



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 1 OF 2017**

**JULIUS ONKWARE  
AKUNGA.....APPELLANT**

**VERSUS**

**THE CHIEF MAGISTRATES' COURT KISII**

**ATTORNEY GENERAL.....  
RESPONDENTS**

***(An appeal from the judgment and decree of Hon. J.N. NYAGA (Chief Magistrate) dated and delivered on the 1<sup>st</sup> day of December, 2016 in the Original KISII CMCC No. 252 of 2015.)***

**JUDGMENT**

1. The appellant herein, JULIUS ONKWRE AKUNGA, sued the respondent before the trial court through a plaint filed on 5<sup>th</sup> June 2015 in which he claimed:

- a) Special damages of Kshs. 16,700.**
- b) General damages**
- c) Loss of business**
- d) Costs and interests.**

2. The appellant's case before the lower court was that a camera, bag, camera flash and photographs, all valued at Kshs. 61,700/= which had been produced in court as exhibits in a criminal case got lost while in the court's custody thereby precipitating the claim and that out of his entire claim of Kshs. 61,700/= the respondents had only paid to him Kshs. 45,000/= thereby leaving a balance of Kshs. 16,700/=.

3. The 2<sup>nd</sup> respondent denied the appellant's claim before the lower court in its defence filed on 1<sup>6th</sup> July 2015 and maintained that all the items produced in court as exhibits had been returned to the appellant.

4. A trial ensued in which only the appellant testified and at the close of the case, the trial court dismissed the appellant's case in its entirety thereby igniting the instant appeal in which the appellant has, in his grounds of appeal, faulted the trial court for failing to fully appreciate the evidence tendered before it thereby pronouncing an erroneous verdict that the appellant's case was not proved to the required standards.

5. The appellant canvassed the appeal by way of written submissions while the respondents did not make any appearance despite having been duly served with the hearing notice. In his said submissions, the appellant faulted the trial court for failing to award him damages for loss of business even after he had tendered evidence to prove that he earned Kshs. 1500/= daily from his photography business.

6. The appellant cited the case of **Great Lakes Transport Co. (U) Ltd vs Kenya Revenue Authority [2009] eKLR** wherein the Court of Appeal cited (with approval) the case of **Odd Jobs vs Muhia [1970] E.A 476** in which Law J A stated:-

*“On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by the Court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.”*

The court then added:

*“In our view from the fact that general damages was pleaded in the body of the plaint and evidence led to show that the appellant was actively using the subject vehicle it followed that it would suffer loss even if special damages were not properly proved.”*

The Court further held thus:

*“Considering all the above and mindful of the legal position that the superior court ought to have considered that it was sitting both as a Court of law and a court of equity, and noting that equity would not allow a wrong to be suffered without a remedy, we hold that the appellant was entitled to an award of general damages.”*

7. This is a first appeal and therefore this court is under a duty to re-analyze the evidence tendered before the trial court with a view to arriving at its own independent findings. This position was stated in the case of **Selle & Another v. Associated Motor Boat Company Ltd & Others (1968) EA 12** as follows:-

*“... This Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it shall always bear in mind that it had neither seen or heard the witness and should make due allowance in that respect ...”* [See also **Jivanji vs Sanyo Electrical Company Ltd (2003) KLR 425**]

8. As I have already stated in this judgment, only the appellant’s evidence was tendered before the trial court. His testimony was that he was a complainant in a criminal case No. Kisii CMCR 2122 of 2009 wherein one Justus Wasuna Onyango was charged with the offence of stealing. He stated that the accused in the said criminal case had stolen his camera, camera bag and cash of Kshs. 5,000/= which items were produced as exhibits in court but that at the conclusion of the case, the respondents did not release the said items to him thereby precipitating the filing of the civil suit before the trial court in which he claimed for the value of the exhibits and damages for loss of business.

9. It was the appellant’s case that even though the respondents had paid him the total sum of Kshs. 45,000 for the lost camera after numerous complaints and correspondence with the judiciary and the Attorney General, there was the claim for general damages and the balance of Kshs. 16,700/= still outstanding and due to him. The appellant produced the following documents as exhibits during the trial.

**a) Certified copy of proceedings in the criminal case Pexhibit 1.**

**b) Payment receipt voucher P.Exhibit 2.**

**c) Letter for payment of Camera Pexhibit 3**

**d) Agreement of purchase of camera Pexhibit 4.**

**e) Letter from the executive Officer Kisii Law Courts – Pexhibit 5.**

**f) Order for return of goods Pexhibit 6.**

**g) Receipt books for photography Business Pexhibit 7**

**h) Letter from chief magistrate indicating loss of exhibits- Pexhibit 8.**

**i) Letter from the Attorney General directing that the appellant be paid for the goods – Pexhibit 9.**

**j) Letter from the court’s Chief Administrator – Pexhibit 10.**

**k) Certificate – Pexhibit 11.**

**l) Copy of a cheque from the judiciary – Pexhibit 12.**

10. On cross examination, the appellant stated that he did not have any receipts in support of the lost photographs as the said receipts were inside the bag that was stolen.

### **Analysis and determination**

11. I have carefully considered the record of appeal and the submissions filed by the appellant herein. I note that the pertinent issue for determination is whether the appellant was entitled to the orders sought in the case before the trial court.

12. As I have already stated in this judgment, the appellant’s claim before the trial court was for the payment of the sum of Kshs. 16,700/= being the balance on the value of the goods that were not released to him by the court after being used as exhibits in the criminal case together with damages for loss of business.

13. It was not in dispute that the appellant’s camera, camera bag and flash, which were produced as exhibits in the criminal case, got lost while in the court’s custody and that following the said loss, the court paid to the appellant the sum of Kshs. 45,000/= as compensation. The trial court found that the claim for Kshs. 16,700/= was unmerited because the sum of Kshs. 45,000/= that had already been paid to the appellant was over and above the stated value of the camera, flash and camera bag. The trial magistrate further observed that the appellant’s claim that photographs valued at Kshs. 12,000/= was not specifically proved as the said photographs did not form part of the items that were submitted to court as exhibits during the criminal trial.

14. I have perused the proceedings of the lower court and I am in agreement with the trial court’s findings that the appellant’s claim was neither proved nor merited. I note that the particulars of the offence that gave rise to the criminal that case was as follows:

**“JULIUS WASUNA ONYANGO: On the 28<sup>th</sup> day of September 2009 at Kisii town in Kisii Central District within Nyanza Province stole one camera bag containing a camera make Minota SR 101 valued at Kshs. 6000/=, a camera flash valued at Kshs. 4,500/= and Kshs. 5000/= from the person of the said JULIUS ONKWARE.”**

15. From the above particulars, it is clear that the only items that were the subject of the criminal case were the camera, bag and flash. In his evidence during the criminal trial, the appellant stated, in part, as follows:

**“He snatched my bag carrying the camera and flash. The camera is make Minota valued at**

**Kshs. 6000/= flash is valued at Kshs. 4,500/=.**

**He also took my cash which was inside the bag- 5000/= which I got from my business.**

**We checked and found the bag, the camera flash and photographs of my customers. I did not find cash Kshs. 5000. Here are the items we recovered. The bag, I bought at Daraja Mbili market at Kshs. 200/=. The bag and flash camera and photographs to be marked MFI-1, 2, 3 and 4 respectively.”**

16. The value of the camera was also proved through the production of exhibit P4 which was an agreement for its purchase. The said agreement confirms that the camera was purchased at Kshs. 6000/=.

17. From the above foregoing, I find that the actual value of the appellant’s items that were lost, while in the respondent’s custody was Kshs. 10,700/= made up as follows:

**Camera – Kshs. 6,000/=**

**Camera flash – Kshs. 4,500/=**

**Camera bag – Kshs. 200/=**

**Total - Kshs. 10,700/=**

18. It is therefore my finding that the appellant’s claim that the lost camera was worth Kshs. 45,000/=and not 6000/= which he had proved, was dishonest and not supported by any evidence whatsoever. The mere fact that the respondents stated, at the time it paid the appellant Kshs. 45,000/=: that the said payment was for the camera did not necessarily mean that the said camera was valued at Kshs. 45,000/=. My take, as can be seen from the numerous correspondence between the parties and other agencies before a settlement was arrived at, is that the said payment was made to the appellant in good faith so as to compensate him for the loss and to cushion him from any inconvenience that he may have suffered while pursuing the release or compensation for the said items.

19. It is trite law that special damages must not only be specifically pleaded, they must also be specifically proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR*, *Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR* and *Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)*. In the latter case this Court was emphatic that

**“... It is now well settled that special damages need to be specifically pleaded before they can be awarded.”**

20. In the instant case, I have already found that the actual value of the appellant’s lost items was Kshs. 10,700/= only and therefore it would appear that the appellant is seeking to take advantage of the fact that the respondent paid to him Kshs. 45,000/= for his loss as a basis to claim that he was entitled to more money.

21. On the claim for loss of business, I note that even though the appellant made a claim in that respect in his plaint, he did not lead any evidence to support the alleged loss apart from stating that he was a camera businessman and that he lost business for 6 years. The appellant did not state how much he earned from his said business at any given period as he merely threw figures contained in a receipt book at the trial court without any credible evidence in support thereof and expected the court to make head or tail of the receipts and award him damages. I find that there was no credible documentary evidence in support of the alleged business on which the court could rely in making an award for loss of business. In the case of *Ryce Motors Ltd & Another vs Muchoki (1995-98) 2 E. A363 (CAK)* commenting on statements of accounts presented without more as in this case stated, the Court observed;

***“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”***

22. My above findings on the issue of loss of business notwithstanding, I further find that even assuming that the appellant had sufficiently proved he suffered loss of business, the liability for the said loss cannot be wholly attributed to the fault of the respondents considering the circumstances of this case. In determining this issue, one needs to appreciate the circumstances under which the respondents came to be in possession of the appellant's items in the first place. It was not in dispute that the said items were, on 3<sup>rd</sup> November 2009 produced in court as exhibits during the criminal trial and remained in court's custody till the finalization of the criminal case after which an order was on 21<sup>st</sup> December 2010 made for their release to the appellant.

23. From the above scenario, one cannot hold the 1<sup>st</sup> respondent liable for loss of business in respect to exhibits held by court in execution of its lawful function of settling disputes. One would have expected the appellant, if indeed the items held by the court as exhibits were his tools of trade, to promptly apply to the criminal court for their release after their production in court so as to enable him mitigate his losses and continue with his business. Quite unfortunately, this was not the case as the appellant sat on his laurels for over one year before making such a move by which time the said exhibits could not be found thereby prompting the 2<sup>nd</sup> respondent to remedy the loss by paying the sum of Kshs. 45,000/= long before the claim was filed in court. A claimant's duty to mitigate his loss was established in the case of **African Highlands Produce Limited V. Kisorio, Klr (2001) 172** where the Court of Appeal held:

***“It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequently upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured on breach of contract or tort, and he is then bound to act, as best he may, not only in his own interests but also in those of the Defendant... The question of what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case....”***

24. In the instant case, I find that the appellant, as a prudent businessman, if indeed he engaged in business, was under a duty to take all reasonable steps to restart his business the moment his camera, worth Kshs. 6,000/= was stolen in September 2009 and not wait for the finalization of the criminal case before he could resume business. My take is that the subsequent loss of the appellant's items, while in the court's custody, even though suspected to have been as a result of theft, was not established to be a deliberate act of negligence on the part of the 2<sup>nd</sup> respondent for which it can be penalized in damages. This court is of the view that the 2<sup>nd</sup> respondent's act of compensating the appellant with the sum of Kshs. 45,000/=, which I have already determined, was an amount way above the actual value of the lost items stated to be Kshs. 10,700/=, was a commendable gesture on its part which must be lauded by this court.

25. In sum therefore and having regard to my observations and findings hereinabove, I find that the instant appeal is unmerited and the order that commends itself to me is the order to dismiss it with no orders as to costs in view of the fact that both respondents did not participate in the appeal.

**Dated, signed and delivered in open court this 19<sup>th</sup> day of December, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Appellant present in person for the Appellant

- N/A for the Respondent

- Omwoyo court clerk