



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 9 OF 2016**

**JULIUS OBONYO TAGO .....APPELLANT**

**VERSUS**

**BETTY MALOBA.....RESPONDENT**

*(Appeal from the judgment and decree of Ukwala PM's Court Civil Suit No 15 of 2015, by Hon Oanda, dated 30<sup>th</sup> July, 2015)*

**JUDGMENT**

1. The appeal herein arises from the judgment and decree of **Hon. R.M. Oanda Acting Principal Magistrate, in Ukwala Principal Magistrate's Court Civil Suit No. 15 of 2015** delivered on 30<sup>th</sup> July, 2015. The appeal was initially filed at Kisumu High Court vide Kisumu HC Civil Appeal No. 73 of 2015 but upon the establishment of Siaya High Court, the file was transferred to this Court on 13.11.2015. In addition, this appeal had been dismissed by Hon. Justice Makau on 27.7.2017 for want of prosecution but on application by the appellant's counsel, the appeal was reinstated for hearing on merit. That explains the delay in hearing and determination of this appeal.

2. Before the trial Court was a plaint dated 24<sup>th</sup> February 2015 wherein the plaintiff **Betty Maloba** who is the Respondent herein sued the defendant **Julius Obonyo Tago** now appellant, claiming:

- a. That the defendant do deposit his passport in court;*
- b. That the defendant be restrained from travelling outside Kenya or any other country until the case filed against him was heard and determined.*
- c. That the defendant compensates the plaintiff for psychological torture and trauma.*
- d. That the defendant do furnish the court with financial security to pay for costs.*
- e. That the defendant do refund all the monies he owed to the plaintiff, loss or damage to property as shall be ascertained after delivery of the plaintiff's household goods*
- f. Costs of the suit and interest*
- g. Any other relief that the court may deem fit and just to grant.*

3. The defendant filed his defence denying the plaintiff's claim in **toto** and urging the court to dismiss the suit with costs maintaining that he only knew the plaintiff in her professional capacity.

4. After hearing the case for the plaintiff and defendant, the trial magistrate found that the plaintiff had proved her case against the defendant on a balance of probability and awarded her KShs.1,000,000 damages. He also ordered that the plaintiff be allowed to access the defendant's home to collect her belongings. No order was made on costs of the suit.

5. It is the above judgment and decree that gave rise to this appeal. The memorandum of appeal dated 19<sup>th</sup> August 2015 sets out five grounds of appeal namely:

- 1. The learned trial magistrate erred in law and fact in entering judgment for the Respondent while the plaintiff's case was not proved on a balance of probability;*
- 2. The trial magistrate erred in law and fact in entering judgment for the Respondent while the Respondent's case as pleaded did*

*not disclose a cause of action;*

*3. The trial magistrate erred in law and fact in making an award of damages which was excessive and without legal basis;*

*4. The judgment is against the weight of evidence on record;*

*5. The learned trial magistrate erred in law in entertaining a suit and entering judgment on the basis of a suit which was fatally defective, bad in law and incompetent.*

*6. The appellant urged this court to allow the appeal, set aside judgment and decree of the trial court and dismiss the respondent's suit in the lower court with costs.*

6. This being a first appeal, this court is obliged to abide by the provisions of **Section 78 of the Civil Procedure Act** which empowers the court to:

*a) Determine a case finally;*

*b) Remand a case;*

*c) Frame issues and refer them for trial;*

*d) Take additional evidence or require the evidence to be taken; or*

*e) Order a new trial*

7. Thus, **Section 78 of the Civil Procedure Act** espouses that the appellate court shall have the same powers and shall perform as nearly as may be, the same duties as are conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted therein. The above provisions were the subject of interpretation by the **Court of Appeal in Sielle v Associated Motor Boat Company Ltd.[1968] EA 123** where it was held, *inter alia*:

*“This court must consider the evidence, evaluate it itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*

8. Applying the above established legal principles, and revisiting the evidence adduced in the trial court, PW1, the plaintiff **Betty Maloba** testified and stated that she was an advocate of the High Court of Kenya, a business lady, a farmer, a mother and a grandmother. She stated that the defendant who is the appellant **Julius Obonyo Tago**, was her husband, having been introduced to her by his own mother **Margaret Makokha and through Absalom Siamba** when they went to her office seeking for legal services for her to represent the defendant/appellant's nephew in Ukwala Court where he was charged with a **criminal offence of robbery with violence and assault**. She stated that she was communicating with the appellant via email and that the appellant herein who was residing outside the country returned later in December 2012 from Canada and they started staying together as husband and wife at his home in Nyangungu village in Siaya County.

9. According to the plaintiff, as a good wife, she took care of the defendant's material and financial needs, as the defendant had instructed her to chase away his **bad** wife which she did. That she brought in her bed, mattresses, utensils, sofa set, cooker, chairs, jiko, stove, coffee table, beddings, bed sheets and anything a lawyer woman could have. That she also constructed a modern toilet and bathroom, a good kitchen, a shop and that she also dug five dams of 3000 liters each. That she planted over an acre of bananas, arrowroots, sugarcane and maize, and that she planted trees in their thousands. The plaintiff further testified that she plastered his house, main hut and brought in her workers from Busia and did the work besides installing a posho mill which was still *insitu* at the time of hearing the matter in the lower court.

10. According to the plaintiff, she was using the defendant's home as her business base. She produced receipts to prove ownership of some of the items and further testified that on 2.2.2015, the defendant approached her while she was in the bedroom and requested for some documents of some court cases which she gave him but that to her surprise, he removed her blanket and started abusing her saying she was a prostitute who was sleeping around with her workers and alleging that she had stolen his palm tree and went to plant it in Busia. That the defendant then chased her and on her way out, she was lucky to use a different route otherwise the watchman had been tasked to kill her but that she escaped by God's grace and went to her Busia House.

11. The plaintiff testified that following the incident, she was affected, went through psychological trauma, she lost weight and appetite and that her law firm at Busia also suffered. That she sought for psychological counselling at Busia District Hospital and Kakamega Referral Hospital where she saw Dr. Waudu on 16<sup>th</sup> March 2015 where she was diagnosed with Post traumatic psychological disorder. She produced treatment notes and medical report. She also claimed that she had an audio track detailing the defendant's abuses against her, to the effect that that she is old, corrupt and immoral. She urged the court to order the defendant to return all her properties to Busia under the watch of OCS Busia and Ukwala and also sought for damages for psychological trauma, costs of the suit and other relief that the court may grant.

12. In cross-examination by the defendant's Counsel, the Plaintiff stated that she knew the defendant as a client but was now married to him for more than three years. She stated that they were not married under any system of law and that he had not paid any dowry. That they met on email and physically in December 2012 and later he returned to Canada the whole of 2013 and he instructed her to chase away **the bad**

wife then she moved into his home with his permission. She admitted that the defendant was married in Canada hence she came in as a second wife or third or fourth wife. She stated that the defendant shouted at her in the presence of the maid and other onlookers. She stated that she knew that he had stopped loving her and that on 14.10.2014 she was involved in a road accident but that her stresses were occasioned by his actions as she was unable to go to work after the incident.

13. In re-examination, the plaintiff reiterated her evidence in chief saying that if she went to his home, her security was not guaranteed.

14. The plaintiff also called **Absalom Oduor** as PW2 who testified that he was a farmer and knew the parties to the suit as husbands and wife. That he was related to the defendant. That after the marriage between the plaintiff and defendant, the plaintiff brought a lot of improvement in their village as she brought many things at home but that the defendant chased the plaintiff away at 10.00 p.m. and warned PW2 against hosting the plaintiff after chasing her away.

15. In cross-examination, PW2 stated that he was from the family of the defendant and that he was not employed by the plaintiff. He reiterated his testimony in chief and stated that he could not tell if the defendant had paid dowry or not.

16. PW3 **Joseph Ooko Otieno** testified for the plaintiff that he was from Ramunde village and an assistant pastor. That he knew the plaintiff and the defendant as husband and wife and that when the plaintiff went to that village, she improved the defendant's home. PW2 stated that the plaintiff had been seeing him over the abuses that she was undergoing.

17. The plaintiff then closed her case.

18. In his statement of defence, the defendant **Julius Obonyo Tago** testified that he was from Nyangungu village but worked in Alberta in **CANADA**. That he was married to **Ruth Rosales** with whom they were blessed with two children and that he met the plaintiff in 2012 when his mother engaged her as an advocate and when he returned to the country, he found that the plaintiff had moved into his home with all her household items without his permission. He stated that she brought to his home three cows without his permission and that there was nobody to care for them. The defendant testified that the case was filed by the plaintiff who was vindictive against him following the disagreement and that his return air ticket had gotten lost hence his life and family had deteriorated. He prayed for costs of the suit and any other necessary relief.

19. On being cross-examined by the plaintiff's counsel, the defendant stated that he studied law but worked as a counsellor. That the plaintiff initiated their relationship and that there were three ponds in his home each valued at KShs.17,000. He stated that the plaintiff had access to his home.

20. He also admitted that some of the plaintiff's items and a posho mill were in one of his buildings. He denied that he had accessed the room where her items were. He stated that he had instructed her to defend his nephew in a criminal case. He denied loving the plaintiff.

21. DW2 **Judith Akinyi Onyango** testified and stated that the plaintiff had been her advocate who conducted the case of Mathew and Fanuel Obongo. She stated that the defendant was her uncle. Further, that she paid the plaintiff legal fees in respect of the said case but the plaintiff never issued DW2 receipts. She stated that it was Absalom Oduor who took her to the plaintiff's office as an advocate.

22. In cross-examination, DW2 stated that she used to see the plaintiff at the defendant's home and that she paid the legal fees to the plaintiff while at home not at the office. She admitted that the plaintiff had one dam and stated that the defendant had two dams but that the plaintiff removed her fish and sold it.

23. In re-examination, DW2 stated that she knew the plaintiff in 2012 but had never been to her office in Busia.

24. DW3 **Cornel Awuor Aluora** testified that she knew the plaintiff as an advocate who defended their nephew in a case and that the plaintiff went and settled at the defendant's home. That he later on 22.2.2015 called an elder to discuss some issues between the plaintiff and the defendant but that the plaintiff did not attend and that she wanted some things.

25. After considering the plaintiff and defendant's cases, the trial magistrate allowed the plaintiff's claim and awarded her general damages of Kshs one Million Kenya shillings, and that is what gave rise to this appeal.

26. This appeal was canvassed orally by the parties' advocates on 29<sup>th</sup> May 2019 and judgment was slated for 29<sup>th</sup> July 2019 but this court had to travel to attend the High Court Leaders Meeting out of station, which event was followed by a recess hence the rescheduling of the judgment date.

27. Mr. Oduor Advocate representing the appellant urged this court as the first appellate Court to re-evaluate the evidence on record and reach its own independent conclusion. Mr. Oduor submitted that the case was hinged on alleged psychiatric injury caused on the Respondent. That such injury is related to the law of negligence and that there are standards applicable in such cases of psychiatric injury. He submitted that whosoever alleges must prove but that in the instant case, there was no proof of negligence as required by law.

28. On causation, it was submitted that it is fundamental for any person to maintain a claim in negligence. That it must be shown that actions complained of led to the injury. Counsel referred to Exhibit No. 2. Treatment notes at page 4 of the record, where the Doctor discovered that the plaintiff's symptoms started in January 2015. Counsel therefore argued that the action of the appellant which allegedly led to emotional injury distress is one episode which took place on 2.2.2015 yet the problem leading to psychiatric injury started much earlier. He also submitted that the doctor who made the report was not called to testify hence the trial Court relied on Medical documents without the benefit of the Doctor who carried out an assessment on the plaintiff. In counsel's view, it was unclear how the trial Court reached the conclusion that the injuries were caused by actions of the appellant.

29. The appellant's counsel also submitted that the pleadings did not disclose a cause of action. He referred to **Paragraph 4** of the plaint where the plaintiff had claimed that the defendant threatened the plaintiff with a gun and chased her from the matrimonial home and argued that this alone without more could not be blameworthy.

30. According to the appellant's counsel, the witness statement as adopted wholly agrees with the plaint but that what the Respondent stated in Court is different from her pleadings and her witness statement. He relied on **IEBC v Stephen Mutinda Muinde C.A. 219/2013** where the Court of Appeal held that *the evidence which do not support the pleadings filed should be rejected*.

31. It was further submitted that the trial Magistrate summed up the respective parties' evidence but for unexplained reasons arrived at a conclusion that allegations made by the Respondent were true. That the trial magistrate did not state why he rejected the Appellant's rebuttal of the Respondent's evidence and allegations. Counsel relied on the decision in **White v Chief Constable** where it was held that damages for emotional injury are rarely given for such distress and that the Courts limit recoverability of damages in such cases to prevent compensation culture. He submitted that the damages awarded were remote as the injury was not foreseeable to occur assuming the averments by the Respondent were true. He prayed that the appeal be allowed and that the Respondent's claim be dismissed with costs.

32. In opposing the appeal, the respondent represented by **Mr. Ingosi Advocate** submitted that the trial Court was right in entering judgment against the appellant as the respondent proved her case on a balance of probability. Counsel argued that the burden of proof was discharged by the Respondent as required any **Section 107 of the Evidence Act** and that the award of damages was reasonable in the circumstances. It was submitted that the Respondent was an esteemed practicing advocate and that her law firm was affected by the trauma. Counsel urged the Court not to disturb the award.

33. On **grounds 2 and 5 of the appeal**, it was submitted that the Respondent disclosed in her pleadings a reasonable cause of action. Reliance was placed on the case of **Auto garage and Other Vs. Motor (1971) E.A.** It was further submitted that **Grounds 2 and 5** amount to raising a preliminary point of law by the appellant yet the defence filed did not raise any preliminary point of law challenging averments by the plaintiff hence the defendant cannot raise it on appeal as that would be contrary to **Order 2 Rule 9 of the Civil Procedure Rules**. Counsel argued that the appellant's evidence did not in any way rebut evidence adduced by the Respondent. He urged the court to find that the evidence adduced by the plaintiff/Respondent before the trial court supported the pleadings and dismiss the appeal.

34. In a brief rejoinder, Mr. Oduor counsel for the appellant submitted that on disclosure of cause of action, while pleadings should not be argumentative, **Order 2** requires precision in the elements of a pleadings. He maintained that the pleadings by the plaintiff did not a cause of action and that the judgment shows that the appellant challenged the evidence of the Respondent but no reasons were given for the decision.

## **DETERMINATION**

35. I have carefully considered the appeal herein and the oral submissions by both the appellant and the respondent. I have also reassessed the evidence adduced in the trial court by both the plaintiff Respondent and the defendant/Appellant herein.

36. From the trial court record, it is undisputed that the plaintiff developed an intimate bond with the defendant while he was out of the country in Canada through his mother and one Absalom when they instructed her as an advocate to represent their relatives in a criminal case and upon his return, the two cohabited as husband and wife. The plaintiff then relocated from Busia to his home in Siaya where she carried out lots of development. She took there with her, her personal belongings. When their relationship soured, the defendant ordered the plaintiff to vacate his home which she did and in her plaint she claims that she left all her belongings including KShs100,000 which her office had received on 22.2.2015. The above situation is alleged to have caused the plaintiff psychological trauma and torture for which she claimed for damages. She also sought for refund of all monies owed to her by the defendant among other prayers set out in the plaint and in her oral testimony in the trial court.

37. In her oral testimony, the plaintiff narrated how the appellant abused her and sent her away from his home at night and how he had organized for her to be killed by the watchman but luckily, she escaped by not using the road where the watchman was. She listed the items which she had carried to the appellant's home and the developments she had brought to his home.

38. She claimed that she suffered psychological trauma after the defendant abused her and chased her from his home.

39. From the above trial record, the *issue for determination is whether the respondent proved her case on a balance of probability to warrant an award of damages for psychological trauma*.

40. I must however observe that the plaintiff's prayers No. **a, d** and **c**, are non-starters as they disclosed no cause of action. There was no basis upon which the defendant would be restrained from travelling out of Kenya until the suit was heard and determined. Freedom of movement is a constitutionally guaranteed freedom under the **Bill of Rights** and therefore any limitation to that freedom must meet the **Article 24** test which from the evidence before the trial court, there was no such justification for limiting that freedom of movement for the appellant. Existence of a court case cannot *per se* be a reason why the court would restrain the appellant from travelling out of the country, noting that he lived and worked in Canada where he eked a living for his family of a wife and two children. The plaintiff respondent admitted in cross-examination that she knew that the appellant was married and she also stated that she was not married to him under any known system of law. That being the case, this court wonders how she could obtain orders restraining the appellant from travelling or leaving the country yet what she claimed to be her belongings were at the appellant's home and there was no evidence that she had tried to recover the same using other legal means to no avail.

41. Similarly *prayer d* of plaint that the plaintiff (*should have been defendant*) do furnish the court with financial security to pay costs does not make any legal sense or at all as that would have been a prayer in an interlocutory application for furnishing of security for costs, prior to the setting down of the main suit for trial.

42. On **prayer e** for refund of all monies that the appellant allegedly owed the respondent/plaintiff and loss or damages to property as shall be ascertained after delivery of the plaintiff's household goods, I find this prayer devoid of substance as it presupposes special damages which were neither specifically pleaded nor strictly proved as required by law.

43. On the **prayer c** that the defendant compensates the plaintiff for psychological torture and trauma as per **paragraph 6** of the plaint, for which the trial court awarded the plaintiff damages amounting to KShs1,000,000,000 (One Million Kenya Shillings) on account that **she did not deserve to be treated the way she was treated by the defendant**, this Court considers that the claim is in the nature of mental harm. To succeed in such a claim, the claimant must show that the defendant appellant herein owed her a duty of care, that that duty was breached, and that the breach caused the plaintiff psychiatric, mental or psychological injury. The success of the respondent's case would depend on the integrity of the psychiatric assessment, the quality of the associated medical notes and whether they support the account provided as part of her claim in her pleadings.

44. In this case, the respondent pleaded that on the material date, the defendant threatened her with a gun and chased her from her matrimonial home and that she left without taking all her personal items plus KShs.100,000 which her office had received. In her evidence in court she never adduced any evidence of being chased with a gun or the defendant taking her KShs.100,000. She also never pleaded that the defendant had prevented her from taking her belongings from his home.

45. The plaintiff respondent never particularized the acts of psychological torture complained of and at **paragraphs 7, 8 and 9** of the plaint, she pleaded prospective or intended suits to be lodged in various courts and jurisdictions to recover monies owed to her by the appellant, defamation and divorce and distribution of matrimonial property even after conceding that she was not married to the appellant under any known system of law.

46. Whereas the plaintiff/respondent claimed that as a result of being thrown out of the defendant's home and the defendant hurling abuses at her, on 2.2.2015 she suffered psychological torture, the medical records she produced in court without calling their makers show that she was well until late January when following domestic torture she developed psychosomatic disorder. There is no evidence that the respondent reported to the police the alleged torture by the appellant or that her illness was directly linked to the alleged torture by the appellant. This court returns that there was no medical or other evidence attempting to establish the alleged resultant psychiatric, mental or psychological injury. Thus, the prayer in that regard must fail.

47. Whereas it is possible that the respondent may have been disappointed by the appellant's failure to make her his wife after cohabiting with her for about two years, that failure to love her in itself cannot give rise to a cause of action as the appellant owed her no duty of care. There is no claim for breach of promise to marry.

48. The respondent being an advocate of the High Court knew or ought to have known the risks of moving into the homestead of a married man and chasing out of that home the man's wife simply because she was a bad wife. If anything, it should be the man's wife who should be suffering mental anguish for losing her husband to the respondent husband-snatcher and not the respondent claiming that she suffered PSD because she was tortured by the appellant who abused her, calling her names of prostitute and thief and chasing her from her new found home.

49. The plaintiff/respondent in my view, miserably failed to demonstrate by her pleadings and evidence in court that the appellant owed her a duty of care or that that duty was breached.

50. Seriously and honestly, this court does not comprehend the basis upon which judgment was entered in favour of the respondent against the appellant by the lower court. The plaintiff/respondent's suit, in my view failed the test of balance of probabilities the day it was filed in court. Courts of law do not award damages based on sympathy for lost love or for unpleaded and unproved facts. Many people fall into and out of love and move on. That must be appreciated, and not to hold people hostage and punish them for not establishing permanent relationships. Accordingly, this appeal succeeds on all fours.

51. For the above reasons, I allow the appeal herein and set aside the judgment and decree of the lower court awarding the respondent KShs.1,000,000,000 damages for psychological trauma and substitute that judgment with an order dismissing the plaintiff/ respondent's suit in the lower court.

52. As the trial court never awarded any costs, I would exercise discretion and order that each party shall bear their own costs of the suit in the lower court and costs of this appeal.

Dated, Signed and Delivered at Siaya this 29<sup>th</sup> day of October, 2019.

**R.E. ABURILI**

**JUDGE**