



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 14 OF 2017

SAMSON CHEPKOIMET KOMEN.....1ST APPELLANT

STELLA KOMEN.....2ND APPELLANT

=VERSUS=

EDWIN KIPKOECH KOMEN.....RESPONDENT

JUDGMENT

1. As held in **Peters v. Sunday Post Ltd** (1958) EA 424:

“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has placing gone wrong, the appellate Court will not hesitate so to decide. “Watt v. Thomas (1947) ALLER 582 ; (1947) A.C 484 applied”.

2. See also **Selle v. Associated Motor Boat Co. Ltd.** (1968) EA 123 that a first appeal is by way of retrial.

3. The plaintiff pleaded his cause of action as follows:

3. On diverse dates between the 6th and 27th February 2013, the defendants maliciously destroyed the plaintiff’s fence at his parcel of land known as plot No. 126 Morop Adjudication Section.

PARTICULARS OF DAMAGE CAUSED BY THE PLAINTIFFS

a) Fencing wire.....Ksh. 6000

b) 30 posts.....Ksh. 9000

c) 4 kilograms of nail.....Ksh. 600

Ksh. 15,600

4. The plaintiff further avers that the defendants uprooted and took away some of the fencing posts on the said fence.

5. The plaintiff avers that he spent Ksh. 4000 reinstating the damage on the two occasions the defendant damaged his fence.

6. The plaintiff claim against the defendants is for Ksh. 20,420 being the value of the damaged fencing wire and posts.

4. In their defence, the defendants denied the claim and put the plaintiff to strict proof in paragraph 3 & 4 of the defence as follows:

3. The defendants deny the contents of paragraph 3 of the plaint and more particularly that the defendants destroyed the plaintiff’s fence.

4. In further reference to paragraph 3 of the plaint, the defendants deny the particulars of damage and invite the plaintiff to strict proof thereof.

5. The plaintiff was bound by sections 107 and 108 of the Evidence Act to prove the defendant's liability on the evidence as well the particulars of loss for which he sought compensation as special damages.

6. It is a cardinal principle of law that special damages must be specifically pleaded and proved. See *Great Lakes Transport Co. Ltd v. Kenya Revenue Authority* (2009) KLR 720.

The evidence

7. From the evidence before the trial Court on a balance of probabilities, it is clear that the defendants who had a boundary dispute with the plaintiff on their respective parcels nos. 1750 and 126- Morop Adjudication section did destroy by removal of the plaintiff fence on plot 126 on diverse dates, and the plaintiff in accordance with the law obtained consent under section 30 of the land Adjudication Act to bring the suit against the defendants.

8. The 1st defendant's testimony was just that it was the plaintiff who "moved the fence in Eric's land parcel no. 1750." The 2nd defendant accepted that "the barbed wire we moved was the one of our plot no. 1750 and not the one for his plot."

9. On a balance of probabilities, he cannot find that the plaintiff proved the damage of his barbed wire fence. The Court however, makes no determination as to the boundary dispute between the parties which must be dealt with by the appropriate Court in proceeding for that purpose.

Measure of Damages

10. As noted by the learned author of Mc Gregor on damages 17th Ed. (2003) at page 48

"Where the claimant's goods have been damaged, the basic pecuniary loss is the diminution in their value which is normally measured by the reasonable cost of repair, and generally without making any deduction from the damages on account of the fact that after repair the goods are in better condition than they were before the tort. On the other hand the basic pecuniary loss is the market value of the goods where they have been destroyed or misappropriated".

11. This case involved both diminution in value and destruction of goods as the fence made up of wooden posts and barber wire requires the replacement of the posts and barber wire and the labour cost of repair.

Mc Gregor, *ibid* at 1059 in cases of destruction of goods holds that "the normal measure of damages is the market value of the goods destroyed at the time and place of destruction".

12. The destruction took place in February 2013 at Morop Adjudication Section in the village set up of Kapkomoi, Baringo as shown in the Plaintiff. The plaintiff did not produce receipts for the posts, barber wire or the labour repair costs. Should lack of receipts disentitle him to relief in special damages where the damage by way of the destroyed fence has itself been proved by testimony of witness and photographic evidence? I, respectfully, think not.

13. Damage has been proved. What was really in contention was the value of the damages for which no receipts were produced. Considering the rural set up of the place where the destruction (and repair or replacement) occurred, it is not surprising that the plaintiff did not acquire or produce receipts. It is common knowledge that formal receipts in the village economy is rarity, and many times traders do not issue receipts for goods and services that they have sold, and the locals, who purchase these services do not care for receipts. Should they be denied relief for their reliance on the informal market economy of the rural areas? Again, I think not.

14. A Court is enjoined to grant relief based on a reasonable assessment of the loss and its remedy in damages in the time and place "of replacement or repair".

15. As an illustration, in fatal accidents, the costs of funeral arrangements being a special damage must be proved but the court shall not deny damages on account of failure to produce receipts of the expenses in the funeral. The Court accepts that such costs follow the event and even though they are not documented, a reasonable amount for the costs of the funeral arrangements shall be awarded because receipts are not usually given to organizers for the various expenditures in the funeral arrangements especially in rural economies.

16. In this case, the trial magistrate in awarding the amount claimed even without proof of value by receipts considered the amounts modest and said;

"It is my opinion that the plaintiff had a fence on his land and that the scene was damaged by the two defendants. Though the plaintiff did not produce receipts for the damage it was clear that the fence was damaged and an amount was incurred to erect it. I thus find that the plaintiff had proved his case as required and award him Ksh. 20,400/= as pleaded as nominal costs for the damage caused by the defendant with costs of the suit and interest at court rates from date of filing."

17. Although the terminology of **nominal** damages may suggest that the trial court was awarding general damages, it is clear from the order that he awarded the damages "as pleaded" and with interest at-Courts rates from the date of filing", clearly indicating these to be special damages.

Conclusion

18. From the evidence, I find the plaintiff /respondent to have proved his case for destruction of his property and the special damages for the replacement and repair of the fence at the pleaded sum of Ksh 20,400/- . On the principles for the interference with award of damages by an appellate Court see Shabani v. City Council of Nairobi (1985) KLR 516, I do not find any justification for interfering with the award of the trial court.

19. The appeal on liability and award of damages is, consequently, dismissed with costs to the respondent.

Order accordingly.

DATED AND DELIVERED THIS 5TH DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent