**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CIVIL APPEAL CASE NO. E018 OF 2021**

**STANLEY MAIRA KAGUONGO.....APPELLANT**

**VERSUS**

**ISAAC KIBIRU KAHUTHIA.....RESPONDENT**

**JUDGMENT**

**BACKGROUND:**

1. The Appellant sued Respondent for Kshs.262,243/- being a debt plus costs and interests vide plaint dated 14th October, 2014.

2. Respondent denied the claim vide defence dated 25th November, 2014.

3. The suit was heard and the court awarded Appellant Kshs.4,500/- with no orders as to costs.

4. Being aggrieved by the verdict of trial court the Appellant lodged appeal and set out 4 grounds of appeal namely:

> ***i. The learned trial Magistrate erred both in law and fact in failing to find that the Appellant had proved on a balance of probability that he was owed by the Respondent a sum of Kshs.262,243/-.***
>
> ***ii. The trial Magistrate erred in law and in fact in making an award of Kshs.4,500/- in favour of the Appellant as the amount expressly by the Respondent whereas it was clear that the sum of Kshs.4,500/- was the balance owed after the Respondent had off-setting monies purportedly owed to him by the Appellant against the sum of Kshs.500,000/- paid to Respondent by the Appellant yet the trial Magistrate found as a fact that the Respondent had not proved his set off against the Appellant.***
>
> ***iii. The learned trial Magistrate erred both in law and fact by failing to properly evaluate the credible evidence adduced by the Appellant thus misdirecting himself on the issue before him which resulted to miscarriage of justice to the Appellant.***
>
> ***iv. The learned trial Magistrate erred both in law and fact in dismissing the Appellant's suit together with costs.***

5. The court directed appeal to be canvassed via submissions of which none of the party filed.

**ISSUES ANALYSIS AND DETERMINATION:**

6. The two core issues; **whether the appellant proved case on balance of probabilities and the order as to costs.**

7. In ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, the Court of Appeal stated that;

> ***"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 well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"***

8. In ***Peters v Sunday Post Ltd [1958] EA 424***, the Court held that;

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"***

9. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR,*** the same stated with regard to the duty of the first appellate court;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

10. The Appellant herein, **Stanley Maira Kaguongo,** a consultant of Nairobi and a Kenya Railways Corporation retiree, the Respondent herein **Isaac Kibiru Kahuthia,** a farmer at Marmanet, and the Respondent's brother and a former workmate of the Appellant 's at Kenya Railways Corporation, DW3, **Joseph Maina** were friends. They knew each other very well by the year 2012 and none is a stranger to the other.

11. According to the Appellant 's case, claim and evidence, he lent a total sum of Kshs.500,000/- to the Respondent herein. The Respondent and his brother acknowledged that the money was received by the Respondent. The only issue in this dispute was whether the same was advanced as a friendly loan or as the Appellant s contribution towards a joint business venture in a partnership involving the 3 of them.

12. It however emerged that the Respondent soon after being advanced the money engaged in various farming ventures including fish farming, bee keeping and livestock farming. He produced several photographs and agreement receipts as defence exhibits. The Appellant did not challenge the same.

13. The Appellant was at the time also carrying out some activities at his farm in Marmanet Scheme. The Respondent used to assist him in some of the activities and according to the Appellant 's claim, part of the Kshs.500,000/- debt was off-set during that assistance.

14. In his plaint dated 16th October, 2014, the Appellant claimed that the Respondent agreed to off-set the sum of Kshs.343,000/-, which he claimed from him against the sum of Kshs.605,243/- owed by him to the Appellant leaving a balance of Kshs.262,243/- which sum the Respondent agreed to pay to the Appellant within a period of 5 months in full and final settlement of the debt.

15. The Appellant was therefore claiming Kshs.262,243/- being the principle sum together with interest at court rate; costs and interest at court rates.

16. In his written statement of defence dated 25th November, 2014, the Respondent avers that he and the Appellant were partners in a joint venture under an oral partnership agreement entered into in the year 2007/2008 to carry out some development projects to wit animal husbandry, beef keeping, horticulture farming and fish farming in Marmanet on a portion of 5 acres of land.

17. He further avers that the sum of Kshs.500,000/-paid to him by the Appellant was the Appellant 's financial contributions towards the joint venture because according to the agreement, the Appellant was to avail the funds while the Respondent was to implement the project by using his skills and expertise in farming and management.

18. He further avers that the profits and losses were to be shared in an unascertained ratio. In his set off, the Respondent pleaded that the Kshs.500,000/- be set off by the cost of improvements he did on the Appellant 's parcel of land amounting to Kshs.147,000/-, the loss balanced with the profit shared from the loss of 3 cows which died and the sale by the Appellant of a cow and it's calf; and that he only owes the Appellant Kshs.4,500/-.

19. Upon receipt of the written statement of the Defence and set off, the Appellant, through his advocate, **M/S. Njeri Wamithi & Co. Advocates,** filed a reply to the defence through which he specifically denies that there existed any joint venture and or partnership between him and the Respondent.

20. On that date, the matter was set down for a case conference that was to be held before me on 18th June, 2015. Parties did not however participate in the conference. The Appellant 's counsel did not attend the conference on that day as ordered. It was later agreed that the matter does proceed with the hearing. The issues were to be framed from the hearing.

21. Hearing did commence before me on 8th October, 2015. The Appellant was the only witness in his case while the Respondent later also testified and called his brother as his other witness.

22. On 25th August, 2016, the Respondent finally closed his case, the submissions were then confirmed closed on 6th October, 2016.

23. The evidence tendered to assist court determine these main issues were mainly oral. Apart from the photograph a reply to the demand letter herein produced by the Appellant as **P. Exhibit 3** and the agrovet invoices produced by the Respondent, parties herein shied away from producing real evidence of the figures involved herein.

24. The first issue is on the burden of proof. Justice Mativo in ***Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR,*** which was cited by the learned counsel for the Respondent quoted with approval Lord Brandon in ***Rheir Shpping Co. SA. v Edmunds [1955] IWLR 948 at 955*** as follows:

> ***"No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take."***

25. Justice Mativo, in the above decision, went on to state as follows:

> ***"Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the……..test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: 'The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."***

26. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he assert, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who fail if no evidence at all were given on either side, See also (***Section 107 of the Evidence Act***).

27. The burden of proof in this suit or proceedings therefore shift to either of the parties herein on each of the issues herein and each issue was determined by trial court on that basis.

28. On the issue of whether there as a partnership herein or not, was pleaded by the Respondent. The burden of proof therein lies with the Respondent. On whether the Respondent owed the Appellant the sum of Kshs.157,000[U1] /-, the burden of proof lied with the Appellant . The burden of proving the set off in the defence lied with the Respondent.

29. The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Mativo J in the above case stated that the standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approved Lord Denning in ***Miller v Minister of Pensions [1942] 2 ALL ER 372*** as follows:

> ***"The ……(standard of proof)…..is well settled. It must carry a reasonable degree of probability…… If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not."***

30. One does not need to go further than the provision of ***Partnership Act No. 16 of 2012*** to define what a partnership is. ***Section 2*** thereof defines is as the relationship which exists between persons who carry on business in common with a view to making a profit. Justice Mativo cited several authorities including ***E.R. Hardy Ivamy: Principles of the Law of Partnership (Tenth Edition, London, Butter Norths, 1975) and Halsbury's Laws of England (4th Edition, Vol. 35 at page 5, on paragraph 12)*** in the above case and impressively summarized 3 essential facts without which no partnership can exist i.e. (i) a business; (ii) Carried on in common and (iii) With a view of profit.

31. Whereas there as proof herein that the Appellant had some farming activities on his land at Marmanet, that the Respondent sometimes used to assist him in those activities through which he offset some of the claims herein;

32. That the Respondent also had some farming activities at Marmanet which he proved through the photograph C Exhibits and Agrovet invoices herein, the trial court finding was that, there was no proof of business (whether of farming or otherwise) carried on in common with a view of profit between the Appellant and the Respondent or any other party herein.

33. There was therefore no proof to the required standards. That proof was to come from the Respondent. He alleged it and Appellant denied. Both allegation and denial were oral. The probabilities of the existence of a partnership or not are therefore equal.

34. It is a tie. Applying the test put forth by Lord Denning in ***Miller v Minister of Pensions, supra*** the standard of proof has not been attained. Through a partnership agreement can be oral, the trial court did not find any evidence to prove a common purpose or a joint venture, or an intention to make profit from the evidence adduced herein. This court as much and agrees with trial court.

35. At one point there was an indication of one party assisting, and not partnering, with the other. At another point what comes out is a party being employed by, and not a partner of, the other. Then another party herein claims to offset his service from the proceeds of another's venture. There are claims and counterclaims of set offs herein.

36. For all intent and purpose, any arrangement/s that existed between the parties here do not qualify to be defined as a partnership with the 3 essential characteristics as defined herein above. This court agrees with trial court finding.

37. From evidence, it is clear that, the Appellant did in fact advance Kshs.500,000/- to the Respondent as claimed. He however only claimed Kshs.157,000/- from the Respondent.

38. The Appellant claim that the debt was offset by some various activities and assistance rendered to his farming business by the Respondent and that the balance as at now is Kshs.157,000/-.

39. The Respondent on the other hand claimed that his assistance and services off set the amount save a balance to the tune of Kshs.4,500/-.

40. Each party herein had the burden of proving the offsetting amount herein. The great burden was on the Appellant. However there was no evidence of how he arrived at the figure of Kshs.157,000/-; and not any other figure including Kshs.4,500/- that had been admitted by the

Respondent.

41. Justice Mativo in ***Hellen Wangari Wangechi case, supra*** observed as follows in similar circumstances:

> ***"It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the Appellant made allegation in the plaint, hence she was under an obligation to support the allegation. For example, since there was a denial in the defence, it was necessary to adduce evidence to show how the amount of Kshs.316,000/- was arrived at."***

42. Kshs.157,000/- being a figure claimed as the balance, it was therefore necessary for the Appellant herein to adduce evidence of the figure that which reduces the amount to Kshs.157,000/- and not to any other amount, including zero.

43. The claim was a special damage in nature thus need for not only be particularly pleaded, but also be specifically proved. See the cases of Savannah ***Development CO. Ltd v Posts and Telecommunications Employees Housing Co-Op Society Ltd (Civil Appeal No. 160 of 1991 (unreported), Jivanji v Sanyo Electrical Company Limited [2003] 1EA 98 and Kenya Shell Ltd v Benjamin K. Kibiro (Civil App. No. 97 of 1986).*** Also the often cited famous Lord Goddard CJ's in ***Bohham Carter v Hyde Park Hotel Ltd [1948] 64 Times Law Reports, 117.***

44. This requirement is not merely a procedural necessity but is a mandatory requirement as held in ***Savannah Development CO. Ltd v Posts and Telecommunications Employees Housing Co-Op Society Ltd supra,*** where the learned Judges of Appeal held as follows on this requirement:

> ***"Having considered judicial pronouncement on the subject of special damages including the decision of this court, we can confidently state that the requirement that special damages must be explicitly pleaded proved is not merely a procedural necessity but is a mandatory legal requirement going to the jurisdiction on the specific issue and an objection by the Respondent that an Appellant has violated this rule may be taken at any time and even an appeal."***

45. There was no reliable evidence from the Appellant to prove with the necessary degree of certainty required e.g. agreement of sale, bank statements, receipts, invoices or any other agreement between him and the Respondent, that the activities performed by the Respondent as the assistance and service rendered to him, or the part payment made to him, by the Respondent were worth (in term of figures the offsetting amount of Kshs.343,000/- as claimed by him).

46. Since the burden of proving the same was on him, the trial court was justified in finding that the offsetting amount herein could have been Kshs.500,000/- or even more, if to grant the same without evidence to prove the figure with the degree of certainty required in such cases of liquidated claims.

47. It was also justified in finding that he had no balance to claim herein. There was also no corresponding proof from the Respondent for his set off.

48. Thus trial court justified in finding that, it was therefore unable to make any liquidated award herein in the absence of proof. The Respondent however admitted in his pleadings that he is indebted to the Respondent to the amount of Kshs. 4,500/- from the outset and was ready to pay the same. That admission did not require proof of trial herein.

49. Thus this court finds no merit in appeal and makes orders;

i. ***The appeal is dismissed with no orders as to costs as parties failed to file submissions.***

**DATED AND SIGNED AT NYAHURURU THIS 17TH DAY OF FEBRUARY, 2022.**

**.....**

**CHARLES KARIUKI**

**JUDGE**