REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 359 OF 1991

MARTHA WANGARI NJOKA.....PLAINTIFF

VERSUS

NAIROBI CITY COMMISSION.....DEFENDANT

JUDGMENT

The only outstanding question in this suit concerns assessment of damages, general and exemplary. Interlocutory judgment was entered for the plaintiff for a declaration that the seizure and impounding of the plaintiff's motor vehicle registration No KUT 264 by the defendant was unlawful and without due process. The judgment was entered in accordance with the holding in the case of *Cleaver – Hume Ltd -v- British Tutorial College (Africa) Ltd* [1975] EA 323. In that case it was held that a failure by a defendant to file a written statement of defence must be regarded, save as to damages, as an admission of each of the allegations in the plaint.

The result is that the defendant is regarded to have admitted it wrongfully, unlawfully and without due process of the law impounded the plaintiff's motor vehicle from a parking lot in the city. It also is regarded to have admitted it unlawfully detained the motor vehicle for the whole period it remained in its custody, which according to the evidence was 231/2 days. The plaintiff is therefore entitled to damages.

There is no rule of thumb covering the assessment of damages in cases of this nature. As a general rule, however, the plaintiff is obliged to show by evidence not only that she suffered inconvenience but also that she had an actionable wrong with regard to non-user of her motor vehicle and in relation to it. There is a judgment with regard to its detention by defendant. Such detention was in effect a trespass to the chattel. So that the defendant's action entitled the plaintiff to damages. What is the measure of damages?

The plaintiff, an advocate of this Court testified that the impounding of her motor vehicle and its detention for over 23 days exposed her to inconvenience, embarrassment, and hardship. She reckoned that her loss could be worked out on the basis of what it would have cost to hire alternative transport for the entire period the motor vehicle was beyond her reach. For that approach, her counsel on record, Mr Murage relied upon the English case of *Birmingham Corporation- vs - Sowsbery* [1970] RTR 84.

Evidence was led to the effect that the plaintiff would have required to part with at least Kshs 2000/= daily to hire a car similar to hers either from Hertz, a car-hire company or from any other company. However no evidence was adduced as to what other companies charged.

I have considered this matter carefully. Clearly, the plaintiff was denied the use of her car. She was inconvenienced, was exposed to hardship and may have been embarrassed. Although that was the case, a careful reading of the case of *The Medina* [1900] AC 113 and a later decision of *Berrill –v- Road Haulage Executive* [1952] 2 Lloyd's Reports 490 which applied *The Medina* case *supra* damages are not necessarily arrived at by ascertaining what it would have cost to hire alternative transport. The trial judge always retains the power to assess the circumstances and fix what he considers to be reasonable damages. In other words, the mere fact that a plaintiff says he or she checked what it would cost to hire alternative transport then he or she should be paid that much. Far from it. The Court must assess the degree of the inconvenience, hardship, or embarrassment suffered and do its best to fix a monetary compensation.

In *Berrill –v- Road Haulage Executive* s*upra* the Court said: -

> "The damage in the form of inconvenience and general damage was trivial and I assess it at the sum of 40s."

I have considered the inconvenience, hardship and embarrassment the plaintiff suffered. It cannot be categorized as extreme. Nor can it be regarded as trivial. Kshs 2,000/= per day suggested by learned counsel for the plaintiff is clearly on the high side. I would have been inclined to accept it had the plaintiff produced other figures from other car hire companies to show that was the charge of most companies. The plaintiff was obliged to adduce evidence to show the Court that it was reasonable and competitive. Taking all the circumstance into account, I consider Kshs 40,000/= as reasonable compensation by way of general damages.

Then there is the question of exemplary damages. These are damages awarded punitively. The Court awards them as an expression of its disapproval and displeasure of the defendant's conduct. There is no clear evidence to lead me to the conclusion that the defendant's conduct deserves punishment. The learned counsel for the plaintiff in his written submission attempted to lay a basis for the damages. However the submission is unsupported by evidence. Consequently, I do not consider that there is justification for an award on this head.

The result is that I assess general damages at Kshs 40,000/=. Costs to be taxed. That is the judgment of the Court.

Dated and delivered at Nairobi this 7th day of April , 1992 .

S.E.O BOSIRE

JUDGE