



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO.29 OF 2006**

**JOYCE MARIACHANA.....APPELLANTS**

**=VERUS=**

**ERICK ADOME**

**DAVID ADOME.....RESPONDENTS**

***[From the decree and Orders of E.H. Keago Resident Magistrate in Busia PMCC No. 303 of 2004]***

**J U D G E M E N T**

The appellant in a plaint filed in the lower court dated 21.7.2004 sought for:-

- a) Kshs211,440/= special damages.
- b) General damages,
- c) Costs and interests

The facts behind the claim are simple. The appellants were tenants of the Respondents in Plot No.135, within Busia Township, vide a tenancy agreement dated 31.7.1997. The appellants were authorized and used the premises as retail shop. On 20.10.2003, without notice or lawful authority, the Respondents

broke into the shop premises and took away all the plaintiff's stock in-trade and cash, all assessed at Kshs211440/=. The appellants/plaintiffs got aggrieved. They filed the lower court claim seeking recovery of the above sum and general damages based on the alleged unlawful act or conduct of the respondent.

The respondents/defendants had filed a defence denying the appellant's claim and the alleged conduct upon which that the appellants based their claim. They however admitted the existence of the tenancy agreement pleaded, except that the 2<sup>nd</sup> appellant averred that the 1<sup>st</sup> respondent had failed to pay rent for 10 months amounting to Kshs30,000/= and had unlawfully sublet the premises to the 1<sup>st</sup> appellant.

Respondents then also pleaded a Counter-claim for the outstanding rent of kshs30,000/= plus kshs20,000/= being compensation the sum the 2<sup>nd</sup> respondent used to repair the premises after the 2<sup>nd</sup> appellant allowed the same to fall into disrepair during the 10 months aforesated. Finally the 2<sup>nd</sup> respondent had raised the defence of lack of jurisdiction by the trial court in view of the fact that this was a Landlord-Tenant relationship under the Landlord and Tenant (shops, Hotels and Catering Establishments) Act.

Both sides gave evidence at the lower court. The highlights of such evidence is that the 2<sup>nd</sup> defendant admitted that there were no arrears of rent outstanding when the defendant forcefully broke into the shop. He accordingly withdrew his claim for rent arrears.

After analyzing the evidence from both sides, the trial court came to the conclusion that it was only the 2<sup>nd</sup> appellant/plaintiff who had locus to claim against the defendants as the 1<sup>st</sup> appellant was only an agent to the 2<sup>nd</sup> appellant. Whether this conclusion is right and justified from the evidence on the record, will be reverted to in a moment. The trial Magistrate also found that there was no evidence to prove that Kshs169,740/= was kept in the shop when the defendants broke into it and took away the stock-in-trade and other items. He accordingly disallowed it.

The trial court also found that the defendants/respondents had unlawfully broken into the appellants shop and were liable to pay general damages. However, since the appellants had not suggested any amount, the court gave give them none. The court accordingly awarded recoverable special damages of kshs41,500/= being the value of stock-in-trade and the weighing machine. He also awarded a refund of rent of kshs4500/= for the period unused by the plaintiffs for the rents which had been paid and received by the defendants at the time of break-in. Finally, the court ordered a return to the plaintiffs of their shelves retained in the shop. It is the above findings i.e the failure to award general damages that aggrieved the appellants to appeal.

I have carefully perused the pleadings, the evidence from both sides, and the written submissions. I find, as did the lower court, that the respondents unlawfully broke into the appellants shop when the appellants were in occupation of the shop and had properly paid rent, to and inclusive of the month of November, 2003 which was still in the future. I therefore totally agree that in the presence of the relevant evidence, the respondents/defendants would stand to be liable for any liability or damage that might arise from their wrongful act.

There was no dispute that the 1<sup>st</sup> plaintiff was an agent of the 2<sup>nd</sup> plaintiff and conducted business on behalf of the 2<sup>nd</sup> plaintiff.

The pleadings and the evidence from the 1<sup>st</sup> plaintiff/appellant, clearly showed that she controlled possession of the shop as an agent. This did not disentitle her from keeping personal items in the shop as a human being. Evidence shows that she had received a sum of kshs169,940/= from her elder daughter with a view and purpose of using it to buy stock for business. She had proceeded to keep the money in the shop and found it had disappeared after the defendants broke into the shop and took away stock in trade. The 1<sup>st</sup> plaintiff had informed the 2<sup>nd</sup> plaintiff of the disappearance of the money and the latter stated so in evidence.

In my opinion and finding the 1<sup>st</sup> appellant was entitled to join the 2<sup>nd</sup> appellant in claiming at least for her Kshs169940/= which she had kept in the shop and which she believed the 1<sup>st</sup> defendant or his agents took during the break-in. That is to say, that the 1<sup>st</sup> plaintiff had a cause for action to claim the missing money. Indeed, the defendants nowhere in their evidence stated that they did not lift the said sum from shop when they lifted other shop goods. An incidental conclusion I come to also is that the trial Magistrate had no reason legal to and was not right to strike out the name of the 1<sup>st</sup> plaintiff from the plaint since it was properly included therein by the plaintiff.

The second issue to examine is whether the lower court was right not to award any general damages when it came to the conclusion that the 2<sup>nd</sup> plaintiff was entitled to such damages on the mere ground that the plaintiff had failed to claim a specific figure.

In my opinion and finding once the lower court reached the conclusion that the appellants were entitled to general damages arising from the wrongful conduct of the respondents as against the appellants, then it was necessary for the court to translate the general damages into some reasonable figure taking into account the circumstances of the case. The court may not stand to be blamed if it awarded an averagely low level of such damages, but giving or awarding a figure of damages should be done. Indeed even where the court dismisses the plaintiff's claim, the proper practice would be to assess such special and general damages in case the claims were to succeed in appeal. In the Court of Appeal case of Manchester Outfitters Suing Division Ltd & Another vs Standard Chartered Financial Services Ltd & Another, [2002] 2 KLR, 590 at 597, the court stated thus:-

**“It is unfortunate that once the learned trial magistrate dismissed the plaintiffs suit he did not assess any damages. It is always desirable that even in such a case damages should be assessed in case the plaintiff later succeeds.”**

Since I have made a finding that the appellant was entitled to a specific amount of general damages, the correct thing for this court to do would be to return the case down to the same court that decided it with orders to assess the damages. However, this is an old case of 2004. The magistrate may have been transferred. In the circumstances it would be easier and more convenient and in the interest of justice for this court to assess those damages since it has power as the first appellate court to do so.

That this court has such power was stated in the Manchester case just above cited. On page 598 thereof, the Appeal Court stated:-

**“Although it is general principle that damages are assessed once and for all at the time of the trial even though the plaintiff may subsequently suffer greater or lesser loss than was anticipated, an appellate court has power to receive further evidence, particularly of matters which have occurred after the date of trial.”**

It will also be appreciated that the Court of Appeal was more cautious to assess the costs in the above case because it was the highest court from where neither party would have had a chance to appeal if they got aggrieved by that court's assessment. That would not be so with this court.

The last issue I would wish to deal with before making a summary of findings, is whether the lower court had jurisdiction to deal with the case. The respondents pleaded that this was a jurisdiction of the Business Premises Tribunal and not any other court.

In my view, while indeed the notice served upon the appellants was supposedly served under Section 4 of Chapter 301 – The Landlord and Tenant (shops, Hotels and Catering Establishment) Act, nevertheless, the act of breaking into the shop and carrying away the tenants’ goods when there were no rents outstanding, was a tortious act and probably criminal act as well. It follows that the appellants were entitled to treat the conduct as a tort and seek relief in ordinary courts as they did. I accordingly reject the argument that the lower court had no jurisdiction.

The summary of this court’s finding is therefore as follows:-

- a) The lower court had jurisdiction.
- b) The evidence on the record by the 1<sup>st</sup> appellant was sufficient to prove and indeed proved that the appellants, jointly and severally, vicariously or directly and respectively, were liable to refund to the 1<sup>st</sup> plaintiff/Appellant the sum of kshs169,940/= lost by the 1<sup>st</sup> appellant during the break-in.
- c) The respondents are liable to pay the 1<sup>st</sup> appellant a sum of kshs46000/= ordered by the lower court being the value of stock-in-trade, weighing machine and refund of un-utilised rent, if not paid.
- d) The Respondents are to return plaintiffs shelves, if not done
- e) Parties to submit evidence and legal authorities on general damages awardable.

It is so ordered.

Dated and delivered at Busia this 13<sup>th</sup> day of June 2011

D.A. ONYANCHA

JUDGE.