



**Akunga v Chief Magistrate’s Court Kisii & another (Civil Appeal
27 of 2018) [2022] KECA 679 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KECA 679 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 27 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 8, 2022**

BETWEEN

JULIUS ONKWARE AKUNGA APPELLANT

AND

CHIEF MAGISTRATE’S COURT KISII 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the High Court of Kenya
at Kisii (W.A. Okwany J) dated 19th December, 2017 in HCCA No. 1 of 2017)*

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. In this second appeal, the appellant, Julius Onkware Akunga, challenges the decision of the High Court in Kisii (Okwany J) dated December 19, 2017 in which the Learned Judge found the appellant’s appeal against the decision of the Chief Magistrate’s Court in Kisii CMCC No. 252 of 2015 unmerited and dismissed it.
2. The appellant had filed a claim before the trial court by a plaint filed on June 5, 2015 against the 2nd respondent in which he claimed special damages of Kshs. 16,700, general damages, loss of business, costs and interest against the respondent. His claim allegedly arose when his camera, bag, camera flash and photographs, all valued at Kshs. 61,700, which had been produced in court as exhibits in Criminal Case No. Kisii CMCR 2122 of 2009, got lost while in the court’s custody. He alleged that out of his entire claim of Kshs. 61,700, the respondents had only paid him Kshs. 45,000, leaving a balance of Kshs. 16,700.



3. In its defence, the office of the Attorney General denied the appellant's claim and maintained that all the items produced in court as exhibits had been returned to the appellant. The trial court dismissed his claim, leading to the appeal before the High Court.
4. In his appeal before the High Court, the appellant faulted the trial court for failing to fully appreciate the evidence tendered before it, thereby reaching an erroneous verdict that he had failed to prove his case to the required standards. Both respondents did not participate in the appeal before the High Court.
5. In reaching her decision that the appeal was unmerited, the first appellate court found that from the pleadings and evidence tendered before the trial court, the actual value of the appellant's items that were lost while in the respondents' custody was Kshs. 10,700 made up as follows:
 - Camera – Kshs. 6,000
 - Camera flash – Kshs. 4,500
 - Camera bag – Kshs. 200
 - Total - Kshs. 10,700
6. The first appellate court further found that the appellant's claim that his lost camera was worth Kshs. 45,000 and not Kshs. 6,000 which he had proved was dishonest and not supported by any evidence whatsoever. The actual value of the appellant's lost items was only Kshs. 10,700 and it would therefore appear that the appellant was seeking to take advantage of the fact that the respondent had paid to him Kshs. 45,000 for his loss as a basis to claim that he was entitled to more money. The appeal was therefore dismissed, but with no order as to costs.
7. Still aggrieved, the appellant filed his memorandum of appeal dated February 2, 2017 in which he raised eight grounds of appeal. He challenges in his appeal before this Court both the decision of the trial court and that of the High Court, notwithstanding the fact that only the decision of the High Court properly falls for appeal before this Court. I will therefore disregard the appellant's challenge to the trial court's decision and deal with the challenge to the first appellate court's decision.
8. The appellant alleges that the learned judge erred in law and fact in basing her decision on irrelevant matters; failing to consider the decisions of this Court which the appellant cited in his appeal as regards damages and thus arriving at erroneous findings; finding that the appellant's claim was neither proved nor merited; finding that the price of the camera was Kshs. 6,000 and not Kshs. 45,000 thereby arriving at an erroneous finding; and for dismissing his suit with costs without considering that the respondents did not comply with order 11 as required by the law, that they did not dispute his claim or defend the suit; and for failing to consider the list of additional documents which demonstrated that he was in business and had incurred a loss averaging Kshs. 1,500 daily which the respondent did not dispute; and in dismissing the suit with no order as to costs without taking into account that the respondents did not attend court.
9. In his submissions filed on February 24, 2022, the appellant reiterates his argument in his grounds of appeal that the first appellate court erred in finding that his camera was valued at Kshs. 6,000. He maintains that the correspondence between him and the respondents clearly indicates that the value of the camera was Kshs. 45,000, which is the amount that he was paid in compensation. He further submits that the first appellate court was in error for failing to give a reason for the dismissal of his claim while he had exhibited documentary evidence to prove that he was a businessman earning an average of Kshs. 1,500 per day. The appellant reiterated this contention in his oral submissions at the plenary



hearing of the appeal. He further submitted that the respondents neither participated in the trial court nor the High Court and he was therefore entitled to general damages and interests.

10. In submissions on behalf of the respondents, learned Counsel, Mr. Wabwire, submitted that it is not in dispute that the appellant's items were lost while in the custody of the 1st respondent. Further, that it was not disputed that upon investigations, the appellant was paid Kshs. 45,000 in compensation. That the amount in dispute was Kshs 16, 700 which the appellant was claiming. The first appellate court had listed the items lost which items amounted to Kshs. 10,200, an amount that was provided by the appellant in his pleadings. The appellant's claim was for special damages, which he had not specifically pleaded or proved. The respondents therefore asked this Court to dismiss the appeal with no orders as to costs.

11. It is noteworthy that despite the fact that this is a second appeal, the appellant raises, almost entirely, issues of fact that were considered and determined by the trial court and the first appellate court. It bears repeating that in an appeal before this Court from a decision of the High Court rendered in exercise of its appellate jurisdiction, the jurisdiction of this Court is confined to matters of law only- see *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR in which it was held that:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

12. The trial court and the first appellate court considered the appellant's claim regarding the value of his camera. Their finding was that the camera was valued at Kshs. 6,000. As was found by the High Court, on the basis of the evidence tendered by the appellant, his total loss was Kshs 10,700, an amount that the first appellate court tabulated from a consideration of the appellant's claim and his evidence as follows:

“14. I have perused the proceedings of the lower court and I am in agreement with the trial court's findings that the appellant's claim was neither proved nor merited. I note that the particulars of the offence that gave rise to the criminal that case was as follows:

“Julius Wasuna Onyango: On the 28th day of September 2009 at Kisii town in Kisii Central District within Nyanza Province stole one camera bag containing a camera make Minota SR 101 valued at Kshs. 6000/=, a camera flash valued at Kshs. 4,500/= and Kshs. 5000/= from the person of the said Julius Onkware.”

15. From the above particulars, it is clear that the only items that were the subject of the criminal case were the camera, bag and flash. In his evidence during the criminal trial, the appellant stated, in part, as follows:

“He snatched my bag carrying the camera and flash. The camera is make Minota valued at Kshs. 6000/= flash is valued at Kshs. 4,500/=.

He also took my cash which was inside the bag- 5000/= which I got from my business.

We checked and found the bag, the camera flash and photographs of my customers. I did not find cash Kshs. 5000. Here are the items we recovered. The bag, I bought at Daraja Mbili market at Kshs. 200/=. The bag and flash camera and photographs to be marked MFI-1, 2, 3 and 4 respectively.”



16. The value of the camera was also proved through the production of exhibit P4 which was an agreement for its purchase. The said agreement confirms that the camera was purchased at Kshs. 6000/=.”

13. It is difficult to fault the first appellate court’s analysis of the fact and the law. The only time that this Court can interfere with the findings of fact of the trial court and the first appellate court is if it is shown that that the court considered matters it should not have, or failed to consider matters it should have, or the decision reached is otherwise perverse- see *Kenya Breweries Limited v Godfrey Odoyo* (*supra*). This has not been shown to be the case in this matter.

14. The only issue raised in this appeal that could remotely be considered an issue of law relates to his claim for loss of business. The appellant alleges before us that he ran a business earning Kshs. 1500 daily. He refers to an ‘additional list of documents’, a confirmation that such documents had not been placed before the trial court. As correctly found by the first appellate court, while the appellant had made a claim for loss of business, he had made no effort to prove the alleged loss. The court expressed the following view:

“ 19. It is trite law that special damages must not only be specifically pleaded, they must also be specifically proved with as much particularity as circumstances permit. See *National Social Security Fund Board of Trustees vs Sifa International Limited* (2016) eKLR, *Macharia & Waiguru vs Muranga Municipal Council & Another* (2014) eKLR and *Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa*, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that

“... It is now well settled that special damages need to be specifically pleaded before they can be awarded.”

20. In the instant case, I have already found that the actual value of the appellant’s lost items was Kshs. 10,700/= only and therefore it would appear that the appellant is seeking to take advantage of the fact that the respondent paid to him Kshs. 45,000/= for his loss as a basis to claim that he was entitled to more money.

21. On the claim for loss of business, I note that even though the appellant made a claim in that respect in his plaint, he did not lead any evidence to support the alleged loss apart from stating that he was a camera businessman and that he lost business for 6 years. The appellant did not state how much he earned from his said business at any given period as he merely threw figures contained in a receipt book at the trial court without any credible evidence in support thereof and expected the court to make head or tail of the receipts and award him damages. I find that there was no credible documentary evidence in support of the alleged business on which the court could rely in making an award for loss of business.”

15. I really can find no basis for faulting the decision of the High Court in dismissing the appellant’s appeal. The learned judge’s analysis of the law and evidence was unimpeachable. A claim for special damages must not only be specifically pleaded but must also be strictly proved-see *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR.

16. It seems to me, as found by the first appellate court, that the appellant was taking advantage of a situation to enrich himself. Having found that his badgering of the respondents had resulted in a payment of Kshs. 45,000, he may have assumed that he could extract a further payment from the State for his alleged loss of ‘business’. The law, however, is not on his side, and it is now time for him to be



satisfied with the compensation he received, several times more in value than the camera and case that he lost, and let this matter rest. This appeal is clearly without merit, and I would dismiss it.

17. At the hearing of this appeal, Counsel for the respondents asked us to dismiss the appeal but with no order as to costs, and that is the order that commends itself to me.

JUDGMENT OF KIAGE, JA

1. I have read in draft the judgment of my sister Mumbi Ngugi, JA. with which I am in full agreement and have nothing useful to add. The final orders shall be as she proposes, Tuiyott, JA being also agreed.

JUDGMENT OF TUIYOTT, JA

- I. I have read in draft the judgment of my sister Mumbi Ngugi, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF JULY, 2022

MUMBI NGUGI

.....

JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

