REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 130 OF 2015

COUNTY GOVERNMENT OF UASIN GISHU.....APPELLANT

-VERSUS-

GEORGE NJOROGE NJOGU.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Tom M. Olando,

Resident Magistrate, delivered on 12 November 2015

in Eldoret CMCC No. 842 of 2014)

JUDGMENT

[1] The appeal herein arises from the Judgment and Decree passed by in **Eldoret Chief Magistrates Civil Case No. 842 of 2014: George Njoroge Njogu vs. County Government of Uasin Gishu.** The Respondent herein had filed that suit against the Appellant claiming loss of business at the rate of **Kshs. 4,000/=** per day from **4 August 2014** along with interest and costs. His cause of action, as set out in the Plaint dated **27 November 2014,** was that he was arrested, harassed and or intimidated by the Appellant on two occasions; and that, on both occasions, he was discharged under **Section 35(1)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. It was therefore his contention that, as a direct result of such harassment, he lost business for a total of 112 days and therefore lost **Kshs. 448,000/=** in income from **4 August 2014**.

[2] Having heard both sides to the dispute, the Learned Trial Magistrate, **Hon. Olando, RM**, found in favour of the Respondent in his Judgment dated **12 November 2015**. He took the following view of the matter:

> **"…From the statement produced by the plaintiff which were not challenged by the defendant it is evident that the plaintiff was arrested by the defendant and that the court directed that the defendants were to allocate the plaintiff an alternative site to conduct his business.**
>
> **It is not enough for the defence to state that they had directed the plaintiff to move to Iten road. The defendant ought to have allocated the plaintiff a specific place along Iten road where he could conduct his business. I find that the plaintiff has proved his case on a balance of probabilities.**
>
> **I award the plaintiff damages for loss of business for 30 days I consider 30 days to be sufficient time within which the plaintiff could have found another work to do or another site to conduct his business at the rate of Kshs. 4000 per day.**
>
> **Total Kshs. 120,000**
>
> **The plaintiff also gets costs and interest…"**

[3] Being dissatisfied with that decision, the Appellant preferred this appeal on **24 November 2015** on the following grounds:

> **[a]** That the Honourable magistrate erred in law and in fact in finding the defendant liable for the plaintiff's loss of business if any;
>
> **[b]** That the Honourable magistrate erred in law and in fact in awarding damages that were manifestly high as to amount to an erroneous estimate of the damages in the circumstances of the case;

[c] That the learned Trial Magistrate erred in law and in fact in failing to consider the evidence on record and the legal principles applicable in awarding special damages.

[4] Thus, the Appellant prayed that the Judgment of the lower court be set aside and a proper finding be made by this court. He also prayed that the costs of the appeal be awarded to him. The appeal was canvassed by way of written submissions pursuant to the directions issued herein on **25 June 2019**. Accordingly, the Respondent filed his written submissions herein on **11 July 2019**; while Counsel for the Appellant, **Mr. Too**, (instructed by **M/s Boinett & Bett Company Advocates)** filed his written submissions on **15 July 2019.**

[5] Counsel for the Appellants proposed only one issue for determination, namely: whether the Respondent is entitled to damages for loss of income as claimed. It was submitted by **Mr. Too** that the Respondent was clearly and specifically told to vacate his place of business since it was out of the designated area for conducting such business as his; and that he was shown an alternative place but ignored, refused and/or declined to move to the new area. According to **Mr. Too**, since the Appellant fully adhered to the right procedure in dealing with the Respondent, it ought not to have been compelled to pay damages to the Respondent as that would amount to unjust enrichment on the part of the Respondent.

[6] Counsel further urged the Court to note that the Respondent pleaded guilty to the charges of operating a business outside the designated area and was convicted on his own plea. That, having breached the law, it would be contrary to the law and equity for him to be compensated for his wrongdoing. Counsel relied on **Bowmakers Ltd vs. Barnet Instruments Ltd [1945] 1 KB 65** for the holding that no court ought to enforce an illegal contract or allow itself to be made the instrument of re-enforcing obligations alleged to arise out of an illegal contract or transaction. He also made reference to **Simon M. Ethangatta vs. Eddah Wanjiru Mbiyi & Another [2007] eKLR** and **Susan Waithera Kariuki & 4 Others vs. Town Clerk City Council & 3 Others [2013] eKLR** where claims of a similar nature as the Respondent's were dismissed.

[7] On quantum, Counsel for the Appellant submitted that the award of **Kshs. 120,000/=** at the rate of **Kshs. 4,000/=** per month was inordinately high; and that it was incredible that a shoe shiner would earn **Kshs. 120,000/=** per month. He urged the Court to find that the trial court erred in coming up with that award as that there was no proof or basis for using the figure of **Kshs. 4,000/=** to calculate loss of income. Accordingly, Counsel for the Appellant prayed that the appeal be allowed and that the Judgment of the trial court be substituted with an order dismissing the Respondent's suit with costs to the Appellant.

[8] The Respondent was however of a different view. According to him the trial court did not err in any way in finding the Appellant liable to him for loss of business. He reiterated his contention that he was arrested twice by the Appellant and charged before a court of law; and that on both occasions, he was released under **Section 35(1)** of the **Penal Code.** He further asserted that on both occasions, he suffered loss of business; and therefore, the award by the lower court was neither excessive nor erroneous. He, thus, urged the Court to dismiss the appeal with costs.

[9] This being a first appeal, the principle propounded in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** applies, namely:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[10] Accordingly, I have carefully perused and considered the record of the lower court; and in particular, the pleadings, the evidence adduced in support thereof, the submissions made by the parties and the Judgment dated **12 November 2015**. The record shows that the Respondent's evidence was taken on **15 July 2015**. He told the lower court that he was then engaged in the business of making rubber stamps and shoe shining; and that he was arrested twice by the Appellant; charged and arraigned before court; but was discharged under **Section 35(1)** of the **Penal Code**. He added that on both occasions, the court made an order that he be given an alternative place by the Appellant but had not been given, hence his claim. The Respondent produced, as exhibits before the lower court to support his case, his licences for the years 2011 to 2015, pin certificate, a certified copy of the proceedings in the criminal cases as well as a copy of the demand letter written by him to the Appellant. His evidence was that he had lost business and profit for 112 days at the rate of **Kshs. 4,000/=** per day; and was therefore entitled to **Kshs. 448,000/=,** together with interest thereon and costs of the suit.

[11] The Appellant's witness, **Samson Kimwidwa Tumei (DW1)** testified on **7 October 2015** and confirmed that, as an enforcement officer employed by the Appellant, he was one of the people who arrested the Respondent because he was making rubber stamps outside the market; and that the Respondent was charged, taken to court and pleaded guilty to the charge. He further confirmed that the court ordered that the Respondent be given an alternative place to conduct his business; which order was duly complied with by the Appellant and the Appellant was relocated to **Iten Road**.

[12] From the evidence placed before the lower court, there was no dispute that the Respondent was, at all material times, a licensed trader holding a valid Single Business Permit for the year 2014. A copy of the permit is at page 11 of the Record of Appeal, and it confirms the evidence of the Respondent that he was then trading as a maker of rubberstamps and a shoe shiner under the business name **Eldostamps & Shoeshine Self Help Group**. There is further no dispute that the course of the year **2014**, the Respondent was twice arrested by the Appellant's enforcement officers and arraigned before court in **Eldoret Chief Magistrate's Criminal Case No. 1718 of 2014** and **Eldoret Chief Magistrate's Criminal Case No. 2355 of 2014**; and that on both occasions, he pleaded guilty to the charge and was discharged under **Section 35(1)** of the Penal Code.

[13] In the circumstances, the only issue for determination is the question whether, in the circumstances, the Respondent was entitled to compensation for loss of business; and if so, whether the award by the lower court is defensible.

On Liability for Loss of Business:

[14] In paragraph 4 of the Respondent's Plaint, it was simply pleaded that:

> **"…in two instances the plaintiff has been harassed and or intimidated, arrested and arraigned in Court. In those two instances he has been discharged under section 35(1) of the criminal procedure code and as such the plaintiff has lost income and business in the sum of kshs. 4000/= per day for 112 days he has not worked regularly totaling to kshs. 448,000/=. These incidents started on 4th August 2014 and have continued to date."**

[15] The indubitable fact emerging from the pleadings and the evidence adduced in support thereof is the fact that the Respondent was on the wrong; and that he admitted as much. He was arrested for flouting the law and he pleaded guilty and was dealt with as by law provided. Accordingly, the question to pose is whether, in the circumstances, he would be entitled to compensation for loss of business; and my answer to that is that is no. This is because it is a cardinal principle that no court should enforce obligations alleged to arise out of illegal transactions. Thus, in **Holman vs. Johnson [17775] 1 Cowp 341**, **Lord Mansfield** expressed himself thus on the principle:

> **"…No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff…"**

[16] Likewise, in the case of ***Scott vs. Brown, Doering, Mcnab & CO, (3), [1892] 2 QB 724 Lindley LJ at p. 728*** *it was held that:*

> ***"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

[17] The same principle was applied in **Bowmakers Ltd vs. Barnet Instruments (supra),** which was cited before me by Learned Counsel for the Appellant. Accordingly, it is my considered finding that the learned trial magistrate fell into error by making an award in favour of the Respondent in the face of his clear and unequivocal admission of guilt and conviction. It matters not, therefore, that on both occasions, extenuating circumstances contributed to the Respondent's unconditional discharge under **Section 35(1)** of the **Penal Code**. The bottom-line is that he was found operating his business in contravention of his licence; and that he admitted the charge and was accordingly convicted thereof.

On Quantum

[18] The Respondent's claim was for compensation for lost income; and therefore in the nature of general damages. As to the whether the lower court erred on quantum, I am mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. In the case of **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR**, the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (**see also **Kemfro Africa Ltd T/A Meru Express Services & Another vs. A.M. Lubia & Another, supra)**

[19] In his evidence before the lower court, the Respondent made no attempt to justify the number of days set out in his Plaint. It would be expected that since the two criminal cases filed against him were disposed of in a summary manner that led to his immediate discharge, he would claim for no more than four days; assuming that he his arraignment before court may not have taken place on the dates of his arrest. Evidently, it was on account of this lacuna in his evidence that the trial court opted to reduce the number of days from 112 to 30 days; reasoning that one month would be sufficient time for the Respondent to find another site to conduct his business or to look for another kind of work to do. In the premises, there was absolutely no basis to support a claim for loss of business in excess of one month and therefore the learned magistrate cannot be faulted for coming to that conclusion.

[20] It is noteworthy too that although the contention of the Respondent was that he was not shown where to relocate to, the Appellant served on the Respondent a notice dated **8 September 2014**, in line with the order of the lower court; and that notice was to the following effect:

> **"…You are hereby given a notice of 48 hours to vacate from old Uganda road (next to the national library) to Iten road opposite high court from the date of this notices. This is in accordance to the orders issued in court 5 as pertains to your area of operation. (CR. 1718/14) failure to abide to this notice will compel the county to evict you to your new area of operation or take any appropriate measures within the law…"**

[21] There was therefore no justification as to why the Respondent did not relocate immediately; or make any attempt to mitigate his loss. Indeed, in cross-examination, the Respondent conceded as follows:

"…When I was charged I pleaded guilty. I was given a notice for 48 hours to go to Iten road…I get less than 4000/=. I am not in business today. I have a license for 2015…I was charged on 10th November 2014. I have not vacated until today…"

[22] Thus, on my part, had I found the claim payable, I would have made an award for no more than **Kshs.12,000/=** for 4 days' lost income at the rate of **Kshs. 3,000/=** per day, granted the clear admission by the Respondent that he was earning less than **Kshs. 4,000/=** per day.

[23] In the result, I find merit in the appeal and would accordingly allow the same. The Judgment and the Decree of the lower court ensuing therefrom is hereby set aside and substituted with an order dismissing the Respondent's suit. Granted the nature of the dispute between the parties; and the fact that the Respondent held a valid licence, not only for **2014** but also for **2015,** I would order that each party shall bear own costs of both the lower court case and the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF OCTOBER 2019

OLGA SEWE

JUDGE