REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 277 OF 2017

LEONARD MUNYUA GRACE SIMALOI SAKUNTA T/A

MUNLEO HARDWARE & METAL FABRICATORS…....APPELLANT

VERSUS

EDWARD NDEGWA NOROGE ALIAS TONNY.....RESPONDENT

(An appeal from the judgment delivered on 5th May, 2017 by Hon. L. W. Kabaria (SRM) in the Civil Suit CMCC 3377 of 2015 at Milimani Commercial Court.)

JUDGEMENT

1. The appellant herein filed an action against the respondentbefore the Chief Magistrate's court claiming to be paid kshs.664,850/= plus interest. The claim is said to be the cost for hire of construction machinery and an excavator comprising of a breaker and a bucket and for the transportation of those machines. The respondent filed a defence to deny the appellant's claim.

2. Hon. L. W. Kabaria, learned Senior Resident Magistrate, heard the case and in the end she found the appellant to have failed to prove their case. She also found that the respondent had fully settled the debt in the sum of kshs.200,000/= and proceeded to award the appellant interest on the sum of ksh.130,000/= which amount was paid after the suit had been filed.

3. The appellant being dissatisfied, preferred this appeal and put forward the following grounds:

> ***1. The learned magistrate erred in law and fact in failing to appreciate and apply the law on burden of proof in civil cases.***
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> ***2. The learned magistrate erred in law and fact in failing to apply and or properly apply the law on burden of proof and finding that the plaintiff had failed to prove his case against the defendant.***
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> ***3. The learned magistrate erred in law in not making any finding and or determination on the plaintiff's claim against the defendant of ksh.664,850/=.***
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> ***4. The learned magistrate erred in law and fact in failing to take into account and or appraising and or properly appraising the evidence before her and thus ruling against the weight of evidence and hence arrived at a bad decision.***
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> ***5. The learned magistrate erred in law and fact in failing to consider whether or not the defendant was truthful and creditworthy witness or not before relying on his evidence and failing to consider at all the appellants' submissions on the conduct of the defendant.***
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> ***6. The learned magistrate erred in law and fact in failing to give any reasons for relying on and taking wholesomely the defendant's evidence on his statement of what was the debt due to the appellant against the weight of the evidence adduced by the appellant.***
>
> ***7. The learned magistrate erred in law and fact in finding that it was not shown when the debt ought to have been paid despite the evidence tendered by the plaintiff.***

4. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also taken into account the rival written submissions. Though the appellant put forward a total of seven grounds of appeal, those grounds revolve around the question of proof.

5. It is the submission of the appellant that they had tendered evidence which established their claim against the respondent to the required standards in civil cases on a balance of probabilities.

6. The appellant averred that the learned Resident Magistrate erred when she failed to attach reasons as to why she declined to give judgment in his favour yet he had submitted credible oral and documentary evidence to prove their claim.

7. The respondent opposed the appeal arguing that the appellant had failed to strictly prove their claim hence the trial magistrate was right to reject it. It was pointed out that there was no material placed before the trial court to support the hourly rate the basis upon which the special damage were pleaded by the appellant.

8. It is not in dispute that the appellant and the respondent entered into an oral agreement for the provision of construction machinery and an excavator. The issue which was in dispute is whether the respondent was to pay per hour or by a fixed sum. It is the evidence of the appellant that he agreed with the respondent to charge his cost per hour while the respondent averred that they had agreed on a fixed sum of ksh.200,000/= which amount had fully been settled at the time of judgement by the trial court.

9. The learned Resident Magistrate considered the evidence before her and came to the conclusion that the appellant failed to discharge the burden of proof. She noted that the material placed before her court does not support the appellant's claim that an hourly rate is what was agreed upon or that they are therefore owed a sum of ksh.664,850/=.

10. The learned Resident Magistrate also noted that the respondent admitted that he owed the respondent ksh.200,000/= out of which a sum of ksh.70,000/= had been paid by the time of filing suit.

11. A careful analysis of the aforesaid conclusions by the learned Resident Magistrate will reveal that she did not attach reasons arising from the evidence. It is evident that both parties tendered evidence to establish what they believed was the agreement they settled on consideration. The learned Resident Magistrate did not assign reasons as to why she believed the respondent's proposal as opposed to that of the appellant.

12. I have on my part re-evaluated the evidence presented before the trial court. The appellant adduced before the trial court delivery notes showing how long the machines worked which delivery notes were confirmed and signed by the respondent.

13. The appellant also produced in evidence as an exhibit a statement of the work which indicated how the claim was calculated. The appellant stated that his statement was accurate. In his evidence in cross-examination, Leonard Munyua Mbugua (PW1) pointed out that the delivery note was signed by the respondent but he did not append his signature on the statement of calculations. PW1 indicated that the delivery notes supported his calculations.

14. PW1 further pointed out that they did not agree on a fix charge of ksh200,000/= arguing that the transportation of the machines alone costs more than ksh.70,000/=.

15. The appellant was emphatic that they sat with the respondent and reconciled all the hours the machines worked.

16. PW1 further stated that they copied from a record book kept at the site into the delivery note which the respondent signed. In his evidence in re-examination PW1 stated that the delivery notes show the work done between the period between 23rd November 2012 and 9th December 2012.

17. The appellant also stated that each machine was given a specific rate for example 'bucket' was ksh.7,000/= per hour while the 'breaker' was ksh.10,000/= per hour.

18. Edward Ndegwa Njoroge (DW1), the respondent herein stated that he sat with the appellants and agreed on a fixed charge of ksh.200,000/= for the work. DW1 admitted and confirmed that he signed the delivery notes at the site to confirm the work done.

19. DW1 also confirmed that the days and hours the machines worked are recorded in the delivery notes.

20. DW1 further confirmed PW1's assertion that the machines were transported to the site at Isinya using a low-loader thus incurring transport costs.

21. Both PW1 and DW1 concur that their agreement on costs was oral. The respondent stated that he only paid what he thought was the outstanding amount after the suit was filed and after auctioneers were sent to attach his property.

22. DW1 also admitted that he did not respond to the demand notice served upon him by the appellant's advocate.

23. In his evidence in cross-examination DW1 stated that the statements presented by the appellants which he signed reflects the hours and days worked. He claimed that he used the statement to account for fuel. DW1 further claimed that he signed the delivery note to acknowledge that work done and fuel consumed were in tandem.

24. After a careful re-evaluation of the evidence I am satisfied that the evidence tendered by the appellant is consistent and credible. The respondent was unable to controvert the same. The explanation given by the respondent to justify the preparation of a statement indicating hours and days the machines worked is not convincing. I am convinced by the explanation that the statement was meant to establish the number of hours the machines worked for purposes of calculating the amount to be charged.

25. The respondent admits in his evidence in cross-examination that he received the demand letter which was adduced in evidence by the appellant. He avers that he did not bother to respond or act on it.

26. I have examined the aforesaid letter which is dated 11.12.2014 and it is apparent that the appellant had given the respondent 7 days to admit that he owed the appellant a sum of ksh.664,850/=. If indeed the parties had agreed on ksh.200,000/= as the amount to be charged then one wonders why the respondent did not bother to file a response disputing the amount and informing the appellant that the agreed amount was ksh.200,000/=. I am satisfied that the parties agreed as proposed by the appellant.

27. The learned Senior Resident Magistrate erred when he believed the evidence of the respondent which indicated that the parties had agreed on a fixed amount of ksh.200,000/= without analyzing the evidence.

28. In the end the appeal is allowed. Consequently, the judgment of the learned Senior Resident Magistrate delivered on 5.5.2017 is set aside and is substituted with an order entering judgment in favour of the appellant in the sum of ksh.664,850/= with interest at court rates from the date of judgment of the trial court until full payment.

29. The appellant to have costs of the suit and the appeal.

Dated, signed and delivered at Nairobi this 25th day of October, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent