



**Nation Media Group Limited v Nyagaya (Civil Appeal E686 of 2021)
[2024] KEHC 11683 (KLR) (Civ) (27 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11683 (KLR)

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

CIVIL

CIVIL APPEAL E686 OF 2021

REA OUGO, J

SEPTEMBER 27, 2024

BETWEEN

NATION MEDIA GROUP LIMITED APPELLANT

AND

LYDIA ODHIAMBO NYAGAYA RESPONDENT

(Being an appeal from part of the judgment of the honourable adjudicator Keyne. G. Odhiambo delivered on the 23rd day of September 2021 in SCC No.261 OF 2021 at Nairobi)

JUDGMENT

1. The respondent was a consumer of the services of the appellant. The respondent's case was that the appellant, his employees and/or his agents caused to be published an advertisement in the Daily Newspaper inviting the general public to send messages to KCSE class of 2020 candidates which would then be published alongside a picture of the candidate.
2. The respondent's case was that he entered into a contract with the appellant and paid a consideration of Kshs 999/- upon seeing the advertisement. Despite following the laid-out procedure, the appellant blatantly failed, ignored and/or refused to publish the message wishing his candidate success therefore amounting to breach as well as nonperformance of the contract which caused frustration and embarrassment to the respondent herein. The respondent sought special damages in the sum of Kshs 2,670/- as well as general damages for breach of contract, loss of legitimate expectation, frustration and embarrassment.
3. The appellant in his defence denied the existence of any contract between the parties and that the advertisement was an invitation to treat. The appellant's position was that there was no laid-out procedure in establishing the contract as alluded to by the respondent. Counsel for the appellant finally



concluded their case by inviting the court to find that there was no breach of contract and if there was any breach, the same was wholly caused or contributed to by the claimant.

4. The trial considered the submission of both parties and found the existence of a valid contract between the parties and that there was a breach of the said contract. The subordinate court proceeded to award special damages of Kshs 1,359/- and nominal damages of Kshs 200,000/- as well as the cost of the suit to the respondent.
5. The appellant dissatisfied with part of the decision of the lower court filed his appeal to this court on the following grounds:
 1. The learned adjudicator erred in law in awarding the sum of Kshs. 200,000 as nominal damages which amount was inordinately high taking into consideration the circumstances of the case as the same was neither pleaded nor prayed for.
 2. The learned adjudicator erred in law in making the aforementioned decision based on complete misapprehension of the law.
 3. The learned adjudicator erred in law in arriving at an award of nominal damages that was not founded on any outlined legal principle.
 4. The learned adjudicator erred in law in awarding nominal damages for breach of contract.
6. This court ordered that the appeal be dispensed by way of written submissions and both parties have complied
7. The appellant in their submissions, pointed out two issues for determination:
 - a. The learned adjudicator erred in law in awarding nominal damages for breach of contract
 - b. The learned adjudicator erred in law in awarding the sum of Kshs. 200000 as nominal damages which amount was inordinately high.
8. On the first issue, the appellant submits that the respondent failed to prove that she incurred because of the breach of contract. The respondent only proved special damages which were pleaded and awarded. The appellant cited the case of *Consolata Anyango Ouma v South Nyanza Sugar co. Limited* [2015] eKLR where the court stated :

The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained had not occurred. The appellant therefore invited the court to find that the award of nominal damages was erroneously given since it had no basis.

9. On the second issue, the appellant submits that an award of nominal damages out to be hinged on some established yardstick or rather principles and should not be awarded in a vacuum. The appellant cited the case of *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR which stated that:

“I do find that the respondent is entitled to nominal damages which should not be so low as to amount to no compensation for the harm caused and not so high as to amount to severe punishment to the appellant who breached the contract.”
10. The appellant therefore contended that the nominal damages awarded by the trial court were too high, amounted to severe punishment to the appellant and is not based on any established principles. The appellant implored the court to find that the sufficient award of nominal damages is and should



have been Kshs. 10,000. Counsel for the appellant invited the court to be guided by the case of *Peter Umbukhu Muyaka v Henry Sitati Mmbasu* [2018] eKLR where the court awarded nominal damages of Kshs 20,000 where the plaintiff had suffered breach of contract worth Kshs 155,000/-.

11. Counsel for the respondent submitted that nominal damages are part of general damages and were therefore rightfully pleaded and that the judge did not err in awarding them. The respondent proceeded to cite the case of *Barclays Bank of Kenya Limited v Hellen Serunya Waswila* [2021] eKLR on what should guide the court when awarding nominal damages reiterating the position of the appellant. The respondent implored the court to be guided by the case of *Gladys Wanjiru Kamau v Edwin Njeru Gichovi* where the plaintiff was awarded Kshs 200,000/- as nominal damages for breach of contract. It was their submission that the award is not high and should therefore not be varied and the appeal should therefore be disallowed.

Analysis And Determination

12. Having carefully considered the submissions of both parties I find only one issue for determination is whether the nominal award of Kshs 200,000 should be varied and/or reduced.
13. The appellant has submitted that the nominal damages awarded by the trial court were in excess and were not based on any established yardstick or principle. They cited the case of *Barclays Bank of Kenya Limited v Hellen Serunya Waswila* [2021] eKLR which stated that nominal damages which are part of general damages should not be awarded to punish the party in breach of the contract. The appellant implored the court to consider varying the amount to Kshs 10,000/-. The respondent on their side contended that the nominal damages awarded by the court were justified and should not be varied for the same reason that the damages were not too high.
14. The issue of whether the claimant is entitled to nominal damages was settled by the trial court and has not been contested, therefore the gist of the appeal is on whether the nominal damages awarded were in excess. The *Halsbury's Laws of England*, Third Edition vol. II, defines nominal damages as follows:

“Where a plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant’s wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal... Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved”.
16. In *Kinakie Co-operative Society v Green Hotel* (1988) KLR 242, the Court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. The damages that the respondent suffered cannot be quantified and must therefore be assessed on some yardstick. Additionally, the court in the case of *Peter Umbukhu Muyaka v Henry Sitati Mmbasu* [2018] eKLR, in awarding nominal damages of Kshs 20,000/- to the respondent stated that he was entitled to nominal damages mainly because there was a breach of contract but he was unable to prove the loss suffered.



17. This case is not different from the above-mentioned one as the appellant has breached their contract with the respondent but the respondent was unable to quantify the loss suffered. The court in the case of *Barclays Bank of Kenya Limited v Hellen Serunya Wasilwa* {2021} eKLR stated:

“I do find that the respondent is entitled to nominal damages which should not be as low as to amount to no compensation for the harm caused and not so high to amount to severe punishment to the appellant who breached the contract. “

19. In this particular case, the court is convinced that the nominal damages awarded at the lower court were not justified and that they appear to amount to a severe punishment to the appellant. I do not find any justifiable grounds why the trial court awarded Kshs 200,000/- as nominal damage for a breach of contract worth Kshs 999.

20. Having considered the circumstances of the case, I find that a sum of Kshs 20,000/- is sufficient damages for the frustration, embarrassment and discomfort suffered by the respondent following the failure to see the success message he had contracted the appellant to publish.

21. The upshot is that the appeal and the award of Kshs 200,000/- awarded by the trial court is set aside and substituted with an award of Kshs. 20,000/-. The parties shall meet their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA TEAMS THIS 27TH DAY OF SEPTEMBER 2024.

R.E. OUGO

JUDGE

In the presence of:

Appellant - Absent

Miss Nyatta - For the Respondent

Wilkister -C/A

