



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 120 OF 2017

(FORMERLY; MACHAKOS HCCA NO. 13B OF 2012)

FIDELIS MULE KALA.....APPELLANT

-VERSUS-

LUNGU FUNERAL ASSOCIATION & 3 OTHERS.....RESPONDENTS

(Being an Appeal from the Judgment of Hon. J.W Gichimu in the Senior Resident Magistrate's Court at Tawa Civil Case No. 113 of 2007, delivered on 28th January 2012).

JUDGEMENT

INTRODUCTION

1. The appellant was the defendant in the lower Court. The claim against him was for payment of Kshs. 38,500/=, costs of the suit and interest. It was averred that at the time when he was the chairperson of the 1st respondent, he was entrusted with some money so as to bank but he did not.

2. He entered appearance, filed his defence and after a full trial, the learned trial magistrate found that a sum of Kshs. 24,500/= had been proved on a balance of probabilities and awarded the same together with the costs of the suit.

3. Aggrieved by the outcome of the suit, the appellant filed the instant appeal and listed 5 grounds as follows;

i. The learned Senior Resident Magistrate erred in both law and fact in awarding the respondent's a sum of ksh 24,500 when the respondents' claim against the appellant had not been proved in the first place.

ii. The learned Senior Resident Magistrate erred in both law and fact by failing to note and appreciate the fact that the respondents had totally failed to demonstrate liability on the part of the appellant.

iii. The learned Senior Resident Magistrate erred in both law and fact in failing to note and to appreciate the fact that liquidated claims/damages must be specifically proved and to find that the respondents had not proved their purported claim against the appellant.

iv. The learned Senior Resident Magistrate erred in both law and fact in failing to take note of the provisions of the 1st respondent's constitution on the duties of the chairman of the 1st respondent's organization.

v. The learned Senior Resident Magistrate erred in both law and fact in ignoring the appellant's defence and in proceeding to make a one sided judgment against the weight of the evidence adduced.

4. The appeal was canvassed by way of written submissions.

5. I have looked at the evidence on record, the judgment of the trial Court, the rival submissions and the authorities cited therein and the only issue for determination in my view is whether the award of Kshs. 24,500/= to the respondents was justified.

6. It is settled law that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

7. The amount pleaded in the plaint dated 07/11/2007 is Kshs. 38,500/= which was said to arise on different dates and occasions. In my view,

the claim of Kshs. 14,000/= was properly disallowed. This appeal will therefore focus on the awarded amount of Kshs. 24,500/=. The appellant submitted that the claim was liquidated and as such, it ought to have been proved strictly.

8. At this juncture, it is imperative for the Court to interrogate what constitutes a liquidated claim.

9. Black's Law Dictionary defines a liquidated claim thus;

"1. A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties' agreement.

2. A claim that was determined in judicial proceedings".

10. Halsbury's Laws of England, 4th Edition Vol. 12, at paragraph 1109 says;

"...In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated".

11. THE SUPREME COURT PRACTICE (1985) VOLUME 1, at page 33; defines a debt or liquidated demand as follows;

"A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'..."

12. In the instant case, the respondents did not invite the Court to quantify or assess their claim. It was a certain amount which had allegedly arisen from an oral agreement. In my view, the fact that the appellant denied any knowledge of the debt meant that some sort of investigation had to be done *to wit* hearing witnesses from both sides in the process of trial. Consequently, the learned trial Magistrate embarked on the process of finding out whether the respondents would prove their claim to the required standard.

13. The burden of proof in civil cases is on a balance of probability.

14. Lord Denning J. in **MILLER –vs- MINISTER OF PENSIONS (1947)** discussing that burden of proof had this to say-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

15. So, did the respondents prove their case to the required standard?

16. **PW1**, Peter Munguti testified that he was the chairman of Lungu Funeral Association (herein after 'the association') which was formed in 1996 but registered in 2001. He produced a certificate of registration. The appellant was the chairman in 1996. In 2004, the treasurer who used to collect money and bank it in KCB Machakos branch wrote a resignation letter and since it was 3 months to elections, it was allowed. It was then agreed that the chairman (appellant) would bank the money.

17. According to PW1, a total of 20,850-member's collections- was given to the appellant on diverse dates between 12/03/2005 and 14/05/2005 but he did not bank it. When asked about the bank deposit slips, he said that he had not banked all the money. Letters were written requiring him to appear before the committee but he did not.

18. When the appellant failed to call a meeting or to attend a meeting, the members decided to elect a new chairman and PW1 was elected. They went to the chief and the appellant was summoned. The organization had by laws.

19. On cross examination, he reiterated that they gave the appellant Kshs. 20,800/= and there was a book but they never used to sign anywhere. They were operating on trust. When the treasurer resigned, they did not write that the chairman would collect the money. Upon being shown the letters written by the secretary, he confirmed that there was no acknowledgement and the appellant did not respond. He said that the difference between Kshs. 38,500/= and Kshs. 20,850/= was for transport and preparation of the case.

20. In re-examination, he said that he personally gave money to the appellant in the presence of others and that he was not present when the letters were delivered.

21. **PW2**, Onesmus Mbuva Kavata said that he was a member and secretary of the association since its establishment. The appellant was the chairman from 1996 -2006. He said that their claim was about money that was collected and never banked. The appellant was to bank it after being given by the vice chairman (PW1). He was given the money because he used to travel to Machakos monthly.

22. When the treasurer resigned, the committee decided that the chairman would take the money. He said the total given to the appellant was Kshs 20,000/=. He produced a statement of account bearing the association's name. He produced the letters he wrote to the appellant as exhibits. He also produced a receipt of the amount paid to the advocate who wrote the demand letter.
23. On cross examination, he outlined the duties of office bearers as per the association's Constitution. He confirmed that the chairman was not mandated to handle money. He said that he would maintain minutes but had not minuted the resolution to have the chairman handle the money. He also said that the appellant did not sign.
24. In re-examination, he said that he had no malice against the appellant and that the money was paid in his presence. That they paid Kshs. 1,250/= to help in asking for the money.
25. **PW3**, Manyolo Mulaita said that he was a committee member of the association since April 1986 (I think he meant 1996) and the appellant was the chairman from 1996-2005. He said that when the treasurer left work in 2004, the committee asked the appellant to be banking the money because he would frequent Machakos to take his salary. During that period, they lost members' contribution amounting to Kshs. 20,800/=.
26. They summoned him twice but he refused to appear before the chief. He did not show them the bank slips. They decided to go to Court.
27. On cross examination, he confirmed that the treasurer left work in 2004 and another one was elected in 2006. The records were in the custody of the secretary. He said that the appellant took over the secretary's job in 2004 but did not have the minutes. He said that the money was being collected by the vice-chairman (PW1) but had nothing to show that the appellant collected money from the vice chairman. He also had nothing to show that the appellant collected any money.
28. In re-examination, he said that he did not have records because they were in the custody of the secretary. Further, he said that he was present when Kshs. 20,800/= was given to the appellant. They tried to get the bank slips from the appellant but he refused. They went to the chief and the appellant was summoned but he declined. He also said that he was present when it was determined that the chairman be given money.
29. On his part, the appellant (**DW1**) said that he was a teacher at Lungu Primary school and had been a member and chairman of the association since April 1996. He said that the association had a constitution. He referred to clause 5 which created the office of the chairman. He said that the duty of the chairman as clearly stated was to preside over the meetings of the group. He outlined the duties of the treasurer as per the constitution. He denied being indebted to the association and said that he did not at any one time handle the association's money. It was his evidence that in the absence of the treasurer, the assistant treasurer would handle the work. He said that he did not sign anywhere that he had received any money to take to the bank.
30. On cross examination, he said that he was the chairman of the association between 1996 and 2006 during which period they conducted about 3 elections. He said that between 2001(when the association was registered) and 2006, they should have held an election each year. He denied that there were times when they did not strictly adhere to the constitution.
31. He said that the treasurer was not in office when he left because she had already resigned. He did not know the date he was voted out. He said that he did not receive any letter asking him to explain his absence from office. When referred to the letters which were written by the secretary, he denied ever receiving them and said that he was seeing them for the first time in Court.
32. He confirmed that the association had an account in Machakos where he was a signatory together with the secretary and treasurer. Any two officials could transact business at the bank. This was not provided for in the constitution. The members registered him as a signatory as he agreed to the same.
33. He said that he was subject to the executive committee and it would give directions on the operations of the group. He denied that the committee ever appointed him to act as the treasurer upon the resignation of the office bearer. He agreed that he had not produced any receipt to prove that he had paid up his contributions.
34. He said that his address was 16 Mbumbuni. He was referred to the demand letter from A, M Mbidyo & Co. Advocates and agreed that it was addressed to him. He confirmed that the association had never issued receipts to members. According to this witness, the money collected was given to the assistant treasurer and he witnessed as she recorded the money.
35. In re-examination, he maintained that he did not bank the money as he was not given any. He said that being a bank signatory did not entail banking but only signing for withdrawals. He said that banking slips would be presented during subsequent meetings for verification. The treasurer would receive the money and the secretary would record the collection. He denied ever doing such kind of work.
36. He maintained that although the demand letter was addressed to him, he never received it and the Court was not told how it was delivered. He said that it was addressed to the chairman (no name) and he was not the chairman at that time.
37. From the evidence on record, it was clear that the 1st respondent had a bank account in KCB-Machakos branch. It was also clear that it had no treasurer between 2004 and 2006. As duly confirmed by the appellant, it was also clear that he was the organization's chairman from 1996-2006.
38. PW1, 2 and 3 testified that they were officials of the association and their testimonies were buttressed by exhibit No. 6 (a letter from the Registrar of Societies). By virtue of being officials, they were members of the association's committee.

39. Clause 7 (a) of the association’s Constitution and rules (exhibit 9) provided that; “ *the committee shall be responsible for the management of the society and for that purpose may give directions to the office bearers as to the manner in which, within the law, they shall perform their duties.*”

40. PW1, 2 and 3 testified that it was the committee’s resolution that the appellant would bank the members’ contributions because he used to frequent Machakos for his salary. Evidently, the committee was within its mandate to make such a resolution.

41. The totality of the evidence on record points to an irresistible conclusion that indeed there was an arrangement between the committee and the appellant for the latter to bank the contributions from members. Further, the appellant’s testimony that he was a teacher at Lungu primary school buttresses the averment that indeed he used to frequent Machakos for his salary.

42. The appellant’s defence was majorly hinged on the strict application of the association’s Constitution and rules. He maintained that his duties as a chairman were well defined and as such it was not possible for him to handle money. The appellant however conceded that he was a signatory of the association’s account but the issue of signatories was not covered in the Constitution.

43. He also agreed that during his tenure as chairman, they should have conducted about 10 elections but only 3 were done. Further, he admitted that he had not produced any receipt to prove that he had paid his contributions. All these point to an irresistible conclusion that indeed, there were times when the association did not strictly adhere to the Constitution. Having left office in 2006, I am satisfied that the failure to strictly adhere to the Constitution happened right under his watch as the chairman. The appellant is therefore estopped from insisting otherwise.

44. It is my considered view that the learned trial magistrate evaluated the evidence on record and properly concluded that on a balance of probabilities, the respondents had given Kshs. 20,850/= to the appellant which he failed to bank. In my view, the recording of ‘Kshs. 20,800/=’ at various points in the proceedings was a typographical error as the amount pleaded in paragraph 3 of the plaint was Kshs. 20,850/=.

45. The respondents also pleaded Kshs. 3,650/= being the amount incurred in travelling to Machakos to have the demand letter issued. He produced a receipt of Kshs. 1,250/= (exhibit 8) from A.M Mbindyo & Co. Advocates. This was the actual amount paid to the Advocate. The travelling expenses were therefore Kshs. 2,400/= which the learned trial magistrate found to be reasonable. I have no reason to doubt him. In any case, had the appellant honored his part of the bargain, it would not have been necessary for the respondents to travel all the way to Machakos.

46. **CONCLUSION**

i. The appeal has no merit and the same is dismissed.

ii. Costs to the respondents.

SIGNED, DATED AND DELIVERED THIS 12TH DAY OF APRIL, 2018, IN OPEN COURT.

C. KARIUKI

JUDGE

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