



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 50 OF 2018**

**JOHN MURIITHI.....APPELLANT**

**VERSUS**

**CHARLES MUNGA KIMITA T/A**

**MWALIMU AGENCIES CO. LIMITED.....RESPONDENT**

**(Being an Appeal from the Judgement of Honourable**

**P. Mutua Senior Principal Magistrate dated 28<sup>th</sup> August**

**2018 in CMCC No. 28 of 2017 in the Chief Magistrate's Court in Nyeri).**

**JUDGEMENT**

**Brief Facts**

1. This appeal arises from the judgement delivered on 28<sup>th</sup> August 2018 in CMCC No. 28 of 2017 whereas the respondent in his claim against the appellant of Kshs.50,000/= being a friendly loan advanced but not repaid as agreed by the parties obtained judgement in his favour.
2. The appellant filed a counterclaim together with his defence claiming that the said Kshs. 50,000/- was a deposit for a contract entered on 15<sup>th</sup> June 2014 between the parties and not an advance. He stated that the contract sum was Kshs.65,000/= and thus the appellant was claiming Kshs.15, 000/= as the balance unpaid by the respondent towards the contract sum.
3. The magistrate found in favour of the respondent and dismissed the counter claim for lack of proof.
4. Being aggrieved by the decision, the appellant lodged the instant appeal citing four(4) grounds of appeal which may be summarised as follows:-
  - a) The learned magistrate erred in law and fact by failing to appreciate the evidence of the appellant and his witness and as such arrived at the wrong finding.
  - b) That the learned magistrate erred in condemning the appellant to meet the costs of the suit.
5. Parties hereby disposed of the Appeal by written submissions.

**Appellant's Submissions**

6. The appellants submissions expounded on his grounds of appeal. While he did not dispute having received Kshs. 50,000/- from the respondent, the bone of contention is the purpose of the said amount of money. The respondent said the money was a friendly loan advanced to the appellant. He produces a petty cash voucher dated 20<sup>th</sup> September 2014 to support his contention. The appellant submits that the said voucher did not indicate whether it was an advance loan or an advance payment for services rendered or services to be rendered. The appellant further contends that it was his testimony that the money was an advance or deposit payment in relation to a contract entered between the parties dated 10<sup>th</sup> June 2014 in which the appellant transported 650 bales of hay at Kshs. 100 per bale.
7. The appellant further submits that he could not avail the original contract because it was in the respondent's custody. However, the trial

court disregarded the appellant's copy pursuant to **section 69 of the Evidence Act**. Further the appellant contends that the court ought to have allowed the copy without giving the requisite notice because he called a handwriting expert as his witness to support his genuineness of the respondent's signature. This made it valid and pursuant to **section 68 of the Evidence Act** the court ought to have allowed him to produce the copy of the contract dated 10<sup>th</sup> June 2014.

8. The appellant submits that in any event, the respondent did not object to the appellant producing a photocopy which further strengthened the appellant's case. He argued that the respondent only raised the issue of possible manipulation of the signature through digital lifting of a digital signature and further that DW2's evidence was in relation to a handwritten signature and not a digital signature as the witness gave evidence in relation to pen pressure and ink distribution. As such, the appellant contends that the expert opinion of DW2 ought to have been considered and given the due weight it deserved.

9. The appellant in his conclusion argued that there is overwhelming evidence showing that the contract exists and that the document is in possession of the respondent.

### **Respondent's Submissions**

10. The respondent submits that at no time did the appellant deny having received Kshs. 50,000/- from him only that it was not a friendly loan. On the contrary, the respondent produced a petty cash voucher indicating "advance" as documentary evidence proving that the appellant received the said amount.

11. The respondent further submits that he challenged the validity and admissibility of the alleged contract produced by the appellant on the basis that the appellant produced a photocopy of the said contract alleging that the respondent was in custody of the original contract. The respondent submits that he who alleges must prove and thus no contract for supply of hay was proven between the parties herein which defeated the whole counterclaim by the appellant as it was predicated on the alleged contract.

12. The respondent further urges this Honourable court not to exercise its discretion in terms of **section 68(1) (a) (vii) of the Evidence Act** which allows copies of documents to be produced without the requisite notice. The respondent states that the appellant has not shown its justification to warrant the court to exercise its discretion in favour of the appellant in regards to that provision of the law. The mere allegation by the appellant that the respondent is in possession of the original document whereas the respondent rightfully told the court that he did not have in his custody any contract, is not a justification to warrant the appellant to be allowed to produce a copy of the said contract. Notably, the appellant failed to give notice to the respondent pursuant to section 69 of the Evidence Act nor did he give reasons for failing to put the respondent on notice and thus he cannot therefore blame his misfortunes on the respondent.

13. The respondent relies on the case of **In Re Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (Deceased) [2016]eKLR** and submits that the production of primary evidence cannot be casually wished away. It is on this basis that the appellant failed to prove his counter claim against the respondent and therefore the trial court was justified in dismissing the appellant's counter claim.

14. The respondent contends that since the expert witness of the appellant confirmed to the court that she did not see the original contract but relied on a photocopy and considering a photocopy could be manipulated and that there was no original contract to begin with. Further, the respondent submits the evidence of an expert witness in not binding to a court and relies on the cases of **Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another [2016] eKLR** and **Elizabeth Kamene Ndolo vs George Matata Ndolo [1996] eKLR** to buttress this point. The respondent thus prays that since he proved his cases on a balance of probability, he prays that the trial court's judgment be upheld and the appellant's appeal be dismissed with costs.

### **Issues for determination**

- a) Whether the appellant proved his counterclaim on a balance of probabilities;
- b) Whether the evidence of his expert evidence was erroneously disregarded.

### **The Law**

15. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

**"....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 allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."**

16. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

17. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348**, observed that:-

**"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."**

19. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

**Whether the appellant proved his case on a balance of probabilities:**

20. This degree of proof is well enunciated in the case of **Miller vs Minister of Pensions [1947]** cited with approval in **D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR**. The court stated:-

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”**

21. Further, **Section 107 of the Evidence Act Cap 80** places the burden of proof on the party who wants the court to rely on the existence of any set of facts to make a finding in his favour, to prove those facts.

22. In the instant case, the appellant contends that the trial court did not appreciate the evidence he adduced arguing that the Kshs. 50,000/- was a contractual sum between the parties for transporting of 650 bales of hay at Kshs. 100 per bale. He further contended that there was a balance of Kshs. 15,000/- and filed a counter-claim against the respondent. The respondent on the other hand contends that the said sum of money was a friendly loan he advanced to the appellant. He who alleges must prove. To prove his contention, the respondent produced evidence to court in form of a petty cash voucher, which indicates the payment is an advance paid to the appellant who appended his signature at the bottom. The appellant on the other hand, although having testified that there was a formal contract between the parties, did not produce the original contract in court. He stated that the original contract was in the custody of the respondent. Since he could not produce the original contract, he relied and produced in court a copy of the contract.

23. It is trite law that documents must be proved by primary evidence. As a general rule, secondary evidence is only admissible in the absence of primary evidence and when a proper explanation of its absence is given. This is enunciated in **section 68 of the Evidence Act** which provides:-

**(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases-**

**(a) when the original is shown or appears to be in the possession or power of:-**

- i. the person against whom the document is sought to be proved; or**
- ii. a person out of reach of, or not subject to, the process of the court; or**
- iii. any person legally bound to produce it,**

**And when, after the notice required by section 69 of this Act has been given, such person refuses or fails to produce it;**

24. **Section 69** lays down the instances under which secondary evidence may be admitted. It provides:-

**Secondary evidence of the contents of the documents referred to in section 68(1) (a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:-**

**Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases:-**

- i. when the document to be proved is itself a notice;**
- ii. when from the nature of the case, the adverse party must know that he will be required to produce it;**
- iii. when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;**
- iv. when the adverse party or his agent has the original in court;**
- v. when the adverse party or his agent has admitted the loss of the document;**
- vi. when the person in possession of the document is out of reach of, or not subject to, the process of the court;**
- vii. in any other case in which the court thinks fit to dispense with the requirement.**

25. Therefore, from the above provision, it is evident that a party seeking to rely on secondary evidence must first give notice to produce it. Further, one has to give a satisfactory explanation as to why the original document is missing. In the instant case, the appellant did not serve the respondent with the notice as required by section 69. Further, the appellant did not give any reasons for failing to serve the said notice. In that regard, by virtue of section 68 and 69, the copy of the contract cannot be admissible. However, the appellant has urged the court to rely on section 69 (vii) and find that the copy is admissible. As discussed, the law is clear on when secondary evidence can be admitted and how it can be admitted. I think the circumstances surrounding the case do not warrant the application of section 69(vii) of the Act. It is clear that the appellant ought to have given notice as required by the law which he failed to do.

26. The appellant called an expert witness DW2 to prove to the court that the signature on the contract was the respondent's. Although the witness gave evidence in court that the signature was made by the respondent, she admitted that she never examined the original agreement and that a photocopy could be manipulated.

27. The status of opinion evidence was dealt with in **Shah and Another vs Shah and Others [2003] 1 EA 290** where the Learned Judge expressed himself as follows:-

**“One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct....The expert opinion is however limited to foreign law, science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony....The opinion of the expert witness is not binding on the court, but is considered together with all other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...”**

28. It thus follows that a court is not bound to accept and follow expert evidence but it must form its own independent opinion based on the entire evidence before it. Laying out the evidence, the expert witness stated that the signatures in the contract and that in the respondent's pleadings were made by the same author. The witness then said on cross examination that she only examined a photocopy of the said contract and copies were amenable to manipulation for example by digital lifting of the digital signature. Since the expert confirmed that the copies could be manipulated therefore there is no evidence to prove that the respondent signed the contract. The appellant has also submitted that the respondent did not object to the production of the photocopy of the contract but only raised the issue of manipulation. The appellant contends that the signature in contention was not a digital signature but a handwritten one. While I agree that the signature was handwritten, the witness could not confirm the signature of the respondent with certainty because she stated that a photocopy could be manipulated. Since there was no original contract to ascertain that the respondent did sign the contract, DW2's testimony was of no value.

29. Further, DW2's testimony also confirms that he did not set his eyes on the original contract. Section 107 of the Evidence Act provides that he who alleges must prove. The appellant failed to prove his counter-claim which led to the magistrate finding that the burden of proof was not discharged and as such the counter-claim was bound to fail.

30. It is not correct as alleged that the magistrate disregarded the evidence of the expert. What the court did was to evaluate the evidence before him thoroughly and applied the law. This included the evidence of the parties and that of the expert.

31. I have also analysed the evidence on record and reach the conclusion that the respondent proved his case on the balance of probabilities in that he produced the petty cash voucher dated 20/09/2014 and gave credible evidence before the court. He proved on the balance of probabilities that he advanced the appellant a soft loan of Kshs.50,000/= which was never paid. A demand letter was also produced in evidence.

32. I find no fault in the judgement of the magistrate in holding the defendant liable to satisfy the plaintiff's claim. The said judgement is hereby upheld.

33. On costs, section 27 of the Civil Procedure Act provides that “costs shall follow the event”. The event refers to the suit before the court for determination. In this case, the respondent's claim was successful and was entitled to costs. Having been served with a counter-claim the appellant had to file a reply to it through his advocate and prepare to defend it. The Counterclaim was dismissed with costs. As such the respondent was awarded his costs on the counterclaim.

34. It is therefore my finding that the magistrate exercised his discretion judiciously in awarding costs in this case and the said orders are hereby upheld.

35. Consequently, I find no merit in this appeal and dismiss it with costs to the respondent.

36. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 25<sup>TH</sup> DAY OF AUGUST, 2021.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 25<sup>th</sup> day of August 2021.**