



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL APPEAL NO. 1 OF 2017

KAMENE MWENGA.....APPELLANT

VERSUS

MUTHAKYE MUSYIMI.....RESPONDENT

J U D G M E N T

1. The Respondent herein, **Muthakye Musyimi**, instituted a suit by way of Plaintiff against the Appellant, **Kamene Mwenga** seeking a refund of **Kshs. 17,300/=** with costs thereon. The issue arose out of a cell phone battery that the Respondent had taken for charging at one **Wambua's** shop that was allegedly stolen by the Appellant's daughter. The cell phone was returned and an apology tendered. However, the matter was reported to the village elders, Assistant Chief and the Chief. The Respondent was dissatisfied with the resolution that the Administrators came up with hence instituted the Civil Suit seeking expenses that were incurred.

2. In a statement of defence the Appellant denied the allegations set out in the Plaintiff and averred that she was not a party to the issue concerning the battery and that each party incurred expenses in the course of the hearings before respective Administrators. She prayed for dismissal of the suit with costs; payment of a she-goat as ordered by the elders and refund of expenses of **Kshs. 13,200/=** per the Judgment of the elders.

3. The case proceeded in the absence of the Appellant. The learned trial Magistrate appreciated that transactions were not documented but reached a finding that the claim was not inordinate, Judgment was entered in favour of the Respondent in the sum of **Kshs. 17,300/=** with costs.

4. Aggrieved, the Appellant, per the Amended Memorandum of Appeal, appealed on grounds that: The learned Magistrate erred in law and fact when he allowed the Respondent's claim even after finding that the claim had not been proved; that he misdirected himself in fact when he failed to consider the whole evidence before him which made him arrive at a wrong conclusion; that he deviated from the procedure provided by the **Civil Procedure Act** and **Rules** made thereunder, which error made him reach an erroneous and/or defective decision; and that he failed to dismiss the Respondent's claim an error that led to him making a decision which was not justifiable in the case.

5. At the hearing the Respondent stated that the Appellant sued her before the Sub-Chief **Kiseuni Sub-Location**. The Sub-Chief decided that they forgive one another. Aggrieved, the Respondent appealed to the Chief who upheld the decision of the Sub-Chief. They went before the Chief thrice. On **1st May, 2016** the Respondent caused her to go before the Chief and she demanded **Kshs. 13,000/=** without proof. She (Respondent) was ordered to pay the Appellant a goat but she declined. They were further summoned to appear before the Chief but she did not avail herself. She spent expenses to an extent of **Kshs. 17,300/=**.

6. The Appeal was canvassed by way of written submissions. The Appellant submitted that the award of one goat and **Kshs. 13,000/=** was in favour of the Appellant. That under the provisions of **Section 61** of the **Evidence Act, Cap 80(k)** the fact that the Appellant was awarded a goat by elders and it was admitted by the Respondent needed no proof. That the Appellant in an unconventional manner, in her defence counter-claimed for the goat. That following the provisions of **Section 61** of the **Evidence Act** as read with **Order 13 Rules (1) and (2)** of the **Civil Procedure Rules** the trial Magistrate ought to have entered Judgment in favour of the Defendant for one goat as prayed in prayer (b) of the defence.

7. That had the trial Magistrate directed himself properly on pleadings and evidence he would have found that the Respondent had no actionable claim against the Appellant. That he could have found that the proceedings before elders ended with an award of a she-goat in favour of the Appellant. The claim was for special damages that should have been specifically proved.

8. That the learned Magistrate concluded that the Respondent failed to prove the case and proceeded to allow the claim.

9. The Respondent on the other hand submitted that the Appellant was not denied the opportunity to be heard as the Appellant was present

when the date for hearing was taken. That the Appellant failed to file an application to set aside the Judgment as provided by **Order 10 Rule 11** of the **Civil Procedure Rules**.

10. Regarding the claim it was stated that the Respondent through her pleadings, oral testimony and that of her witnesses provided the Court with sufficient evidence.

11. This being the first Appellate Court it is duty bound to re-evaluate the evidence, assess it and come to its own conclusion bearing in mind the fact that It did not have the opportunity of seeing or hearing witnesses who testified at trial (**See Selle vs. Associated Motor Boat Company Ltd (1968) EA 123**).

12. The matter in the Lower Court proceeded in the absence of the Appellant. A perusal of the Lower Court record shows that both parties appeared before Court on the **22nd December, 2016** when a hearing date was fixed. The date having been fixed by consent before the trial Magistrate the Plaintiff was not required to serve the Defendant with the hearing notice. On the date scheduled for hearing the case proceeded ex parte following the absence of the Appellant herein. **Order 12 Rule (2)** of the **Civil Procedure Rules** provides thus:

“If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is satisfied —

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.”

The Appellant had notice of hearing of the case and the Court was not given any reason why the Appellant failed to turn up. Therefore proceeding ex parte was not a misdirection on the part of the Court.

13. The matter having proceeded ex parte, if the Appellant had a plausible reason for not turning up on the scheduled day, she had the right of applying to set aside the Judgment and any consequential orders that could have resulted following the order of the Court. However, she did not exercise that right.

14. The claim as set out in the Plaint was for **Kshs. 17,300/=**. The Respondent’s demand was for costs incurred but per the prayer sought amounts to Special Damages. In the case of **National Social Security Fund Board of Trustees vs. Sifa International Limited (2016) eKLR** it was stated that:

“It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”

15. The learned Magistrate did appreciate that the claim was not particularized and pleaded. That the attempt made by the Respondent to particularize the alleged costs was not concise or neat. Despite the finding, he allowed the claim in the Respondent’s favour.

16. The burden of proof lay with the Respondent. She was obligated to tender evidence against the Appellant to prove the case on a balance of probabilities. This was not done.

17. Having re-considered evidence adduced at the Lower Court, I find the claim having not been proved. Therefore, I do set aside the Judgment entered. The case stands dismissed. Consequently, I allow the Appeal with costs to the appellant both in the Lower Court and Appellate Court.

18. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of July, 2018.

L. N. MUTENDE

JUDGE