



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mawira & 7 others v Kajuju (Civil Appeal E055 of 2023)  
[2024] KEHC 1456 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1456 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E055 OF 2023  
TW CHERERE, J  
FEBRUARY 15, 2024**

**BETWEEN**

**EVANS MAWIRA ..... 1<sup>ST</sup> APPELLANT**  
**SAMUEL KIOGORA ..... 2<sup>ND</sup> APPELLANT**  
**PIERRA KANANA CHRISTINE ..... 3<sup>RD</sup> APPELLANT**  
**GILBERT MBAABU ..... 4<sup>TH</sup> APPELLANT**  
**FAITH NKIROTE ..... 5<sup>TH</sup> APPELLANT**  
**GERALD KINYUA ..... 6<sup>TH</sup> APPELLANT**  
**STEPHEN NKOROI ..... 7<sup>TH</sup> APPELLANT**  
**GRACE NKIROTE ..... 8<sup>TH</sup> APPELLANT**

**AND**

**MONICA KAJUJU ..... RESPONDENT**

*(An Appeal from the Judgment and Decree in Nkubu PMCC  
105 OF 2018 by Hon. E.M.Ayuka (SRM) on 25th August, 2022)*

**JUDGMENT**

1. Around 2018, Respondent operated a bar business known as Sunrise and Sunset Bar at Mitunguu trading centre. At the hearing it was the Respondent's case that on 26<sup>th</sup> June, 2018, a group of people among them the Respondents stormed her bar and destroyed property valued at Kes. 1,030,727/-. Respondent therefore sought damages for the damaged goods, general damages, costs and interest. In support of her claim, Respondent relied on stock taking books and a bundle of receipts. Her case was supported by her manager and two other witnesses who stated they were around the scene when the



incident took place. Plaintiff and her witnesses confirmed that the raid to her bar was executed by a large group of demonstrators whom police were unable to control.

2. The 1<sup>st</sup> Appellant, the then MCA of Mitunguu Ward stated that on the material date, he visited Mitunguu trading centre after he received information that a group of women were planning a demonstration to protest the murder of a woman in the area that occurred on 24<sup>th</sup> June, 2018 and which was blamed on illicit brews. 1<sup>st</sup> Appellant denied entering Respondent's bar but confirmed that the demonstrators, in the presence of police officers, gained entry and poured illicit brews that were found therein. In support of his defence, the 1<sup>st</sup> Appellant tendered numerous newspaper cuttings and photos depicting a group of demonstrators and jerricans with illicit brews flowing on the ground from therein.
3. 2<sup>nd</sup> to 8<sup>th</sup> Appellants confirmed being present at the scene but stated that the demonstrations and entry into Respondent's bar where illicit brews were poured was by a group of women demonstrators.
4. After the conclusion of the trial, the trial court by a judgment dated 25<sup>th</sup> August, 2022, dismissed the defence and found Respondents liable to the Respondent for Kes. 1,030,727/-, costs of the suit and interest.

### Appeal

5. Aggrieved by the judgment, Appellants filed this appeal on 20<sup>th</sup> April, 2023 mainly on two grounds namely:
  1. Whether Appellants were identified among the persons that raided Respondent's bar
  2. Whether Respondent proved damage of her goods

### Determination

6. I have considered the appeal in the light of the trial court record, the submissions and authorities cited by the parties.
7. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle v Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR).
8. Concerning the first ground of whether Appellants were identified among the persons that raided Respondent's bar, Appellants conceded that they were at the scene. Respondent and her witnesses identified Appellants as having been among the persons that raided Respondent's bar and the trial magistrate's finding on that ground was well founded.
9. Regarding the second issue of whether Respondent proved damage of her goods, Respondent wholly relied on stock books and receipts. Appellants argued that Respondent did not prove her case and in support thereof relied on of Appellants that submitted *Scarce Commodities Limited & another v Augustus Wafula Wambati* [2022] eKLR where the court found that an OB report was not sufficient prove of loss of goods.
10. Respondent on the other hand submitted that it had placed evidence in the form of receipts and stock books, on the table which tilted the balance of probabilities in her favour and that the award by the



trial magistrate was therefore justified. I support thereof, reliance was placed on *Mitchell Cotts (K) Ltd v Musa Freighters* [2011] eKLR.

11. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.” (Emphasis added).

12. Respondent’s claim was in the nature of special damages and it is trite that special damages must be specifically pleaded and strictly proved. In *David Bagine v Martin Bundi*, Nairobi, Court of Appeal, Civil Appeal 283 of 1996 [1997] eKLR), the Court of Appeal, referring to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), stated that:

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

13. And in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* [2016] eKLR, the Court of Appeal observed:

“The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages.”

14. I notice that the trial magistrate relied on the stock books and receipts to find the Respondent’s case proved. A perusal of the said records demonstrates that they run upto the 25<sup>th</sup> June, 2018 which was a day prior to the incident complained off. No stock was taken after the incident on 26<sup>th</sup> June, 2018 to demonstrate what stock was in the bar after 26<sup>th</sup> June, 2018 from where the actual loss occasioned by the incident of 26<sup>th</sup> June, 2018 could be calculated.

15. In civil cases, the burden of proving claims in suits rests on the claimant, and that standard of proof is on the balance of probabilities. In light of the foregoing, I have come to the conclusion that Respondent, other than noting down the particulars of goods that were at her bar as at 25<sup>th</sup> June, 2018 failed to demonstrate that either some or all of the said goods were actually lost either by damage or conversion as a result of the raid into her bar on 26<sup>th</sup> June, 2018 and her claim for Kes. 1,030,727/- ought to have been disallowed.

16. Consequently, I find that this appeal has merit and it is allowed with an order dismissing the Respondent’s claim with costs of the trial and of the Appeal to the Appellants.

**DATED IN MERU THIS 15<sup>th</sup> DAY OF February 2024**

**WAMAE. T.W. CHERERE**



## **JUDGE**

Appearances

Court Assistants - Kinoti/Munene

For Appellants - Mr. Mwirigi for OMK Advocates

For Respondent - Ms. Masamba for Mithega & Kariuki Advocates

