



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 1246 OF 2004

ABUBAKAR AHMED ABDULRAHMAN..... PLAINTIFF

VERSUS

MOZAHIM SALIM MOHAMED BAJABER..... 1ST DEFENDANT

THE ATTORNEY GENERAL..... 2ND DEFENDANT

J U D G M E N T

1. Abubakar Ahmed Abdulrahman, the Plaintiff herein, filed an action against Muzahim Salim Mohamed Bajaber and The Hon. Attorney General, the 1st and 2nd Defendants respectively, vide the plaint dated 17th November, 2004 in which he sought for judgment as follows: -

i) Ksh.24,350,000/- being special damages.

ii) USD 2,500 being special damages

iii) General damages for harassment, false imprisonment, mental distress and anguish, conversation and breach of trust and care.

iv) Interest on (i), (ii) and (iii) as the court will order.

v) Costs of this suit.

The Defendants each filed a defence to deny the Plaintiff's claim.

2. Before delving deeper into the merits or otherwise of this dispute, let me first determine the objection as to the admissibility of some of the documentary evidence the Plaintiff proposed to produce. The Plaintiff sought for leave to produce as exhibits in evidence are documents listed as Nos. 1 – 10, 15 – 18 and 26 – 30 in the Plaintiff's list of documents as exhibits in support of his case.

3. Mr. Odhiambo, learned advocate for the 1st Defendant raised an objection to the Plaintiff's request arguing that if the request is allowed it will go contrary to Section 35 of the Evidence Act. He argued that the makers of the aforesaid documents should have been summoned to appear, testify and produce those documents.

4. The learned advocate complained that the 1st Defendant would lose the opportunity to test the veracity of such documentary evidence.

5. It was further pointed out that the Plaintiff was unable to explain the discrepancies in those documents when he was cross-examined. He also argued that the Plaintiff has failed to lay a foundation to enable this court exercise its discretion in favour of the Plaintiff under the proviso to Section 35(1) of the Evidence Act.

6. Mr. Munene, learned litigation counsel appearing for the Hon. Attorney General, the 2nd Defendant herein, adopted the submissions of Mr. Odhiambo. He argued that most of the documents the Plaintiff seeks to produce are unsigned nor dated.

7. I have carefully considered the rival arguments and carefully perused documents No. 1 – 4 in the Plaintiff's list of documents. They are basically invoices in their original form in respect of four motor vehicles purchased. They are, therefore, primary documents whose contents the Plaintiff has stated are within his knowledge. Pursuant to the provisions of Section 35(1) of the Evidence Act, the foresaid documents are admissible.

8. The other relevant documents the Plaintiff sought to produce in evidence as exhibits are documents Nos. 5 to 10 in the Plaintiff's list of documents. After a careful perusal of the aforesaid document, it is clear that they are deeds of assignment and acknowledgment of ownership executed by the owners of the motor vehicles imported by the Plaintiff. Those who executed the aforementioned documents are namely; Fatuma Haj Khamis Abdul, Omar Farouk Mohammed, Khatijbai Omar Abdurahman, Mohammed Abdul Kadir Hasham, Jaffar Mohammed Tufa and Laila Abdulhakim Dhabaan. It is apparent that the aforesaid documents are primary documents, therefore the Plaintiff is allowed to produce them as exhibits under Section 35(1) of the Evidence Act.

9. The Plaintiff further sought for leave to produce the letter dated 9th September, 2002 as an exhibit in evidence. It is a letter the Plaintiff wrote to the Director, Criminal Investigations. The Plaintiff had served the 2nd Defendant two notices to produce. Pursuant to the provisions of Section 68 of the Evidence Act, the letter is admissible as an exhibit as secondary evidence.

10. The document listed as Nos. 26 are agreements executed the Plaintiff and between Abbas Hatim Ali. It is a document in its primary form, therefore, the Plaintiff is entitled to have it produced as an exhibit under Section 35(1) of the Evidence Act.

11. The Plaintiff further sought to have the statements recorded before a Notary Public in Dubai by Khadijabhai Abdurahman Umar, Farouk Mohammed Hasham, Mohammed Abdul Kadir Hashim. They are documents numbers 29 – 34. These are primary documents duly executed in counter- parts. What the Plaintiff seeks to do is to produce the original counter parts. I am convinced he is entitled to do so. In any case, most of the statements were recorded by the Plaintiff. I am satisfied that if those who executed the documents are summoned to appear to produce those statements, considerable delay may arise since the makers of those statements are based in Dubai. In the circumstances, I allow the Plaintiff to have the documents produced as exhibits in evidence.

12. In the end I find no merit in the objections raised by the Defendants. Consequently, I admit documents Nos. 1 – 10, 15 – 18 and 26 – 30 as P.Exhibit Nos. 1 – 10, 15-18 and 26-34.

13. Having determined the preliminary issue touching on the admissibility of evidence, I now turn my attention to the substance of the judgment. Before taking into account the evidence in this dispute, it is appropriate at this state to set out in brief the background of this suit. The Plaintiff's claim arose from a transaction in which the Plaintiff was a car dealer engaged in the business of importing and selling motor vehicles from Dubai in the United Arab Emirates into Kenya. The Plaintiff acknowledged that he knew very well that the 1st Defendant having been introduced to him by his brother and former business partner Swaleh Salim Mohamed in 1999.

14. The Plaintiff pointed out that at all times, the 1st Defendant was involved in the business of clearing and forwarding as an agent based in Mombasa.

15. It is also stated by the Plaintiff that in the year 2002, the Plaintiff imported six motor vehicles from Dubai in the United Arab Emirates. Those motor vehicles were three Toyota Prados, Two Toyota Land Cruisers and one Toyota Aristo Saloon.

16. When the aforementioned motor vehicles arrived in Mombasa the Plaintiff is alleged to have instructed the 1st Defendant to clear the vehicles for him at Kenya Ports Authority by giving him authority to collect the clearing documents from Alheelam Clearing and Forwarding Trading Company, Nairobi.

17. It is alleged that the motor vehicles were transferred from Mombasa to Nairobi to be cleared at the Inland Clearing Depot.

18. The Plaintiff also alleged that the 1st Defendant went ahead and duly cleared the motor vehicles and was given the logbooks and other relevant documents in the name of the original consignees.

19. He further claimed that with the intention to defraud the Plaintiff, the 1st Defendant registered the motor vehicles in his name and later sold them to third parties.

20. When the Plaintiff came to learn of what had happened, he reported the incident to the police to assist him recover the motor vehicles. He was, however, not successful. He was, therefore, prompted to file this suit and sought for judgment as shown hereinabove.

21. The Plaintiff's case is supported by the evidence of the Plaintiff who personally testified. The Plaintiff (PW 1) told this court that he was a car dealer before retiring and that he was involved in the business of importing and selling motor vehicles imported from Dubai into Kenya.

22. The Plaintiff also stated that he was introduced to the 1st Defendant by his brother and former business partner Mr. Swaleh Salim Mohammed in 1999.

23. PW 1 further averred that he secured six people namely Jaffer Mohammed Tufa, Mohammed Abdul Kadir Hashim, Umar Farouk Mohammed Hasham, Fatuma Haj Khamis Abdu, Laila Abdulhakim Dhabaan and Khatijbai Omar Abdurahman for importation of their vehicles into Kenya. He stated that the aforementioned persons transferred those motor vehicles to him by deed of assignment and acknowledgment of ownership together with transfer of motor vehicles in his favour.

24. The Plaintiff gave the particulars of the aforesaid vehicles as follows:-

i) Toyota Prado

Chassis No. KZJ95 038936

Engine No. 1KZ 0705564

Model 1999

Colour- Silver

ii) Toyota Aristo Saloon

Chassis No. JZS 161-00131222

Engine No. 27J-0639969

Model 1999

Colour – Black

iii) Toyota Land Cruiser

Chassis No. HDJ101 – 0011356

Engine No. 1HD 0169983

Model 1999

Colour – White

iv) Toyota Prado

Chassis No. KZJ95 0125426

Engine No. 1KZ – 0669545

Model – 1999

Colour – white, Silver

v) Toyota Land Cruiser

Chassis No. HDJ101-0009145

Engine No. 1HD – 0163142

Model – 1999

Colour – White

vi) Toyota Prado

Chassis No. KZJ95 – 0090875

Engine No. 1KZ – 0580730

Colour –Blue

25. PW 1 further averred that the 1st Defendant acted contrary to his instructions. He said that he cleared the aforementioned motor vehicles and with the intention of defrauding him, the 1st Defendant proceeded to register those motor vehicles in his name.

26. PW 1 also said that upon realizing what the 1st Defendant had done, he lodged a criminal complaint about the fraudulent transfer with the Criminal Investigation Department, Nairobi.

27. PW 1 stated that motor vehicle registration No. KAM 527M was impounded by the police on the basis of a report he made to the police. The Plaintiff also said that he informed the police of having spotted motor vehicle registration Number KAN 555E at Eastleigh but the police did not take any step to impound it nor investigate his complaint. PW 1 further stated that due to the police inertia he was prompted to seek the assistance of politicians and the Commissioner of Police to pressurize the police to expedite the investigation of his complaint and

thereafter to take action.

28. The Plaintiff also stated that he was summoned by the Criminal Investigation Officers from Kileleshwa where he was forced to enter into an amicable settlement with the 1st Defendant over motor vehicle registration No. KAM 527M. He claimed that he was ordered to remain in custody at Kileleshwa Police Station when he refused to append his signature on a document prepared as an agreement to settle the matter.

29. PW 1 alleged he was kept in custody for two days after which he was taken to CID Headquarters where he was compelled to enter into a settlement with the 1st Defendant in which he agreed to sign on 25th June, 2003 due to desperation to secure his freedom.

30. The Plaintiff stated that pursuant to the aforesaid agreement, he was forced to withdraw the complaint against the 1st Defendant who in turn agreed to settle a sum of Ksh.1,900,000/-, the value assigned to motor vehicle Registration No. KAM 527M by monthly instalments.

31. It is said that the 1st Defendant managed to pay Ksh.500,000/- but declined to settle the outstanding balance upto date. PW 1 stated that despite making a report on the default of instalment payments on the part of the 1st Defendant, the police failed to take action.

32. PW 1 further told this court that he was requested by the CID to furnish them with the statements of the original consignees to facilitate the arrest and prosecution of the 1st Defendant. He said he was forced to travel all the way to Dubai to obtain witness statements recorded in Dubai before a Notary Public by the consignees except for Fatuma Haji Khamisi who recorded her statement in Mombasa in respect of Motor Vehicle Chassis NO.KZJ95-0090875 since she was in the country at the time.

33. The Plaintiff accused the police of failing to investigate, prosecute and act on his various complaints. PW 1 said he came to learn that one Shamit Singh Varma had sold one of the vehicles Registration No. KAN 458K to a third party and that the second vehicle Registration No. KAN 555E was sold to the Late Job Omino.

34. PW 1 said that the duo filed applications to compel the relevant authority to provide them with the logbooks and to be declared as the rightful owners of the motor vehicles but those applications were dismissed. PW 1 accused the police of failing to impound the aforesaid motor vehicles despite the fact that the applications filed by PW 1 had been dismissed and blamed the police of being complicit in frustrating his complaints.

35. The Plaintiff stated further that the 1st Defendant was eventually charged with the offence of stealing by agent but the case has not been heard due to the 1st Defendant's abscondment leading to issuance of a warrant of Arrest which has not been executed upto date. He stated that as a consequence of those transactions he incurred various costs and expenses which he has beseeched this court to award him.

36. The Defendants summoned two witnesses namely Muzahim Salim Ajaber (DW 1) and Orieny (DW 2) to testify in support of their defence. It is the evidence of DW 1 that he has never done the business of clearing as an agent and that he has never worked with the Plaintiff (PW 1).

37. DW 1 also denied executing any agreement with the Plaintiff. The 1st Defendant claimed that he was acquitted of the charge of theft by agent.

38. DW 1, however, admitted in cross-examination that he used to sell cars imported from Japan. DW 1 further stated that he was arrested and taken to Kileleshwa Police Station where he agreed on payment with the Plaintiff but that he never signed any agreement. DW 1 said he knew one Hatim Abbas as a broker and denied selling to him motor vehicle Registration No. KAM 855V.

39. Mr. Orieny (DW 2), an Executive Officer with the court testified in respect of **Criminal Case No. 465 of 2005 , Republic Vs Muzahim Salim Bajaber**. DW 2 told this court that the aforesaid file was disposed of.

40. He was, however, unable to tender in court as evidence a copy of Gazette Notice authorizing the disposal of the file.

41. DW 2 stated that the accused (DW 1) had been discharged under Section 87A of the Criminal Procedure Code as opposed to being acquitted and that he had no knowledge of the existence of a warrant of arrest issued against DW 1.

42. The Office of the Attorney General, the 2nd Defendant herein, closed its case without summoning witnesses.

43. Having considered the evidence tendered by both sides and the rival written submissions, the following issues arose for the determination of this court: -

i) Whether the Plaintiff is entitled to Ksh.24,350,000/- and USD 2,500/-.

ii) Whether the Plaintiff is entitled to general damages for harassment, false imprisonment, mental distress and anguish, conversion and breach of duty, trust and care.

iii) Whether the Attorney General is liable to the Plaintiff.

iv) Who should pay costs of the suit?

44. On the first issue, it is apparent from the plaint that the Plaintiff is seeking for payment of Ksh.24,350,000/- and USD.2,500.00 as a special damages. The 1st Defendant is categorical that the Plaintiff is not entitled to the amount claimed. It is the submission of the 1st Defendant that the Plaintiff has failed to tender evidence to show that he had any dealings with the 1st Defendant.

45. It was also pointed that the evidence was not credible in that it was not conceivable for motor vehicles imported from Dubai to take 2 years to arrive in Kenya.

46. It is further the submission of the 1st Defendant that there were no vehicles belonging to the Plaintiff that the 1st Defendant could have stolen and or converted.

47. It was also pointed out that the claim on travel and accommodation expenses cannot succeed because they were not proved.

48. The 2nd Defendant is of the submission that the Plaintiff is to blame for his misfortune having entered into an agreement between himself and the 1st Defendant and when things went wrong he decided to involve the police.

49. I have carefully considered the rival submissions over the claim on this head. Though the 1st Defendant has denied having had any dealings with the Plaintiff, I am convinced by the evidence presented by the Plaintiff that the duo knew each other very well. I believe the evidence of PW 1 that the Plaintiff was introduced to the 1st Defendant by his brother and former business partner one Swaleh Salim Mohammed in 1999.

50. I am further convinced that the 1st Defendant was at material time engaged by the Plaintiff as a clearing and forwarding business agent. The Plaintiff specifically stated that he imported six motor vehicles from Dubai into Kenya and had them released to the 1st Defendant with the importation documents to clear them.

51 I have already stated that the 1st Defendant denied having any dealings with the Plaintiff. However, it is important to note that the 1st Defendant told this court that he negotiated with the Plaintiff while in police custody at Kileleshwa Police Station on payment of motor vehicle KAM 527M. I am satisfied that the 1st Defendant had business dealings with the Plaintiff.

52. I am also convinced that the 1st Defendant acted contrary to the instructions of the Plaintiff when he cleared the motor vehicles and by registering and proceeding to sell them to third parties. I am therefore, satisfied that the Plaintiff has on a balance of probabilities that 1st Defendant took and converted the Plaintiff's six (6) Motor Vehicles.

53. Arising from the failed transactions, the Plaintiff has beseeched this court to award him Kshs.24,350,000/- and USD 2,500/- being special damages.

54. On the claim for loss of the six motor vehicles, the Plaintiff has tendered evidence in form of invoices as follows: -

- KAM 527M Kshs.1,400,000.00
- KAN 108K Kshs.2,395,000.00
- KAN 555E Kshs.4,711,500.00
- Unregistered motor vehicles

belonging to Fatuma Khamis Kshs.2,389,500.00

TOTAL Kshs.15,108,00.00

I am convinced that the Plaintiff is entitled to the claim.

55. The other claim which the Plaintiff sought to be awarded is in respect of travel, hotel accommodation and food expenses. The Plaintiff told this court that he incurred the aforesaid expenses while pursuing the 1st Defendant here in Kenya and on the trips he made to Dubai to look for the original consignees of the motor vehicles to record witness statements. The Plaintiff stated that in whole saga he made 120 trips, Mombasa – Nairobi and back and claimed a sum of Kshs.3,600,000/-. I find the claim justified. Consequently, the Plaintiff is awarded the same.

56. The Plaintiff further presented evidence showing he flew in 4 witnesses from Dubai into Kenya thus incurring expenses of Ksh.255,000/-. The Plaintiff deserves a refund.

57. The Plaintiff was also able to convince this court that he incurred other expenses in the sum of Ksh.550,000/- Prior to flying, the witnesses to Dubai, he flew to Dubai to look for the original consignees where he stayed for a month.

58. The Plaintiff has also claimed Ksh.5,200,000/- being loss of business between 2002 and 2004 plus a further loss of Ksh.50,000/- on telephone and communication charges. In the end I am convinced that the amount claimed as special damages should be awarded.

59. The second major issue is whether the Plaintiff is entitled to general damages for harassment, false imprisonment, conversion, mental

anguish, breach of duty, trust and care. The Plaintiff has tendered evidence showing that he was summoned to CID Headquarters and was requested to enter into an amicable settlement with the 1st Defendant over motor vehicle Registration No. KAM 527M. It is the Plaintiff's evidence that he refused to co-operate in the first instance but he later agreed to do so after being confined to police cells for two days.

60. The Plaintiff aver that he was only released when he agreed to enter into an amicable settlement with the 1st Defendant who appeared to enjoy police protection. I am convinced that the Plaintiff was unlawfully detained by the Police and forced to settle the dispute between him and the 1st Defendant over the aforementioned motor vehicle. I am satisfied that the Plaintiff is entitled to claim for General Damages on this head as against the 1st Defendant. None of the parties proposed a figure on this head. I think an award of Ksh.2,000,000/- in my view is a reasonable provision.

61. The third issue is whether in the circumstances, the Hon. Attorney General is liable to the Plaintiff. The Plaintiff is of the submission that he is entitled to be compensated by the Attorney General by way of General Damages. It was pointed out that the police were reluctant to prosecute the 1st Defendant for the theft of the Plaintiff's motor vehicles and that the Police only acted after the Plaintiff sought help from higher authorities.

72. The Plaintiff further accused the police of releasing the motor vehicles after being impounded and the fact that the police unlawfully held in custody to force him to settle the dispute with the 1st Defendant.

73. The Plaintiff further accused the police of failing to investigate his complaint. The Plaintiff gave the details of instances where the police literally failed to take action. The 2nd Defendant failed to tender evidence to controvert the Plaintiff's evidence. I am therefore convinced that the Hon. Attorney General failed to treat the Plaintiff fairly. I find that the police harassed and failed to protect the Plaintiff. The police also casually dealt with the Plaintiff's complaints. For the above reasons, the 2nd Defendant is found culpable. I award the Plaintiff a sum of Kshs.2,000,000/- as general damages for harassment, false imprisonment and breach of duty.

76. The final issue touches on costs. The Plaintiff is the successful party. Costs follows the event. The Plaintiff is entitled to costs.

77. In the circumstances of this case, the 1st Defendant should meet 75% of costs of the suit while the 2nd Defendant should meet 25%.

78. In the end, judgment is entered in favour of the Plaintiff as against the Defendants as follows: -

a) As against the 1st Defendant

i) General Damages for harassment, Mental

distress and anguish and conversion**Ksh. 2,000,000/-**

ii) Special Damages**Ksh.24,350,000/-**

iii) Special Damages**USD.2,500/-**

(The exchange rate of Ksh.100/- per dollar

(100 x 2,500.00 =250,000.00) Ksh. 250,000/-

iv) 75% costs of the suit.

v) Interest on (i), (ii) and (iii) above at court rates from the date of judgment until full payment.

b) As against the 2nd Defendant

i) General Damages for breach of duty,

harassment and false imprisonment **Ksh. 2,000,000/-**

ii) 25% Costs of the suit

iii) Interest on (i) above at court rates from the date of judgment until full payment.

NET TOTAL

Ksh.28,600,000/-
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Dated, signed and delivered at Nairobi this 20th day of July, 2018.

.....

J K SERGON

JUDGE

In the presence of

..... *for the Plaintiff*

..... *for the 1st Defendant*

..... *for the 2nd Defendant*