarding the credibility of the 2nd respondent, bearing in mind that it was the trial Judge who had the advantage of seeing and hearing the witness. Moreover the appellant did not call any evidence to controvert the evidence of the 2nd respondent. It therefore follows that the respondents proved on a balance of probability the items which were stolen and their value. The fact that they did not produce receipts of purchase did not water down the foregoing evidence as they told the court some of the items were purchased several decades back. The best form of evidence would obviously be in the form documentary e.g. receipts but where such evidence was not available, other form of cogent evidence may be adduced to prove ownership and the

value of an item. This Court in the case of:- Antique Auctions Ltd vs. Pan African Auctions Ltd [1993] eKLR faced with similar circumstances held:-

“This point of an acceptable evidence to prove special damages on the evidence of a witness was considered by Lutta, JA. in Kampala City Council v Nakaye S (1972) EA 446 at page 449 letter I and said:

‘Secondly, in regard to the question of the value of the articles, household and personal of the plaintiff, the latter gave evidence as to what she paid for the articles in question and stated that the receipts in respect thereof had been removed or lost as a result of the demolition of the house, and the Judge believed her. I am satisfied that the Judge was right in accepting her evidence in this regard and I see no reason to differ ...’

[17] The foregoing coupled with the fact that the appellant as the lessor owed the respondent a fiduciary duty to ensure the safety of the lockers, we are of the view that the appellant was liable for the said loss which happened while the items were under their safe custody. Accordingly, the trial Judge did not err in awarding the special damages claimed.

[18] On the issue of general damages, as a general rule, there can be no damages for breach of contract. This was the holding of this Court in Habib Zurich Finance (K) limited vs. Muthoga & Another [2002] 1 EA 81 at page 88 wherein it cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharanishi vs. Karsam (1974) EA 4 where that Court stated:-

“This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general...”

See also Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited vs. Janevams Limited [2015] eKLR. In this Case, it is not in dispute that the respondents claim was based on breach of contract hence the learned Judge erred in granting general damages.

[19] The totality of our re- evaluation of the evidence on record is that the Judge cannot be faulted in awarding the sum of Ksh.7,639,000 for special damages. We however find the award of Ksh.500,000 in general damages was a misdirection as the claim was purely based on a contract. In the circumstances, this appeal ought to succeed in part to the extent that general damages of Ksh.500,000 is set aside. Due to the partial success, we make no orders as to costs of this appeal.

Dated and Delivered at Mombasa this 2nd day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR