



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 7 OF 2017

(CORAM: J.A. MAKAU – J.)

PETER ODUOR ODUOL.....APPELLANT

VERSUS

ERICK OLUOCH ODEMBA.....RESPONDENT

(Being an appeal against the judgment dated 29.3.2017, in PMCC No. 106/2015 in Bondo by M.O. Obiero – P.M.)

JUDGMENT:

1. The Appellant **PETER ODUOR ODUOL** and Another were jointly sued by the Respondent herein for recovery of KShs.719,940/= being KShs.584,940/= against the Appellant and KShs.135,000/= against the 2nd Defendant at the lower Court being money due and owing in transactions of buying and selling fish within Usenge Beach and other nearby beaches.
2. The Appellants and the 2nd defendant, who has not preferred an appeal appeared on 19th August, 2015, but failed to file defence in time leading to interlocutory judgment being entered on 7.9.2015. The Appellant and the 2nd Defendant filed an application to set aside judgment entered in favour of the Respondent through an application dated 19th October 2015, which Application was allowed by consent of the Counsel for the parties on 4.11.2015, subsequently defence was filed on the same day.
3. The Appellant and the 2nd defendant in their defence dated 4.11.2015 denied the Respondent's claim. The Appellant contended that it was the Respondent who owed him money for the fish supplied and not paid for in the sum of KShs.200,000/= and further for the marine engine hired out to him and the engine in use, urging also that was a contribution of the Respondent towards the enterprise.
4. After full trial the Court found for the Respondent against the Appellant to the tune of KShs.346,400/= with costs and dismissed the Respondent's claim against the 2nd defendant with costs.
5. Aggrieved by the judgment of the trial Court, the appellant lodged the appeal on 25th April 2017 setting out six (6) grounds of appeal being as follows:-

(a) The Learned Magistrate erred in law and fact by making a finding that the plaintiff had proved that the 1st defendant owed him any money.

(b) The Learned Magistrate erred in law and fact when, even after the plaintiff admitted being in possession of all documents showing transactions between himself and the 1st defendant and having failed to produce them, still found in favour of the plaintiff.

(c) The Learned magistrate erred in fact and law by basing his findings upon documents he himself admitted were "very difficult to comprehend."

(d) The Learned magistrate erred in law by not finding in favour of the 1st defendant based upon the principal of presumption of likely facts.

(e) The Learned Magistrate erred in Law and fact by disregarding the evidence of the official of Usenge Beach Management Unit whose evidence clearly showed that if any money was owed the plaintiff, by the 1st defendant then it had been paid in full.

(f) The decision of the learned Magistrate went against the weight of the evidence.

6. The Court gave direction that the appeal be determined by way of written submissions. The Appellant's Counsel M/s. P Ochieng Ochieng & Co. Advocates filed their submissions on 9th March 2018, whereas M/s. Bruce Odeny & Company Advocates filed submissions on behalf of the Respondents on 14th March 2018. I shall therefore proceed to consider the Appeal on the basis of the pleading, the evidence adduced before the trial Court and Counsel's rival submissions.

7. The Appellant Counsel in his written submissions contends the Learned trial Magistrate erred in law and fact by making a finding that the plaintiff had proved that the 1st defendant (Appellant) owed the Respondent money. The Appellant urges the Respondent in cross-examination, stated under exhibit 5, of his book, it shows he received other amounts of fish which he had not accounted for. That the trial Court found there was no explanation of the meaning "start float" in the document. The appellant urged the trial court misdirected itself having found the evidence in exhibit P.5 as he did, in finding the amount was owing and added it to amounts indicated in exhibit P-1, 2 and 3. The Appellant urged the evidence of Usenge Beach Management Unit, Chairman, DW3 was wrongfully rejected.

8. The Appellant underground No. 1 of appeal contends that the Learned Magistrate erred in law and fact by making a finding in favour of the Respondent, having not proved that the Appellant owed him any money. The Respondent in his plaint claimed KShs.584,940 from the Appellant. The Respondent averred the amount he was claiming arose out of a loan he advanced the Appellant and machine which he had also given the Appellant who declined to returned the same. The Respondent produced three agreements dated 27.8.2013, exhibit 1, 2nd agreement dated 8.9.2016 exhibit 2 and thirdly agreement dated 16.1.2014 exhibit 3. The total amount in the three agreements is KShs.185,000. The mode of repayment was by delivery of fish to the Respondent at a recovery rate of KShs.30 for each kilogramme of the fish delivered. The Respondent produced record on delivery of fish exhibit 4 dated 12th January 2015 and 9th January, 2015. PW2 confirmed the engine used in the boat used by the Appellants was given to the Appellant by the Respondent and that the Appellant used to give fish to the Respondent.

9. The Appellant in his evidence testified he used to sell fish to the Respondent since 2013 and stopped in 2015 as he used to advance him money and deduct upon delivery at a rate of KShs. 30 per kilogram of fish. The Appellant in his defence stated he does not know whether he owes the Respondent any money but admitted there was a record which he used to sign and admitted the Respondent gave him three engines but one got lost. The Appellant stated he does not have any record to show he paid the Respondent money and how much. DW3 produced record on the amount of fish which the Appellant delivered to the Respondent exhibit D1. DW3 did not produce the records of the transaction between the Appellant and the Respondent urging Respondent has it.

10. I have carefully considered this Counsel's rival submissions and the evidence by the Respondent and his witness and the Respondent and his witness. The Appellant in his evidence did not deny the three agreements nor their contents. The Appellant similarly has not challenged the contents of exhibit 4. The document shows what the Appellant delivered on three occasions being all in all worthy KShs. 62,540. On the Appellants defence that he supplied fish and be paid the amount to the extent of KShs.345,690/= he did not produce any record but opted to rely on record from Usenge Beach Management Unit. DW3 produced exhibit D1 which showed the amount of fish delivered was 11,523 kgs. The exhibit D1 is in respect of fish delivered to Usenge Beach Management Unit at the time of weighing the same. It is not an acknowledgement of delivery of fish to the Respondent. The document has nothing to do with the transactions between the Appellant and the Respondent. The Appellant showed exhibit D1 was his delivery and urged he does not have any records to show the amount of fish he delivered to the Respondent nor received by him to show he paid the Respondent his claim.

11. Having considered the evidence in its totality I am satisfied the Respondent proved his claim that the Appellant owed him money as found by the trial Court to the tune of KShs.346,400/=.

12. I have very carefully considered the Appellant's written submissions and the five grounds of appeal and noted all surround on the issue raised underground No. 1 of the appeal which I have considered, and found that, it would be repetition in dealing with grounds Nos. 2, 3, 4, 5 and 6 of the Petition. The said grounds have already been disposed off underground No.1. of the appeal. I therefore find no merits in grounds Nos, 2, 3, 4, 5 and 6 and I dismiss the same.

13. The upshot is that the Appeal has no merits and the same is dismissed with costs.

DATED at SIAYA This 20th Day of April 2018.

J.A. MAKAU

JUDGE

Delivered in Open Court

In the Presence of Ochieng Co. Advocate for Applicant

Mr. Bruce Odeny & Co. Advocate for the Respondent.

Court Assistants:

1. Laban Odhiambo

2. Leonida Atika

J.A. MAKAU

JUDGE