



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 134 OF 2012

JANET AKUNAVA.....APPELLANT

VERSUS

SOLOMON ESAU.....1ST RESPONDENT

EQUITY BANK LIMITED.....2ND RESPONDENT

(Being an appeal from the original judgment of T. Nzioki, Principal Magistrate

in Eldoret CMCC No. 285 of 2010 delivered on 8th November 2012)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Principal Magistrates Court dated 8th November 2013. The 1st respondent was an employee of the 2nd respondent. The appellant had brought a suit claiming general and special damages. The appellant owed the 2nd respondent a debt. The appellant's case in the lower court was that on 23rd October 2009, the 1st respondent unlawfully locked her up in the 2nd respondent's store for six hours; and, that as a result, she lost her freedom, suffered mental anguish and loss.

2. The learned trial Magistrate found that the respondents were liable. He awarded her Kshs 80,000 as general damages for unlawful confinement and mental anguish. The claim for special damages of Kshs 50,000 was dismissed. She was awarded interest on the general damages and 70% of the costs.

3. The appellant has lodged a memorandum of appeal dated 6th December 2012. It urges five grounds. They can be condensed into three: First, that the award of general damages was inordinately low or at variance with the evidence; secondly, that the learned trial magistrate failed to consider that the appellant's reputation was brought into disrepute; thirdly, that the court disregarded documentary evidence and in particular the loss of commission; and fourthly, that the trial court disregarded the appellant's submissions.

4. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1. I have considered the grounds of appeal, the pleadings in the lower court, the evidence in the trial court and the written submissions by learned counsel for both

parties.

5. The appellant had testified that on the material date, she was standing outside the premises of Barclays Bank. The 1st respondent and another person approached her and asked her to accompany them into Equity Bank. She was then held in solitary confinement for six hours. She testified that she was taken to an upstairs office. Another person informed her that she owed the bank Kshs 47,000. She was only released when her relatives or well-wishers (PW2, PW3 and PW4) paid the sum to the bank. She pleaded in the plaint that she was a land agent. As a result of the confinement, she claimed to have lost a commission on sale of land of Kshs 50,000.

6. The appellant owed the 2nd respondent Kshs 47,000 in loan arrears. She readily conceded in her cross-examination that she had defaulted in repayment since the year 2008. Doubt is removed completely by the bank statement for the period 6th December 2007 to 21st January 2011. Although the appellant said she had not received any notice, a formal notice dated 4th December 2008 was exhibited by the respondents. The truth of the matter however is that the bank had *not* obtained any *decree*. I thus readily find that the process of execution undertaken by the respondents was avaricious, mercenary and unlawful. There was no cogent evidence that the appellant was just being held in the banking hall during working hours as she made arrangements to liquidate the debt. I also agree with the learned trial magistrate that the appellant was held in a poorly ventilated room or store next to a toilet. On the totality of the evidence of PW1, PW2, PW3 and PW4, I am satisfied that the respondents *unlawfully confined* the appellant in their premises for six hours.

7. The appellant had testified that as a result of the incident, her relatives and church members viewed her as a con artist. She complained to the police; they took no action against the respondents. She authored a complaint to citizen newspaper (Exhibit 5). She said while in confinement she missed on her dose for hypertension. Since she had to stand all the time, her legs became swollen. In addition, she testified that she lost the land commission. She produced a memorandum of understanding dated 9th October 2009 to support her claim.

8. Granted that evidence, the first key question is whether the damages awarded were reasonable. Put another way, was the quantum of damages manifestly low? The appellant's written submissions in the lower court dated 7th July 2010 proposed an award of Kshs 500,000 as general damages; another Kshs 500,000 for mental anguish, and Kshs 50,000 for loss of the commission. The respondent on the other hand had suggested that general damages of Kshs 1,000 were sufficient for false imprisonment. Regarding the claims of defamation, the respondents asserted that the appellant is the one who published the defamatory content. On the loss of commission, the respondents' case was that the memorandum of understanding was open ended and was not necessarily to be performed on 23rd October 2012.

9. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Kemfro Africa Limited & another v Lubia & another [1987] KLR 30, Akamba Public Road Services Ltd v Omambia Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

10. First, I disagree with the submission that the appellant could recover under *two* heads of general damages for *false imprisonment*; and, for *mental anguish*. The damages all *flowed* from the same injury. Secondly, the appellant could not claim for damages for defamation. She *is* the *one* who *published* the defamatory content to *Citizen Newspaper*. Furthermore, it would amount to unjust enrichment. See Kariuki v East African Industries & another, [1986] KLR 383. I have also found that, in fact, the plaint dated 18th March 2010 contained *no* prayer for damages for *defamation*.

11. The proposed quantum by the appellant was too high for the false imprisonment that took place in this case. I agree with the learned trial magistrate that the cases cited by the plaintiff related to false criminal charges. I have studied the judgment of the lower court at page 114 of the record. The learned trial magistrate considered the submissions by the appellant; but he formed a different opinion. I *cannot* then

say that the trial court *disregarded* the appellant's submissions. The quantum of damages proposed by the respondents on the other hand was too low or unreasonable. The learned trial magistrate found that an award of Kshs 80,000 was appropriate.

12. Granted that the appellant was confined unlawfully in a bank for only six hours, I would not say that the award of general damages of Kshs 80,000 was *manifestly* low or high. I have studied the authorities cited by the appellant in this appeal. In *Charles Mboko v Attorney General*, Nairobi Civil Case 833 of 2009 [O.S] [2014] eKLR the cause of action was for general damages for *torture, degrading treatment and unlawful confinement*. Damages of Kshs 3,500,000 were awarded. In *Dickson Agaluki & another v Ukwala Supermarkets* Nairobi Civil appeal 391 of 2006 [2013] eKLR, the appellants had been arrested and detained without probable or reasonable cause. The same may be said of the decision cited by the appellants in the lower court of *Thomas Oluoch & another v Mutai*, Nairobi High Court Civil Case 1729 of 2001 [2005] eKLR. The plaintiff in that case had been falsely confined on an unreasonable charge. That is not the situation obtaining here. I have also studied the decision cited by the respondents in *Kariuki v East African Industries & another*, [1986] KLR 383. There the plaintiff was charged without any reasonable grounds. He was confined for *three months*. The plaintiff was awarded Ksh 1,000 as general damages, Kshs 1,000 for false imprisonment and Kshs 18,000 for malicious prosecution.

13. In the end, I am unable to *substitute* my *discretion* for that of the learned trial magistrate. I cannot say that the award of Kshs 80,000 was *so high or inordinately low or founded on wrong principles*.

14. I will now turn to the claim for special damages. Although the claim was *specifically* pleaded, it was *not* strictly proved. It was not contested that the appellant was a commission agent. Two memoranda of understanding were produced. The first is dated 9th October 2009 between the appellant and a third party for sale of land. The appellant was to get 10% commission out of the consideration of Kshs 500,000. That would amount to Kshs 50,000. There is a similar memorandum dated 26th October 2009 between the appellant and another third party. Payment vouchers for the commission are exhibited. Unfortunately, there is no clause in either agreement or other cogent evidence that the contracts were to be *performed* on 23^d October 2009. I cannot then say conclusively that as a result of the confinement, the appellant missed out on the deal. I think what the two agreements demonstrate is the nature of income that the appellant would make on a good day. That does not amount to *strict proof* that on the material day, the appellant *lost* Kshs 50,000. I cannot then say that the learned trial magistrate *misapprehended* the evidence.

15. In the result, this appeal is devoid of merit. I uphold the judgment of the lower court. The appeal is hereby dismissed. In the interests of justice, each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 22nd day of June 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance by counsel for the appellant.

Ms. Nasilo for the respondent instructed by Kalya & Company Advocates.

Mr. J. Kemboi, Court clerk.