



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. E015 OF 2019

BETWEEN

CASEMENT INDUSTRIES LIMITED.....1ST APPELLANT

DAVID KAMAU.....2ND APPELLANT

AND

AGRI HARDWARES (EA) LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. Atambo, PM

dated 12th April 2013 at the Magistrates Court at Nairobi, Milimani

in Civil Case No. 7405 of 2006)

JUDGMENT

1. The appellants have appealed against the judgment and decree of the subordinate court entering judgment against them for Kshs. 1,252,206/-, costs and interest. The appellants were the defendants before the subordinate court while the respondent was the plaintiff. I shall refer to the parties in their capacities before the subordinate court for ease of reference.
2. The plaintiff's case against the defendants set out in the amended plaint dated 17th November 2004 was for goods sold and delivered and it was that between January 1996 and March 1997, it supplies to the defendants' diverse types of building materials and accessories upon request amounting to Kshs. 1,752,206/-. They were given credit of Kshs. 500,000/- and as result owed the plaintiff Kshs. 1,252,206 as at 31st March 1997 together with interest thereon at commercial rates from that date which it claimed.
3. In the amended defence dated 11th July 2005, the defendant denied that claim and more particularly they denied that amount claimed as due. They also stated that there was a misjoinder of parties as they were not liable as alleged or at all.
4. At the hearing, Kamal Shah (PW 1), the plaintiff's director and David Kamau Gakuru, the 2nd appellant, testified on the defendants' behalf. By a judgment dated 12th April 2013, the trial magistrate found that the plaintiff had proved its case and entered judgment as prayed thus precipitating this appeal.
5. The thrust of this appeal is set out in the memorandum of appeal dated 3rd July 2019 and the submissions of counsel for the appellants, Mr Gathaara. Counsel submitted that the appellants were not contesting the fact that they received assorted goods from the respondent but they were contesting the judgment only to the extent that the trial magistrate erred by failing to deduct several invoices claiming Kshs. 432,795.50 as interest. He contended that the invoices were not on account of goods sold and delivered but for interest which was not part of the claim.
6. Ms Muiruri, counsel for the respondent, opposed the appeal and supported the judgment. She submitted that the issues raised in this appeal were not canvassed before the trial court. She took the position that the trial court dealt with all matters pleaded including the issue of interest and came to the correct conclusion based on the facts and evidence.

7. As this is a first appeal, it is important to recall the general principle governing the exercise of this court's appellate jurisdiction. It is that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see *Selle v Associated Motor Boat Company Ltd* [1968] EA. 123, 126).

8. The issue in this appeal is whether the trial magistrate erred in including the following invoices for interest claiming Kshs. 432,795.50 as part of the claim for goods sold and delivered:

Invoice No. 26743 dated 30/8/1996 for Kshs. 100,745/50

Invoice No. 26869 dated 30/10/1996 for Kshs. 61,007/00

Invoice No. 26887 dated 30/11/1996 for Kshs. 47,276/00

Invoice No. 26998 dated 30/01/1997 for Kshs. 84,759/00

Invoice No. 27102 dated 28/02/1997 for Kshs. 45,304/00

Invoice No. 27180 dated 31/03/1997 for Kshs. 93,734/00

9. It is not disputed that the plaintiff's claim, as pleaded, was for goods sold and delivered. The uncontested evidence, which the trial magistrate accepted and which the defendants now admit, is that they received the goods as evidenced by delivery notes and invoices. I have looked at the invoices identified by the defendant and they are for, inter alia, "*charges paid to our banks on your overdue account.*" They are not for goods sold. In his testimony, PW 1 stated that he charged interest for late payment.

10. In order to claim interest, the plaintiff must establish an agreement to charge interest or point to custom or usage that supports such a claim (see *Alba Petroleum Ltd v Total Marketing Kenya Ltd* NRB CA Civil Appeal No. 43 of 2015 [2019] eKLR). Further, the plaintiff did not plead the terms upon which it was entitled to charge for interest. The trial magistrate did not analyse or appreciate the basis of the interest claimed in the 6 invoices I have set out above and how it was arrived at. In the judgment, the trial magistrate found as a fact that the defendants never paid for the value of the goods they received. Had the trial magistrate considered the invoices for payment of actual deliveries, the invoices for interest and bank charges, not having been pleaded, would be excluded reducing the amount due to the plaintiff by Kshs. 432,795.50.

11. Having reviewed the evidence, I find that the sum of Kshs. 432,795.50 on account of interest ought to be excluded from the amount claimed and it is to that extent I allow the appeal. The principal amount due to the respondent is therefore Kshs. 819,410.50.

12. In conclusion, I allow the appeal on the following terms:

(a) The judgment of the subordinate court is set aside and substituted with judgment for the respondent against the appellants, jointly and severally, for Kshs. 819,410.50 which shall accrue interest at court rates from 31st March 1997 until payment in full.

(b) The appellants shall pay costs of the suit in the subordinate court.

(c) The respondent shall pay the costs of this appeal.

DATED and DELIVERED at NAIROBI this 28th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Mr Gathaara instructed by Z. N. Gathaara and Company Advocates for the appellants.

Ms Muiruri instructed by KTK Advocates for the respondent.