



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 156 OF 2019**

**BETWEEN**

**ABDULRAHMAN OPONDO OSAMA.....APPELLANT**

**AND**

**WINFRED KENDI.....1<sup>ST</sup> RESPONDENT**

**O.C.S MERU POLICE STATION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. By a plaint dated 27.10.2017 filed in **MERU CMCC 197 OF 2017** on 31.10.2017, the Appellant who was the Plaintiff sought orders for a declaration that some goods recovered from the 1<sup>st</sup> Respondent's shop were his, general damages, costs of the suit and interest.
2. In her defence, the 1<sup>st</sup> Respondent pleaded that the goods particularized in the plaint are properties illegally taken away by the Appellant and the police from their family shop at Marimanti and do not belong to the Appellant.
3. In a judgment dated 21<sup>st</sup> November, 2019, the learned trial magistrate found that the 1<sup>st</sup> Respondent had established that the disputed goods were hers and hence dismissed Appellant's case with costs to the Respondents.

**The Appeal**

4. Dissatisfied with the judgment, Appellant on 05.12.2019 filed this appeal vide a memorandum of appeal dated 03.12.2019.

**Analysis and determination**

5. My duty as an appellate court is to be found in Section 78 of the Civil Procedure Act which requires that I evaluate and consider the evidence and the law, and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own conclusion. in doing so, I have a duty to give an allowance of the fact that I neither saw nor heard the witnesses as they testified. See **Selle v Associated Motor Boat Co [1968] EA 123**.

**Evidence on record**

6. In support of his case, Appellant stated that on 18.04.2017, he found 1<sup>st</sup> Respondent selling electrical goods that had been stolen from his shop around 2013. He reported the matter to the police who accompanied him to 1<sup>st</sup> Respondent's shop from where they carted away a total of 115 items as shown on the inventory dated 18.04.2017 marked PEXH. 1 which Appellant said he identified as his due to their uniqueness. His witness Aden Muriithi similarly talked about the uniqueness of the goods but both admitted that the goods were not exclusively made for the Appellant.

7. In her defence, 1<sup>st</sup> Respondent denied the Appellant's claim and produced a bundle of receipts and Safaricom transcripts in support of her contention that she had bought the goods.

## **Analysis and Determination**

8. I have considered the evidence on record and submissions for both parties and it is clear that the determination of this appeal revolves around the question whether the Appellants proved his case on the balance of probabilities.

9. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

10. In the case of **Muriungi Kanoru Jeremiah vs Stephen Ungu M’warabua [2015] eKLR** the court held as follows with regard to the burden of proof:

**“...As I have already stated, in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”**

11. **The Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17**, at paras 13 and 14: describes the burden of proof thus:

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”**

**The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence”**

12. The evidence on record reveals that whereas the Appellant tendered an inventory of goods recovered from 1<sup>st</sup> Respondent’s shop, he neither provided a list of goods stolen from his shop nor the receipts in support thereof. He similarly never tender evidence to support his contention that his goods were unique nor reveal the details of the uniqueness. On the other hand, the 1<sup>st</sup> Respondent’s tendered receipts and Safaricom transcripts in support of her contention that she had bought the goods in question.

13. This being the only evidence that was presented at the trial, I find that the trial magistrate was absolutely correct in holding as he did, that that the Appellant did not prove that the goods recovered from the 1<sup>st</sup> Respondent were his. Although the 1<sup>st</sup> Respondent produced receipts to prove the goods in question were hers, I find that in the circumstances of this case, she bore no burden of proof whatsoever in relation to the said goods.

14. For the reasons given hereinabove, I am in agreement with the holding by the learned trial magistrate that the Appellant did not prove his case. I also hold that the case was appropriately dismissed.

15. In conclusion, I find that this appeal has no merit and it is dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED AT MERU THIS 18<sup>th</sup> DAY OF November 2021**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For the Appellants - N/A for Kithinji Kirigiah & Co. Advocates**

**For the 1<sup>st</sup> Respondent - N/A Murango Mwenda & Co Advocates**

**For the 2<sup>nd</sup> Respondent - N/A**