



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 19 OF 2019

BIMAS KENYA LIMITED.....APPELLANT

VERSUS

TERESIA KENDI.....RESPONDENT

(Being an appeal from the judgement of Hon. D.N.Ogoti (CM) in Maua CMCC No. 150 of 2012 delivered on 11th January 2018)

JUDGEMENT

1. The Appellant was sued in a plaint dated 19th July 2012 where the Respondent prayed for the return of her shop goods described in paragraph 3 of the Plaint which the Appellant unlawfully took away from her shop at Kiutine Market. The Respondent also prayed for loss of business at the rate of Ksh.2000 per day, general damages for conversion and cost of the suit and interest.
2. Upon considering the evidence of the Respondent and her two witness as well as the evidence of the Appellant's witness the trial Magistrate concluded that the Respondent had proved her case against the Appellant and entered judgement against the Appellant and in favour of the Respondent for Ksh.69,110 being the equivalent value of the shop goods taken by the Appellant, general damages for conversion of Ksh.350,000 together with cost of the suit and interest were also awarded to the Respondent.
3. The Appellants were aggrieved by the aforesaid determination and they filed a Memorandum of Appeal on 11th February 2019 raising five grounds of appeal enumerated as follows;
 - a. **That the learned Chief Magistrate erred when he failed and/or neglected to evaluate or consider all of the Appellants list of documents adduced as evidence that the Plaintiff's husband, one Joseph Muthamia Mati made an application for a loan to the appellant and the same was advanced to him and he pledged the stock of his business as security for the loan; which business belonged to him and the Respondent.**
 - b. **That the learned Chief Magistrate erred when he totally disregarded the evidence adduced by the Appellant which evidence was never contradicted**
 - c. **That the learned Chief Magistrate erred when he delivered a judgement in favour of the plaintiff whereas she had not proved her liquidated claim as against the Appellant under her prayers (a) and (b) of her claim.**
 - d. **That the learned Chief Magistrate erred when he totally disregarded and failed to address himself to the defence, the documents, statements and/or the evidence adduced by the appellant.**
 - e. **That the learned Chief Magistrate erred when he failed and/or neglected to use his judicial discretion to find that the suit was filed in collusion and in a bid to defraud the Appellant by the respondent and her husband, Joseph Muthamia.**
4. Based on the above grounds the Appellant prayed that this appeal be allowed, the judgement of the trial court be set aside and substituted with a judgement in favour of the Appellant with costs.
5. In the ruling dated 28th November 2019 this court directed the parties to canvass the appeal through written submissions. Both parties have since filed their respective submissions.
6. The Appellant submitted that the Respondent did not present any document to show that she owned the shop and/or managed it. That Kshs. 69,110/= was a liquidated claim to which the Respondent did not produce documentation to show the cost of goods attached. That the

legal definition of conversion does not include legal attachment of pledged goods. The Appellant did not accidentally come across the chattels. Lastly, that the trial court gave a blind eye to the Relationship of the Respondent and Joseph Muthamia.

7. The Appellant relied on the following cited authorities in support of its submissions i.e.

a. Capital Fish Kenya Limited v the Kenya Power & Lightning Company Limited [2016] eKLR, where it was held that merely throwing figures at the trial court without any credible evidence in support of alleged special damages cannot be used to award the same as there was no strict proof of the special damages.

b. Channan Agricultural Contractors Limited & Another v John Oindo Asoyo [2017] eKLR, where the court held that general damages are not at large but are nominal and intended to recognise the fact that the Respondent's right was violated rather than provide compensation for actual loss which is catered for by way of special damages and that a claim for loss of use constitutes special damages and must be pleaded and proved.

c. Kenya Tourist Development Corporation Vs Sundowner Lodge Limited [2018] eKLR, where it was held that an award of general damages must be justified based on comparable awards, there must be a foundation that leads the court to arrive at a certain figure and the discretion should not be exercised whimsically and capriciously. The award made must be comprehended and capable of being defended.

8. The Respondent on her part submitted that she was not obliged to enjoin Joseph Muthamia as a party to the proceedings before the lower court since they did not have any contractual obligation as she not a party to the contract between the Appellant and Joseph Muthamia.

9. That the Appellant failed to utilise provisions of **Order 1 Rule 15 (Notice to 3rd and subsequent parties)**. That documents relied upon i.e. business permits proved that she was the sole business owner. That she had equally satisfied the ingredients of conversion by proving the following facts:

- a. Presenting clear evidence that the Appellant had illegally taken her goods from her shop against her will
- b. The Appellants proceeded to retain the goods and disposed them through sale
- c. Out of the illegal acquisition the Respondent suffered loss and damage that led to closure of her business.

10. She relied on the cited case of **Peter Ndungu Ngae v Ann Waithera Ndungu & 2 Others [2014] eKLR**, where it held that conversion is common law remedy for the unlawful interference with the goods of another.

11. She submitted further that she had presented clear evidence which proved that the Appellant had wrongfully, unlawfully and illegally taken goods from her shop against her will, that the Appellants illegally proceeded to retain the goods and dispose them through sale as if they were its own and that the Respondent suffered grave losses which led to her closing down the business thereby losing her daily means of income.

12. The Respondent urged the court to dismiss the Appeal with costs.

Analysis and Determination

13. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

14. Pw1 TeresiaKendi testified that she was dealing in general shop goods and had a business permit in her name (Pexh1). That on 31/5/2012 at 10:00 a.m. some two people came to her shop and claimed they were from Bimas Kenya Ltd and wanted to collect Muthama's debt. They took shop goods like; rice charcoal, sugar, Maize, black beans, 4 soda crates, millet, soaps and maize flour.

15. That after they left she assessed the goods and found they were worth Kshs. 69,110/=. She produced two **receipts from Kinyua Shop (Pexh 2)**. That she later reported them to the Area chief and later to the police at Kiutine. The police noted the Report and issued her with an O.B (Pexh 3). That at the time her business was doing well and she could earn about Kshs. 2,000/= per day. She denied knowledge of the two persons from Bimas. She also stated that she later on contacted her advocate who wrote a **demand letter to the appellants (Pexh 4)**.

16. In cross-examination she testified that she did not have rental receipts for the premises. That the permit presented in court was from 5th June 2012 to 12/6/2012. The same is dated 5/6/2012. The goods were seized on 31/5/2012. At the time she did not have a permit but had paid for the same. That she reported to the Assistant Chief on 31/5/2012 but to the police 2 months later. That the receipts bear no stamp and are not signed. She acknowledged Muthamia as her boyfriend with whom they were living with.

17. **Pw2 JosephatThageta** the Assistant Chief of Ndoledi Sub Location testified that he is familiar with the Respondent as the one who was operating the shop at Kiutine for more than five years. That on 31/5/2012 she reported to him that the Appellant had raided her shop and carted away shop goods. That he went to the shop and found some empty shelves. That he proceeded to the market and found agents of the Appellants selling the goods cheaply. The Assistant Chief confirmed that the Respondent was married to Joseph Muthama and they were living in a room behind the shop in question. PW2 said that the said Joseph Muthama was a farmer and he confirmed from him that the loan he took from the Appellants was secured by his crops and household goods.

18. **Pw3 Benson Karitha Michubu** testified that he was working at a 'kinyozi' opposite the Respondent's shop. That he worked there for 6 months. That the Respondent was running the shop which also stocked cereals. That on the material day he saw two ladies seizing the Respondent's goods and removing them from the shop. He testified that the two ladies carried away maize, black beans, rice and charcoal and other items. He said he didn't know if the Respondent was married

19. **Dw1 Julia Muthoni Njeru** testified that she works as a credit officer for the Appellant. That the Appellant is a micro finance that gives loans to people. That the Appellant finances groups where the minimum membership is 10 and a maximum of 42. That they conduct one month training and later disburse the loan to each member considering the ability to repay. The loans are secured by the business. The group guarantees the loans. One of them was New Visioners Self held Group to which Joseph Muthama was a member and Secretary. She produced the membership form and list of Membership as **Dexh 1 & 2**.

20. That Joseph Muthamia applied for loans in 2010 for a sum of Kshs. 20,000/= and in 2011 for Kshs. 30,000/= both of which he cleared. That in September 2011 he was advanced Kshs. 40,000/= which he defaulted in April 2012. That she was also familiar to the Respondent who she told the court operated the shop with Joseph Muthamia and who she knew as wife to Joseph Muthamia.

21. She stated that the business stock was pledged as security. That upon Joseph Muthamia defaulting the Appellant repossessed the shop goods i.e 2 ½ bags of charcoal, ndegu, beans, 3 crated of empty sodas but 6 had sodas, 10 kgs of green grams, 4 kg of beans, 4 kg of maize, 5 kgs of wheat flour and 10 kgs of millet. That the appellant sold the seized items fetching Kshs. 9,100/= out of which Kshs 1,000/= was used for the group members, Kshs 300/= was for transport and the balance of Kshs 7,900/= was repaid to the appellant. As the time of default the balance was Kshs. 8700/=. That the monies did not cover the amount owed but Muthamia sent Kshs. 8,200/= via Mpesa the excess being in his saving account.

22. He presented **Muthamia Id as Dexh 3. The loan application forms as Dexh 4 and loan Statement as Dexh 5.**

23. In cross-examination she testified that they never offered the Respondent any loan since she was not a member of a self-help group. DW1 said she did not have any document pledging the business as a security and that Joseph Muthamia did not sign any document for the loan. She also said that they did not issue him with a written notice. They only gave a verbal notice. They also did not have a court order.

24. The issues for determination are;

- a. Whether the trial Magistrate evaluated or considered all the Appellant's list of documents adduced to show that the Respondent's husband made an application of the loan and pledged the stock of his business as security and that the business belonged to the Respondent and her husband
- b. Whether the learned trial Magistrate disregarded the evidence adduced by the Appellant
- c. Whether the Respondent proved her liquidated claim as against the Appellant under prayer A and B
- d. Whether the trial Magistrate addressed himself to the defence, the documents statements and/or the evidence adduced by the Appellant
- e. Whether the trial Magistrate failed and/or neglected to use his judicial discretion to find that the suit was filed in collusion and in a bid to defraud the Appellant by the Respondent and her husband Joseph Muthamia.

25. The evidence showing that Joseph Muthamia Mati received Ksh.40,000 from the Appellants is his statement of account produced by the Appellant showing that on 5th September 2011 Ksh.40,000 was sent to Joseph Muthamia by MPesa ad at 31st May 2012 when the Respondent's shop goods were carted away, the statement showed that Joseph Muthamia had an outstanding loan of Ksh.6700. Unlike in the previous loans that were advanced to Joseph Muthamia this particular advance was not accompanied by a loan application form and an affidavit of the Applicant pledging the items to be offered as security. The Appellant's witness Julia Muthoni Njeru in cross-examination said that she did not have any document pledging any business as security whether for Joseph Muthama or for the Respondent herein. She also confirmed that Joseph Muthama did not sign any document for this loan. She said that they did not give a written notice to seize the goods. They did not take an inventory of the goods they seized and they sold them the same day because that is how they do things.

26. In his judgement the trial Magistrate alluded to the fact that the Appellant did not produce any documents to demonstrate that the goods attached were the ones pledged, this is at pages 4 and 5 of the said judgement. The trial Magistrate therefore found that there was sufficient evidence that the Plaintiff is the one who operated the shop based on the Respondent's evidence and the evidence of PW2 and PW3. Although the Respondent was evasive in answering question as to her relationship with Joseph Muthamia that Relationship which was confirmed by the Assistant Chief PW2 could not have been a reason to find that since the Respondent was married to Joseph Muthamia she was liable for the loan he took from the Appellant in absence of any documentary evidence being that the Appellant is a legal entity.

27. I do find therefore that ground number 1 cannot succeed as the trial Magistrate evaluated the documents and came up to the conclusion and rightly so that there was nothing to show that Joseph Muthamia pledged the stock of Respondent's business as security for the loan he took. There was also nothing to show that the Respondent's business was jointly owned between her and the said Joseph Muthamia.

28. On ground number 2, the Appellants in their submission have not pointed out which of their evidence was disregarded by the trial Magistrate as such the court is not able to make a finding on the same.

29. For ground no 3 the Respondent gave a list of the items that were allegedly carted away by the Appellants and claimed that they were valued at Ksh. 69,110 she produced two receipts for Ksh. 6,510 and Ksh. 11,450 as some of the receipts issued upon purchase of her shop goods from the wholesale. She said that some receipts got lost but she bought some items from farmers and she was therefore not issued with any receipt.

30. The Appellants on the other hand gave the list of what they seized vis-a-vis the Respondent's claim

	Appellant	Respondent
a. Charcoal	2.5 bags	4 bags
b. Green grams	10kgs	100kgs
c. Beans	4kgs	100kgs
d. Maize	4kgs	50kgs
e. Wheat flour	5kgs	20kgs
f. Millet	10kgs	120kgs
g. Crates of sodas	3empty+6 bottles filled	4 crates of soda
h. Sorghum	-	140 kgs
i. Maize flour	-	2 bundles
j. Rice	-	50kgs
k. Sugar	-	50kgs
l. Salt	-	1 satchet
m. Twiga soap	-	1 carton
n. Ariel soap	-	1 carton
o. Plastic chairs	-	5
p. Cash	-	Ksh.800

31. Although it is true that receipts are not always issued on purchase of goods especially for produce and charcoal, the quantity of the items listed by the Respondent is too huge to have carried away by two women that is DW1 and another without an explanation from the Respondent whether there was a vehicle or a hand cart used to carry the items away. PW2 said he followed the Appellant's agent toward the direction of the market and found them selling rice and sugar. He did not estimate the quantity of the items he found being sold. If more items were carted away the Assistant Chief only found two items being sold and did not engage with the Appellant's agents to know where the rest of the items had gone to.

32. PW2 said he saw two ladies go to the Respondent's shop and they carried maize, black beans, rice and charcoal and other items which quantity he did not specify. The view of this court is that the Respondent ought to have proved that the goods were valued at Ksh. 69,110 by producing receipts for the items bought from the wholesale or calling the farmers who sold to her the farm produce to confirm for how much and when the farm produce was bought prior to the date of seizure. As it stands there is no proof of how much each item cost. The court is therefore left to guess what the specific costs of those items were. I am in agreement with the Appellants that although the Respondent pleaded specifically that she was claiming Ksh. 69,110 she had not strictly proved her claim she ought therefore to have been awarded the proven sum of Ksh. 17,960.

33. Ground no.4 is similar to ground no 4 is similar to ground 1 and the same has been addressed exhaustively therein.

34. Whether the trial Magistrate ought to have used his judicial discretion to find that the suit was filed in collusion and in a bid to defraud the Appellant by the Respondent and her husband Joseph Muthama.

35. I have looked at the statement of defence by the Appellants dated 13th August 2012 and there is no claim of fraud made therein and it appears from the judgement of the lower court that the parties did not file any written submissions where the Appellant made any claims of

fraud against the Respondent and her husband. The trial Magistrate could not have addressed his mind to an issue that was not pleaded by the parties.

36. The Appellant submitted generally and did not address the grounds one by one and in particular introduced new issues that were not in the Memorandum of Appeal. In particular, was the issue of general damages which the Appellant claim that ought not to be awarded because the shop in issue was run jointly by a couple on of whom pledged the stock.

37. The court having found that the Appellant's did not prove that the goods in the Respondent's shop were pledged as security for loan advanced by them it cannot be said that the Respondent's goods were liable to pay the loan .The fact that the court found that the Respondent had not proved the income of Ksh.2000 per day did not mean the court could not quantify injuries suffered by her when the Appellants unlawfully took her goods from the shop without any legal basis .

38. This court therefore finds that the appeal succeeds in relation to the special damages pleaded but not fully proved by the Respondent.

39. The judgement of the trial court is therefore set aside and substituted with a judgement for Ksh. 17,960 for prayer A with interest from the date of the filing of the suit and general damages of Ksh.350,000 with interest from the date of judgement together with costs of the suit in the lower court .

40. Each party to bear their own costs of the appeal.

HON.A. ONG'INJO

JUDGE

DATED AND DELIVERED AT NAIROBI VIA EMAIL THIS 28TH DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON. A. ONG'INJO

JUDGE