



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CORAM: A.K NDUNG'U, J

CIVIL APPEAL NO. 128 OF 2017

SCANPEX COMMUNICATIONS SYSTEM LTD.....APPELLANT

VERSUS

AMICABLE TRAVEL SERVICES LIMITED.....RESPONDENT

(Being an appeal from the judgement of Hon. I. Gichobi (Ms), SRM

delivered on the 24th February 2017 in Nairobi CMCC No. 7184 of 2010)

JUDGEMENT

1. This appeal arises from the judgment of the Senior Resident Magistrate dated 24/2/2017.
2. By way of a plaint the appellant had sued the defendant for a sum of Kshs. 1,311,334.50, interest on the sum from July 2008 till payment in full, costs of the suit and interest thereon and any other relief the court deemed just to grant.
3. In a judgement dated 24/2/2017, the trial court made a finding as follows;

“The plaintiff’s claim is allowed as against the defendant to the extent of the defendant paying the plaintiff for the radio communications gadgets supplied on June and July, 2008 at the last (previous) sale price. Each party to bear their own costs.”
4. Aggrieved by the said judgement, the appellant lodged this appeal and raised the following grounds;
 1. **That the learned magistrate erred in law and in fact in failing to state the exact sum payable by the respondents to the appellants.**
 2. **That the learned magistrate erred in law and in fact in failing to award interest on the sum payable as prayed in the plaint.**
 3. **That the learned magistrate erred in law, misapprehended and misunderstood the principles governing awarding of costs leading to a wrong exercise of discretion by failing to award costs to the plaintiff for the suit and counterclaim.**
5. The appeal was canvassed by way of written submissions.
6. This being a first appeal, I am called upon to re-evaluate the evidence and reach my own conclusions thereon (See **Selle –vs- Associated Motor Boat Co. Ltd [1968]EA 123** where the court stated;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the 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 the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

7. The testimony on record is that of Tarlochan Singh Madham, the managing director of the appellant company. The appellant company had supplied the defendant from 2005 with communication equipment. In 2008, the defendant failed to pay for supplies worth 1,311,334.50 cts. There was further an unpaid balance of Sh. 107,336.50cts.

On cross examination on price of radios supplied, he stated that the agreed price as per the agreement signed on 16/9/2005 was Kshs. 34,850/= which price was used for 4 to 5 years. Due to inflation, there was an increase of the price by Sh 400 but the witness confirmed that the defendant was not notified.

8. The defendant did not call evidence.

9. I have re-evaluated the pleadings and evidence adduced. It is imperative to state at the outset that the averments in the defence asserting;

1. Full payment of items supplied as per contract with the plaintiff.

2. Unmerchantability of the goods.

3. Unwarranted and exaggerated and unilateral costs.

4. Unconscionable price for the items.

5. Disputed charges for installation and charges for servicing during existence of warranty were all not substantiated as the defence called no evidence.

10. That is not to say that in all civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities.

11. The **Evidence Act** is clear on the burden of proof. Section 107 thereof provides;

“S 107 (1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 109 provides;

“S 109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

12. It was upon the defendant to prove by way of evidence the allegations serialised at paragraph 9 herein above. In the absence of evidence the plaintiff's evidence is uncontroverted and the defendant did not prove the assertions in the defence.

13. In the case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997** said;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

*Similarly in the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000** Mbaluto, J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. If one is still in doubt as to the legal position reference could be made to the case of **Drappery Empire vs. The Attorney General Nairobi HCCC No. 2666 of 1996** where Rawal J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the plaintiff. The plaintiffs have given evidence on oath supported by documentary evidence, which go to prove their case.*

Accordingly, in the absence of any evidence to the contrary and as proof in civil cases is on a balance of probabilities, I find that the plaintiffs are entitled to succeed.”

14. I have gone to great lengths to discuss the issue of proof of the claim by the plaintiff to remove out of the way any notion that the plaintiff did not prove liability against the defendant and to pave way for the determination of the issues for determination which I summarise to be;

1. Whether the magistrate erred in law and fact in failing to state the exact amount payable.

2. Whether interest was payable on the sum prayed for.

3. Whether the trial court erred in failing to award costs.

15. As regards issue No. 1, the trial court's pronouncement at the conclusion of the case was not only ambiguous but casual. The court stated;

"The plaintiff's claim is allowed against the defendant to the extent of the defendant paying the plaintiff for the radio communication gadgets supplied in June and July 2008 at the last (previous) sale price. Each party to bear their own costs."

16. In the Nigerian case of **Adeyeye vs. Alhaji Ajiboye and Others**[1995]9 NWLR (pt 417)125, the court citing the case of **Asogwa vs. Chukwu** held;

"That a good judgement should include accuracy, brevity and clarity."

17. The conclusion in the trial court's judgement lacks in clarity and was in error.

18. Having re-evaluated the evidence, it is clear to this court that the only proven disputed price was in relation to the supply of 25 radios which as per initial contract were priced at Sh 34,850 but which price as per the admission of the PW 1 had been adjusted upwards by Sh. 400 without agreement.

19. It is difficult to see why the trial court did not find it necessary to pick out this price which was in its record and evidence and do the final computation of the net sum payable in terms of her judgement to the plaintiff thus bringing clarity to the judgement. Failure to do so left the plaintiff with an empty judgement thus earning a pyrrhic victory.

20. It has been submitted that this matter should be remitted back to an alternative Magistrate of the Subordinate Court to assess and find out what amount the "previous" price was.

21. That proposition is not well founded since as seen above the "previous" price is on record both in the documentation presented and the oral evidence adduced.

22. The finding of this court on this issue is that a computation of the net payable sum would be calculated by factoring in the overpriced radio at Sh 400 x 25 (Sh 10,000) which sum should be deducted from the sum of Kshs. 1,311,334/50.

23. The trial court thus ought to have entered judgement for the plaintiff for Ksh. 1,301,334.50.

24. On whether interest on the sum found due was payable, the trial court's judgement is completely mute on this aspect of the proceedings yet interest was a distinct and express prayer by the plaintiff under prayer (ii) of the plaint dated 28/9/2010.

25. I have considered the rival submissions in respect of the issue of interest. **Section 26(1)** of the **Civil Procedure Act** provides;

"S 26 (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

26. The award of interest on a sum claimed is basically to cushion a party for the deprivation of the money or goods by another. This is well explained in the case of **Pram Lata vs. Peter Musa Mbiyu** [1965]EA when the Court of Appeal held;

"In both cases, the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest."

27. That principle is buttressed in the case of **Mukhisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1970]EA 469 where the Court stated;

"The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgement."

28. The case of **Jane Wanjiku Wambi vs. Anthony Kigamba Hato & 3 Others** [2018] eKLR sits on all fours with our present suit. I agree with my brother Justice J. Ngugi who finding himself in similar territory had this to say;

"I have come to the conclusion that the learned trial magistrate erred by not averting her mind to whether interest was payable on the liquidated sum she ordered the respondent to pay the appellant. Had the learned trial magistrate done so, she would have likely reached the conclusion that the appellant was entitled to an award of interest at court rates from the time of filing the suit since she

had already concluded that the appellant was entitled to a liquidated amount which she had been deprived of by the actions of the respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our court's repeated application of Section 26 of the Civil Procedure Act."

29. From the foregoing and in the absence of any tenable grounds for denying the plaintiff interest, I find that the trial court fell into error.

30. On costs, the trial court expressed itself thus;

"The successful party is entitled to costs. The circumstances of this case are unique and I will order that each party bears their own costs."

31. I have applied my mind to the proceedings herein. I note that the award of costs is a discretionary power of the trial court. Such discretion must, however, be exercised judiciously.

32. As held in the case of **Devram Daltani vs Haridas Kalidas Danda (1949)16 EACA 35** a successful party can only be deprived of his costs when it is shown that his conduct, either prior or during the course of the suit has led to litigation which but for his own conduct might have been avoided.

33. This being an appellate court, I can only interfere with the exercise of discretion by the trial court if;

1. The discretion was not exercised judiciously or was exercised on wrong principles.

2. Where the trial court gives no reason for the decision and am satisfied that the decision is wrong or

3. Where reasons are given and I consider them not to constitute "good reason" within the meaning of section 27 of the Civil Procedure Act (See Supermarine Handling Services Ltd –vs- KRA C.A No. 85 of 2006).

34. In our instant suit the trial magistrate did not explain what the "*unique circumstances of this case*" were. The reason given in the exercise of the discretion was wrong and does not constitute a good reason for denial of costs within the meaning of S 27 of the Civil Procedure Act.

35. An attempt has been made in the submissions by the respondent to show that the appellant was guilty of misconduct before the trial. I am not persuaded that that is a true position in light of the material before me.

36. In the end therefore, I find fault in the judgement and orders of the trial court. I set aside the said judgement, allow the appeal and make the following orders;

1. Judgement is entered for the plaintiff for Kshs. 1,301,334.50 with interest at court rates from the date of filing suit.

2. The plaintiff shall have costs of the suit both at the trial court and on appeal.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

A. K. NDUNG'U

JUDGE