



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 494 OF 2016**

SABINA MASEKE .....APPELLANT

- V E R S U S -

JOYCE NGENDO ..... RESPONDENT

*(Being an appeal from the judgement of Hon. Usui (Mrs.) SPM delivered on 22<sup>nd</sup> December 2008 in Nairobi Chief Magistrate's Court, in Milimani CMCC No. 6885 of 2008)*

**JUDGEMENT**

1) Sabina Maseke, the appellant herein filed a compensatory action before the Chief Magistrate's Court, Milimani Commercial Court against Joyce Ngendo, the respondent herein vide the amended plaint dated 29<sup>th</sup> July 2013. In the aforesaid plaint, the appellant sought for judgement as follows:

*i. General damages*

*ii. Special damages in the sum of ksh.30,730*

*iii. Costs of this suit*

*iv. Interest on (i) and (ii) above.*

*v. Any other relief as the court deems just under the circumstances.*

2. The respondent filed a defence to deny the appellant's claim. The suit was heard by Hon. E. K. Usui, learned Senior Principal Magistrate and judgement was entered in favour of the appellant and against the respondent for ksh.30,730/= plus costs and interest. Being dissatisfied the appellant preferred this appeal.

3. On appeal the appellant put forward the following grounds:

*1. The learned magistrate erred in law by not awarding the appellant general damages as claimed in the plaint.*

*2. The learned magistrate erred in law not considering that the plaintiff was entitled to general damages, having found that the defendant was liable.*

4. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submission. The main issue raised and argued by the

appellant on appeal is that the learned Senior Principal Magistrate erred when the court failed to award the appellant general damages even after having found the respondent liable. It is the submission of the respondent that the trial magistrate did not to award general damages because the appellant had failed to prove the claim on a balance of probabilities.

5. Having considered the relevant material placed before this court on appeal, it is not in dispute that the appellant had sought in her amended plaint to be awarded general damages. In her submissions she equally submitted proposed figures to be awarded on this head. On paragraph 5(b) of the amended plaint, the appellant specifically beseeched the court to award her general damages against the respondent for breaching her constitutional rights. The appellant tendered evidence before the trial court claiming that she was evicted from the respondent's rental premises due to her tribe. She therefore asked to be paid general damages for discrimination.

6. The learned Senior Principal Magistrate gave an award of ksh.30,730/= representing the claim for special damages plus costs. The learned trial magistrate gave a black out the evidence, submissions and pleadings related to the claim for general damages.

7. With respect, I agree with the submissions of the appellant that the trial magistrate erred when he ignored the prayer for general damages. It is an issue which cannot be determined on appeal because the whole prayer was overlooked by the trial magistrate.

8. In the end, I find merit in the appeal. It is allowed thus giving rise to issuance of the following orders:

**i. The appeal is allowed and that the suit is remitted back to Hon. E. K. Usui, learned Senior Principal Magistrate to determine afresh the question touching on the claim for general damages for breach of the appellant's fundamental rights and on the question as to whether or not damages should be awarded and how much, if any.**

**ii. The award on special damages remains undisturbed.**

Dated, Signed and Delivered in open court this 17<sup>th</sup> day of November, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent