



African Population and Health Research Center v Kwiringira (Civil Appeal E219 of 2022) [2024] KEHC 9113 (KLR) (Appeals) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL E219 OF 2022

HI ONG'UDI, J

JULY 30, 2024

BETWEEN

AFRICAN POPULATION AND HEALTH RESEARCH CENTER .. APPELLANT

AND

JAPHETH KWIRINGIRA RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate's Court at Milimani delivered by the Hon. E.M Kagoni, on the 27th July, 2021 in Milimani COMMSU NO. 609 of 2019)

JUDGMENT

1. In the original suit, the respondent sued the appellant for compensation of Kshs. Usd 73,500.00, costs of the suit, interest for a deal gone sour.

The Respondent's Case

2. The genesis of this dispute as stated in the plaint dated 18th September, 2019 is as follows; that sometime in June 2018, the Defendant ran an advert on their website, <http://aphrc.ora/newsite/APHRC-Preview/>, looking for a consultant with experience in urban sanitation research, policy analysis, good understanding of research methodology including data collection and analysis, stakeholder and policy makers' engagement mapping and knowledge translation to conduct policy oriented research in Uganda with focus on the districts of Kampala and Mbarara.
3. Further, that on 24th June 2018 the respondent being interested in the project responded to the advertisement by applying and submitting the requirements as per the advertisement and also confirmed his availability from July 2018 to December 2018. On 25th June 2018, Dickson Amugsi, for and on behalf of the appellant confirmed receipt of the respondent's response to the advertisement and thereafter engaged him on the budget of the consultancy which he provided.



4. That by way of email, on 5th July 2018, the respondent was informed and congratulated for being selected as the consultant for the project. In the same mail, the respondent was asked to put together the research protocol for submission to the Ethics committee. In a further email dated 9th July 2018, he was asked to share a detailed budget with the appellant based on the negotiated amount for the Fecal Waste Management component of Usd 80,000.
5. On 20th July, 2019 the parties agreed on the price for the two consultancies of Fecal Waste Management (FWM) and Cost Effectiveness Analysis (CEA) at Usd 120,000. On 22nd August 2018, Mr. Amugsi on behalf of the appellant wrote to him confirming that the budget had been approved by the tender committee and the contract would be ready the same week.
6. The Respondent Averred further that in an email of 27th August 2018, the appellant wrote to him demanding for his input into the Fecal Waste Management report failure to which they would use his plan B. According to him, he was engaged by the appellant to provide a service as a consultant for two assignments: a) the Fecal Waste Management; b) Cost Effectiveness Analysis projects in Uganda, but the appellant intentionally refused, ignored and/or trivialized his request to have his contract for services signed, while it consistently engaged him to provide professional services.
7. It was his case that despite all the work done the appellant refused to compensate him hence the claim as pleaded under paragraph 28 of the plaint.

Appellant's Case

8. The appellant filed an amended defence dated 11th November, 2019 denying all the respondent's averments. In short it asserted that there was no contract entered into between the appellant and respondent. It accused the appellant of having no due regard for process. That there was no way a contract would have been approved without the engagement of various stakeholders.
9. The respondent testified as the only witness while the appellant called two (2) witnesses. After a full hearing and filing of submissions the trial Magistrate later on 27th July, 2022 delivered his Judgment in favour of the respondent. The appellant was ordered to pay the respondent Usd 20,500 + interest and costs for professional fees for work done.
10. The appellant being aggrieved with the entire judgment, lodged this appeal on 18th September, 2019 setting out the following grounds:
 - i. The learned magistrate erred in law and in fact by failing to appreciate the law and elements of the Law of Contract.
 - ii. The learned magistrate erred in law and in fact when he purported to make a contract for the parties.
 - iii. The learned magistrate erred in law and in fact through misapprehension and/or failure to adequately evaluate the evidence and exhibits tendered thereby arriving at an erroneous finding that the respondent was unconditionally selected.
 - iv. The learned magistrate erred in law and in fact through misapprehension and/or failure to adequately evaluate the evidence and exhibits tendered thereby arriving at an erroneous finding that there was an enforceable Contract.
 - v. The learned magistrate erred in law and in fact by finding that the Appellant was in breach of the said Contract while the particulars of the said breach were not pleaded.



- vi. The learned Magistrate erred in law and in fact by failing to appreciate the absence of evidence on record to the effect that the appellant breached the said contract.
 - vii. That learned magistrate erred in law and in fact by failing to appreciate that the Appellant had demonstrated sufficient effort to hasten their internal processes while ignoring evidence put forward showing that the respondent was the one who frustrated the whole process.
 - viii. The learned magistrate erred in law and in fact when he made a decision that violates the appellant's rights as guaranteed in law including the *Consumer Protection Act* No. 46 of 2012.
 - ix. The learned magistrate erred in law and in fact when he failed to give effect to the cardinal principle of the law that parties are bound by the pleadings.
 - x. The learned magistrate erred in law and in fact by disregarding the totality of the appellant's submissions, cited authorities, and as a result, arrived at materially unsupported findings of fact and law.
 - xi. The learned magistrate erred in law and in fact by failing to appreciate the proper effect and purport of the evidence before it and in arriving at a decision, which is not supported by and/or is manifestly against the weight of the evidence.
 - xii. The learned magistrate erred in law and in fact by awarding special damages in the sum of Usd 20,500 for alleged work deemed to be done outside the contract in contravention to the trite legal position that special damages must be strictly proven.
 - xiii. The Judgement of the honourable magistrate was manifestly punitive against the appellant and contrary to the overwhelming evidence and submissions of the appellant.
11. The appeal was canvassed by way of written submissions, and both parties complied.

Appellant's Submissions

12. These were filed by the firm of Njoroge Regeru & Company Advocates and are dated 20th March, 2024. Counsel gave a background of the case before submitting on the grounds of appeal.
13. In regard to grounds 1, 2, 3, 4 and 11 she submitted that it was not disputed by all that no signed contract existed between the appellant and the respondent. However, that the trial Magistrate found that there indeed existed a contract between the parties herein the same having been awarded on 5th July, 2018, vide an email.
14. Counsel submitted further that the trial Magistrate ignored a cardinal principle of the law to the effect that courts do not make contracts for parties. In support of his argument she relied on the case of *JNN, (a minor suing as the next friend v Naisula Holdings t/a N School* [2018] eKLR, where the court held as follows;

“It is trite law that "the courts do not make contracts for the contracting parties. No. It is a matter purely between them sese ipse".[26] This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties.” (Emphasis added)



15. Additionally, she submitted that the appellant’s advertisement calling for consultants was an invitation to treat and neither can the respondent’s conditional selection be construed to be acceptance of offer. In support of this argument counsel relied on the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which held as follows:

“It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”
16. Regarding grounds 5, 6, 9 and 10 counsel submitted that the trial Magistrate in his judgment found that the appellant had the contract yet the respondent did not plead breach of contract. That it was the duty of the court to adjudicate upon the specific matters in dispute, which the parties themselves have raised. To support this position counsel relied on the case of *Independent Electoral and Bounderies Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR.
17. In respect to grounds 7, 8, 12 and 13 she submitted that the respondent was awarded Usd 20,500 pegged on services being rendered to the appellant, despite his failure to particularize and demonstrate in his pleadings and throughout the proceedings the kind of services he rendered. Further, that it was the appellant who was left to scantily put together what the respondent might have construed as work done.
18. Counsel submitted that it was trite law that he who alleges must prove. He relied on section 107 of the *Evidence Act* and the cases of: *Patrick Mubia Gaiti v Joseph Kingiri Mwangi & Another* [2020] eKLR as cited in *Bonham- Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177, *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another* [2016] eKLR and *Equity Bank Limited & 2 Others v Perpetua Muthoni Nduma* [2019] eKLR, in support.
19. Lastly, counsel submitted that it was the respondent to be estopped from demanding payment of unsolicited advice. She urged the court to allow the appeal with costs.

Respondents submissions

20. These were filed by the firm of Bitala & Kakinga Advocates and are dated 18th October, 2024. Counsel gave brief facts of the case and identified two issues for determination.
21. On whether the appeal is merited, counsel submitted that the trial Magistrate did not err in law nor fact by allegedly creating a contract for the parties. Further, that the Magistrate’s role was purely interpretive, aimed at elucidating the exercise and terms of the contract based on the evidence provided, rather than formulating a new contract. She submitted that a valid contract constituted three elements; offer, acceptance and consideration. To support this position, she relied on the on the cases of: *NIC Bank Limited v Victor Ochieng Oloo* [2018] eKLR and *Charles Mwingi Miriti v Thanaga Tea Growers Sacco Ltd & Another* [2014] eKLR.
22. Counsel further submitted that the crux of the contract between the parties was evidenced through clear actions and communications. Further, that the appellant by advertising on its website in 2018 extended an invitation to treat. Thus, the respondent, seized the opportunity and submitted an offer. The same was unequivocal and accepted by the appellant as demonstrated through subsequent email exchanges, particularly those dated 5th July 2018. Counsel added that the said correspondences, involving key representatives from both sides, crystallized the mutual consensus and the agreed consideration of Usd 120,000 for the consultancy services, thereby cementing the contract’s existence and enforceability.



23. The second issue is what the available remedies to the parties are. He urged the court to dismiss the appeal with costs to the respondent. For costs he relied on the case of *Orix Oil (Kenya) Limited v Paul Kabuu & 2 others* [2014] eKLR where the court held that costs should follow the event. Counsel further urged the court to issue an order for immediate execution of the decree and that the judgment sum deposited in a joint interest earning account be transferred to the respondent.

Analysis and determination

24. This being a first appeal, it is this court's duty to re-evaluate and re-consider the evidence tendered before the trial court, and arrive at its own conclusion.
25. This principle of law was well settled in the case of *Selle & another v Associated Motor Boat Company & others* 1968 EA 123

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

26. Having carefully considered the evidence, grounds of appeal, the submissions and the authorities relied on by the respective parties, I find that the issue for determination is whether the instant appeal has merit.
27. It is not in contention that the appellant engaged the respondent for purposes of having him render consultancy services to it, vide an email dated 5th July 2018. In cross-examination by the respondent's advocate DW1 confirmed that the respondent tendered (after the appellant ran an advert on its website looking for a consultant) his interest and was successful. He further confirmed that the respondent had been awarded the consultancy contract on 5th July, 2018 and the same was to run between July 2018 to December, 2018. The initial budget was Usd 80,000 but reviewed to Usd 120,000/= after negotiation.
28. Counsel further submitted that the appellant had asked the respondent to prepare a work plan (Exhibit 5) which he did but he refused to review reports which were outside the scope of consultancy. DW1 then stated that the respondent was not issued with a contract as the same was awaiting signing by the executive director who later halted it. DW2 equally stated that no contract was awarded to the respondent and that it was the respondent who made them not sign the contract.
29. The respondent testified as PW1 and adopted his witness statement dated 19th September 2019 as his testimony. In cross-examination, he stated that he was a consultant with the appellant though there was no consultancy agreement. He added that what existed was correspondence to that effect. He added that the consultancy was capped at Usd 80,000/= and dealings were by conduct of the parties. He confirmed having preformed services for which he had not raised invoices and the appellant did not pay for them. He referred to an email indicating that his contract was with the deputy director.
30. The trial Magistrate in his judgment while relying on the case of *Brogden v Metropolitan Railway Company Ltd* [1877] 2 App.Cas 666 held that a contract is made when it is accepted either orally, in writing or by implication. He observed that an offer was made via email and the acceptance was equally done via email, so it did not matter that the contract was not physically executed.



31. From the evidence herein above, the bone of contention is whether there existed a contract between the appellant and respondent. In the case of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court held that; -

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

32. In *Eldo City Limited v Corn Products Kenya Ltd & another* [2013] eKLR which applied the English Supreme Court decision in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, it was held as follows;

“whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract.”

33. Further, in *Storer v Manchester City Council* [1974] 1 WLR 1403, as follows:-

“In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

34. The email of engagement at the heart of this matter is that of 5th July, 2018 produced by the respondent in his list of documents marked as PExb.1-4 whose existence DW2 confirmed in his testimony. The email to the respondent from DW1 who is an employee of the appellant, clearly captured in the nature of services to be rendered and where the same was to be done. It is helpful to set out verbatim the contents of the said email here, it stated as follows; -

“Dear Japheth,

I am pleased to inform you that you have been conditionally selected as a consultant; for the fecal waste management project in Uganda. We will give you more details in the course of next week. Meanwhile, you could start putting the research protocol together for possible submission to ethics committee of your choice for approval. This will help save time. Once again, congratulations. (emphasis added)

Kind regards,

Dickson”

35. In light of the above cited authorities, and the email dated 5th July, 2018 this court proposes to look at whether there was any intention by the parties herein to form a contract and whether the respondent rendered any consultancy services as was required in the email of 5th July, 2018. I note that in an email dated 9th July, 2018 (Page 30 of the record of appeal) DW1 requested the respondent to look at an attached TOR drafted in Kenya and advise if the same was doable in Kampala and Mbaara. The respondent replied vide the email dated 10th July, 2018 (page 30 of the record of appeal) giving



- comments on the said TOR. DW1 acknowledged receipt of the said email (page 31 of the record of appeal) on the same day saying he was impressed by the advice/comments given by the respondent.
36. The onus of proving the basis for his claim lay with the respondent. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* [2014] eKLR, in distinguishing between legal and evidential burden held *inter alia*;
- “The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.
37. The legal burden was on the respondent to demonstrate that he rendered any consultancy services to the appellant based on the email of 5th July, 2018 confirming his selection as a consultant. In my view, the emails of 10th July, 2018 by both the appellant’s employee (whose email correspondences have not been denied by the appellant) and the respondent confirmed that he indeed rendered some consultancy services to the appellant, even before the signing of the contract.
38. There are all indications that there was an intention to create a contract. I say so because from the evidence of DW1 and DW2 everything about the contract was ready save for the signing. This information had been passed on to the respondent who expected the contract to be signed which was never to be because of the declination by the appellant. The reason for the declination was grounded on an email exchange between the respondent and DW1 on some issues.
39. It was the duty of the appellant to quantify his claim for Usd 20,500. He claims to have rendered professional services to the appellant. How can these services be assessed in the absence of a contract expressing the terms?
40. It is true the respondent suffered a disappointment based on the fact that he had prepared himself for consultancy work to do for the appellant. For the court to grant the prayer for Usd 20,500, the respondent ought to have clearly set out the professional services he was rendering in the absence of a contract.
41. After duly considering all the factors herein I find that what is actually due to the respondent is compensation for the time he wasted believing the contract was coming his way, and also his time with the appellant’s officers when they visited him in Uganda. He took his time to be with DW1 on 26th July, 2018 and even took him to the Kampala Fecal Waste Treatment Plant and a few other relevant places on 27th July, 2018. He therefore had a high expectation.
42. My finding is that the trial court in making any award should have stuck to the respondent’s main prayer in the plaint dated 18th September, 2019, which prayer was for compensation. That being the position I set aside the Judgment by the subordinate court and substitute it with a Judgment for Usd 15,000 as compensation. He is also awarded costs plus interest from the date of Judgment in the subordinate court.
43. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.



H. I. ONG'UDI
JUDGE

