



**BOM Ahero Girls Secondary School v Achieng t/a Laureen Achieng Timber Yard
(Civil Appeal E24 of 2022) [2023] KEHC 25022 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 25022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E24 OF 2022
MS SHARIFF, J
OCTOBER 27, 2023**

BETWEEN

BOM AHERO GIRLS SECONDARY SCHOOL APPELLANT

AND

**LAUREEN ACHIENG T/A LAUREEN ACHIENG TIMBER
YARD RESPONDENT**

JUDGMENT

a. Background

1. The Respondent sued the Appellant at the Magistrate's court seeking Kshs.1,350,430/= plus costs and interest of the suit, being the amount owed for supply of timber.
2. The particulars of the case before the Magistrate's court were that on various dates between 24/01/2016 and 23/04/2016 the Respondent delivered an assortment of timber products to the Appellant to the tune of Kshs.1,350,430/= for which payment was never made.
3. In support of her case the Respondent called one witness and produced a number of LPO's, delivery notes and invoices detailing the, quantity and prices of the timber delivered.
4. The Appellant on their part denied ever entering a contract with the Respondent for supply of timber. They labelled the LPO's, LSO's and letters as forgeries and called for dismissal of the suit with costs.
5. After due consideration of the pleadings, evidence and submissions the trial Magistrate entered judgment in favour of the Respondent to the tune of Kshs.1,310,000/= plus costs and interests from the date of filing suit till payment in full.
6. Being aggrieved by this judgment the Appellant has now proffered this appeal on the following grounds.



1. That the Learned Magistrate completely misunderstood the evidence before him, wrongly analysed the evidence thus deciding in favour of the Respondents.
 2. That the learned Magistrate erred in law and fact by failing to appreciate the totality of the evidence before him and the submissions made on behalf of the Appellants thus reaching a conclusion that was contrary to the evidence before him.
 3. That the learned Magistrate erred in law and in fact in considering frivolous, vexatious and unsupported facts
 4. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before him and therefore arrived at a wrong conclusion.
7. On the 9/05/2023 the court issued directions that the Appeal be canvassed by way of written submissions. The Appellant's filed theirs on 22/5/2023 while the Respondent filed submissions on 8/5/2023.

b. Appellant's Case

8. In their submissions dated 19/5/2023 the Appellant outlined the following issues for determination;
 1. Whether there was a valid contract.
 2. Whether the Respondent rendered the goods and services as claimed.
 3. Whether the Respondent was entitled to the prayers before the Magistrate's court.
9. On the first issue the Appellant submitted that the Respondent's failure to prove the existence of a contract meant she had not discharged her burden of proof under section 107 and 108 of the Evidence Act. They further contended that being a learning institution they only procure goods through tendering. They averred that the elements of a sale contract as per the Sale of Goods Act had not been met and the LPO's and LSO's were forgeries.
10. Regarding the second issue the Appellant stated that the Respondent neither delivered goods nor offered any services. To buttress this point they stated that the LPO's, invoices and delivery notes didn't have the school logo, seal or authentic stamp. Additionally, the stores clerk testified that he did not receive any goods. They placed reliance on the case of Teknical Equipment International Limited v National Water Conservation & Pipeline Corporation [2013]eKLR where the court held that the delivery notes were questionable for not being stamped and signed.
11. On the third issue the Appellant submitted that the Learned Magistrate was wrong in allowing the Respondent's case on the strength of forged documentation. They urged this court to allow the appeal.

c. Respondent's Case

12. *Vide* her submissions dated 8/5/2023 the Respondent opposed the appeal and outlined the following issues for determination.
 1. Whether the Respondent had established sufficient grounds to warrant payment of Kshs.1,350,000/=
 2. Whether the Respondent is entitled to interest at commercial rates.
13. Regarding the first issue the Respondent characterised the amount claimed as special damages. It was her contention that the case had been sufficiently proved through production of the delivery notes,



LPO's and invoices. She relied on the cases of *Okulu Gandhi v South Nyanza Sugar Company Limited* (2018)eKLR and *Christine Mwigina v Samuel Kairu Chege* (2017)eKLR in which the common thread was that special damages should be proved with a degree of veracity based on the circumstances of the transactions.

14. As for the second issue she urged this court to grant interest from the date of filing suit since it was a liquidated claim. She placed reliance on section 26 of the *Civil Procedure* and the case of *Jane Wanjiru Wambui v Anthony Kigamba Hats & 3 others* {2018}eKLR.

d. Analysis and Determination

15. After careful consideration of the record of appeal and the rival submissions of the parties, what emerges for consideration in this appeal is whether the Learned Magistrate was right in awarding the Respondent Kshs.1,310,230/=.
16. The Appellant contended that they never ordered or received any goods from the Respondent. They labelled the LPO's, delivery notes and invoices as forgeries, averring that as government entity they only procured goods through tendering and not by single sourcing.
17. On the other hand, the Respondent argued that she was single sourced by the Appellant's principal and she delivered the goods as evidenced by the documents produced.
18. This being a first appeal this court is enjoined to reconsider and re-evaluate the evidence so as to draw its own conclusion giving allowance to the fact that it neither heard nor saw the witnesses. (see the Court of Appeal case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
19. The Appellant raised the pertinent issue of whether there was a contract. In the Court of Appeal case of *Ali Abid Mohammed v Kenya Shell & Company Limited* (2017) eKLR, it was stated that an oral contract can be inferred from the conduct of the parties. The court held as follows:

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per litter and for a certain period of time.”
20. Upon consideration of the appeal record and inference of the existence of a contract is made from the circumstances of this case it is easy to infer the correspondences exchanged between the parties. Two letters dated 22/12/2015 and 28/12/2015 from the Appellant requesting for timber and cedar poles elicited a response from the Respondent *vide* a letter dated 30.12.2015 wherein the Respondent undertook to deliver the requested goods. This evinces the presence of some business arrangement that gives rise to obligations on either party. This court therefore finds that the uncontroverted letters hereinabove point to the existence of a binding contract between the parties herein.
21. The Appellant dismissed the LPO's, LSO's and delivery notes as forgeries however they did not provide any proof for this assertion. Section 109 of the *Evidence Act* stipulates that the burden of proof as to any fact lies on the party who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
22. In this suit it is the Appellant who wishes the court to believe that the documents were forgeries. They should therefore have called handwriting experts, document examiners to prove this assertion. A cursory look at the documents show that some of them should have been signed by the either the



Principal, Deputy Principal, Bursar or Clerk. In as much as the clerk refutes receipt of any goods or services none of the others was called to corroborate his evidence. Additionally, the so-called O.B report of the alleged forgeries was not availed to enable the lower court to scrutinise it. There is therefore no iota of evidence to prove that the LPO's were forgeries.

23. The upshot of the foregoing is that this appeal is devoid of merit and the same is dismissed with costs to the Respondent.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 27TH DAY OF OCTOBER 2023

MWANAISHA SAIDA SHARIFF

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JUDGE

