



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 15 OF 2013

MWASI MALUKE..... 1ST APPELLANT

WAYUA MWASI 2ND APPELLANT

V E R S U S

COUNTY GOVERNMENT OF KITUI1ST RESPONDENT

MULANDI KAVALI 2ND RESPONDENT

(From the decision in Mwingi SRM Civil Case No. 95 of 2006 – V. A. Otieno – Ag.SRM).

JUDGMENT

The two appellants filed a suit through a plaint in the Senior Resident Magistrate's court at Mwingi on 17th July 2006. They claimed that the 2nd respondent as an employee of 1st respondent on the 21st of June 2006, accompanied by Administration Police Officers invaded the appellants hawking station at Mwingi town and assaulted the 2nd appellant Wayua Mwasi on the buttocks, arrested the 1st appellant Mwasi Maluke and carried away all the clothes displayed for sale by the two appellants, without justification. They asked for orders that the respondents forthwith return the goods and all clothes belonging to the appellants confiscated or detained by the respondents. Secondly, they asked for special damages for loss of clothes of Kshs 102,950/=. Thirdly, general damages. Fourthly, a permanent injunction do issue restraining the respondents from further confiscating clothes belonging to the appellants held by them as from 21st June 2006. Lastly, they asked for cost of the suit plus interest.

After evidence was tendered in court on both sides, judgment was delivered by the magistrate's court on 23rd July 2013. In the judgment the court allowed the first prayer for return of the clothes of the appellants by the respondents. The court decided that the second prayer of special damages was moot and was already dealt with by the grant of the first prayer. With regard to the third prayer for general damages, the court awarded damages for the loss suffered in the sum of Kshs 30,000/=. The fourth prayer for injunction was declined by the court as the court observed that it was impossible to enforce. Costs were granted to the appellants.

The appellants were dissatisfied with the court's decision, and came to this court on appeal through their advocates Nyamu and Nyamu Advocates. The grounds of appeal are as follows:-

1. The learned magistrate erred in law and fact when he disregarded the evidence of the plaintiffs (appellants) while awarding general damages in their favour.

2. The learned magistrate erred in law and fact when he failed to consider that the plaintiffs (appellants) incurred huge loss of business for the 8 years that their goods were illegally in the defendant's custody without their consent.
3. The learned magistrate erred in law and fact by awarding only Kshs 30,000/= as damages for loss of business for a period of 8 years which amount of compensation was not adequate in the circumstances.
4. The learned magistrate erred in law and fact by failing to appreciate the evidence of the 2nd plaintiff (appellant) that she was humiliated by the 2nd respondent in public by being slapped on the buttocks which evidence was corroborated and by failing to award damages against the 2nd respondent for such humiliation or addressing the same in the judgment.
5. The learned magistrate erred in law and fact by failing to consider that the amount of Kshs 30,000/= awarded in general damages was not adequate for the 8 years loss of business given that the same would only be commensurate to Kshs 10/= per day in respect of business which was too meager for a hawker of the appellants' standing.
6. The learned magistrate erred in law and fact by failing to award damages for breach of implied contract despite acknowledging that the same was incurred by virtue of payment of hawking license fees.
7. The learned magistrate erred in law and fact by failing to award adequate damages for breach of contract and loss of business occasioned by the respondent despite a finding that the same were proved.

Counsel for the appellants Paul Mugwe and Co. Advocates, filed written submissions to the appeal. Counsel for the respondent J.K. Mwalimu and Co. Advocates also filed written submissions. Mr. Nyaga who appeared for the appellants during the hearing of the appeal relied on the written submissions filed. Mr. Mwalimu for the respondents did not attend court.

In brief the submission of counsel for the appellants was that the claim of special damages of Kshs 102,950/= was proved, and should have been awarded. Counsel also submitted that the award of Kshs 30,000/= for general damages was a small and inadequate as the 2nd appellant was slapped on her buttocks in public. Counsel proposed an award of Kshs 100,000/= for humiliation of the 2nd appellant.

Counsel relied on a case of *Peter M. Kariuki -vs- Attorney General (2012) eKLR* in which the case of *Kemfro Africa Ltd -vs- Lubia and Another (1987) KLR 30* was cited with approval. Counsel emphasized that the respondent unlawfully confiscated the appellants' clothing which were goods for sale.

The submissions of the respondents counsel were in brief that the learned magistrate correctly addressed the issues before the court and awarded proper reliefs. Counsel submitted that special damages were not proved. Loss of business was also not proved.

This is a first appeal and I am required to reconsider the evidence afresh and come to my own conclusions and inferences. See the case of *Selle -vs- Associated Boat Company Limited (1968) EA 123*.

I have perused the trial court proceedings, and the judgment, and considered the submissions on both sides. I have considered the authorities cited to me.

The standard of proof in civil cases is on the balance of probabilities. A plaintiff is required to prove his or her case on the balance of probabilities – see the case of *Kirugi -vs- Kabiya (1987) KLR 347*. Secondly, an appellate court will generally be slow in interfering with the trial court's award of damages unless it is either inordinately high or inordinately low as to result in an injustice. I agree with the

submission of counsel for the appellant on this point relying on the case of ***Kemfro Africa Ltd -vs- Lubia (1987) KLR 30***. There are several decided court cases on this point, including the case of ***Butt -vs- Khan (1977), KLR 1***.

The appellants have raised several issues on appeal. A number of claims they want to be awarded on appeal however, were actually not requested in the proceedings before the trial court.

Under ground 2 of appeal the complaint of the appellants is that the magistrate failed to consider that the appellants incurred huge loss of business when their goods were in custody of the respondents for long without their consent. As the appellants did not make such a claim for recovery of damages for loss of business, this request cannot be considered by this appeal court. It fails, and I dismiss the same.

Ground 3 requests this court to find that the learned magistrate erred to award only Kshs 30,000/= damages for loss of business for 8 years, which was not adequate. Again there was no claim for an award of damages for loss of business. In my understanding the award of Kshs 30,000/= was for general damages under the third player in the plaint.

The fourth complaint of the appellants under the memorandum of appeal is that the learned magistrate failed to appreciate the evidence of the 2nd appellant who was humiliated by the 2nd respondent in public by being slapped on the buttocks and failing to award damages against the 2nd respondent for such humiliation or addressing the issue in the judgment. Again, there was no prayer in the plaint for recovery of damages for humiliation caused to the 2nd appellant. This ground of appeal also deserves to be dismissed, and I dismiss the same.

Ground six of appeal is a complaint that the magistrate erred by failing to award damages for breach of implied contract despite acknowledging that the same was incurred by virtue of payment for hawking license fees. Again the appellants did not ask for damages for breach of implied contract in the plaint. If the magistrate considered that issue in the judgment, it must have been because of the evidence tendered on both sides. However the magistrate could not create heads of claims and award damages under heads which were not pleaded by the appellants in their plaint.

Ground seven of appeal is a complaint that the magistrate failed to award adequate damages for breach of contract and loss of business occasioned by the respondents. Again, there was no claim made by the appellants under this head for an award of damages in their pleadings in the trial court.

These proceedings took a considerable time to finalize in the trial court.

The proceedings were commenced in July 2006. The case was concluded and judgment delivered on 23rd July 2013, a period of about 8 years. If the appellants wanted to amend their pleadings and make additional claims, they had ample time and opportunity to do so. They did not do so. They cannot blame the learned magistrate for not awarding damages which were not claimed by the appellants.

The appellants were obliged to make their claims, serve them to the respondents and prove their claims on the balance of probabilities. They cannot expect the magistrate or trial court to award damages under claim heads which were not pleaded by them.

Having perused and considered the judgment and awards made by the trial court, I find no fault on the magistrate. The trial court did the best it could to determine the case in light of the rather unclear prayers in the plaint. I thus find no reason to interfere with the awards of the trial court. In my view from the pleadings and requests of the appellants in the plaint, the decision of the magistrate's court was the most that that court could do. I will thus disallow the appeal.

Consequently, the appeal of the appellants is hereby dismissed. Due to the circumstances of the matter and the fact that from the evidence on record, the 1st respondent and their officer 2nd respondent acted in a high handed manner, I order that each party will bear their respective costs of the appeal. Otherwise the

decision of the subordinate court on costs in those proceedings still stands. This appeal is thus dismissed.

Dated and delivered at Garissa this 12th day of October 2016.

GEORGE DULU

JUDGE