



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CIVIL APPEAL NO. 4 OF 2014**

**BETWEEN**

**KENYA WOMEN FINANCE TRUST ..... APPELLANT**

**AND**

**JUDITH ACHIENG OBUDHO..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. O.J. Ong'ondo, RM in Principal Magistrates Court in Homa Bay, Civil Case No. 18 of 2009 dated 22<sup>nd</sup> November 2011)***

**JUDGMENT**

1. The appellant (“ KWFT”) appeals against a judgment rendered in the magistrate’s court where the court made the following orders:

- a. *The defendant is ordered to pay the plaintiff Kshs 7,000/- residual value of sale of plaintiff impounded TV worth Kshs.10,000/-*
- b. *The defendant pay Kshs 220,000/- general damages for fraudulent impounding and sale of plaintiff’s TV without making a inventory or giving notice to the plaintiff for its actions.*
- c. *Costs and interest.*

2. In order to appreciate and deal with the appeal it is necessary to outline the pleadings and evidence as it emerged in the subordinate court. The respondent entered into an agreement with KWFT for a loan Kshs 20,000/- secured by her household assets. The loan was to be repaid by monthly instalments of Kshs 1,800/-.

3. The gravamen of the respondent’s claim is that on 19<sup>th</sup> August 2008, KWFT’s agents fraudulently and in breach of the agreement, attached the TV and sold it. In the plaint, the respondent set out particulars of fraud and breach of contract as follows:

- i. *Proceeding to impound and to sell the plaintiffs’ TV set which otherwise was not part of the household assets offered as security by the plaintiff.*
- ii. *The defendants’ employees, servants and/or agents fraudulently took away the plaintiffs’ TV set without leaving behind any repossession order, or notification of sale of*

*the plaintiffs' TV set.*

*iii. The defendant, its employees agents and/or servants fraudulently and without due regard to value, sold the plaintiff's TV set at unrealistic value*

*iv. The defendant breached the contract between itself and the plaintiff by the impounding the plaintiffs TV set.*

4. As a result of fraud and breach of contract the respondent prayed for the value of the TV and an award of general damages.

5. In its defence KWFT admitted the loan agreement but denied the particulars of breach of contract or alleged fraud. KWFT stated that the respondent belonged to a group whose members impounded the goods after she defaulted in payments. KWFT contended that it did not have control over the group hence it could not be liable. In the alternative, KWFT pleaded that the appellant breached the loan agreement hence, "*necessitating the action taken.*" It denied the claim for loss and damages.

6. After the pleadings closed, the parties called their respective witnesses. The respondent confirmed that she took a loan from KWFT and defaulted. She stated that her house was raided by KWFT and household goods taken. Her husband, PW2, cleared the outstanding balance, whereupon all the household items were released except the TV. She said the TV was worth Kshs 10,000/- when it was bought but it was worth Kshs 7,000/- at the time it was sold. PW2 testified that when the respondent's house was raided, he went to KWFT's office and paid the outstanding loan. He confirmed that all the household items were released except the TV.

7. On behalf of KWFT, John Kanga, the manager testified that the respondent took the loan through one of the groups and that she provided household goods as security.

8. After hearing the case, the learned magistrate was satisfied that the plaintiff had proved her case. The appellant appeals on several grounds which, from the arguments made by the parties, may be distilled into three broad grounds as follows;

- (a) Whether the learned magistrate set out the points of determination in judgment.
- (b) Whether the respondent proved her case on the balance of probabilities.
- (c) Whether the court was entitled to award general damages for breach of contract?

9. As this is a first appeal, the duty of the court is to review the evidence and come up with its own independent conclusions bearing in mind that it neither heard nor saw the witnesses (see *Selle v Associated Motor Boat Co. [1968] EA 123* and *Jabane v Olenja [1986] KLR 661*).

10. The first ground of appeal deals with compliance with **Order 21 rule 4** and 5 of the **Civil Procedure Rules** which provides as follows;

*Rule 4*

*Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.*

*Rule 5*

*In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue*

11. I have reviewed the judgment of the trial court and whereas a concise statement of the case, points for determination thereon and reasons for the decision are not distinctly and separately enumerated or isolated, the learned magistrate set out the facts, evidence, findings and reliefs in the judgment. Ultimately the issue is one of substance and not form. There is therefore no merit in the complaint that the learned magistrate failed to comply **Order 21 rule 4** and 5 of the **Civil Procedure Rules**.

12. KWFT submits that the respondent did not prove her case on the balance of probabilities. The issue, as I have outlined above, is whether KWFT wrongfully impounded the TV. Counsel for KWFT contends that the evidence shows that it is the members of the group that impounded the goods while the respondent asserts that it is KWFT which impounded the goods.

13. Both KWFT and the respondent agree that the goods were impounded. In his testimony, DW1 testified that, *“Our officers went to impound goods. It is true that impounding took place and was executed by 6 OMAT group members. Items were taken to our offices KWFT.”* The fact that DW1 admitted that its officers went to impound the goods points to involvement of KWFT. The learned magistrate was entitled to reach the conclusion that KWFT was liable and I uphold this finding.

14. Having admitted that it was involved in the impounding the items which were taken to offices, KWFT bore the burden of showing that it released the TV to the respondent. It did not provide any evidence to show that it released the TV. The respondent therefore proved her claim on the balance of probabilities.

15. The next issue concerns the relief that was granted. The respondent pleaded special damages. KWFT correctly submits that special damages must be pleaded and proved (see **Kampala City Council v Nakaye [1972] EA 446**, **Siree Limited v Lake Turkana El Molo Lodges [2002] 2 EA 521** and **Hahn v Singh [1985] KLR 716**). This proof is on a balance of probabilities. The respondent produced a receipt to show that she bought the TV and she was awarded Kshs 7,000/- which reflected its depreciated value. KWFT did not demonstrate that the TV could have been worth much less than that contended by the respondent. I therefore uphold the award.

16. KWFT contests the award of Kshs 200,000/- as general damages on the ground that general damages cannot be awarded for breach of contract. The appellant cites several cases including **Dharamshi v Karsan [1974] EA 41** where the Court of Appeal upheld this position. The respondent urges the court to uphold the award of general damages as the same was awarded for KWFT’s fraudulent conduct. Counsel for the respondent contended that the general damages may be awarded for fraud. He also submitted that general damages need not be specifically pleaded as was held in **Said Kibwana and General Tyre EA Limited v Rose Jumbe [1993] TLR 175**.

17. This issue calls for an understanding of the nature of the respondent’s cause of action. I must state from the outset that the respondent’s plaint was not a model pleading. The advocates and the parties did not pay attention to the manner the case was framed. The respondent seemed to conflate fraud and breach of contract. The case was in reality on for conversion of property and it was defended by the appellant as such. The issue was whether KWFT took and failed to release the respondent’s TV without lawful cause. In **Atogo v Agricultural Finance Corporation & Another [1991] KLR 521** the Court of Appeal stated that, *“There can be no doubt that a wrongful taking of another person’s goods constitutes the tort of conversion.”*

18. Fraud in common parlance, as defined by the **Concise Oxford English Dictionary** is, *“Wrongful or Criminal deception intended to result in financial or personal gain.”* **Blacks’ Law Dictionary, 9<sup>th</sup> Edition** page 731 defines fraud as, *“A knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases, especially when the conduct is willful, it may be a crime. A misrepresentation made recklessly without belief in its truth to induce another person to act.”* While **Jowitt’s Dictionary of English Law (2<sup>nd</sup> Edition)** at page 827 describes fraud, *“advantage gained*

*by unfair means, a false representation of a fact made knowingly, or without belief in its truth, or recklessly, not caring whether it is true or false”*

19. The common denominator in the definition fraud is an element of dishonesty. The particulars set out in the plaint and did the evidence did not disclose any form of dishonesty on the part of KWFT or its officers. I therefore hold that that the case for fraud was neither pleaded nor established hence damages could not be awarded for fraud.

20. In coming to the conclusion I have made I have in mind the principal stated in the case of ***Odd Jobs v Mubia [1974] EA 476*** where the Court of Appeal stated that the trial Court may base its decision on an unpleaded issue where it appears from the course followed at the trial that the issue has been left to the Court for decision.

21. In a claim for conversion, the measure of damages is normally compensatory, with the object being to restore the respondent to the position which she occupied before the tort was committed. An award of damages in conversion must not operate to penalize the defendant or to grant a windfall. The law is on this point is summarised in ***Clerk and Lindsell on Torts (14<sup>th</sup> Edition)*** para. 1150 which states;

*Damages for deprivation of goods – The damages to which a plaintiff who has been deprived of goods is entitled is prima facie the value of the goods together with any special loss which is the natural and direct result of the loss.*

22. The Court of Appeal in ***Atogo v Agricultural Finance Corporation & Another (Supra)*** noted that the appellant, whose property was wrongfully attached, was entitled to general damages. General damages are generally are at large but they must bear a relationship to the subject matter. As the basis upon which the award of general damages was awarded was fraud and breach of contract, this court is entitled to intervene. As there was no malice or bad faith, I think a reasonable sum of Kshs. 20,000/- as general damages for breach of the respondent’s right to her property is reasonable. Following the principle I have outlined above, the learned magistrate properly awarded the respondent the depreciated value of the TV.

23. In light on the findings I have made, I order as follows;

(a) I allow the appeal to the extent that the award of Kshs 220,000/- award for general damages is set aside and substituted with an award of Kshs 20,000/- as general damages.

(b) The general damages shall accrue interest at court rates from the date of judgment in the subordinate court.

(c) The appellant shall have half the costs of this appeal.

**DATED and DELIVERED at HOMA BAY this 24<sup>th</sup> day of November 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Abisai, instructed by Abisai and Company Advocates for the appellant.

Mr Nyauke, instructed by Nyauke and Company Advocates for the respondent.