



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, OUKO & KIAGE JJA.)

CIVIL APPEAL NO. 115 OF 2006

BETWEEN

DOUGLAS ODHIAMBO APEL1ST APPELLANT

EMMANUEL OMOLO KHASINO 2ND APPELLANT

AND

**TELKOM KENYA LIMITED.....
RESPONDENT**

(Appeal from the Judgment of the High Court of Kenya at Nairobi (P. Kihara Kariuki, J.) dated 31st March 2006

in

HCCC NO. 2547 OF 1998)

JUDGMENT OF THE COURT

By a plaint dated 17.11.98 filed at the High Court in Nairobi, the two appellants **DOUGLAS ODHIAMBO APEL** and **EMMANUEL OMOLO KHASINO** sued the defunct Kenya Posts and Telecommunications Corporation, the Commissioner of Police and the Attorney General seeking damages for wrongful confinement and malicious prosecution. They also sought special damages in the sum of Kshs. 130,000 being legal fees allegedly paid in defending their criminal prosecution they said was malicious and which ended in their acquittal, as well as “damages for inducing breach of contract plus costs and interest.”

That plaint was subsequently amended to name Telkom Kenya Limited as a substitute for the Kenya Posts and Telecommunications.

Defences were filed by the defendants in which liability was denied and, issues being joined, it was to proceed to trial.

On 19.10.04, the case came before Aluoch J. and the parties recorded a consent in the following terms;

- “1. Let the second and third defendants herein be and are hereby WITHDRAWN from this suit.**
- 2. That judgment on liability be and is hereby entered as follows – i.e. 15 % against the plaintiffs and 85% against the first defendant.**
- 3. That the matter be mentioned on 1st November 2004 for recording quantum of damages.”**

The anticipated consent on quantum of damage did not materialize despite a couple of adjournments of the fixed formal proof to enable the parties to reach a settlement on the same.

At a mention on 23.2.06 before Visram J. (as he then was) the parties recorded a consent order in the nature of directions for filing of submissions to be followed by a mention to take a judgment date before any judge. Submissions having been filed, an order was made by the same judge that the parties appear before Kihara Kariuki, J. (as he then was) for taking a judgment date.

In a judgment dated and delivered on 31.3.06, Kariuki, J. adverted to the difficulty that confronted him in that he was required to assess damages on the basis of pleadings and submissions when no evidence whatsoever had been tendered by either party. Not even the plaintiffs testified. Said the judge;

“So as things stand, there is no evidence on record upon which I, as a court of law, can undertake an assessment of damages. There are averments in the plaint that the plaintiffs suffered loss and damage. The plaintiffs must place before the court evidence to sustain those averments. Pleadings and written submissions are not evidence.”

The learned judge also found difficulty in having to assess damages for wrongful confinement and malicious prosecution yet, by the earlier consent alluded to, the claim against the Commissioner of Police and the Attorney-General had been withdrawn. The learned judge explained the difficulty as follows;

“The plaintiffs were arrested and charged by the police. And the prosecution was undertaken by the Attorney-General as public Prosecutor. Telkom Kenya was merely a complainant. The decision to charge and prosecute the plaintiffs was taken by the police and the Attorney-General. Telkom Kenya as a complainant would not have been involved in the process. Once Telkom Kenya had made a complaint to the police, it was left to police to investigate the complaint and decide whether or not to charge the plaintiffs. That is why in a claim for damages for unlawful arrest, false imprisonment and malicious prosecution, the proper defendant is always the Attorney General.”

Faced with the twin dilemmas aforesaid, the learned judge, though observing that he would ordinarily have dismissed such a suit, proceeded to assess damages in deference to the consent orders made by his brother and sister judges. He awarded nominal damages of Kshs. 100 each to the two plaintiffs which were reduced by 15% in line with the judgment on liability. He made no order as to costs.

Aggrieved by that judgment, the plaintiffs filed this appeal before us charging that the learned judge erred in three aspects;

- i. Deciding issues not before him
- ii. Awarding nominal damages only
- iii. Declining to award costs.

Arguing the appeal, **Mr. Nyamogo**, the appellant's learned counsel submitted that the learned judge ought simply to have assessed damages on the basis, not of the pleadings or submissions as he said he could not, but on the fact of liability having been settled by consent. He was emphatic that the removal of the Attorney-General from the suit ought not to have troubled the judge nor inhibited the suit as the respondent had voluntarily taken up the responsibility of the Attorney General and the Commissioner of Police.

Mr. Nyamogo next assailed the assessed nominal damages stating that it was an error for the learned judge to ignore the fact that the sum of Kshs. 130,000 was already the subject of a final judgment. He also stated that the costs should have followed the event.

On her part, Ms. Mbabu, the learned counsel for the respondent, submitted that there was no consent for the production of documents without calling witnesses. She contended that no law existed for the production of evidence by way of submissions. In fact, she argued, the very fact that the appellant's counsel had tried to attach receipts for legal fees to the submissions was proof that special damages needed to be proved and were not settled by the judgment on liability. She contended further that the claims for damages for wrongful confinement and malicious prosecution were unsustainable without the joinder of the Attorney-General and, finally, that costs were at the discretion of the court.

Replying to those submissions, Mr. Nyamogo insisted that the respondent had obligated itself to shoulder liability entirely. On the attaching of receipts to the submissions, counsel averred that he was being merely generous as liability had already been settled.

Our duty as a first appellate court is to re-assess, re-evaluate and analyze the record and the evidence so as to arrive at our own independent conclusions. See: **SELLE Vs. ASSOCIATED MOTOR BOAT COMPANY LTD** [1968] EA 123 and **PIL KENYA LTD Vs. OPPONG** [2009] KLR 442. Having done so, we find that the learned judge was entirely correct in holding that at a formal proof requiring assessment of damages, a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied by the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court.

The need for proof is not lessened by the fact that the claim is for special damage. Unless a consent is entered into for a specific sum, then it behooves the claiming party to produce evidence to prove the special damages claimed. It is not enough to merely point to the plaint or to repeat the claim in submissions. The law on special damages is that they must be specifically pleaded and strictly proved. See **RATCLIFFE Vs. EVANS** [1892] 2QB S24; **KAMPALA CITY COUNCIL Vs. NAKAYE** [1972] E.A 446 and **HAHN Vs. SINGH** [1985] KLR 716.

The learned Judge cannot therefore be faulted for rejecting the receipts for legal fees placed before him as annexures to the plaintiffs' submissions. Submissions, as he correctly observed, are not evidence. The only way the receipts would have been produced and acted upon by the court would have been by the plaintiffs taking the stand and producing them on oath or the parties agreeing expressly that they be the basis for special damages. This did not occur. The necessity of the rule becomes immediately clear where, as in this case, the respondent contends that receipts for legal fees in defence of the appellant's criminal case seem to have been issued prior to their arrest. Special damages were not proved and the claim for Kshs. 130,000 was properly rejected.

On the law of malicious prosecution, we do not doubt that the judge directed himself properly in holding that the claim lay as against the Attorney General alone. He was also correct in holding that the withdrawal of the suit against the Commissioner of Police and the Attorney-General meant that that claim was essentially non-suited. In the case before us, however, that was not the end of the matter.

The record shows that the respondent herein agreed to shoulder 85% of liability at the time the suit against the Commissioner of Police and the Attorney-General was withdrawn. When the case was listed for formal proof before Ojwang J. (as he then was) on 9.11.05, counsel for the respondent confirmed to the court that the matter was coming up "for formal proof between the 1st defendant [Telkom] and the

plaintiff[s]”. The matter proceeded thereafter on that basis. This issue is in fact placed beyond dispute by the position taken by the respondent in its submissions filed on 1.3.06 before the High Court and which opened with this statement;

“Parties have agreed on the question of liability which was recorded way back ago where the defendant has obligated itself entirely to shoulder liability.”

In light of that explicit and repeated declaration of its liability under general damages, we must fault the learned judge for not factoring it in his assessment of damages. Had he done so, he would not have granted the nominal Kshs. 100.

It is to be noted that the general damages claim was not limited to unlawful confinement and malicious prosecution alone but also on inducing breach of contract as well.

Being persuaded that the respondent had voluntarily admitted liability and agreed to shoulder it, we assess and award the damages at the sum of Kshs. 50,000 for each appellant as proposed by the respondent itself in its submissions before the trial court. This sum shall attract interest at court rates from the date of the High Court judgment.

We also award the appellants the costs of the suit at the High Court and interest thereon.

As the appellants have only partly succeeded before us, we award them half the costs of this appeal.

Dated and delivered at Nairobi this 24th day of January, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

/mwn