Kilonzo v Lakhan aka Maendimahad Habibhai Lahkani (Civil Appeal 40 of 2018) [2023] KEHC 21986 (KLR) (31 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21986 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 40 OF 2018

AK NDUNG'U, J

AUGUST 31, 2023

BETWEEN

WALTER KILONZO .... APPELLANT

AND

MAHENDI LAKHAN AKA MAENDIMAHAD HABIBHAI LAHKANI .... RESPONDENT

(Being an Appeal against the Judgment and decree of the Honourable DR. Julie Oseko, Chief Magistrate delivered on 7th day of August, 2018 in Malindi Cmcc No.189 of 2016)

JUDGMENT

CORAM: Hon. Justice A.K.Ndung'u

Richard Otara Advocate for the Appellant

Muli and Ole Kina Advocates for the Respondent

1. By way of a Plaint dated 24th day of August, 2016 and amended on 28th October, 2016, the Plaintiff sued the defendant for a sum of Kshs. 1,349,909 and interest at 10% per month till payment in full plus costs of the suit and interest. A defence to the claim was filed on 24th October, 2016 denying the entire claim.

2. The trial court, upon hearing the parties, entered judgment in favour of the Plaintiff on the 7th August, 2018.

3. Aggrieved by the said decision, the Appellant lodged this appeal based on 8 grounds as follows; -

    i. The learned trial magistrate erred on both point of law and fact by misapplying wrong principles of the law especially ignoring the company law by shifting the company's obligations to an employee.

ii. The learned trial magistrate grossly erred on both point of law and fact by ignoring all evidence tendered by the Appellant and proceeded to consider her own things which were not part of the evidence tendered before her.

iii. The trial magistrate erred on both point of law and fact by failing to appreciate the fact that the agreement was between the Respondent and a third party who is not party to this suit.

iv. The trial magistrate misapplied her judicial thinking failing to note that the Respondent had failed to prove his case on the required standards of the law.

v. The learned trial magistrate appreciates the fact that the furniture was delivered in the hotel and not into the Appellant's premises but goes on ahead to hold the appellant liable for the company's debt.

vi. The trial magistrate was biased and unfair against the Appellant in all fairness.

vii. The contents of the trial magistrate's judgments do not tally with the evidence adduced during the trial of the case.

viii. The trial magistrate erred in fact by introducing her own figures which were not mentioned throughout the trial or in the agreement.

4. This being a first appeal, it is the duty of this Court to consider and re - evaluate the evidence and reach its conclusion thereon. I have, however, to give due allowance, that this court neither saw nor heard the witnesses testify. The applicable principle thereto is well captured in Selle and Another V Associated Motor Boat Company Limited and Others (1968) EA 123, where the Court stated; -

> " ....this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind 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 it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence......."

5. A summary of the evidence on record is as follows. Pw 1 Mahendi a.k.a Mahendimahamad Habibhai Lahkani adopted his statement filed in court on 25th August, 2016 together with the attached documents. The gist of his evidence is that the defendant owed him Kshs. 910,000/= on account of furniture produced and sold to him. He avers that by an agreement dated 7th day of March, 2016, the defendant agreed to liquidate the account by equal installments of Kshs. 150,000/= on or before the 10th of every month and that in the event of nonpayment, interest at 10% was applicable. The Plaintiff defaulted and at the time the suit was filed a sum of Kshs. 1,349,909/= was due and owing.

6. Pw 1 further stated that upon being served with a demand notice, the defendant through his advocate proposed to pay the sum due by installments. The letter was produced in evidence.

7. On his part, the defendant testified that his good will was that he would assume the subject debt pending execution of some conditions and terms agreed between the Plaintiff, one Dinesh and himself. It is his evidence that the discussion and negotiations for supply of furniture that he

knows of was for a company called Meridian Ltd. All negotiations and discussions were made between him as a representative of the company and the said Dinesh Repod.

8. The Defendant added that there was a written agreement that defined the terms and conditions of the supply of the furniture. The agreement specified a sum of Kshs.9,335,600/=. All payments were made to Dinesh being the person known to Meridian and himself. He stated that the written agreement produced was to be typed and it was to include a reconciliation of the amount to be paid.

9. I have considered and re-evaluated the evidence tendered before, the trial court. The only issue for determination is whether the Respondent proved his case to the legal threshold required. The burden of proof lay on the Respondent.

10. The legal basis for the legal burden of proof is provided in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows: -

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

    That is the legal burden of proof.

11. It follows therefore that once the Court is satisfied that a party has adduced sufficient evidence in support of their case if not controverted, then the evidentiary burden shifts to the opposite party, to adduce evidence rebutting the claimant's case. In other words, while the plaintiff in a matter bears evidentiary burden to adduce evidence to prove his/her case, then the burden shifts and it behooves the defendant to adduce evidence in rebuttal.

12. The Respondent's claim was backed by evidence in his statement and the documents marked as exhibits 1, 2A, 2b and 2c. These are the agreement acknowledging the debt and committing to pay, the demand letter, the letter from the Appellants Advocate acknowledging the debt and seeking to pay in installments of Kshs. 50,000/= per month and the reply by the Respondent's Advocates rejecting the offer.

13. The Plaintiff's evidence is not met by any cogent rebuttal thereto. The defendant states that his good will was to assume the debt pending execution of some conditions and terms agreed between himself, the plaintiff and one Dinesh. He refers to negotiations for supply of furniture to a company called Meridian Limited between the company and one Dinesh. He tables no evidence of such negotiations. He refers to an agreement that defined terms and conditions for the supply of the furniture. He does not produce it. He refers to payments made to Dinesh. He produces no supporting documents.

14. Contrary to the assertion by the Defendant that the Plaintiff did not prove how the debt arose, the evidence on record is self-explanatory. The appellant acknowledges the debt in the agreement produced by the plaintiff, an agreement, he signed.

15. The allegation that the written agreement produced was to be typed and reconciliation of accounts included is escapist in nature. If that were to be true, why would the parties sign the draft? This allegation cannot, in light of the evidence on record, be true.

16. The Appellant has raised what I consider a spurious allegation that he had not instructed his advocate to write the letter committing to pay the debt. The less said about this the better. If the

same be true, this would have been a very serious issue touching on the professional conduct of his counsel. The letter in question is so central to these proceedings that the Appellant would not have treated the matter as casually as it now appears. Nothing would have stopped the Appellant from holding the said advocate to account, including and not limited to, requiring him to testify and be cross examined. That allegation is completely without foundation.

17. In the end, I reach the conclusion that, based on the evidence on record, the Respondent proved his case to the required degree. The appeal fails and is dismissed with costs to the Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31ST DAY OF AUGUST, 2023.

....

A.K.NDUNG'U

JUDGE

In the Presence of; -