

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NOL. 496 OF 2009

ABDI KHER SOMO ISAAK

t/a AK SOMO SCRAP METAL DEALERS PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL OF KENYA DEFENDANT

JUDGMENT

The plaintiff is a scrap metal dealer. In the year 2008 some Lorries transporting scrap metal were stopped and the drivers arrested in Garissa. The drivers were subsequently charged with the offence of transporting dangerous waste without licence contrary to section 87 (2) (b) of the Environmental, Management Coordination Act 1999 as read with section 87 (5) of the same Act.

Following presentation of prosecution evidence all the drivers were acquitted under Section 210 of the Criminal Procedure Code the court stating that the waste referred to in Section 87 of the Act does not include scrap metal and it was not envisaged that scrap metal was one of the things that would require a special licence. In addition to acquittal of the accused persons the magistrate ordered that the exhibits belonging to the accused persons and produced in court be released to them.

Following that order the exhibits were not released as ordered and in fact the State moved to the High Court to prevent release of the exhibits. Going by the proceedings in the lower court and which form part of the record, the refusal to release the vehicles which were loaded onto 9 lorries was because they were toxic and hazardous waste. However, after some time the goods and lorries were released. It transpired that the goods belonged to the plaintiff herein after which he filed this case against the Attorney General claiming general damages for unlawful detention of the scrap metals. He also claimed costs of the suit and interests at court rates.

The claim was opposed by the defendant who filed a defence to the fact that if there was any arrest the same was undertaken pursuant to the defendant's statutory duties and that the confiscation of the scrap metal and subsequent use as exhibits was done lawfully, regularly and procedurally.

The plaintiff testified in support of his claim, while the defendant called the former Provincial Police Officer at Garissa during the time of this incident. The plaintiff has sufficiently established that he was a licenced scrap metal dealer going by the documents he produced to court. There were also sufficient evidence that he had authority to transport the scrap metal to Nairobi going by the letters of authority by the officer in charge, Elwak Police Station.

Whether or not that officer had authority to issue such letters is neither here or there. He also produced letters from several scrap metal dealers who used to purchase goods from him.

There is also no doubt going by the court proceedings on record that, the release order by the lower court was made on 7th August, 2008 which however was challenged and the High Court allowed a stay of the order which was recorded by the lower court on 4th September, 2008.

From the time the lower court issued the release order and the time the High Court order was served, that period cannot be computed in favour of the plaintiff. On 6th November, 2008 Onyancha J, made an order for the release of all the motor vehicles and their cargo. It is that period from September to November, 2008 that the plaintiff has pegged his claim.

There is evidence from some documents on the record that indeed he used to supply scrap metal to several companies. There is also evidence from one of the dealers that the price had fallen considerably by November, 2008 from Kshs. 26 to 30 per kilogram to Kshs. 15 to 18 per kilogram. From the Kenya Revenue Authority receipts attached to his bundle of documents, 120,000 kilograms were detained. That notwithstanding, the plaintiff was supposed to show the court that during the time his goods were held by the police for a period of 100 days, he had standing orders to supply the same. This he did not show.

The blanket claim of general damages without any guide as to the loss he incurred may not be sufficient evidence to make a clear award. What is not in doubt however is that, the detention of his goods was unjustified in view of the court orders and that he may have lost income in the circumstances.

On a balance of probability therefore, I find in his favour. In the absence of any evidence to guide the court in making an award of general damages as claimed, but believing that he suffered some loss in the circumstances of this case, I make an award of Kshs. 2,000,000/= (two Million) against the defendant.

Accordingly, there shall be judgment for the plaintiff against the defendant for the said sum of Kshs. 2,000,000/=. He is also be entitled to

costs of this suit and interest at court rates.

Dated, signed and delivered at Nairobi this 15th day of May 2018.

A. MBOGHOLI MSAGHA

JUDGE