



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 12 OF 2018

SOLOMON LUYALI.....APPELLANT

VERSUS

JEREMIAH MAKORE WETENDE.....RESPONDENT

(Appeal from the Judgment of Hon. E Malesi, Senior Resident Magistrate (SRM), in Kakamega SRMCCC No. 176 of 2017 of 16th January 2018)

JUDGMENT

1. The appeal herein arises from the judgment and the decree of the Senior Resident Magistrate's Court at Kakamega in Civil Suit No. 176 of 2017, delivered on the 16th January 2018, in the following terms -

(a) an award of Kshs. 75, 999.00; and

(b) costs;

Total Kshs. 75, 999.00.

2. The appellant aggrieved by the learned trial magistrate's, decision lodged an appeal, vide his memorandum of appeal dated 18th February 2018. In its memorandum of appeal, the appellant raised two grounds of appeal, which are as follows:

(a) That the trial magistrate erred in law by awarding special damages to the respondent which had not been specially prayed for; and

(b) That the trial magistrate erred in law in failing to consider the appellant's defence and written submissions hence arriving at a wrong decision.

3. The appellant's case is fairly straightforward. He complains that the award made by the trial court was in the nature of special damages, yet the respondent had not sought special damages in his suit. He had instead prayed for general damages. He submits that the trial court ought not to have made the award of special damages as the same had not been sought, and the said court, therefore, fell into error in that respect.

4. The case for the respondent at the trial court was that he had booked a room at an establishment owned and ran by the appellant. The room was broken into, and his goods stolen. He founded his suit on the tort of negligence, claiming that the appellant owed him a duty of care which was breached, and he sought damages based on that breach. He pleaded, at paragraph 4 of his plaint, that he had lost a laptop computer and a tablet whose gross value he put at Kshs. 75, 999.00. At paragraph 13, he pleaded that he was claiming general damages from the appellant to restore him to the position prior to his loss. In prayer (a) of the plaint, he sought an order in terms of paragraph 13 of the plaint. In its judgment, the trial court found that the respondent lost goods worth Kshs. 75, 999.00, blamed the appellant for it and proceeded to award the respondent that amount.

5. The duty of the first appellate court is stated in *Kiruga vs. Kiruga & Another* [1988] KLR 348, where the Court of Appeal observed that:

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

6. The same was emphasized in *Abok James Odera t/a AJ Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates*

[2013] eKLR as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

7. This is a first appeal to the High Court. The court has a duty to consider the evidence adduced before the trial court in its entirety; the grounds of appeal; the judgment of the trial court and the written submissions filed by both parties, together with all the authorities cited.

8. Directions were taken on 10th December 2018, that the suit herein be disposed of by way of written submissions. Both sides have filed their respective written submissions. I have read through both sets of written submissions and noted the arguments made in them.

9. In his written submissions, the appellant addresses the two grounds of appeal raised in his memorandum. On the first ground, he adopts a two-pronged approach. Firstly, he submits that for special damages to be awarded they must be specifically pleaded, and secondly that a party must be bound by its pleadings. On the first issue, he cited the *Black’s Law Dictionary* 9th edition, which defines special damages as:

“Damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved.”

There is also reference to *Osborn’s Concise Law Dictionary* where special damages are defined as damages of a kind which is not presumed by the law but must be expressly pleaded and proved.” He further cites Order 4 rule 6 of the Civil Procedure Rule, which states that:

“Where the plaintiff seeks recovery of money, the plaint shall state the precise amount claimed, except where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant.”

10. He has also cited case law, *Isaac Mworira M’Nabea vs. David Gikunda* [2017] eKLR, where the court said:

“In so far as special damages are concerned, they must be strictly pleaded and proved. A careful perusal of the record clearly reveals that these two heads of damages were not strictly proved nor pleaded as required by the law. In fact, the appellant only quantified them in his submissions.”

11. On the second issue, he submit that the appellate court should not frame an issue that was not pleaded by the parties, for parties are bound by their pleadings. He cites the decision in *Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd* [2018] eKLR, where the court said:

“It is now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings, any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

12. On the second ground, he submits that the trial court did not consider the evidence that the appellant tendered, and did not take into account that the evidence presented by the respondent was contradictory. He says that the respondent was not clear on the room that he had booked, and his evidence on the exact date of the theft was inconsistent.

13. On his part the respondent submits that the trial court did not make an award for special damages, and therefore it was erroneous for the appellant to plead that the court awarded the same. He submits that the receipts that the respondent produced were not to prove loss of the items, and, therefore, special damage; but rather they were to establish ownership of the items. On the second ground, he submits that the trial court did consider the appellant’s evidence and submissions, and therefore its decision cannot be faulted on that score.

14. Having considered the grounds of appeal and the written submissions that the parties have placed before me, the issues that I have flagged for determination are;

(a) whether the trial court erred in awarding special damages; and

(b) whether the trial court considered the appellant’s defence.

15. Special damages are awarded in respect of special damage or loss, that is damage or loss which is not general. Damage or loss is said to special if it is quantifiable or calculable. That is where the damage is known or can be ascertained, usually through attaching a value to it. Where the nature of the damage or loss suffered is not capable of quantification or ascertainment or estimation, then it is described as general, and the law, through the courts, has developed principles for determining the amounts to be awarded in such cases. The loss of or damage to a material thing, like a car or a house, falls within the realm of special loss or damage. It can be ascertained, but the loss of a human life or limb is not quantifiable in monetary terms, and it, therefore, falls under general damage. Special damages are founded on a value, while general damages are worked out or calculated based on some formula.

16. The law on award of special damage is notorious and well settled, as pleaded by the appellant. It must not only be pleaded; it must be specifically proved. I agree with the authorities that the appellant has cited to support his case. I could add more. In *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* [2016] eKLR, the Court of Appeal said:

“Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as the circumstances permit. See National Social Security Fund Board of Trustees vs. Sifa International Limited [2016] eKLR, Macharia & Waiguru vs. Murang’a Municipal Council & Another [2014] eKLR and Provincial Insurance Co. EA Ltd vs. Mordekai Mwanga Nandwa KSM CACA 179 of 1995 (ur).”

In *Caltex Oil (Kenya) Limited vs. Rono Limited* [2016] eKLR, the same court said:

“... It is trite law that special damages must be pleaded and proved. See Mohamed Ali & another vs. Sagoo Radiators Limited [2013] eKLR (Civil Appeal No. 231 of 2005) wherein the Court adopted the holding of the Court in Hahn vs. Singh (1985) KLR 716 that:

“... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves.”

17. The starting point herein should be whether or not the respondent’s claim was for special damages. The foundation of the respondent’s claim is the loss of his laptop computer and tablet, whose value he ascertained as Kshs. 75, 999.00, and that was the figure that the court awarded him. His loss was known, ascertained and quantified as Kshs. 75, 999.00. It was a material loss of an item whose value was known and quantifiable. The damage he suffered could only be redressed by way of an award of special damages, not general damages.

18. Had he pleaded special damage, or claimed special damages, in his plaint? I do not think so. The principal prayer in the plaint is phrased as follows:

“(a) An order in terms of paragraph (13) above.”

Paragraph 13 of the plaint reads as follows:

“That the Plaintiff’s claim against the Defendant is for general damages to restore the plaintiff to the original condition before the damage was occasioned.”

19. It is plain from the above averments that the respondent did not pray for special damages, even though the body of his plaint stated that the loss actually suffered was material in nature and the loss suffered, therefore, was special rather than general. He ideally ought to have sought to recover special damages for his loss was special or specific. It would appear from the written submissions of the respondent that he believes that his loss was not specific and that he did not plead special damage and the court did not award him the same. Yet, the converse is the true position, his loss was specific. He states so in his pleadings, and that was what the court awarded him. He did not specifically pray for an award of special damages in his plaint.

20. Did the court award special damages? I think it did. as I have stated above, the damage that the respondent suffered according to his pleadings is the loss of his laptop computer and tablet. The value for the two items is tabulated in paragraph 5 of the plaint, and works out to a total of Kshs. 75, 999.00. The prayers in the plaint do not include a prayer for the sum of Kshs. 75, 999.00. What is prayed for are general damages. General damages are unquantifiable and unliquidated. However, what the court awarded was the value of the lost items, which would mean that the respondent’s loss was quantifiable and liquidated, which made it a special or specific damage as opposed to a general damage. For a avoidance of doubt, the trial court said in its judgment:

“The plaintiff lost a laptop and a tablet. Documentary evidence has been availed to support that the plaintiff owned these two items. Clearly therefore the plaintiff suffered loss. The remedy available to the plaintiff is for him to be compensated for his loss. The value of the items lost is clearly stated. Kshs. 54, 600/= and Kshs. 21, 999/= for the laptop and tablet respectively. The aggregate award is therefore Kshs. 75, 999/=.”

21. Was the trial court justified in awarding the respondent the sum of Kshs. 75, 999.00? I do not think so. The respondent did not seek, in his pleadings, to be awarded Kshs. 75, 999.00. He did not pray for that amount. In his written submissions he is categorical that that he did not seek such damages and what the court awarded was not special damages. However, as demonstrated above, the award by the court was based on a value rather than a formula, it was, therefore, special damages and not general damages. The pleadings before the trial court did not pray for special damages and, therefore, there was no justification to make an award whose nature was special damages as opposed to general damages as pleaded in the plaint. A party is bound by their pleadings. The trial court erred when it framed an issue that the respondent was entitled to damages whose nature was special damages and not the general damages that they had sought in the plaint.

22. On the second ground, that the defence was not considered, I have carefully read through the judgement, and I do not agree with the position taken by the appellant. At page 3 of the judgement, which has the determination, the trial court devoted considerable time and space to analyzing the evidence of the defence. It cannot be accurate to say that the court did not consider it. It did, but dismissed it. Whether there was justification for the dismissal of his defence is what the appellant should have addressed in his appeal.

23. In view of everything that I have stated above, it is my finding that the appeal herein is merited. The trial court fell into error by making an award in the nature of special damages when the same was not prayed for. The respondent was bound by his pleadings. I shall accordingly allow the appeal, with the result that the respondent’s suit in Kakamega SRMCCC No. 176 of 2017 should have and is hereby dismissed with costs to the appellant. Any party aggrieved by the orders made herein, is at liberty to move the Court of Appeal appropriately, within twenty-eight (28) days. The appellant shall have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 18th DAY OF October, 2019

W MUSYOKA

JUDGE