



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 71 OF 2017

LUKE ONDITI OGUGU.....APPELLANT

VERSUS

ELIZABETH MORAA ONSANDO.....RESPONDENT

(Appeal from the judgment and order of Hon. Naomi Wairimu P.M dated and delivered at Ogembo on 16th August 2017 in the original Ogembo SPM Civil case No. 27 of 2012)

JUDGMENT

1. It was not disputed that by a written undated agreement, Elizabeth Moraa Onsando, the respondent and Luke Onditi Ogugu, appellant entered into an agreement of selling sugar. The Respondent was the seller while the appellant was the buyer and it was agreed that the sugar cane was being sold for Kshs 326,000/-. The parties agreed that the appellant would make a down payment of Kshs 30,000/- while the balance was to be settled in three separate installments broken down as follows;

2nd payment of Kshs 50,000/- be remitted on 10th October 2009

3rd payment of Kshs 100,000/- be remitted on 10th November 2009

4th payment of Kshs 146,000/- be remitted on 10th December 2009

It was also a term of the agreement that any default of either party to meet its obligations would attract a penalty of Kshs 978,000/-.

2. On 31st January 2012 the Respondent herein, filed a claim before the Principal Magistrate's Court at Ogembo against the Appellant over an alleged breach of contract. She averred that the appellant failed to pay the balance of Kshs 296,000/=. The appellant filed his written statement of defence on 8th March 2016 claiming that he had paid Kshs. 280,000/- and only had a balance of Kshs 46,000/-. The trial court after hearing both parties found in favour of the respondent and ordered the appellant to pay Kshs 296,000/- together with costs of the suit.

3. Arising from the judgment is an appeal preferred by the Appellant urging this Court to set aside the decree of the trial court on the following grounds: -

1. *That the learned principal magistrate erred in law and in fact in believing in its entirety the testimony of the Respondent which was not corroborated by any other witness and disbelieving that the appellant and his witnesses.*
2. *That the learned principle magistrate's findings are not supported by the evidence on record and constitute misdirection and wrong conclusion.*
3. *That the learned trial magistrate erred in law and in fact by failing to make a finding that the respondent had not proved on a balance of probabilities that indeed the appellant owed her a sum of Kshs 296,000/-.*
4. *That the learned principal magistrate erred in law and in fact by failing to make a finding that the appellant had a strong defence well-collaborated and thereby dismiss the respondent's case.*
5. *That the learned principal magistrate erred in law and in fact by refusing to allow the appellant to call more witnesses thereby prejudicing the appellant's constitutional right to affair hearing and to a fair opportunity to proof his case.*
6. *That the findings and conclusions of the learned principal magistrate are not supported by the evidence on record and more particularly of that of the many defence witnesses.*

4. Being a first appeal, this court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (*See Selle v Associated Motor Boat Co. [1968] EA 123.*)

5. At the hearing Elizabeth Moraa Osando (Pw1) testified that after the death of her husband she did not have money to cater for her medical treatment and decided to sell her sugar cane to the appellant at the price of Kshs 326,000/- upon which the appellant paid a deposit of Kshs 30,000/- and agreed to settle the balance. She testified that the appellant has never paid the balance. They had a written agreement witnessed by Elijah Nyarumi spelling out the terms of the transaction and they both signed the agreement.

6. Luke Onditi Ogugu (Dw1) testified that the respondent sold him cane in 2009 at the price of Kshs 296,000/- and he paid Kshs 30,000/- on 2nd October 2009. He testified that on 10th October 2009 he paid Kshs 50,000/-. He told court that the respondent's son Boni Nyatike and Ben came to his house and he gave them Kshs 20,000/- to cover Ben's college fees. He also recalled that on 12th October 2009 he paid the respondent Kshs. 30,000/- so that she could pay fees. He told court that in December he went with Oriri Nyamosi to the respondent's house and paid Kshs 100,000/-. On 21st December 2009 his son Zacharia gave the respondent Kshs 30,000/- and later on the 28th December he sent James Oyagi with Kshs. 20,000/-. He told court that after receiving the demand letter he went to the plaintiff's house and paid Kshs. 20,000/- through Thomas Mochama. He told court that the total money which he owes is only Kshs 26,000/-.

7. Zachary Ogugu (Dw2) testified that on 20th December 2009 the appellant gave him Kshs 30,000/- which he took to the respondent and signed a book after paying the said money to her. Thomas Gitenya Mochama (Dw3) testified that the respondent called him when the appellant brought her money and he counted it and it totaled to Kshs. 20,000/-. Dw3 told court that the payment was recorded in paper which was in a book and he signed it. Boniface Mweri Nyatike (Dw4) testified that he accompanied Ben Onsando, the respondent's son to Kenya where they collected Kshs 20,000/- from the appellant and took the money to the respondent. He testified that the money was for school fees. James Onyengo Oyagi (Pw5) testified that in November 2009 he took Kshs 20,000/- to the respondent on instruction of the appellant.

8. It is not in dispute that the appellant and respondent entered into an agreement for the sale of sugar cane for which the agreed purchase price was Kshs 326,000/-. It is not also in dispute that the respondent already paid Kshs 30,000/- as a down payment. What is before this court is whether the respondent proved its case on a balance of probabilities that the respondent did not settle the balance of Kshs 296,000.00. **Section 107(1) of the Evidence Act Cap 80** provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of fact which he asserts must prove that those facts exist”

Under **section 109 of the Evidence Act**

“The burden of proof as to any particular fact lies on that 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”

9. The evidential burden of proof of admissibility is provided for under section 110 of the **Evidence Act** that provides as follows:

“110 Proof of admissibility. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence”

10. In considering the legal principles as set out in the above sections under the **Evidence Act**, the respondent had the burden to lay the basis for her claim by proving that the appellant had failed to settle the balance of Kshs 296,000/-. I have considered the evidence by the respondent and I find that she proved her case on the balance of probabilities that there was a balance of Kshs 296,000/- which was due to her. She gave clear testimony that;

“I sold cane to Luka Onditi and we agreed on a fee of 326,000. He paid me 30,000/= and he was left with a balance. He never paid me any other money.”

11. This was also reflected in the agreement and clause 1 of the agreement read that *“Payment will be as follows first deposit is Kenya Shillings 30,000 thirty thousand he has paid on 2-10-2009 (sic).”* The respondent also discharged the burden of proof once the appellant admitted that there was indeed a balance of Kshs 296,000/- and alleged in his defence that he had paid the balance of the purchase price. At this point the burden of proof shifts to the appellant to prove that he had paid the Kshs 280,000/- as claimed in his written statement of defence. Paragraph 3 of the written statement of defence filed by the appellant states as follows:-

3. The defendant contends that he paid the down payment after agreeing that the balance was to be spread into about six installments and which the defendant paid respectively as follows:

i. The second installment the defendant paid the plaintiff the sum of Kshs 50,000/- which the money she duly accepted and acknowledged. The third installment the defendant paid in cash Kshs. 100,000/- on 7th November, 2009 and acknowledged receipt and duly witnessed by her worker known as ORIRI NYAMOSI.

ii. The fourth installment of Kshs. 50,000/- duly paid (sic) the defendant's worker known as ZAKARIAH in December, 2009.

iii. The fifth installment I paid the plaintiff I paid BONNY (sic) whom the plaintiff sent to come and collect from me Kshs. 20,000/- which the money the plaintiff admitted receipt.

iv. Lastly the last installment was Kshs. 30,000/- which I paid through her son whom sent(sic) to come and collect which the money the plaintiff accepted receipt.

12. The appellant gave evidence that he paid Kshs 100,000/- to the respondent when Oriri Nyaosi was present but did not call the said witness to substantiate his claim. The appellant in his testimony told court that he paid the respondent a sum of Kshs 50,000/- as the 1st installment which she duly accepted and acknowledged, again this was not proved to the required standard in civil cases. The appellant also alleged in his defence that the fourth installment of Kshs. 50,000/- was paid to the respondent's worker known as ZAKARIAH in December, 2009 however he did not give any evidence before the trial court to support this claim and neither was the employee by the name Zakaria called to testify. What the appellant alluded to at trial was that his son Zacharia gave the plaintiff Kshs 30,000/- on 20th December 2009. Zachary Ogugu (Dw2) testified that he handed over Kshs 30,000/- to the respondent and he signed a book, unfortunately the said book was not produced into evidence. It was also the appellant's cases that he paid the 5th installment to the respondent, a fact which was corroborated by testimony Dw4 who told court that he accompanied the respondent's son to meet the appellant in Kenya where they collect Kshs 20,000/- from the appellant. Dw4 testified that they took the money to the respondent which she utilized to pay school fees. Evidence of Dw4 displaces the claim by the appellant that he paid Kshs 30,000/- to the respondent's son for fees as Dw4 confirmed that the amount paid was Kshs 20,000/-. The appellant also gave evidence that after receiving the demand letter he went to the plaintiff's house and paid Kshs. 20,000/- however this was not in his pleadings and it is trite law that parties are bound by their pleadings. His defence was filed long after he received the demand letter and after the suit was filed by the plaintiff. The appellant's claim that he paid the Kshs 20,000/- does not hold.

13. Having equally re-evaluated the evidence and analyzed the facts I find that the appellant was able to prove that he paid Kshs 20,000/- to the respondent which was collected by the respondent's son in the company of Dw4 who the respondent claimed was the one managing her farm. For reasons I have set out, I allow the appeal to the extent that I set aside the judgment and substitute it with an award of Kshs 276,000/-.

Dated signed and delivered at Kisii this 21st day of June 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Onyancha For the Appellant

Mr. Nyangacha h/b Mr. Ondari For the Respondent

Rael Court clerk