



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OUKO, & J.MOHAMMED, JJ.A)

CIVIL APPEAL NO. 74 OF 2005

BETWEEN

SOMA PROPERTIES LIMITED.....APPELLANT

AND

H A Y M (*suing as the administrator of the estate of S H (Deceased)*).....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa, J) dated 2nd December, 2004

in

H.C.C.C. No. 1517 of 2002)

JUDGMENT OF OUKO, JA

To **H Y M**, his wife **R H Y (R)** and their children, people with triskaidekaphobia are perhaps right that “13” is indeed an unlucky number. What started on the morning of 13th November, 1999 as a family shopping turned out to be an endless pain and anguish for the next four (4) months, and perhaps to this day.

It is a day that left a permanent scar in this family. On that day at about 10.30a.m, R left their home on 2nd Parklands, Nairobi for an outing to Westlands with her children, including her 12 years old **S H (S)**. They ended up at the Sarit Centre. After visiting a few shops they decided to buy books at the Text Book Centre on the ground floor. As they came out of Text Book Centre, S leading the way, they walked right into cross fire of a gun battle between police officers and robbers who were fleeing the Kenya Commercial Bank located also on the ground floor. In the exchange of gun fire S was hit on the neck. She was rushed to the nearby M.P. Shah Hospital, where she was admitted in the I.C.U. According to **Dr. Patrick Akuku Okoth** who assessed her condition, there was entry wound on the right side of the neck and exist on the left side of the neck. But this notwithstanding she was fully conscious and able to move both upper limb and left lower limb. She was, however unable to move the right lower limb. CT Scan of the cervical spine showed fractures of laminae C5, 6 & 7. C7 vertebral body was fractured.

The next day, 14th November 1999, Dr. Akuku observed that S was beginning to experience bradycardia (a slow heart rate) but maintaining adequate saturation. On the third day, 15th November, 1999, the family

made a decision and she was flown to Johannesburg, South Africa's Milpark Hospital. But because of the high cost of hospitalization, after only one day in that facility, S was flown back home and readmitted at the ICU of M.P. Shah Hospital. Sometimes in December 1999, it would appear her condition improved and she was transferred to the ward. By 16th January, 2000, Dr. Akuku was in a position to assess her condition and report as follows:

“She has continued to remain stable and is now ready for a more aggressive rehabilitation programme. She still requires to have cervical collar, especially when she is sat out of bed as she still has neck pain, especially on flexion and extension of the neck.”

In February 2000, the family decided to take S to India. Unfortunately at 5.00a.m on 20th March, 2000 she passed away.

The father, who I shall now refer to as the respondent blamed ***Soma Properties Limited*** (“the appellant”), which is the registered proprietor of ***L.R. Number 1870/IX/159-*** where Sarit Centre Shopping Complex stands and instituted an action claiming general and special damages attributing negligence on the part of the appellant, that the shooting and resultant death of S, who I shall from this point on refer to as “*the deceased*”, was due to the appellant's breach of common duty of care owed to the deceased by virtue of being in the premises lawfully.

In the amended plaint the respondent alleged that the appellant was negligent and enumerated the following as the particulars:-

- i. Failing to take any or any reasonable care to see that the deceased would be reasonably safe in using Sarit Centre,
- ii. failing to provide personnel and security screening devices at the entrance and within the premises to detect any arms or weapons,
- iii. permitting persons armed with dangerous weapons to enter Sarit Centre,
- iv. exposing the deceased to risk of damage, danger and injury,
- v. Failing to take any or any adequate or effective precautions to ensure that armed robbers or dangerous individuals did not enter Sarit Centre and shoot the deceased,
- vi. failing to provide any or any adequate security for the proper safety of the deceased,
- vii. failing to provide any or any adequate security for the proper safety of the deceased,
- viii. failing to give the deceased any or any adequate or effective warning of the presence of armed robbers or dangerous men,
- ix. permitting the deceased to walk in Sarit Centre when the appellant knew or ought to have known it to be dangerous to do so,
- x. permitting Sarit Centre to be a risk and danger to the deceased, and,
- xi. failing to discharge the common duty of care of the deceased in breach of the law.

In special damages the respondent claimed Kshs.5,010,581.60 comprising mainly costs of hospitalization of the deceased at M.P. Shah Hospital, Milpark Hospital, South Africa, Bombay Hospital and Research Centre, India, air fare, accommodation and subsistence.

The appellant denied liability and maintained in the amended defence that it was not in any way responsible for the attempted robbery and could not guarantee that no robbery or attempted robbery

would ever take place; that it had engaged and deployed personnel from a professional security company with an alarm system throughout the building; that in addition armed police officers were deployed to patrol the premises. The appellant raised the defence of *volenti non fit injuria*.

Before the hearing commenced in the High Court, the following admissions and consents pertinent to this appeal were recorded-

“13.10.2004

A. Admission of facts

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5. At the time of the incident, it is an admitted fact that the proprietors of Sarit Centre had guards from B. M. Security and police officers armed generally patrolling the centre.

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B. “By consent, further that issues 1,3,4,5 and 6 is (sic) hereby admitted, namely that 1st plaintiff is duly appointed administrator. That the deceased was hit with a bullet and sustained serious injuries and died five (5) months later.

That the robbers were solely responsible for the injuries”.

Further consent was recorded as hereunder:-

“14.10.2004

C. Amendments.

By consent, the chamber summons dated and filed on 14.10.04 seeking leave to amend the plaint be and is hereby allowed.

The effect of the amended plaint which is hereby deemed to be filed (sic) is

- i. to remove the 2nd plaintiff from the suit....**
- ii. that the prayer under the Fatal Accident Act be and is hereby abandoned.**

D. By consent judgment be and is hereby entered on quantum and subject to the determination on liability be as follows:

The Law Reform Act

- a. Pain and suffering -Kshs.20,000/-**
- b. Loss of expectation of life- Kshs.80,000/-**

That the issue of lost years be determined by Court.”

When the trial commenced, the respondent and his wife, R gave the details of how the deceased met her death, and their efforts in trying to save her life. What is amazing from their evidence is how the deceased

in her state survived rounds trips to South Africa where she spent only one day and then to India, on a stretcher.

The respondent, in particular contended that the appellant ought to have put in place surveillance cameras to monitor movement of the people within Sarit Centre, deploy guards equipped with metal detectors, a system of screening motor vehicles as they are driven into the Centre. There was evidence of the expenses incurred by the respondent in trying to save the deceased's life.

On behalf of the appellant, **Mansur Kasmani**, the administrator of Sarit Centre recalled that on the date of the incident, thirty five (35) security guards from BM Security, two armed police officers were deployed within Sarit Centre in addition to an alarm system to secure the centre; that the bank itself had its own complimentary security. The witness admitted that they had had at the Sarit Centre previous armed robberies. **Joginder Singh Sokhi**, a retired senior police officer now in private practice, was instructed by the insurers of the appellant, Phoenix of East Africa Assurance Co. Ltd to investigate and present a report respecting this shooting incident. He observed that it was a term of the sub-lease that the tenants would pay to the appellant, the cost of protecting, policing, guarding, installation of security devices, hiring of security firms and the general maintenance of security, law and order throughout the property.

According to the report, thirty five (35) civilian security detail sourced from B.M. Securities were deployed at the entrance and elsewhere within the property but they were merely armed with truncheons which were incapable of combating an attack by an armed gang. In addition, the report found evidence that two of the guards had radio handsets. The report further revealed that the bank itself had an unarmed security guard at the main door; that on the day in question, two armed police constables, **Simon Murangi** and **Francis Kariithi** were on duty at the Sarit Centre; that the appellant had installed an alarm system in the property; that as a matter of fact, it is the activation of the alarm that drew rapid response from P.C. Simon Murangi and PC Francis Kariithi and several police officers from Nairobi Area Police Headquarters; that the robbers, upon realizing that their mission had been frustrated and that they had been cornered engaged the police in a gun fight that saw the deceased and two other victims, a 20 year old, **Farhan Nawaz Nirza** and **James Gitonga** shot in the cross -fire. In the process the robbers left behind the bag containing the money they had stolen from the bank.

The robbers were pursued in a long drawn confrontation that ended with the arrest of four (4) of their members in a coffee plantation in Spring Valley. One **Mak Aror** automatic pistol. 38mm and a 9mm Ceska ammunition and Motorola communication set were recovered as was the getaway motor vehicle. The ten police officers involved in the battle with the gang members discharged from their firearms a total of 80 rounds of ammunition. The four arrested robbers were charged in **Nairobi CM Criminal Case No. 2982 of 1999** with robbery with violence.

Paul Chebet Towett, the supervisor of the guards deployed at the Sarit Centre was on duty on this fateful day when he heard gunshots. He ran to the control room to place a "mayday call" an emergency distress signal through radio communication, to the police, hence the prompt and massive response by the police.

The learned Judge, (**Angawa, J.**) considered the foregoing evidence in her judgment the subject of this appeal and having, properly, in our view dismissed the appellant's defence of *volenti non fit injuria* found that the appellant owed but breached a common duty of care to the deceased and was as a result 100% liable for her death.

The learned Judge found that as a result of the following acts of negligence and omissions, the applicant was in breach of its common duty of care; that it failed to:

- i. warn the public of the presence of armed robbers
- ii. provide metal detecting devices.
- iii. introduce a system of searching motor vehicles

iv. install close circuit cameras

v. conduct a fire drill for staff and members of the public.

With that finding on liability, the learned Judge turned to assess quantum damages. But in a strange move, the learned Judge, without any prompting by any party reviewed the consent recorded on 14th October, 2004 in which an award of Kshs.20,000/- for pain and suffering was agreed. The Judge substituted that award with Kshs.1, 000,000/-. She explained her decision in this regard as follows:

“The pain this child had undergone would not have been equivalent to Kshs.20,000/- a sum I would normally award for someone who died soon after the accident. To this extent, noting that the deceased was seriously injured with a gunshot wound (sic) through her neck, and the injuries to C5, C6, C7 which information the court could not have confirmed before hand and before seeking the doctor’s medical report evidence

(sic)...”

The learned Judge also awarded Kshs.720,000/- on the head of lost years, Kshs.80,000/- on loss of expectation of life (as agreed in the consent) and Kshs.1,551,159.60 as special damages.

Judgment was given to the respondent in the total sum of Kshs.3,351,159.60. This award and the finding on liability aggrieved the appellant who has now brought this appeal on twelve (12) grounds, which **Mr. Michuki**, learned counsel for the appellant condensed into two clusters and argued as follows:-

1. Whether the appellant failed to take reasonable measures to secure the safety of customers, and
2. Whether the learned Judge had power to vary the consent recorded by parties on quantum.

The argument of counsel on these grounds can be summarized thus; that the learned Judge applied a higher standard of proof than that provided for in the Occupiers Liability Act- Cap 34 Laws of Kenya, and, secondly, that the learned Judge erred in interfering with a consent order without an invitation to do so by any of the parties.

For these propositions learned counsel relied on among other decisions, ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another, Civil Appeal No. 345 of 2000***, (on the standard of proof), ***Overseas Tankship (U.K) Ltd v Morts Dock & Engineering Co. Ltd [1961] 1ALL E.R 404*** (on the question of reasonable foreseeability of damage); ***Flora Wasike v Destimo Wamboko [1982-1988] 1 KAR 625*** (on the setting aside of a consent judgment) and ***Mwanyule vs Said t/a Jomvu Total Service Station [2004] 1KLR 47*** (to the effect that the court can only arrive at a decision after considering the pleadings, evidence and matters canvassed before it but should never constitute itself as a witness.)

The respondent for his part filed a notice of cross-appeal in which he complained that:

- i. The learned Judge used threats and intimidation against the respondent’s advocate.
- ii. She conducted the proceedings to the detriment of the parties by not allowing the respondent, his advocate and witnesses time-off for refreshment and lunch and conducting hearing beyond 18.30 hours on 29th November.
- iii. The learned Judge without any reason rejected the respondent’s notice to produce and some of the documentary evidence the respondent sought to rely on.
- iv. She failed to accurately and properly record the proceedings, and
- v. The learned Judge improperly refused to grant the appellant an adjournment to summon witnesses.

On these grounds, **Mr. Lutta**, learned counsel for the respondent conceded that the complaints about intimidation and proceeding beyond official court hours were not matters one would ordinarily find on record. I shall shortly revert to the rest of the grounds in the cross –appeal.

On the main appeal, counsel submitted that the learned Judge properly exercised her discretion in setting aside the consent award and substituting it with one which was reasonable; that the learned Judge properly found that the appellant ought to have provided a secure premises to the deceased and other users of Sarit Centre considering that there had been a similar incident before the one in question.

I agree that apart from the cross-appeal, the question for our determination, is in a narrow compass, namely, the liability of the appellant and only if I find liability then there shall be need to consider the second question relating to quantum.

From the amended plaint, it is clear that the respondent’s claim was based on of the tort of negligence, specifically occupier’s liability, whose origin is traceable to rules developed at common law but which are now enacted into a legislation, the Occupiers’ Liability Act (**the Act**), which came into effect on 1st January, 1963. The Act imposes a duty on the land owners to those who come onto their land to ensure their reasonable safety while on the land. **Section 2** of the Act provides:

2. Rules as to duty of occupier of premises to visitors

1. ***The rules enacted by sections 3 and 4 of this Act shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.***

2.

3. Extent of occupier’s ordinary duty

1. ***An occupier of premises owes the same duty, the common duty of care, to all his 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 agreement or otherwise.***

(2) For the purposes of this Act, “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 reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
(Our emphasis)

This provision, imposes a duty of care on an occupier and proceeds to define the standard of care necessary to fulfil that duty. The words “reasonable” and “reasonably” used in the above extract emphasize the standard of care expected of an occupier. It is a standard measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected. The standard of reasonableness is not one of perfection. Thus an occupier will escape liability if it is established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.

The appeal therefore revolves around the questions whether the appellant owed the respondent a common duty of care and whether the fatal shooting of the deceased by armed gang, a third party, was due to the breach by the appellant of that duty.

As is the case with any tort, the party advancing the claim bears the burden of proof the standard of which is on a balance of probabilities. **Section 3** aforesaid does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A plaintiff who invokes that section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of before liability can attach.

Ordinarily, the common claims under this tort relate to injury suffered by persons as a result of the physical state or condition or some defect of the occupier's premises and arise out of the relationships in which the existence of a duty of care is well established and the nature of the duty is well understood. It is exceptional, and I have not come across local decisions, apart from the one this appeal raises where a common duty of care is imposed on an occupier to protect those lawfully on his premises against the criminal acts of third parties. This question is indeed controversial in the United States of America, Australia and Canada as demonstrated by the decisions of courts in those countries which are not unanimous. For instance in the famous Australian case of ***Modbury Triangle Shopping Centre TYY Ltd vs Tony Paul Anzil & Another [2000] HCA 61***, the first respondent sued the appellant in tort for damages for personal injuries inflicted by three unknown men, one armed with a baseball bat which was used to assault him in the appellant's car park at night while businesses at the premises were open. The lights at the car park were controlled by automatic device. While there was no suggestion that the appellant was vicariously responsible for the acts of the criminals, it was explained that their liability arose from the fact that they were the occupiers of the car park; that at the time of the attack, the businesses were open and the car park lights were off; that the failure to have the lights on was negligent; that the risk of harm of the kind suffered was foreseeable; and that the negligence was a cause of the harm. The trial Judge, **David, J** after rejecting the defendant's argument that since the acts of third parties (criminals) were involved there could be no duty of care, held that there is a duty of care to prevent damage or injury from acts of third parties including criminals, holding that the appellant was liable.

On appeal to the Full Court of Supreme Court of South Australia, the court unanimously agreed with the trial Judge prompting a further appeal to the High Court of Australia (Gleeson, CJ, Gaudron, Hayne & Callinan, JJ). (Kirby dissenting) In his judgment, allowing the appeal, **Gleeson, CJ** held that:

"...the appellant had no control over the behaviour of the men who attacked the first respondent, and no knowledge or forewarning of what they planned to do. In fact, nothing is known about them even now. For all that appears, they might have been desperate to obtain money, or interested only in brutality, the inference that they would have been deterred by lighting in the car park is at least debatable. The men were not enticed to the car park by the appellant. They were strangers to the parties." Callinan, J. justified the court's decision as follows:-

"...that a criminal may be actuated to commit a criminal act against property or person, in situations of varying degrees of security, including a high degree of security is always foreseeable. Furthermore, it will never be possible to eliminate entirely, or indeed "substantially minimise" ... the risk of injury by a criminal act. All that will be possible is some reduction in the risk."

In the Supreme Court of New Jersey in the case of ***Goldberg v Housing Authority of the City of Newark [1962] 1 86 A 2d 291 at 293, Weintraub, CJ.*** explained the unreasonableness of requiring an occupier to take reasonable care for the protection of those lawfully on his land against criminal acts of third parties by drawing this analogy:

"Everyone can foresee the commission of crime virtually everywhere and at any time. If foreseeability itself gave rise to a duty to provide "police" protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable."

Many years later in Denver in January 28, 1979, **John Lanmon** was leaving a restaurant (Taco Bell) when he encountered robbers who shot him on the hand. He filed a suit against the restaurant owners alleging they owed him a duty of care. The trial court found that indeed he was owed a duty of care in view of the foreseeability of a robbery attack. On appeal to the Court of Appeals, the Judges (one dissenting) agreed that there was a duty on the part of the defendant to take ***"reasonable measure to prevent or deter reasonably foreseeable acts, and to alleviate known dangerous conditions"*** specifically,

the risks associated with armed robberies. The Supreme Court of Colorado in a majority decision (three Judges dissenting) upholding the Court of Appeals stated:

“Taking all these factors into consideration, we conclude that the Court of Appeals was correct in holding that Tacco Bell had a legal duty, under the circumstances of this case, to take reasonable measures to protect its customers from the consequences of criminal acts on the part of unknown third persons.”

(See *Tacco Bell, Inc. v Lannon*, 744 p.2d & 43 [1987]).

The two decisions of the Supreme Court of Louisiana in *James Joseph Pinsonneault v Merchants & Farmers Bank & Trust Company* 99-12(La. App.3 Cir 7/12/99 and *Posecai v Wal-Mart Stores Inc* 99-1222 (La. 11/39.99, 752 50 2nd 762 confirmed that:

“While business owners generally have no duty to protect others from criminal acts of third persons, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable.”

Apart from their similarity in the standard of proof with our law, I cite the last three cases to demonstrate that security matters are dynamic and that it is a difficult thing to impose on an individual a duty to ensure citizens are safe, a duty, viewed by many, including the dissenting Judges in the above decisions, as a national duty of the State.

In Kenya, on the basis of the Occupiers’ Liability Act and the common law there is a duty imposed on the occupier to maintain the premises, including all the common areas which are part of the premises in a manner that does not, in all the circumstances, pose any threat to injury or damage to those on the premises, including protection against criminal acts of third parties as long as the risk, injury and damage are foreseeable and the occupier has not restricted, modified or excluded his duty to any visitor or visitors by agreement or otherwise. Even though the duty does not change, the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each situation on the question of foreseeability .To determine when a crime is foreseeable, will depend on a number of factors such as the nature of the business, frequency and similarity of prior incidents of crime on the premises and the neighborhood.

I have no doubt that by the very nature of the appellant’s business, a larger traffic of people, going shopping and to the banks, were expected to visit the property. All the people lawfully on the premises expected, for the period they were there to be safe. The learned Judge properly found that the appellant owed to the respondent a common duty of care.

From the record there can be no question that there was a foreseeable risk in view of the previous robberies and thefts in the premises. There was a sub-lease in which tenants agreed to pay the appellant to enhance security in the premises as well as an indemnity insurance policy, pointing to the foreseeable risk. Bearing this in mind can it be said that in the circumstances, the appellant discharged its “**common duty of care**” to see that the deceased would be reasonably safe in using the premises? I reiterate the provision of **Section 3** aforesaid that “**the common duty of care**” imposes on the occupier a duty to take such care as in “**all the circumstances of the case is reasonable.**” for the safety of his premises. It was in evidence that Sarit Centre is a leading Commercial Centre not only in Nairobi but also in the whole of East Africa, sitting on approximately 2.1506 hectares of land. In it are several shops, offices and restaurants. The premises have seven (7) entrances. In view of these factors, I consider that the deployment of thirty five (35) security guards though unarmed two armed police officers, one unarmed guard at the entrance of the bank and the existence of an alarm system were reasonable measures intended to ensure that visitors were reasonably safe. Indeed as a result of these measures, the robbery was frustrated, the loot of the robbery abandoned, and the robbers pursued and arrested. The shooting and wounding of the deceased was not due to lack of precautionary measures but an unfortunate misfortune and I do not agree that the doctrine of *volenti non injuria* was not applicable. Just like the appellant, the deceased did not have the full knowledge of the extent of the risk that lay ahead before the shooting. To

demand, like the learned trial Judge did that the appellant ought to have done more, in the circumstances and requiring it to have put in place “adequate” measures, was to raise the threshold beyond that set by statute. It is a well-known fact that armed robbers choose targets that have cash or valuable items readily, accessible and have loose security procedure. But even with the best precautions, robberies will still occur. But what is sought even in such situations is that reasonable efforts must be employed to assure visitors of their safety.

The incident occurred in 1999 and the standard of care expected of the appellant was that which was practicable and expected of it in the circumstances of the time. Compared to today, there were then fewer security threats. Today, of course things are very different and the standard of precaution higher. The danger of armed robbery and increased threat of terrorist attack serve to remind every citizen, business, clubs, buses, aircrafts and shopping malls owners to maintain a high level of vigilance

For these reasons, I have come to the conclusion that the learned Judge in failing to apply the correct principles of the law and the statutory standards erred and came to a wrong decision. Accordingly, I would allow the appeal with the result that the judgment and decree in HCCC No. 1517 of 2002 is set aside. The notice of cross-appeal has no merit and I would dismiss it. I would make no orders as to costs on account of the unfortunate circumstances presented in this matter.

Dated and delivered at Nairobi this 19th day of June 2015.

W. OUKO

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JUDGE OF APPEAL

/mgkm

JUDGMENT OF GITHINJI, JA.

I have had the advantage of reading in draft the judgment of **Ouko, JA** with which I entirely agree. With respect, the learned Judge has correctly and with clarity stated the law relating to occupier’s liability for the criminal actions of third parties which is the central issue in this appeal.

The common duty of care owed by an occupier of premises to visitors is defined in subsection 2 of section 3 of the occupiers’ Liability Act thus:

“For the purposes of this Act, “common duty of care” is a duty to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

It is clear from the definition that the common duty imposed by the Act is to take reasonable care in all the circumstances of the case to see that the visitor is reasonably safe. The Act neither imposes on the occupier an absolute common duty of care nor guarantees a visitor absolute safety.

The standard or degree of care depends on the facts of each case. The facts of the case giving rise to this appeal are peculiar.

On the material day **R H Y, (R)** the respondent’s wife had taken her children including the deceased for

an outing at Sarit Centre situated in Westlands Nairobi. This is a leading commercial centre in Nairobi comprising four floors built on five acres. The centre has seven entrances. There are, among other businesses, shops, offices, car parks, basement, restaurants, supermarkets, groceries, bookshops, entertainment, camera shops and banks.

In the early afternoon of the material day, armed robbers raided the Kenya Commercial Bank situated on the first floor, the same floor that R and the deceased were. The robbers escaped from the bank after the robbery where upon the bank manager activated an alarm. Two armed policemen who were on patrol at the centre rushed to the scene and shooting ensued. The deceased, the 12 year old daughter of the respondent was hit by a bullet on the neck which fragmented and ricocheted upon hitting a stone pillar. The injury turned fatal. Two other people were injured. The respondent gave evidence and called two witnesses – R and P O. The latter gave evidence relating to charges for treatment of the deceased at M.P. Shah Hospital.

The respondent was not at Sarit Centre at the time of the shooting. However, he testified that he expected Sarit Centre to secure surveillance camera to monitor the movements of people and the guards to be equipped with metal detectors. R on her part stated that she expected total security.

To be fair to the respondent, his counsel applied for adjournment of the case to summon more witnesses but the application was rejected by the learned Judge.

On the other hand, the appellant called three witnesses – Masur Kasmani – the manager of Sarit Centre. Joginder Singh Sokhi, who investigated the incident on instructions from the insurance company and Paul Chebet Towett – supervisor BM Security.

The essence of the evidence of Masur Kasmani was that Sarit Centre had contracted B.M. Security to provide security guards; that they had 35 security guards during the day and two armed police officers; that the centre had been in use for 25 years; that about 30,000 people go to the centre daily and that it was not possible to check all the shoppers.

Joginder Singh Sokhi, after investigations concluded, *inter alia*, that B.M. Security was one of the top security companies in the country; that there were 54 guards deployed at the complex on a 24 hour basis; that metal detectors or gate mist metal detectors were not installed in shopping centres; that close circuit television cameras would have limited scope; that there had been least or no such incident before; that the centre is relatively safe and secure and that the security provided was reasonable.

Paul Towett testified that after he heard the exchange of fire, he ran to the control room and activated emergency system to call police for reinforcement.

The learned judge considered the issue of appellant's liability very briefly. The following excerpt shows the grounds on which appellant was fixed with liability.

“The bank whose customers were mainly the tenants receives 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 pacing the money on the floor.

The close circuit cameras are the most effective way to enhance security. This would have alerted the security long before to assist contacting each tenant to allow their customers to leave the shop.

A fire drill practice would have also 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 fire so that in an emergency, such as this, members of public would have panicked”.

Ultimately, the trial judge concluded:

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

It is clear that the respondent did not provide concrete evidence to prove on a balance of probabilities that the appellant breached the common duty of care.

In contrast, the appellant called concrete evidence which tended to show that the premises were reasonably safe, that the security provided was reasonable and that there was no practice in the industry to install either metal detectors or CCTV cameras in shopping centres at that time and that it was not practicable to use them without interfering with business.

The evidence of Joginder Singh Sokhi can be characterized as expert evidence in security business. He is a retired Assistant Commissioner of Police and Commandant of Criminal Investigations Department. After retirement he established his own security firm which provides security guards and security equipments. His evidence was reliable.

It is also apparent from the excerpt of the judgment quoted above that the learned judge drifted from the statutory test of common duty of care and applied a different test. The learned judge did not make a finding that the appellant was in breach of common duty of care.

I conclude that in all the circumstances of this case, the respondent did not establish a breach of common duty of care by the appellant. I would allow the appeal on liability and set aside the judgment appealed from and make orders as proposed by **Ouko, JA**. It is not necessary to deal with an appeal against the quantum of damages. As **J. Mohammed, JA** agrees, the decision of the Court is that the appeal is allowed, the judgment and decree of the High Court is set aside. The cross-appeal is similarly dismissed. There shall be no orders as to costs of the appeal or the cross appeal.

Dated and delivered at Nairobi this 19th day of JUNE, 2015.

E.M. GITHINJI

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JUDGE OF APPEAL