



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 151 OF 2018

FELIX ODIWUOR ALUOCH T/A RESCUE BOOKSHOP.....APPELLANT

-VERSUS-

MODERN COAST COURIERS LIMITED.....RESPONDENT

(Being an appeal from the Judgement of the Chief Magistrate's Court at Mombasa by Hon. J A Kassam (Senior Resident Magistrate) delivered on 20th July, 2018 in Mombasa CMCC No. 1107 of 2014)

Coram: Hon. Justice Reuben Nyakundi

A. N. Atancha advocates for the Appellant

Mogaka, Omwenga and Mabeya advocates for the Respondent

JUDGEMENT

The Appellant, dissatisfied with the dismissal of his suit by the trial court for lack of a cause of action, filed a memorandum of appeal dated 10th August 2018 against the whole judgment of the Senior Resident **Magistrate Hon. Kassam** delivered in Mombasa CMCC No. 1107 of 2014 on 20th July 2018.

In reaching the decision to dismiss the Plaintiff's suit for want of a cause of action, the learned trial magistrate held:

“ This case raises an important legal issue concerning the validity of way bills and exemption clauses in various contracts it is important to show in full how each party is obligated. The Plaintiff attached a copy of the way bill however, failed to attach a copy of the conditions provided overleaf the receipt issued to the customer. Although the parcel was sent by Laxim, the way bill in Court does not bear any conditions.

In this case, the Plaintiff is not therefore relying on any exemption clause in the contract. Further, the way bill was drawn to the attention of the sender and not the Plaintiff as a receiver. The Plaintiff did not provide any Consignment Sheet which forms the contract between the parties. On the front page of the way bill, the particulars of the parcel have not been disclosed. I found that the way bill never formed part of the contract between the Plaintiff and the Defendant and therefore, there was no cause of action and the Plaintiff's case is dismissed with costs to the Defendant.”

It is the foregoing decision that gives rise to the instant appeal which is founded on the six grounds elucidated below:

- 1. That the learned trial magistrate erred in law and in fact by failing to consider that the books of the appellant had indeed been damaged while in transit by the respondent.**
- 2. That the learned trial magistrate erred in law and in fact by finding that the way bill never formed a part of the contract.**
- 3. That the learned trial magistrate erred in law and in fact by finding that the way bill was only drawn to the attention of the sender and not the appellant**
- 4. That the learned trial magistrate erred in law and in fact by raising various defence issues which ought to have been raised by evidence of the respondent and which evidence was not given by the respondent at all.**

5. That the learned trial magistrate erred in law and in fact by failing to find that the appellant had sufficiently proved his case on a balance of probability as against the respondent

6. That the learned trial magistrate erred in law and in fact by failing to make judgement in favour of the appellant.

Submissions on Appeal

On behalf of the Appellant, two issues were delineated by Counsel for adjudication. The first, whether the Respondent is liable to compensate the Appellant for the loss incurred. The second, whether the trial court ought to have considered the Defendant/Respondent's pleadings and/or submissions in making its final judgement.

Submitting on the first issue, the argument is made that the way bill is conclusive evidence of the existence of an agreement between Laxmi booksellers and the Respondent herein. That it is common knowledge that a way bill does not particularize the contents of a parcel and that the evidence of the witnesses proves that the Appellant ordered books from Laxmi and the same were sent by the Respondent to Mombasa. It is further submitted that the parcel received in Mombasa was wet and this fact was confirmed by one Mrs. Butt. On the strength of this argument it is submitted that the parcel was destroyed due to negligence on the part of the Respondent hence they should be condemned to bear the costs.

For the second issue, it is submitted that as the Defendant/Respondent did not call any witness to rebut the evidence of the Plaintiff, that evidence remained uncontroverted. In the premises, the trial court in reaching its determination ought not to have considered the Defendant's pleadings and submissions as they amounted to mere statements. Buttressing this position, reference is made to **David Kahuruka Gitau & Another v Nancy Ann Wathithi Gitau & Another [2016] eKLR**.

In sum, it was submitted that there was no doubt that the Appellant incurred loss due to negligence on the part of the Respondent who therefore ought to compensate that loss.

For the Respondent, Counsel draws the Court's attention to **John Macharia Gichigi v Commissioner of Police [2017] eKLR** for the parameters it ought to consider before interfering with the trial court's exercise of discretion. It is then submitted that when the court is faced with two probabilities, it can only determine the matter on a balance of probability. Reliance is placed on **Kanyungu Njogu v Daniel Kimani Maingi [2000] eKLR**. It is Counsel's submission that both witnesses for the Plaintiff failed to prove the case against the defendant on a balance of probability. Making reference to the trial court's judgment, Counsel casts doubt on the particulars of goods sent stating that it was indicated as a carton and nowhere were books mentioned.

Going further it is submitted that the burden of proof that there was negligence was on the Appellant, which burden was not discharged. Reference is made to **Section 107(1) of the Evidence Act** and **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR**. It is hence submitted that on a balance of probability the Appellant had failed to prove his case to warrant the entry of Judgement for Ksh. 13,710/- as claimed.

On why the Defendant did not call any witnesses, it is submitted that this was so as there was no nexus between the Plaintiff/Appellant and the Respondent since it was Laxmi that entered into a contract with the Respondent as opposed to the Appellant. As such, no valid cause of action subsisted.

Reference was also made to the maxims of equity with the submission that a person who seeks equity must do equity. According to Counsel, quoting the judgment of the trial Court, the Appellant acted contrary to this principle by failing to attach a copy of the conditions attached overleaf the way bill.

On this basis, the Court is asked to dismiss the appeal with costs.

Reevaluation of the case at trial, The Law, Analysis and Determinations

This being a first appeal, the court is cognizant of its duty under section 78 of the Civil Procedure Act and the eternal principle articulated in the cases of **Selle v Associated Motor Boat Company Ltd (1968) EA 123, 126 paras H – I**, that I am entitled to reconsider the evidence, evaluate it and draw my own conclusions but keep in mind that I have not seen or heard the witnesses. In **Selle, Sir Clement De Lestang** stated that:

“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on 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 (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270).”

It is well established that this Court, sitting on appeal, will only interfere with the exercise of discretion by the trial court in the circumstances set out in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court stated as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

As the case at trial went, by a Plaintiff dated 10th June, 2014, the Appellant herein filed suit at the trial court against the Respondent seeking recompense to the tune of Ksh. 13,710/- for goods destroyed in transit from Nairobi to Mombasa while in the care of the Respondent, a courier company.

Per the Appellant's own testimony, on 5th March 2012, he purchased books worth Ksh. 29,944.40/- from Laxmi booksellers and Stationeries Ltd in Nairobi, which he had the Respondent company send to Mombasa on the same day. He produced a cash sale receipt and way bill as evidence. Upon picking the package on 6th March 2012, he discovered some of the books had been damaged by water. According to him, a Mrs. Butt who was in charge promised to pay the total value of the destroyed books which amounted to Ksh. 13,710/-. However, he was never paid hence the suit.

When cross examined, he admitted that while his bookshop was registered, he did not have the registration certificate in court. That he had paid Laxmi Booksellers & Stationeries Limited through an M-Pesa transaction but he had not produced an M-Pesa statement to prove this fact but would call Laxmi Booksellers as a witness. That the way bill indicated the package as a carton but did not specify the contents and that he had a list of the damaged books.

The Appellant called to testify on his behalf one David Okelo Oluoch, an employee at Laxmi booksellers. He confirmed that Laxmi received an order for textbooks from Rescue Bookshop in Mombasa and produced a cash sale receipt dated 5th March 2012 showing the books for sale worth Ksh. 29,944.40/-. He testified to taking the books to the Respondent for transit onward to Mombasa and averred that the next day he was called by the Appellant and informed that the books had sustained water damage.

Upon cross examination, he said he was the one that sent the books and admitted that as per the waybill, the sender was indicated as Laxmi and the consignee Rescue bookshop. He added that the cash sale receipt was the evidence that the goods were sent but admitted to not having a receipt from the Respondent showing that he sent the books.

The Respondent at trial did not produce any witnesses and the Defence's case was closed for non attendance. Both parties subsequently filed their submissions and the trial magistrate rendered the decision quoted in the preliminary part of this judgement.

Having reevaluated the evidence and taking into account the issues raised in the memorandum of appeal and the submissions made by Counsel on appeal, I find that the instant appeal turns on whether the Respondent was in any way liable for the damage to the Appellants books.

In finding a resolution, my point of departure is a sticking point raised by the Appellant, that since the Defendant/Respondent had not called any witnesses, the Plaintiff's evidence remained uncontroverted and that the learned trial magistrate erred by taking into account matters that had not been pleaded by either party. The Court finds favour in this position, guided by the case of **David Kahuruka Gitau & Another v Nancy Ann Wathithi Gitau & Another [2016] eKLR** where while citing the decision of **Mbaluto J in Interchemie EA Limited v Nakuru Veterinary Centre Limited Milimani HCCC No. 165b of 2000, Mativo J** held that where the Appellant did not call any witnesses, the only evidence on record was that adduced by the Respondents which remained uncontroverted.

Similarly, in **Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR** it was held:

“The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged.”

The Respondent herein argues that its failure to call witnesses is by the reasoning that there existed no contract as between them and the Appellant. This, in my view, is a misguided position as it is not for the Respondent to reach such a conclusion but rather a duty of the court to determine the existence, or lack thereof, of the rights and duties of the respective parties. As such, my decision will be rendered on the premise that the Appellants case at trial was unchallenged.

To the second point, the learned trial magistrate in dismissing the Appellant's claim noted that the Plaintiff *'failed to attach a copy of the conditions provided overleaf the receipt issued to the customer.'* In addition, the trial magistrate finds that *'the Plaintiff is not therefore relying on any exemption clause in the contract. Further, the way bill was drawn to the attention of the sender and not the Plaintiff as a receiver. The Plaintiff did not provide any Consignment Sheet which forms the contract between the parties.'*

Nowhere in the Plaintiff's case does the issue of the conditions or exemption clauses arise and neither is any reference whatsoever made to a consignment sheet as being the document forming the contract between the parties. Hence, as I see it, the learned trial magistrate fell into error of the sort contemplated in **Mbogo v Shah [supra]** by acting on matters it had not been called upon to act on.

However, even with the foregoing position, the burden of proof remains with the Appellant throughout to prove his case on a balance of probabilities. Under **Section 107 of the Evidence Act** it is the duty of the party who asserts existence of facts upon which he desires the court to give judgment as to any legal right or liability, to prove the existence of those facts. The Appellant submits that on the strength of the way bill drawn by the Respondent herein as well as the witness testimonies in viva voce hearing, there is conclusive evidence of an agreement between Laxmi booksellers and him for the delivery of books to Mombasa through the Respondent company. He asserts that it is by the Defendant/Respondent's negligence that his books got damaged. In **Coggs v Benard, (1558-1774) ALL ER 1** Gould, J stated that:

“Any man who undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage”.

In *Khetshi Dharamshi Co. Ltd v P.N Mashru Ltd* [2006] eKLR, the Court made reference to the East African Court of Appeal decision in *Express Transport Co. Ltd. v. BAT Tanzania Ltd* [1968] E. A.443. where Sir Charles Newbold, P stated:

“Where an article has been destroyed by negligence, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately before its destruction, together with any consequential loss following on the destruction of the article which is not too remote.”

In *Big Road Enterprises v DHL Global Forwarding (K) Ltd* [2017] eKLR, my colleague Sewe J ascribes to a position which I align myself with, quoting Raoul Colinvaux’s *Carver’s Carriage by Sea, Vol. 2 (London: Stephens 1971) at pages 46-47* where it is stated thus:

“When goods are delivered to a carrier without any specific contract being made, the right to sue for breach of duty on the carrier’s part appears to be in the person to whom the goods at the time of the bailment, or who is to bear the risk of the transit. If the actual sender is acting on the owner’s instructions, the latter is regarded as the contracting party, and he becomes entitled to sue for the goods, and is liable to pay the freight, and otherwise to perform the implied contract.”

In the instant appeal, it is established through the testimony of the Appellant and his witness that indeed he bought books from Laxmi booksellers, which books were transported by the Respondent company but unfortunately were damaged by water before the Appellant could take possession of them. In the absence of an explanation to the contrary, the finding of this court is that the books got destroyed due to the negligence of the Defendant/Respondent.

In the upshot, the appeal is allowed. The judgement dated 20th July 2018 is set aside and the prayers in the Complaint dated 10th June 2014 are granted as prayed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH, 2020

R NYAKUNDI

JUDGE.

In the presence of:

1. Mr. Abaja for Omwenga for the respondent