



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL APPEAL NO. 166 OF 2012**

**FEISAL YASSIN.....APPELLANT**

**-VERSUS-**

**NARESH RATHOD.....1<sup>ST</sup> RESPONDENT**

**FASTRACK LOGISTICS LIMITED.....2<sup>ND</sup> RESPONDENT**

*(An Appeal from the judgment of Hon. Odenyo, Principal Magistrate, delivered on 12<sup>th</sup> September, 2012 in Mombasa Chief Magistrate's Court Civil Case No. 4350 of 2003).*

**JUDGMENT**

1. The suit against the respondents in the lower court was that on or about 27<sup>th</sup> September, 2003, the 1<sup>st</sup> respondent on his own volition caused the arrest of the appellant on allegations of banking discrepancies amounting to the tune of Kshs. 1,200,000/= and ensured his incarceration at Urban Police Division. He was then released on a police bond pending investigations. The appellant also alleged that the 1<sup>st</sup> respondent by the use of police officers forced him to acknowledge the debt arising from the discrepancy by being forced to make a confession at Urban Police Division.
2. The appellant averred that he was made to execute a blank transfer (form) for his motor vehicle registration No. KAM 600U Toyota Corolla valued at Kshs. 400,000/= with the intention of the respondents selling the said motor vehicle to set off part of the money they alleged he had stolen from the 2<sup>nd</sup> respondent. The appellant claimed that the 1<sup>st</sup> respondent accompanied him to 2 banks where the appellant had accounts, namely, Giro Bank and Barclays Bank and made him to withdraw the sum of Kshs. 43,000/= and Kshs. 23,000/=, respectively, from the said accounts. That the 1<sup>st</sup> respondent demanded for the money which the appellant had in his house and sent the appellant's colleague to the said house to pick whatever he had. He stated that he had 25 Sterling Pounds and 2,780.00 US Dollars which was taken by the 1<sup>st</sup> respondent.
3. The appellant claimed that the 1<sup>st</sup> respondent also took his Kshs. 40,000/= net salary for September, 2003 and encashed his 2 years' leave allowance which was due and owing in the sum of Kshs. 92,000/=. The appellant also claimed that the 1<sup>st</sup> respondent took a photocopier valued at Kshs. 50,000/= from his house. That the 1<sup>st</sup> respondent required him to work without pay and demanded that he repays a further sum of Kshs. 300,000/=. The appellant further averred that he had been harassed and put under police supervision. He also stated that the 1<sup>st</sup> respondent had insisted on being repaid the entire sum of Kshs. 1,200,000/= without proof of his involvement in the loss of the said money.
4. The respondents filed their amended statement of defence and counter-claim dated 10<sup>th</sup> May, 2005, where they denied the averments contained in the plaint and averred that upon reconciling the 2<sup>nd</sup> respondent's statements of accounts, they noted that monies amounting to Kshs. 950,862.40 had not been banked by the appellant. That the matter was reported to the police by the 1<sup>st</sup> respondent where the appellant admitted that he had taken the said amount, recorded a statement at the police station and offered to pay back the amount in issue to the 2<sup>nd</sup> respondent. The respondents claimed that the appellant voluntarily gave the items stated in paragraph 6 of the plaint to the 1<sup>st</sup> respondent as part-payment and that the items listed in paragraphs 6(a) & (c) were later returned to the appellant's Advocate through a court order.
5. The respondents also stated after carrying out the necessary investigations, the police charged the appellant vide (Mombasa Chief Magistrate's Court) Criminal Case No. 2899 of 2003. In the counter-claim, the respondents claimed from the appellant Kshs. 950,862.40 being the amount allegedly misappropriated and converted into the appellant's own use in the course of his employment with the 2<sup>nd</sup> respondent. The respondents also claimed interest on the aforesaid amount at court rates and costs of the suit.
6. In the lower court case, judgment was delivered on 12<sup>th</sup> September, 2012, where the Court held that the respondents had proved their

counter-claim against the appellant on a balance of probability. The Trial Court entered judgment for the 2<sup>nd</sup> respondent against the appellant for the sum of Kshs. 950,862.40 together with interest at court rates from the date of filing suit. The 2<sup>nd</sup> respondent was also awarded costs of the counter-claim.

7. The appellant was dissatisfied with the decision of the Trial Magistrate and on 28<sup>th</sup> September, 2012, he filed a memorandum of appeal dated 24<sup>th</sup> September, 2012 raising the following grounds of appeal-

- i. That the learned Magistrate erred in law and fact in dismissing the appellant's evidence in its totality;
- ii. That the learned Magistrate erred in law and fact in taking extraneous matters into account and leaving out important matters;
- iii. That the learned Magistrate erred in law and fact in failing to consider that the appellant had been charged with criminal charges over the subject matter of this suit and he had been acquitted after a full hearing;
- iv. That in his judgment the learned Magistrate of the civil cases section, purported to act as an appeal of the same Court in the criminal cases section (sic); and
- v. That the judgment goes against the weight of the evidence.

8. The appeal herein was canvassed by way of written submissions. On 5<sup>th</sup> February, 2021 the appellant's submissions were filed by the law firm of L.N. Momanyi & Company Advocates. The respondents' submissions had been filed earlier on 1<sup>st</sup> February, 2021 by the law firm of Muregi Okere Advocates.

9. Mrs. Momanyi, the appellant's learned Counsel submitted that the appellant was in charge of the daily banking for the 2<sup>nd</sup> respondent, Fastrack Logistics Limited, while the 1<sup>st</sup> respondent was the Financial Controller of the said company. She submitted that on 3<sup>rd</sup> April, 2008 by consent of the parties herein, the appellant withdrew his claim and the same was marked as settled since he had been given back his assets, which the respondents had unlawfully taken away from him. The said withdrawal of the appellant's claim left the respondents with the obligation to prosecute their counter-claim.

10. The appellant's Counsel submitted that in his pleadings, the appellant averred that he was in charge of daily banking for the 2<sup>nd</sup> respondent but that did not mean that the said banking started and ended with him. She submitted that DW1 in his testimony stated that his duties included preparation of deposit slips and the handing over of the same and the money collected to other people for banking. She stated that it was wrong for the learned Magistrate to conclude that the appellant was the only person who could tell if there was any shortfall in banking. She further submitted that the appellant gave a plausible reason for handing over his property to the respondents, which he said was caused by police intimidation and being terrified but thereafter he was able to recover his assets through his Advocates. Mrs. Momanyi was of the view that the learned Magistrate erred in dismissing the appellant's evidence in its entirety.

11. She submitted that the learned Magistrate took into consideration extraneous material that was not placed before him by holding that the appellant would have known if his colleagues banked less than what was filled in the banking slips prepared by him. She further submitted that evidence had been placed before the Trial Magistrate to the effect that when the dispute herein first arose, the respondents caused the appellant to be arrested and charged with theft by servant but after a full hearing, the appellant was acquitted by a Court of competent jurisdiction. She asserted that since the Trial Court in the criminal case found that the appellant had not stolen the money, the Hon. Magistrate in finding him guilty for theft in the civil case before the lower court, essentially overturned the finding of the criminal court.

12. Mrs. Momanyi submitted that the respondents did not adduce any evidence that proved that the appellant had converted any of the respondents' money for his own use. She submitted that it is trite that one should not benefit from an illegality thus by allowing himself to be convinced that the appellant had stolen from the respondents on the grounds that they had illegally caused him to hand over his assets, the learned Magistrate allowed the said respondents to benefit from their illegal actions. This Court was urged to allow the appeal.

13. Mr. Okere, learned Counsel for the respondents submitted that under Order 42 rule 2 of the Civil Procedure Rules, it is a mandatory requirement to file a certified copy of the decree or order appealed against together with the Memorandum of Appeal. He indicated that the Record of Appeal herein neither has a certified copy of the decree of the Trial Court nor does it have proof that the appellant applied for a certified copy of the said decree. He submitted that without a copy of the decree contemplated under Section 79G of the Civil Procedure Act, 2010 as read together with Order 42 rule 21 of the Civil Procedure Rules, 2010, the Record of Appeal filed herein is of no consequence and the appeal must be struck out. He relied on the case of **Lawrence Nguthiru Riccardahw v George Ndirangu** [2014] eKLR, where the Court struck out an appeal where there was no evidence that the appellant had applied for a certified copy of the order appealed from.

14. It was submitted by Mr. Okere that the appellant's contention that evidence of an acquittal should have been taken into consideration in civil proceedings before the Trial Court was erroneous. He further submitted that in any event, certified copies of the purported criminal case proceedings had not been included in the Record of Appeal filed before this Court. He added that even if the criminal proceedings had been put in as evidence, the standard of proof in criminal cases is totally different from that applicable in civil cases. He relied on the case of **Stanley Kimere v Everrigging Africa Contractors Limited** [2007] eKLR.

15. The respondents prayed for the appeal to be struck out and for this Court to order for the release of the monies deposited in the joint names of the Advocates for the parties herein together with interest, if any, and for the said money to be released to the account of Muregi Okere Advocates for onward transmission to the respondents. Mr. Okere relied on the provisions of Order 27 rule (9) of the Civil Procedure Rules, 2010.

16. In her rejoinder, Mrs. Momanyi submitted that a Court cannot strike out an appeal for failure by an appellant to have the decree certified. She submitted that the acquittal of the appellant was part of the evidence thus her client should not be condemned to pay for money which he did not steal.

#### **ANALYSIS AND DETERMINATION.**

17. The duty of the first appellate court is to re-evaluate and analyze the evidence tendered before the lower court both on points of law and facts and to draw its own findings and conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for the said fact. The said duty was restated in the case of **Joseph Munga'thia vs County Council of Meru and Another**, Civil Appeal No. 146 of 2002 (Nyeri) (unreported). The Court stated that-

**“In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of the law. On facts, we are duty bound on first appeal to analyse the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses and seeing their demeanor and making allowance for the same.”**

18. An appellate court should also be slow to differ with the Trial Court and should only do so with caution and in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the Trial Court acted on wrong principles of law in arriving at the findings it did. That was stated in the decision in **Mwangi & Another vs Wambugu [1983] 2 KLR 100**. See also **Mkuba vs Nyamuro [1983] LLR** at page 403.

19. This court has re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel and the evidence that was adduced before the Trial Court. The issues for determination in this appeal are-

**i. Whether the Record of Appeal is deficient for failure to annex a certified copy of the decree appealed against.**

**ii. Whether the appeal is merited.**

#### **Whether the Record of Appeal is deficient for failure to annex a certified copy of the decree appealed against.**

20. Mr. Okere submitted that the Record of Appeal is deficient since the decree had not been certified. He relied on the provisions of Order 42 rule 2 of the Civil Procedure Rules, 2010 which provide as hereunder-

**“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”**

21. He also relied on Section 79G of the Civil Procedure Act which provides that-

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

22. The prerequisites that qualify an appeal as being ready for hearing are provided in Order 42 Rule 13(4) of the Civil Procedure Rules, 2010 which states thus-

**“Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—**

**a. the memorandum of appeal;**

**b. the pleadings;**

**c. the notes of the trial magistrate made at the hearing;**

**d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**

**e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**

**f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:**

**Provided that—**

**i. a translation into English shall be provided of any document not in that language;**

**ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f). (emphasis added).**

23. It is clear from the provisions of the law highlighted in the preceding paragraph that a decree or order or judgment appealed from is an integral part of an appeal filed in the High Court against a decision from the subordinate court. Without the judgment, order and/or decree appealed from there is, in effect, no appeal. It is for the said reason that **Section 79G** provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period.

24. It is discernible from **Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010** that what is required by the 1<sup>st</sup> appellate court is the judgment, order or decree appealed from to be filed before an appeal can be allowed to go for hearing. In the present case, the appellant has attached a copy of the lower court judgment together with a copy of the decree and certificate of costs in compliance with the provisions mentioned above. In the case of **Elizanya Investments Limited v Lean Energy Solutions** [2021] eKLR, this Court observed as follows-

**“.....it is not a mandatory requirement for an appellant to include both the Judgment and the decree of the lower court in the Record of Appeal. It would however not be useful to attach a decree and leave out the Judgment of the Trial Court.”**

25. The High Court sitting on appeal in the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 Others** [2020] eKLR, was of a similar view when it held that-

**"The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13(f) of the Civil Procedure Rules for the filing of a copy of the "judgment, order or decree appealed from" and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances."**

26. The Record of Appeal filed herein on 20<sup>th</sup> November, 2020 includes a Memorandum of Appeal dated 24<sup>th</sup> September, 2012, certified copies of the lower court proceedings and the judgment of the said court delivered on 12<sup>th</sup> September, 2012 by Hon. R. Odenyo. The said Record of Appeal also contains a copy of the decree and certificate of costs in accordance to the provisions of Order 42 rule 13(4) of the Civil Procedure Rules, 2010.

27. In view of the foregoing, failure to include a certified copy of the decree in the Record of Appeal should not invalidate the appeal herein for reasons of non-compliance with the provisions of Order 42 rule 13(4) of the Civil Procedure Rules, 2010. This court has had the full benefit of reading the lower court's judgment, hence there has been substantial compliance.

28. It is the finding of this Court that the lack of a certified copy of a decree does not in any way affect the appellant's appeal and the right to be heard as enshrined under Article 50 of the Constitution of Kenya. It is thus incorrect for the respondents to assert that the appellant's appeal is deficient. I therefore decline to strike out the appeal on the said ground.

#### **Whether the appeal is merited**

29. The 1<sup>st</sup> respondent contended that the appellant worked for the 2<sup>nd</sup> respondent as an Accountant, Book Keeper and Cashier under his supervision. His evidence before the lower court was that the appellant's duties included working the books of accounts, collecting cash, cheques and preparing the cash deposit slips for banking. He stated that the appellant was not the one who used to go to the bank to deposit cheques and the money collected for the 2<sup>nd</sup> respondent.

30. He also stated that sometime in September, 2003 the Managing Director of the 2<sup>nd</sup> respondent who had been going through bank files found out that some cash collected was not banked. That during a meeting between the appellant, the 1<sup>st</sup> respondent and a Police Officer called Ibrahim, the appellant confessed that he had stolen the money. That he admitted that he had not been banking the money and he was prepared to pay the said some of money to the tune of Kshs. 950,962.40. The 1<sup>st</sup> respondent's evidence was that in a bid to pay the said amount of money, the appellant parted with Kshs. 78,000/=, USD 2,780.00 and 25 Sterling Pounds and that he handed over his car together with the original logbook as security for the remaining balance.

31. The proceedings of the lower court reveal that the said sums of money together with the car were later on returned to the appellant through his Advocate. The 1<sup>st</sup> respondent also stated that an audit was subsequently done that revealed a shortfall in banking. During cross-examination, the 1<sup>st</sup> respondent stated that he did not know the names of the people who receipted and banked the money. He indicated that in the preparation of his report, he relied on receipts and banking slips which were produced in Court by the police in the criminal case.

32. DW 3 Sergeant Charles Kamau during cross-examination stated that in the criminal case, the appellant was acquitted under Section 210 of the Criminal Procedure Code. DW4 Patrick Muiruri, who was the Officer-in-charge of criminal registry of the Mombasa Chief Magistrate's Criminal Court produced the court file in respect of Criminal Case No. 2899 of 2003 in which the appellant was acquitted.

33. The appellant in his defence stated that he met the 1<sup>st</sup> respondent near Central Police Station together with two plain clothes police officers who intimidated him. He was then taken to Urban Police Division and was asked to write a confession admitting that he took Kshs. 1,200,000/= which was allegedly missing. He wrote the said confession which stated that he was going to pay back the said money. He stated that the procedure at the 2<sup>nd</sup> respondent's office was that staff would receive money from clients and hand it over to him to prepare it for banking. He confirmed that he only prepared banking slips and gave to a colleague to do the banking.

34. As a result of the dispute between the parties herein, the appellant was arrested and charged with the offence of stealing by servant but he was later acquitted under Section 210 of the Criminal Procedure Code. The appellant contended that by virtue of his acquittal by the criminal court, the civil court should not condemn him to pay monies that a court of competent jurisdiction held he did not steal. The respondents on their part submitted that the standard of proof in criminal cases is different from the one in civil cases.

35. In the case of **Ochieng vs Ayieko** [1985] KLR 494, O’kubasu, J (as he then was) held as follows-

**“Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate’s Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.”**

36. The Trial Court in the civil case was not bound by the outcome of the Trial Court in Chief Magistrate’s Court Criminal Case No. 2899 of 2003. As a 1<sup>st</sup> appellate court, this Court cannot however disregard the fact that the appellant was acquitted in the said case. It is noteworthy that the 1<sup>st</sup> defendant testified that the appellant was not responsible for banking the money received as all he did was to prepare banking slips and cheques. The appellant in his defence to the counter-claim adduced evidence to the same effect. In reaching his decision in the civil case, the Trial Magistrate relied heavily on the pleadings in the appellant’s plaint where he averred that he was in charge of the daily banking for the 2<sup>nd</sup> respondent and the fact that he signed a blank motor vehicle transfer form and withdrew money from his bank accounts and handed over the same to the 1<sup>st</sup> respondent.

37. It is clear to this Court that the appellant parted with possession of his car, the cash in his 2 bank accounts and the money which was in his house as well as a photocopier machine due to the intimidation he received in the hands of the 1<sup>st</sup> respondent and the police officers which led to him to making a confession.

38. In regard to non-payment of his salary and leave allowance, the appellant was at the mercy of the 1<sup>st</sup> appellant who was the Financial Controller of the 2<sup>nd</sup> respondent. It is clear that even before the appellant was charged in the lower court, the respondents had turned themselves into prosecutor, jury and judge and concluded that the appellant had misappropriated funds belonging to the 2<sup>nd</sup> respondent and they commenced the process of recovering the same.

39. It is my finding that the Trial Court in the civil case erred by dismissing the appellant’s evidence despite the fact that it was corroborated by the 1<sup>st</sup> respondent in his testimony to the extent that it was not the appellant who used to do daily banking for the 2<sup>nd</sup> respondent. There was no allegation made by the respondents that when filling the bank deposit slips for the money collected for the 2<sup>nd</sup> respondent, the appellant short changed the 2<sup>nd</sup> respondent. The allegation by the respondents was that some of the 2<sup>nd</sup> respondent’s money was not banked.

40. It is settled law that the burden of proof lies with whoever wants the court to find in his favour in support of what he claims. Section 107 of Evidence Act succinctly states:

**“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.”**

41. Further, Section 108 of Evidence Act states that-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”** (emphasis added).

42. In the present case, the respondents claim that the appellant did not bank Kshs. 950,862.40 as he converted it to his own use in the course of his employment. The 1<sup>st</sup> respondent relied on a report prepared by himself and the court file for the Chief Magistrate’s Court Criminal Case No. 2899 of 2003. The 1<sup>st</sup> respondent stated that the receipts he relied on in preparation of his report had been produced in the said criminal case. DW4 when producing the court file for the criminal case before the court which heard the civil case stated that the said receipts were not found in the Criminal Case Court file and that he was still looking for them.

43. The degree of proof in civil matters is on a balance of probabilities. This Court finds that what the respondents did was to claim that the appellant had misappropriated Kshs. 950,862.40 but no documentary and/or direct evidence was adduced to support their claim other than a report by the 1<sup>st</sup> respondent. No explanation was given as to why the people responsible for banking the said monies after the appellant had prepared the cheques and banking slips were not called to testify as to how much they were given to bank during the time the said money was allegedly stolen by the appellant. As such, it could not be ascertained at what point in the chain of activities from receipt of the money to the actual banking, that it disappeared.

44. I have perused the authorities relied on by the respondent’s Counsel but they are not applicable to the circumstances of this case.

45. In the criminal case, the appellant was acquitted under Section 210 of the Criminal Procedure Code as the Trial Court found that he had no case to answer. The said provisions state as follows-

**“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall**

**forthwith acquit him.**” (emphasis added).

46. The burden of proof in the criminal case against the appellant was much higher than in the civil case that gives rise to this appeal. Having analyzed the evidence adduced for and against the counter-claim by the respondents, I find that the respondents did not prove their case on a balance of probability. Having come to the said conclusion, I hold that the lower Court erred in finding that the respondents had proved their case on a balance of probability. I set aside that decision of the lower Court in its entirety.

47. It is therefore my finding that the appeal herein is well merited and the same is hereby allowed. This Court further makes an order for the release of the monies held in Barclays Bank of Kenya (now, Absa Bank Kenya PLC) Account No. 2028227550 Nkrumah Branch, together with interest if any, held in the joint names of the Advocates in whose names the bank account was opened, to the appellant’s Counsel forthwith, for onward transmission to the appellant. Costs of this appeal and the lower court civil case are awarded to the appellant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30<sup>TH</sup> DAY OF JULY, 2021. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mrs Momanyi for the appellant

Mr. Okere for the respondents.

Mr. Cyrus Kagane – Court Assistant.