



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 483 OF 1999

GEORGE OCHIENG OLOOAPPELLANT

VERSUS

KENYA COMMERCIAL BANK LIMITEDRESPONDENT

J U D G M E N T

On 17th October, 1996 the appellant filed a suit against the respondent and sought the following orders:-

- (a) Loss of Kshs.1,300/= per day,
- (b) Expenses incurred being Kshs.2500/= per month
- (c) General damages,
- (d) Costs of the suit and interest thereon and on (a), (b) and (c) above at court rates from 1/11/1994 until payment in full and final satisfaction of the decree herein,
- (e) Any other relief this Honourable Court may deem just to grant.

The background of the suit was that the appellant was a customer of the respondent operating a current account number 260-742-943 at its Siaya Branch.

That during 1987, (13th April) he obtained a loan from the respondent in the sum of Kshs.8000/= repayable at Kshs.300/= per month on the security of his fixed deposit at the same bank.

That by October 1990, the appellant had repaid the full amount of the loan.

That in November, 1994 the appellant was advanced Kshs.100,000/= by Kenya Finance Bank Limited for the purpose of commencing posho mill business which loan cheque he deposited in his account with the respondent.

That the respondent took part of the proceeds to recover its own alleged monies due from the appellant which action the appellant termed wrongful, unlawful, malicious and negligent.

The appellant complained that as a result of this action on the part of the respondent, his posho mill project was derailed and/or destroyed and he suffered loss of profits, expenses inconvenience and serious personal embarrassment and reputation.

Particulars of special damage were stated in paragraph 9 of the plaint; hence the prayers made as herein

before stated.

The case was heard by the Resident Magistrate (N.M. Kamuya) on 30th September, 1999, submission made on 18th October 1999 and Judgment delivered on 2nd November, 1999, wherein the appellant was awarded damages he considered manifestly inadequate.

In the case the appellant testified on the basis of the plaint filed in court on 17th October 1996 while the defence witness a Mr. Josephat Ikoto testified that this problem arose out of an error on the closure of the appellant's loan account.

That when the respondent discovered the error, it rectified the same by crediting the appellant's account with Kshs.17,601/40 in respect of the amount wrongly deposited to his account, interests and ledger fees.

In his judgment the learned magistrate found that the respondent had acted unlawfully in restricting the appellant from utilizing funds that he had deposited with them for use in buying a posho mill and awarded the appellant a sum of Kshs.38,620/= being loss of profits for one year, rent payable for one year pecuniary damages and interest hence the present appeal filed in this court on 9th November 1999.

The memorandum of appeal listed six (6) grounds of appeal, namely:-

- (a) THAT the learned Resident Magistrate erred and misdirected himself in delivering a whimsical and unrealistic assessment of damages not founded on law.
- (b) THAT the learned trial magistrate erred and misdirected himself in assessing damages in a manner contrary to the established legal principles, norms and judicial practice of assessment of damages.
- (c) THAT the learned trial magistrate's assessment was so low and unrealistic that it amounted to a departure negation of the principles of assessment of damages thereby constituting a gross miscarriage of justice.
- (d) THAT the learned trial magistrate erred and misdirected himself in delivering the assessment of damages not based on evidence and submissions made before him.
- (e) THAT the learned Resident Magistrate's purported assessment of damages was wholly inadequate and failed in any way to compensate the appellant for the severe damage and financial loss suffered; and
- (f) THAT the learned trial magistrate erred and misdirected himself in delivering an assessment of damages which was against the weight of damages.

The appeal was heard by this court on 30th April, 2002 when counsel for the parties submitted thereon with counsel for the appellant giving the background of the case.

Counsel submitted that because the respondent held part of the proceeds from the loan cheque from Kenya Finance Bank Limited to set off the sum allegedly owed to it by the appellant, the latter's cheques given out in respect to the posho mill project were not honoured.

He stated that the appellant had placed before the trial magistrate how he had suffered loss of Ksh.1300/= inform of daily profits and Kshs.2500/= per month for rent and watchman's salary as well as interest on fixed deposit when his said deposit money was used to allegedly pay off the outstanding loan.

Counsel stated that damages for embarrassment would have been assessed at Kshs.100,000/= but that the learned magistrate came up with figures the basis of which was unknown. That there was no principle or mode of calculations given for the award made by the magistrate.

According to the counsel a sum of Kshs.240,000/= would have sufficed; and stated that the award was so manifestly low that there was need for this court's intervention.

He prayed that this appeal be allowed and the order of the lower court set aside and substituted with one for kshs.240,000/=.

Mr. Kosgei for the respondent opposed the appeal and said though the loan had been fully repaid, the account was not closed and this gave rise to accrual of interest in the sum of Kshs.13006/20 as at November, 1994.

That this is why when the appellant deposited the cheque for Kshs.100,000/= some of its proceeds were used to clear the outstanding debit balance in error. But that this error was rectified by crediting the appellant's account with a sum of Kshs.13006/20 on 27.4.95.

That there was a further Ex-gratia payment of Kshs.17,601/40 to the appellant's account on 4.9.95.

Counsel stated that the appellant's claim was excessive because at the hearing of the case the appellant produced record books which were not made by him; and that since evidence of daily expenses was made, this meant daily profits were less.

According to counsel the magistrate's figure of Kshs.1000/= as daily profits was fair and reasonable.

That payments made to the watchmen were in form of special damages which were not specifically pleaded in the plaint and strictly proved and that the claim for embarrassment was in the form of a tort of defamation which should have been filed within one year of the cause of action which was not done.

Counsel for the respondent stated that there was no evidence adduced on loss of interest, how much money was on a fixed deposit or the rate of interest thereon.

According to him a sum of Kshs.38,620/= awarded by the magistrate was fair and that the respondent was ready to pay it. He prayed that the appeal be dismissed with costs.

After the plaintiff gave the essential background information of this case, this is what he said as forming the essential part of his claim.

“After they agreed I can write some cheques for 6000/= for myself, were returned unpaid. They are before court. I could not install the posho mill due to lack of funds. My project could not go on. It collapsed. The Kenya Finance recovered their money from my fixed deposit account. They wrote to me informing me that my cheques were bouncing. I suffered profit costs that I could have made from my business of Kshs.1300/= per day. I later installed my posho mill. I do earn an average of Kshs.1300/- . I had recovered our takings for one year. We were non-operational for 1 year. I incurred costs for rent and watchmen. I used to pay 2500/=. I ask to produce vouchers for the watchman and the rents. I am asking for 120,000/= and interest at 16%. I had kept the money in a fixed deposit account. I suffered embarrassment and ask for general damages.”

I think an important piece of evidence given by the appellant which would give rise to embarrassment and for which he was seeking general damages was that he had been written to and informed that his cheque were bouncing.

There is one such letter dated 11th January 1995 – No 215211 for Kshs.7000/=. It was drawn to the name of the appellant himself.

Another cheque, also drawn to the name of the appellant is the one dated 16th November 1994 for Kshs.1000/=. These two cheques were returned with remarked ***“refer to drawer ”***.

Apart from the banker itself no other third party was involved to ridicule or look down upon the appellant for the bounced cheques. It is also true to say this, claim is in the form a tort of defamation whose particulars should be specified in the plaint and the claim made within one (1) year from the date of the cause of action - - - Sections - - - - of the Defamation Act and Section - - - - of the Limitation of Actions Act.

The appellant did not disclose before the lower court how much money he placed at his fixed deposit with Kenya Finance Bank or what the rate of interest was.

He did not tell the lower court from which date he projected to start his posho mill project to give rise to the period of one year he alleged he lost profits and/or interest.

This was the appellant's case and the onus was on him to adduce evidence to prove all the ingredients of the claim he was making.

The evidence before the lower court did not meet the standard required and the magistrate had to use his own means to compensate the appellant for the loss he had suffered as the respondent had admitted being negligent in the way it handled the appellant's loan account.

To my mind the appellant was entitled to nominal damages, having failed to specifically plead and strictly prove special damages or that he was entitled to the sum of Kshs.120,000/= he mentioned in his evidence as general damages.

I do not, however, wish to interfere with the amounts awarded to the appellant by the learned Resident Magistrate whatever method was used to arrive at that figure and do not agree that the sum was manifestly low as stated by his counsel.

I dismiss this appeal with costs.

Delivered this 6th day of November, 2002.

D.K.S. AGANYANYA

JUDGE