REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBAS

Civil Appeal 93 of 1998

HASSAN MBARAK……..……..……APPELLANT

VERSUS

BAWAZIR S. SALIM & ANOTHER…....……..RESPONDENTS

JUDGMENT

I have before me an appeal by Hassan Mbarak Salim, the plaintiff in the original action, from the judgment and decree of the Chief Magistrate's Court in CMCCC No. 4212 of 1996 (Hassan Mbarak – v – Bawazir Swaleh Salim and Zunirada Bawazir). In that action, the Learned trial Magistrate awarded Kshs. 300,000.00 to the appellant which he determined to be the balance of purchase price for a motor vehicle the appellant had sold to the 1st respondent who was the 1st defendant in that action. The Learned trial Magistrate also awarded to the same respondent Kshs. 450,000.00 as damages for defamation of character.

The appellant brought his action in the Lower Court by way of a plaint dated 11th September 1996. He pleaded that he had in 1995 sold a motor vehicle Registration number KAG 007 Toyota Corolla to the respondents for Kshs. 525,000.00 of which the respondents had paid Kshs. 100,000/= leaving a balance of Kshs. 425,000,000 outstanding which was the sum he claimed in the plaint. In the alternative, the appellant prayed for return of the motor vehicle and forfeiture of the deposit. He also claimed interest on the principle sum at bank rates and costs.

The respondents delivered their defence and counter claimed for damages for defamation of character. They denied that the purchase price for the said motor vehicle had been agreed at Kshs. 525,000.00. They pleaded that they had no intention of purchasing the said motor vehicle but that the appellant forced the matter upon them. With regard to their claim for damages for defamation of character, the respondents pleaded that about the month of February 1996, the appellant had maliciously and without any cause whatsoever, made a report to Urban Police station that the defendants had stolen his motor vehicle consequent upon which the officer in charge summoned the defendants at the police station for interrogation on several occasions. It was also pleaded that the appellant took the said police officer to the respondents' home at Mikindani street in the town centre and while there conducted a search in broad daylight without any reason and in view of the respondents' workers, tenants, neighbours and bystanders. It was further pleaded that by his malicious actions, the appellant exposed the respondents to criminal prosecution and to their workers employees and passer's by who saw the respondents' home being visited and searched by police as criminals and wrong doers. It is then pleaded that the respondents by reason of the said matters had been greatly injured in their credit character and reputation and had been brought into public scandal, ridicule and contempt. It was also pleaded that the respondents had been put to expense in hiring an advocate to attend to the said police matters. The respondents therefore counterclaimed against the appellant for damages on the footing of aggravated or exemplary damages and

set the damages against any sums that could be found due to the appellant.

At the trial the appellant gave evidence and called two (2) witnesses, Hussein Saidi Batheyu (PW2) and Masudi Musa (PW3). In his testimony the appellant stated that he had imported a Toyota Corolla car which he wanted to sell in 1995. He was then introduced to the 1st respondent by PW2 since the 1st respondent had intimated to PW2 that he wanted to purchase a motor vehicle. A meeting was t hen convened at Blue Room Hotel where the price of the vehicle was agreed at Kshs. 525,000.00 although the vehicle was then at his home and was to be seen at Whiteline Petrol Station where the purchase price was to be paid to the owner of the petrol station (PW3) on collection of the vehicle. Later the appellant learnt that the 1st respondent had collected the vehicle for a road test but had neither paid the purchase price nor returned the vehicle. After a week the vehicle was involved in a road accident, caused by the 1st respondent's son. The appellant went to the 1st respondent who promised to pay later. At the time, the vehicle had not been registered. The 1st respondent gave the appellant Kshs. 100,000.00 but Kshs. 50,000.00 was for registration for which he paid and the vehicle was registered as KAG. The appellant continued asking for his money but in vain. He sought the assistance of PW3 without success and then reported to the police. He went with the police to the respondents' home and they then advised him to file suit. The appellant instructed counsel who before filing suit served the respondents with a notice of demand which notice elicited no response from the respondents.

Hussein Saidi Batheyu (PW2) testified that he knew of the appellant's desire to sell a vehicle and of the 1st respondent's wish to purchase one. The trio met at Blue Room in June 1995 and the price of the vehicle was agreed at Kshs. 525,000.00. The team then moved to Whiteline Petrol Station where the 1st respondent saw the vehicle. The latter took the vehicle for a road test and it was agreed that the 1st defendant would pay the price and take the vehicle. Later, PW2 together with the appellant, went to the respondents' home where the 1st respondent promised to pay. The vehicle was however later involved in an accident.

PW3, Masudi Musa, recalled that the appellant informed him that the 1st respondent would call at his Petrol Service Station to check on the vehicle in respect of which the price had been agreed at Ksh.525,000.00. The 1st respondent went to PW3's Petrol Station and took the vehicle for a test drive but did not return it. Later the 2nd respondent went to PW3 and sought assistance of N.I.C to purchase the vehicle. PW3 stated that he was then a representative of the N.I.C. PW3 completed a loan application form for the 2nd respondent and recommended the application. He then forwarded the application to NIC which rejected the same. Later he learnt that the vehicle had been involved in an accident. Later PW3 went to the home of the respondents where the 1st respondent promised to pay for the vehicle. Later he was summoned to the police to record a statement. In the opinion of PW3 the price of Ksh.525,000.00 for the vehicle was reasonable since its value was about Ksh.600,000.00.

The respondents gave evidence in their defence and in support of the counter claim. They called three witnesses: Habib Salim Rashid (DW3), Ali Mohamed (DW4) and Hassan Chengo (DW5). The 1st respondent's testimony was briefly as follows;-

He knew the appellant who was then his tenant (in 1995). He was informed by Hussein that the appellant had a vehicle for sale whereupon a meeting was arranged at Blue room before he saw the vehicle. The price was not then agreed. He was given the vehicle at White Line Petrol Station for a test –drive. The next day his brother was involved in a road traffic accident with the said vehicle due to faulty brakes. He sent word to the appellant of the accident and he came to console him but did not talk about the vehicle. Later the appellant again went to his house and told him to pay Ksh.400,000/- since the vehicle had been involved in an accident. He accepted that price and paid Ksh.100,000/=. The appellant then went to report to the police and took policeman to him. At that time the appellant had not paid duty and had not obtained a log book for the vehicle which only had a temporary permit. The 1st respondent took the salvage of the vehicle which he bought at Kshs.75000.00. He was to pay the balance when the appellant called the police and called him a thief. Although the 1st respondent was to pay the balance of

Kshs.300,000.00 before the accident, he stated that after the accident he could only pay the salvage. He denied applying for a loan for the said vehicle. He further stated that the police wanted to arrest him and he went to Urban CID office twice. He added that the appellant spoilt his name before neighbours, employees, his family and the public for which he claimed damages of Kshs1,000,000.00

The 2nd respondent stated that there had been no agreement for sale of the vehicle but her husband, the 1st respondent, had taken the vehicle for a test drive. The vehicle had unfortunately been involved in an accident after which they comprised at Kshs.400,000.00 as the price of the vehicle of which her husband paid Kshs.100,000.00. She denied the claim of Ksh.525,000.00. She recalled that the appellant called police to harass them and took two policemen to their house when her husband was sick. The policemen told her that her husband had stolen a vehicle. The appellant also said so in the presence of their neighbours and workers. He even told the officers to enter the house and collect the thief. That was repeated on another day and caused a lot of harassment. They then told the DCIO Urban, their side of the matter. She further stated that her husband was regarded as a criminal by neighbours and treated with contempt. She added that the appellant was malicious because he knew that her husband was not a thief but a prominent member of society.

Habib Salim Rashid (DW3) stated that he visited the respondent on 14.9.1996 when the appellant went there with two policemen. He heard the appellant shout "This is the thief's house" and asking the servants where the 1st respondent was. The appellant entered the 1st respondent's house with the policeman. The next day the appellant again took policemen to the house of the respondents. He told the officers that the 1st respondent was hiding and they should search for him. The police officers did so and left. DW3 stated that the incidents exposed the 1st respondent to public contempt and odium. In his view the appellant was trying to use force to exact payment. DW3 knew the 1st respondent as a respected person.

Ali Mohamed (DW4) testified that he was at his house let to him by the 1st respondent in 1995 when he heard someone saying "thief." He went out and saw the appellant whom he had not known before. He heard him tell two people that there was a thief. He learnt later that the two people were CID officers. He did not know the 1st respondent as a thief.

Hassan Chengo (DW5) recalled one day in the year 1995 when the appellant knocked at the respondents' house. He opened the door and the appellant asked for the 1st respondent. He replied that the 1st respondent was sick. He then allowed the appellant into the house. The following day the appellant went to the respondents' house again accompanied by three (3) policemen who insisted on entering the house and searching it and then left. As they did so the appellant complained to the policemen that they should not have left the 1st respondent. PW5 did not see the 2nd respondent on the first visit but he saw Hatib.

When the appellant returned with policemen the 2nd day, the team entered every room. PW5 recalled the appellant tell the policemen that the 1st respondent was a thief and should be arrested. That attracted other people.

On the conclusion of the evidence, counsel for the parties made their submissions before the trial Magistrate. The trial Magistrate after considering the evidence adduced before him and the submissions made to him by counsel concluded that the appellant, told him a lot of untruth. He accepted the respondents' testimony that there was an agreement to compensate the appellant with Ksh.400,000/= for the vehicle that had been involved in the accident. The 1st respondent had then paid Kshs.100,000.00 and instructed the appellant to have the vehicle registered before he would collect the balance. The Learned trial Magistrate therefore found that the 1st respondent was indebted to the appellant in the sum of Kshs. 300,000/= which was to be paid after getting the log book.

The Learned trial Magistrate further found that the 1st respondent had been injured in his character

by the shouting of the appellant that the 1st respondent was a thief in the hearing of Habib Sahim Rashid (DW3), Ali Mohamed (DW4) and Hassan Chengo (DW5). He also found that the conduct of the appellant was malicious because he knew that the 1st respondent had asked for the log book of the vehicle before paying the balance of purchase price but instead of bringing the log book he decided to call the police. In the trial Magistrate's opinion the conduct of the appellant exposed the 1st respondent to ridicule odium and contempt and attracted an award of damages which he set at Kshs.450,000.00. The upshot was that overall it was the appellant who was to pay the 1st respondent Kshs.150,000.00. The Learned trial Magistrate found that the 2nd respondent had been wrongly sued and dismissed the suit against her with costs.

The learned trial Magistrate decision provoked this appeal. The appellant has put up seven (7) grounds of appeal namely:

1. That the Learned trial Magistrate erred in fact and law in giving judgment in favour of the appellant for Kshs.300,000.00 only while there was no basis for doing so.

2. That the Learned trial Magistrate erred in disregarding the appellant's evidence completely of the value of the car which was agreed at Ksh.550,00.00 while credible evidence was given to that effect.

3. That the Learned trial magistrate erred in law and fact in entering judgment for the respondent in his counter claim for defamation.

4. That the Learned trial magistrate misdirected himself in failing to hold that information given to the police for purposes of directing crime is privileged and that the appellant herein did exactly that in reporting about his vehicle which had been converted by the respondents.

5. That the Learned trial Magistrate erred in holding that in reporting the respondents to the police, and showing the police the home of the respondents the appellant was actuated by malice.

6. That even assuming without admitting that the trial Magistrate was right in granting the counter claim he erred in awarding the sum of Kshs .450,000.00 in general damages and used wrong principles in arriving at such a high figure.

7. That the Learned trial Magistrate erred in awarding a Sum of Ksh.450,000.00 to the respondents and Ksh.350,000.00 in favour of the appellant the effect of which was that the wronged party was condemned to suffer a further loss of Kshs.150,000.00

Counsel agreed to file written submissions and highlighted the same before me on 24.4.2008. For the appellant it was argued that he proved his claim of Kshs.425,000.00 and ought to have been awarded the same. Counsel for the appellant further argued that the defence and counter claim were defective in form as the title did not state that the respondents had a counter claim. Counsel further contended that there were material inconsistencies in the evidence adduced by the respondents and the testimonies did not support the pleadings and the counterclaim should therefore have been rejected. In counsel's view, the element of malice was not proved by the respondents and was not addressed by the Learned trial Magistrate. In the premises, counsel prayed that the appeal be allowed and if any damages were to be awarded, the same should have been reasonable and not excessive.

Responding to the submissions of the appellant's counsel, the respondents' counsel submitted that the judgment of the Learned trial magistrate should no be disturbed. In the first place, so counsel argued, there was never a case against the 2nd respondent. As against the 1st respondent counsel argued that there was clear evidence of defamation of character and the circumstances in which the defamation occurred excluded the appellant's plea of privilege. In the premises, counsel urged that the appeal be dismissed with costs.

This is a first appeal. The court is therefore duty bound to reconsider the evidence adduced before

the lower court and make its own evaluation and draw its own conclusions. In doing so the court should bear in mind that it has not had the advantage of the trial court in seeing and hearing the witnesses. The court should therefore be slow to disturb findings of fact of the trial court (See Peter –VS- Sunday Post Ltd [1958] EA 424. I must therefore examine with care whether the findings on facts were not based on evidence adduced before the Learned trial Magistrate or whether there was a misapprehension of the evidence or that the Learned trial Magistrate acted on wrong principles in arriving at those findings of fact.

On the question as to whether, there was a verbal agreement between the appellant and the respondents regarding the purchase of the subject motor vehicle, the Learned trial Magistrate did not believe the appellant and his witnesses. The Learned trial Magistrate found no evidence to connect the 2nd respondent to the agreement which was alleged to have been made at Blue Room hotel as she did not attend that meeting. He also found that the vehicle had not been registered by the time of the Blue Room hotel meeting and therefore the inclusion of the registration number in the plaint was misleading. The Learned trial Magistrate also found that by that time (Blue Room Hotel Meeting), the respondents had not even seen the subject vehicle nor had they test driven the subject vehicle. In those premises the Learned trial magistrate found that there could not have been an agreement for the sale of the said vehicle at Blue Room Hotel. I am unable to fault those findings and conclusions. The Learned trial Magistrate was perfectly entitled to arrive at the conclusion that the sum of Ksh. 525,000.00 alleged by the appellant as the purchase price of the said vehicle had not been agreed. That conclusion was based on logic as analyzed by the learned trial Magistrate.

So, what was the price of the said vehicle? The Learned trial magistrate found that the 1st defendant had agreed to pay the appellant Kshs.400,000.00 for the said vehicle as compensation for the vehicle which had been damaged in his hands. The 1st respondent testified at the trial that after the vehicle had been involved in the accident he offered to pay the appellant Ksh. 400,000.00 which offer was accepted by the appellant. They then "agreed at that price." The 2nd respondent supported that evidence. She said in her testimony that "they had not negotiated the price but after the accident, they compromised at a price of Kshs.400,000.00." The respondent therefore clearly admitted that the purchase price for the said vehicle was Kshs.400,000.00. I cannot disturb the finding that the 1st respondent agreed to pay Ksh.400,000.00.

There is no dispute that the 1st respondent paid the appellant Kshs.100,000.00. The appellant unequivocally admitted that payment. It cannot therefore be gainsaid that the balance due to the appellant from the 1st respondent was kshs.300,000.00. That is the sum, the Learned trial magistrate awarded the appellant. That award cannot be faulted. I therefore dismiss grounds 1 and 2 of the appeal.

Grounds 3 and 4 of the appeal will be considered together. Ground 3 captures the essence of both grounds. It is expressed as follows:-

"The Learned trial Magistrate erred in law and fact in entering judgment for the respondent in his counterclaim for defamation."

With regard to the counter claim, the Learned trial magistrate framed three (3) main issues for determination. They were as follows:-

(a) Did the plaintiff take the police to the defendants' home?

(b) If so, did he utter defamation words?

(c) Was the reputation of the defendant injured?

In considering whether the Learned trial Magistrate captured the central

issues for determination, the starting point is the respondent's own pleading

in the defence and counter claim. It was pleaded in paragraph 6 as follows:-

6. Further the defendants state that on (sic) or about the Month of February this year (1996) the plaintiff unlawfully, maliciously and without any cause whatsoever made a report to urban Police Station that the defendants had stolen his motor vehicle. Consequently the officer in Charge summoned the defendants at the police station for interrogations on several occasions."

It is to be noted that both respondents jointly complained against

the appellant. It is also noted that they fixed a date of the complainant to be in or about the month of February 1996. They also made a specific complaint that the appellant made a report to urban Police Station that the respondents had stolen his vehicle. I will refer to those averments later on in this judgment.

In paragraph 7 the respondents averred as follows:-

"7. In addition, the plaintiff brought the Officer In Charge of Urban Police Station to the home of the defendants at Mikindani Street in the Centre of town and there procured the said officer to conduct a search in daylight without any reason openly and in view of Defendant's Workers, Servants, Tenants, neighbours and bystanders."

It should be noted again that both respondents jointly complained against the appellant and their complaint was specific that the appellant brought the Officer-In-Charge of Urban Police

Station to their home and that the officer conducted a search without any reason and openly. The significance of those averments will appear in a few moments.

In Paragraph (8) the respondents, pleaded as follows:-

"8. By his malicious actions the plaintiff exposed the defendants to criminal prosecution and to their workers, servants, employees and passersby who saw home of the defendants being visited, searched by police as criminals and wrong doers."

In that paragraph both respondents made specific reference to the actions of the appellant in the defence and counter claim and specified the anticipated consequences thereof which were that the respondents were exposed to criminal prosecution and further that the appellant's statedactions exposed the respondents to their workers, servants, employees and passersby as criminals and wrong doers.

On the basis of paragraphs 6, 7 and 8 the respondents pleaded in paragraph 9 as follows:

"9. The defendants state that by reason of the matters aforesaid the defendants have been greatly injured in their credit character and reputation and have been brought into public scandal ridicule and contempt."

The question that arises is whether the respondents adduced evidence to prove their averments in the counter claim. The foundation of the respondents' claim was a report allegedly made by the appellant to Urban Police Station in or about the month of February 1996 that the respondents had stolen his vehicle consequent upon which, the Officer-In-Charge summoned the respondents to the police station on several occasions. Throughout his testimony the 1st respondent did not state when the appellant reported him to the Officer-In-Charge of Urban Police Station.

Indeed in his entire evidence he did not mention the Officer-In-Charge of Urban Police Station. He stated that the appellant went to report him to the police. He further testified that he was told that he had stolen a car. He then went to the Urban CID office twice. No where did he state that he was summoned to Urban Police Station by the Officer-In-Charge.

On her part the 2nd respondent did not testify that the appellant had made any report to Urban Police Station or to any Police Station that she had stolen the appellant's vehicle. She did not state that she was ever summoned to the said Police Station by the Officer-In-Charge at all.

She further did not testify that she was ever interrogated. She also did not put any date to the report allegedly made by the appellant. The Officer-In-Charge of Urban Police Station was not called as a witness nor was an extract of the alleged report produced in evidence. In the end, paragraph 6 of the defence and counter claim was not supported by the evidence of the respondents.
As stated above, in paragraph 7 the respondents pleaded that the appellant took the Officer-In-Charge of Urban Police Station to the respondents' home and that he procured the said Officer-In-Charge to conduct a search in broad daylight without any reason. As already observed, the Officer-In-Charge of Urban Police Station was never called as a witness. However, the respondents themselves in their testimony did not state that the said officer had ever gone to their home and conducted a search thereat.
As pleaded in paragraph 8 of the defence and counterclaim, the Appellant's alleged report to Urban Police Station and the taking of the Officer-In-Charge of that station to the respondents' home were the actions that exposed the respondents to criminal prosecution. They were the actions that further exposed the respondents to their workers, tenants and passersby as criminals and wrong doers. However, the evidence that the respondents adduced did not prove the allegations to the said paragraph. As already stated the officer-In-Charge of Urban Police Station did not feature anywhere in the testimony of the respondents.
There is no evidence that the respondents sought and obtained leave to amend their defence and counter claim. It was therefore not open to them to adduce evidence to establish what they had not pleaded. The issues framed by the Learned trial magistrate as issues 4 (a) and (b) did not flow from the pleadings as framed by the respondents themselves. There was therefore no basis for what the Learned trial magistrate framed as the central issue. He was plainly wrong when he said as follows:
"The issue here is not what the police did, but the words uttered by the plaintiff."

With respect the Learned trial Magistrate set up a different basis for the Respondent's claim from that which they themselves had pleaded in their statement of defence and counter claim. That could not be done without amendment to the defence and counter claim which had not been sought or given.
The basis of the findings in favour of the respondents by the Learned trial Magistrate was the evidence given by Habib Salim Rashid (DW3), Ali Mohamed (DW4) and Hassan Chengo (DW5). The Learned trial Magistrate recalled that the three witnesses had told the court that they had heard the appellant shout that the defendant was a thief. The statement was allegedly made in the holy month of Ramadhan and the witnesses were surprised that such a purported staunch Muslim could steal. In the trial Magistrate's view those words injured the character of the respondent. With respect, it was not open to the Learned trial Magistrate to create another basis for the respondents' action outside their own pleadings. The role of the court is to determine issues presented to it in the pleadings. The parties are the masters of their own pleadings and if they wish to vary, change or alter those pleadings, there are known well beaten channels that must be followed. The respondents having failed to seek leave to amend their pleadings the Learned trial Magistrate should have found that the respondents were bound by their defence and counter claim as filed.
But even if the words alleged to have been uttered by the appellant had been pleaded in the defence and counterclaim, the question arises as to whether the testimony of Habib Salim (DW3), Ali Mohamed (DW4) and Hassan Chengo (DW5) would have supported the averment. Habib Salim testified that the incidents took place on 14th September 1996 and 15th September 1996. On 14th he heard the appellant shout "This is the thief's house" and on 15th September he heard the appellant telling the police officers that the 1st respondent was hiding and told them to search for him.
Ali Mohamed (DW4) testified concerning a different date and heard different statements. He testified that the incidents occurred in the year 1995. On the first occasion he did not hear the appellant say anything. The appellant, according to him, asked where the respondent was upon which DW5 replied that the respondent was sick. He then allowed the appellant into the house. On the following day DW5 again saw the appellant. On that occasion he was accompanied by three (3) policemen. The team insisted on entering the house and searching

it. DW5 did not say the 2nd respondent was present but he said Habib (DW3) was present. DW5 recalled that the appellant told the policemen that the respondent was a thief and they should arrest him. He further heard the appellant tell the CID officers that the 1st respondent was a thief and had stolen his vehicle.
The Learned trial Magistrate believed DW3, DW4 and DW5, but did not address the conflict in their testimonies. If the Learned trial Magistrate had considered the conflict in the evidence of those witnesses, he would have noted that they were not in agreement with respect to the date the incidents occurred and on the words uttered by the appellant. Indeed if the testimony of DW4 and DW5 was to be believed, the respondents' claim would be statute barred.
The respondents have not cross-appealed. They also have not applied that the decision of the Learned trial Magistrate be confirmed for different reasons from those relied upon by the Learned trial Magistrate. In this regard, I will briefly consider whether the report made by the appellant to the police is actionable. For such a report to be actionable, there should have been a specific reference to the actual report made by the appellant and when such a report was made to determine whether the action had been filed within the limitation period of one (1) year. Even if the actual report was established and dated the respondents had to plead malice and give particulars thereof to exclude privilege. They had to show hat the appellant's report to the police had no foundation at all; the test being subjective. A mere report to the police is not culpable. The police are not morons who act on the whims of complainants. They are officers trained in their many fields of operations and act independently on receiving reports from complainants. A mere report per se would not in itself be actionable. It is not surprising therefore that the Learned trial Magistrate did not think much of what the police did and the report made to them. He must have found that the respondents had not proved that the appellant had no reasonable cause for making the report.
Having considered all the various factors involved and having independently re-evaluated the evidence which was placed before the Learned trial Magistrate, I have come to the conclusion that the respondents' claim was not proved on a balance of probabilities and should have been dismissed.

Before penning off, there is an aspect of the Learned trial Magistrate's judgment which merits my consideration and upon which counsel did not address me. The Learned trial Magistrate whilst specifically finding that the appellant had not established his claim against the 2nd respondent did not make any finding on whether the 2nd respondent's claim against the appellant had been proved. The Learned trial Magistrate appeared to have concluded that the 2nd respondent had not made any claim at all against the appellant and said nothing about the same. That was not proper as the counterclaim was made by both respondents. Yet the 2nd respondent did not allege in her testimony that the appellant had made any report against her nor was there any other evidence adduced in that regard.
Her claim against the appellant should therefore have been dismissed.
Another matter which was strongly urged by counsel for the respondents and which should have been treated as a preliminary point of objection was the competence of the appeal on the ground that the records of appeal filed by the appellant did not include vital documents. Counsel made that argument because, a decree included in one of records has not been approved by him as required under Order XX Rule 7 of the Civil Procedure Rules. It was not counsel's argument that the decree included in the record had not been drawn up in accordance with the judgment. His main concern was that, it had not been forwarded to him for approval. There was otherwise no prejudice occasioned to the respondents. With respect, I do not think that the appellant's appeal is incompetent for merely failing to include the decree in the initial record of appeal filed. In any event under Order XLI Rule 8B (4) of the Civil Procedure Rules, there is no requirement that a formal record of appeal be filed. All that is required is that the court before hearing the appeal be satisfied that the documents listed in the said sub rule are on the court record. Indeed the court may dispense with the production of any document listed therein except the memorandum of appeal, the pleadings and the judgment, order or decree appealed from. Even the failure to produce the said vital

documents does not attract the sanction of striking out. The absence of the documents would merely mean that the appeal would not be proceeded with until they are availed. That being my view of the mater, all the authorities relied upon by counsel for the respondents are really of no relevance as those authorities applied the Court of Appeal Rules.

The High Court does not have the same limitations or strictures as are imposed by the Court of Appeal Rules.
On damages, the Learned trial Magistrate found that the trend then was to award exemplary damages to deter the behaviour which he had found proved. In his view the figure of Kshs. 450,000.00 served that purpose. The Learned trial Magistrate did not refer to any authority nor does it appear that he carried out any meaningful research on the matter.
Nevertheless, I do not find the award to be manifestly too high as to suggest an error of principle or a wrong estimate of the damages awardable in the circumstances. So, if I had fund as proved the respondents' claim I would not have disturbed the Learned trial Magistrate's award of Kshs. 450,000.00
The upshot however, is that this appeal is allowed in part. The judgment and decree of the Learned trial Magistrate on the respondents' counter claim is quashed and substituted therefore with an order dismissing the counter claim with costs. The judgment for the appellant against the 1st respondent in the sum of Kshs. 300,000.00 is confirmed. The order dismissing the appellant's case against the 2nd respondent with costs is also confirmed. The appellant has not prayed for costs of this appeal and he has only partially succeeded, each party shall therefore bear his/her own costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Hamza holding brief for Mazrui for the Appellant and Mkani holding brief

for Khaminwa for the Respondents.

F. AZANGALALA

JUDGE

16TH JULY 2008