



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 207 OF 2007

KISII BOTTLES LIMITED.....APPELLANT

VERSUS

CHACHA GABRIEL SINDA.....RESPONDENT

(Appeal from the judgment and Decree of Hon. S.M.Soita Ag. Senior Principal Magistrate in the Original KISII CMC. Civil suit No. 654 of 2006 dated and delivered on 11th day of October, 2007)

JUDGMENT

1. This appeal arises from the judgment of the Acting SPM, Hon. Mr. Soita delivered on 11th October 2007 in Kisii CMCC No.654 of 2006. The appellant has set out 8 grounds of appeal in the Memorandum of Appeal dated 6th November 2007 and filed in court on 9th November 2007. The grounds are that:-

1. That the learned trial magistrate erred in law and in fact in finding that the appellant do pay the respondent Kshs.1,000,000/= for loss of business and Kshs.100,000/= for general damages which awards were arbitrary and unwarranted in the circumstances.

2. That the learned trial magistrate erred in law and in fact in not finding that the respondent had not established that he had suffered any loss warranting the awarded sums.

3. That the learned trial magistrate erred in law and in fact in not finding out that the respondent was not entitled to any award for loss of business having failed to prove the same.

4. That the learned trial magistrate erred in not taking into account entirely the submissions of the appellant.

5. That the learned trial magistrate erred in not taking into account that the respondent had not proved that he had any contract with the appellant thus no award at all of any nature should have been awarded in the circumstances thereof to the respondent.

6. That the learned trial magistrate erred in finding the appellant negligent while the respondent had not pleaded any negligence in his pleadings.

7. That the learned trial magistrate erred in law and in fact in awarding general damages when

there was no proof of loss on the respondent.

8. That the awards of Kshs.1,000,000/= for loss of business and 100,000/= for general damages are so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent.

2. The appellant prays that the appeal be allowed and the judgment of the Acting Spm dated 11th October 2007 on general damages and special damages be set aside against the appellant. The appellant also prays for the costs of this appeal.

3. The appellant has, in the written submissions dated 25th May 2012 and filed in court on 5th July 2012, narrowed down the 8 grounds to the following 3 issues:-

1. Did the respondent establish that he had suffered loss of business to entitle him to the sum awarded to him.

2. Did the learned magistrate err in awarding the respondent a sum of Kshs.1,000,000/= for loss of business when the same had not been pleaded?

3. Was the Court's award so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent?

4. I would compact the above 3 issues to only 2:-

a. Whether the trial court erred in law and fact in awarding the respondent Kshs.1,000,000/= for loss of business and Kshs.100,000/= for general damages;

b. Whether the learned trial magistrate erred in finding the appellant negligent while the respondent had not pleaded any negligence in his pleadings.

5. Before I proceed to consider the above issues (which I shall consider

along the lines submitted by the appellant in its submissions) the respondent's case before the trial court was as set out in paragraphs 4, 5, 6, 7 and 8 of the plaint:-

"4. The plaintiff avers that on or about 16th July 2006 at around 3.00 p.m. he was in the course of his business when one of the customers who had been served with Smirnoff Vodka whisky and a soda 500 ml sprite brand, detected some foreign particles (nylon piece of paper) in the soda he had been served with.

5. The said customer upon detecting such impurities he uttered unpleasant words that the plaintiff was using charms and witch with intention and/or for the purposes of attracting customers.

6. That due to the foregone the said bottle of soda was shown to almost all the customers who were present refreshing themselves with their respective brands and food, who stopped drinking and eating and left the plaintiff's premises.

7. As the customers left, others quarrelling, words went around and the plaintiff's premises was deserted making the plaintiff sale to go down and such words had defamed the plaintiff's name and good will of his business.

8. Due to the act of the defendant, his agents and/or servants where upon they sold and/or supplied out to the plaintiff a sub-standard products the plaintiff has suffered loss and damage."

6. It is to be noted that no particulars of the loss and damage referred to in paragraph 8 of the plaint are

given, save that in paragraph 10 of the plaint the respondent averred as follows:-

“10. The plaintiff used to make a profit of between Kshs.34,000/= to Kshs.40,000/= per day which has drastically gone down to between 2000/= and 5000/= and the same is decreasing on daily basis.”

7. The respondent prayed for judgment against the appellant for:-

- a. *General damages for loss of business and good will.*
- b. *Costs of this suit.*
- c. *Interest on (a) and (b) above.*
- d. *Any other relief the Honourable court may deem fit to grant.”*

8. The appellant entered appearance and filed the following 7 paragraph defence:-

1. *“The defendant accepts the description of the parties hereto save that its address for service for purposes of this suit is C/o G.J.M. Masese Esq. Advocate, Mwalimu House, P.O. Box 348, KISII.*
2. *The defendant will aver at the hearing hereof that the plaint discloses no cause of action.*
3. *The defendant will also aver at the hearing hereof that the plaintiff does not run a registered business as alleged or at all and will put the plaintiff to strict proof thereof.*
4. *The defendant denies the contents of paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the plaint and will put the plaintiff to strict proof.*
5. *The defendant denies the contents of paragraph 11 of the plaint and aver that there is no business loss suffered as alleged or at all.*
6. *The defendant denies ever being served with notice as alleged or at all.*
7. *Save as herein before admitted each and every allegation of fact is denied as if the same were set out and denied seriatim.”*

9. The appellant asked the court to dismiss the respondent's case with costs.

10. During the hearing the respondent stated the following:-

- *His business was that of a bar and restaurant where he sold beer, sodas and meat in the butchery and also food. He also had rooms for lodging.*
- *He operated under a liquor licence dated 12th March 2006 – P. Exhibit 2*

and also had a licence for the other businesses – P. Exhibit 1.

- *On 16th July 2006, at about 3.00 p.m., a sprite soda served to one of the customers was found to have foreign material in it. The bottle was produced as P. Exhibit 3.*
- *Thereafter word went round that he (respondent) was using kuria charms to attract customers as a result of which the respondent's business started going down – P. Exhibit 5.*
- *By September 2006, the respondent closed down the butchery.*

11. The respondent testified that as a result of that one incident, his business suffered loss and damage and good will. During cross examination, the respondent confirmed that the manual he had produced as

an **Exhibit – MF1-6** – did not relate to 16th July 2006, and further that he had not registered a business name.

12. The respondent called one witness, one Simeon Imaya as PW2 who testified that on 16th July 2006, while he was at Suneka Village Inn, he heard one of the customers shouting. The customer grabbed one of the waiters and slapped her while making allegations that the waiter was trying to bewitch them. When the respondent sought to find out what was happening, he was also told that he was trying to bewitch his customers. PW2 testified that he was thereafter shown a bottle of sprite which had impurities in it. PW2 further testified that since the incident, customers started avoiding the respondent's pub. By 22nd May 2002, the respondent's former business was now under new management.

13. PW2 further stated that though he saw the bottle of sprite which contained impurities, what he saw did not make him stop going to the pub.

14. The appellant called one Geoffrey Momanyi Ouko the area sales manager with the appellant/defendant as DW1. DW1 told the court that he was based in Kisii which covered Suneka and he had had occasion to deal with Suneka Village Inn and that one Charles Bundi had requested for one of their equipments to chill their products; whereupon they had entered into an agreement. DW1 produced a liquor licence issued to Grace K. Bundi DExh.4. He confirmed that he never dealt with the respondent/plaintiff, and that the appellant's distribution system for the area was through two agents in Suneka, one by the name of Musagi Distributors while the second was Strategic Sales Depot Inn.

15. DW1 further testified that in every area where they had invested their equipment, they had a buying card for every customer and village Inn had such cards. That in the card they recorded the number of cases of sodas they sold and also made comments on the card regarding the status of that outlet in relation to stock holding and frequency of purchase. He produced his card in relation to village Inn relating to the period between 17th March 2005 and 19th June 2007. The card indicated that on average, Suneka Village Inn was buying 5-6 crates per day and that after 16th July 2006 there were no changes in the average purchases. DW1 stated that he was not aware of any sprite drink which had particles in it. He produced the customers buying record which was marked as DExh.2.

16. In addition DW1 stated that no information about one bottle of soda which was contaminated was given to him. He also testified that the appellant complied with its internal standards including VAT Complaint. He also produced a copy of their stocks receipt book from 26th June 2006 to 6th August 2006 which related to sales around Suneka and stated that any sales to Suneka Village Inn would have been receipted. He produced the same as **(DEX. (3))**. He urged the court to dismiss the suit as the person he was dealing with for Suneka Village Inn was not the respondent/plaintiff.

17. On cross-examination DW1 told the court that the liquor licence he produced was in respect of the year,2007 though the incident complained of took place in 2006. He stated he did not have the licence for 2006 and had no evidence to disapprove the fact that the plaintiff was running the business in 2006.

18. In his judgment, the learned trial magistrate found that the licence of 2007 produced by PW1 in the names of Grace Bundi only confirmed that the respondent closed shop after his business went down. On a balance of probabilities he found that the soda directly affected the business of the respondent and held appellant liable, leading to the award of Kshs.1,000,000/= for loss of business and a further kshs.100,000 as general damages for loss of good will. The respondent was also awarded costs of the suit and interest.

19. In his submissions counsel for the appellant has argued that the respondent did not establish that he suffered loss of business; that loss being a special damages claim that had to be specifically pleaded in the plaint and proved and that the award was so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent.

20. The respondent on his part filed written submissions through his advocates M/s G.M. Maengwe & Co. Advocates. The respondent contends that the appeal was incompetent as the record of appeal had not

been certified as correct and the proceedings thereto not certified as the copy of the original as required by law. Further that the record of appeal omitted exhibits which were mandatorily required to be part of the record of appeal for any fair and just adjudication of the appeal herein. To support this contention counsel placed reliance on the case of **Stephen P.C. Ngala -vs- Burka Ahmed Salim & another - Civil Appeal (Application) No. 311 of 2004** and **Commercial Bank of Africa Ltd -vs- Ndirangu [2000] 1 E.A 29.**

21. When the matter came up before me on 9th December, 2013 Mr. Bosire holding brief for Mr. Odhiambo chose to rely entirely on these written submissions while the respondent who was present in person reiterated the submissions filed by his advocate.

22. This being a first appeal, I am obliged to reconsider and re-evaluate the evidence which was presented before the learned Senior Principal Magistrate and make my own conclusions bearing in mind that I have neither ssw nor heard the witness testify (see **Peters -vs- Sunday Post Limited [1958] E.A. 424; Selle & another -vs- Associated Motor Boat Company Limited & others [1968] EA 123** and **Ephantus Mwangi & Another -vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278.** Hancox J.A. as he then was in the **Ephantus Mwangi case** (above) observed as follows:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

The learned JA further stated:-

“An appeal court will also interfere on findings of fact if it is shown that the trial court failed to take account of particular circumstances or probabilities material to an estimate of the evidence.”

23. With the above principles in mind, the following are matters to be determined by this court:-

i. Does the fact that the appellant’s record of appeal omits some exhibits tendered in the trial court mean that this appeal is incompetent?

ii. Did the learned trial magistrate err in awarding the respondent a sum of kshs.1,000,000 for loss of business when the same had not been

pleaded.

iii. Was the trial courts award so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent, if any?

24. With regard to the first question it was held in **Deepak Chamnlal Kamani & another -vs- Kenya Anti-corruption Commission & 3 others [2010] eKLR** where the court cited and approved the remarks of **Lord Woolf in M Biguzzi -vs- Rank Leisure’s plc (1999) 1.W.L.R. 1926** where Lord Woolf’s committee had introduced in the English legal system the concept of overriding objective of litigation, to the effect that:-

“Under the CPR the position is fundamentally different as rule 1.1 makes clear that the CPR ‘are new procedural code into overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the CPR was that often the courts had to take draconian steps, such as striking out proceedings in order to stop a general culture of failing to prosecute proceedings expeditiously: That led to litigation which was fought furiously on both sides. On behalf of the claimants to preserve their claim to an end irrespective of the justice of the case because of failure to comply with the rules of the court.”

The learned Lord Justice continued:-

“Under rule 34(2) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of the case. The advantage of the Civil Procedure Rules over the previous rules is that the court’s powers are much broader than they were. In many cases, there will be alternatives which enable a case to be dealt with justly without the draconian step of striking the case out.....”

25. In the **Kamani case** (supra), the court had been asked to strike out the record of appeal on the basis that primary documents, namely’ the judges’ notes of the hearing had been omitted from the record. While accepting that a judge’s notes of the hearing were primary documents the court nevertheless refused to strike out the record of appeal and held:-

“We think that in the circumstances of this appeal striking out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion we order under rule 89(3) of the courts rules the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the judges left out in the record of appeal.....”

26. In **Kenya Commercial Finance Company Limited -vs- Richard Akwesera Onditi [2010] eKLR** R.S.C. Omolo P.N. Waki & J.G. Nyamu JAA sitting in Kisumu held:

“We must stress here that in applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of Section 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal, the only difference now is that the court has wider powers and will not automatically strike out proceedings. The court before striking out will look at available alternatives. It is also not being forgotten that while the English position is on the face of it, buttressed by notes, the courts’ position in Kenya is buttressed by statute.”

The respondent in the instant appeal wants the appeal dismissed because:-

- a. The record of appeal has not been certified as correct and the proceedings thereto are not certified as the copy of the original as required by law.**
- b. The record of appeal omitted exhibits which were mandatorily required to be part of the record of appeal for any fair and just adjudication of the appeal herein.”**

27. My answer to the respondent's plea is that on 14th May, 2012, with the consent of both counsel, the Record of Appeal dated 29th November, 2011 and filed in court on 1st December, 2011 was held to be proper, though upon perusal of the Record of Appeal it is evident that some exhibits produced during the trial were not included in the record of appeal, but this court has the advantage of noting that this matter was before Kisii Chief Magistrate’s court and I can therefore call for the lower court file which I have done and refer to the exhibits which were filed in the lower court. The appellant is however under a duty to avail the missing documents to the court through a supplementary Record of Appeal.

28. Although the appellant has not addressed the issue of why he omitted those exhibits from the record of appeal as required by law, it is noted from the authorities cited above that this court has a wider discretion not simply to strike out a Record of Appeal but to look for available alternatives. Although this court has called for lower court file for purposes of this judgment, the papellant has leave of this honourable court to compile, file and serve a supplementary Record of Appeal within 15 days of the date of this judgment. In the circumstances the respondent's arguments touching on the Record of Appeal are dismissed.

29. Secondly, with regard to whether the learned magistrate erred in awarding the respondent a sum of Kshs. 1,000,000/= for loss of business when the same had not been pleaded it is worth noting that in the plaint the respondent only prayed for the following:

- a. **General damages for loss of business and good will.**
- b. **Costs of this suit.**
- c. **Interest on (a) and (b) above.**
- d. **Any other relief the Honourable court may deem fit to grant.**

30. As indicated by the plaint, the respondent did not specifically plead or peg in monetary terms any amount for loss of business and good will and during the trial the respondent stated thus:

“I was making profit of kshs.30,000 to 40,000 per day.I wish to produce my record of business for sale and returns this runs from April,

2006 to September, 2006.”

During cross-examination the respondent stated:-

“I was making profits of kshs.18,000 per day” and on re-examination the same respondent stated:-

“I was making profits of kshs.34,000 per day”

31. From the above statements made by the respondent during trial, it is not clear exactly how much profit he was making if at all. He did not specifically plead in the plaint nor prove his estimated loss of either business or his good will. A look at the trial magistrate’s judgment as to how he placed the respondent/plaintiff’s loss of business/goodwill does not help either as he simply states:-

“Having considered submissions by both sides invite award of Kshs.1,000,000 for loss of business”

32. In **Bullen & Leake 2nd Edition at page 50** the learned authors state as follows:-

“...Whenever the plaintiff has suffered any ‘special damage’ this must be alleged in the statement of claim with all necessary particulars and the plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly in the statement of claim of particulars. Special damage in the sense of monetary loss which the plaintiff has sustained upto the date of trial must be pleaded and particularized otherwise it cannot be recovered.”

33. The above principle which correctly states the law was followed in **Sanda -vs- KCC (1992) LLR 314 CAK**- Coram Omolo and Tanui JAA where the Court upheld the decision of the trial court declining to award damages based on loss of profits on the grounds that the same should have been specifically pleaded and proved.

34. Applying the above principles to this appeal, the basis under which the respondent/plaintiff was awarded Kshs.1,000,000/= for loss of business was not established as the same was neither pleaded nor specifically proved. The alleged loss was not supported by any documentation by the respondent/plaintiff. The appeal therefore succeeds on this ground.

35. The third issue for determination is whether the award by the trial court was so manifestly high as to amount to an erroneous estimate of the damage suffered by the respondent.

36. From the proceedings in the trial court the respondent/plaintiff

contended that he was buying 10 crates of sodas a day which would cost about 6,500/-. DW1 the area sales manager with the appellant stated that on average the respondent/plaintiff's bar and restaurant was buying 5-6 crates per day. The estimates were from 17th March, 2005 to 19th June 2007 according to a card they used to record the number of cases of sodas they sale.

37. On the whole therefore, I find and hold that the respondent did not prove his claim against the appellant on a balance of probabilities. Even PW2 who testified that he witnessed the incident of the contaminated bottle of sprite soda on 16th July 2006, told the court that the incident did not stop him from going to the pub. Further, the respondent did not set out his "Special Damages" in the plaint with all necessary particulars and in the circumstances, there was no basis for the trial court to award the same.

38. In the premises, this appeal succeeds. I set aside the judgment of the trial court and in lieu therefore I enter judgment dismissing the respondent's claim with costs to the appellant. The appellant shall also have the costs of this appeal.

Dated and delivered at KISII this 31st day of July, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:-

Mr. Mageto for Nekesa for the Appellant

Present in person for the Respondent's

Mr. Bibu - Court Clerk.