REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL CASE No. 256 OF 2013

SELINA VUKINU AMBE.....APPELLANT

VERSUS

MDF-ESA KENYA.....RESPONDENT

***(Being an Appeal from the Hon. C. Obulutsa Senior Principal Magistrate at Milimani Commercial Courts, Nairobi in Civil case No. 8017 of 2008 delivered on 30th April, 2013*)**

JUDGMENT

In the plaintiff's plaint in the lower court, she claimed Kshs. 380,000/= equivalent to 3,800 Euros for work done at the instance of the defendant. The claim was denied by the defendant now respondent. After hearing the appellant the lower court awarded her Kshs. 190,000/= plus costs of the suit and interest at court rates. She was aggrieved by the said judgment and lodged this appeal.

The summary of the grounds of appeal are that the lower court erred in law and in fact in finding that she was not entitled to the entire sum claimed in the plaint and in offering 9.5 days compensation yet she had proved working for 19 days. The lower court was also faulted for finding that there was no binding contract between the appellant and the respondent which finding was not true. The appellant also contended that the lower court erred in fact and in law in finding that her report was not up to standard and failing to consider that the said report was implemented by the respondent.

Upon the said grounds she pleaded that the appeal be allowed. It is my duty to go through the evidence adduced in the trial and come to independent conclusions which I have done. It is the duty of a party who alleges to prove the same.

There is evidence that the appellant was hired to do some work upon some terms which she did. The work was to take 15 to 19 days at the rate of 200 Euros per day. It was her evidence that she completed the work and presented her invoice to the respondent's principals FAWE. There is undisputed evidence that the respondent agreed to pay for 5 (five) days service.

The record of appeal contains a copy of the contract between the respondent and the principal FAWE which however may not be binding on the appellant for lack of privity of contract. The agreement prepared between the appellant and the respondent was never executed because it was to be implemented under the Arbitration Laws of Tanzania which was not acceptable to the appellant.

The contract between the respondent and FAWE however had a bearing on the performance of the appellant in her relationship with the respondent. There is a provision in that contract, which stated *inter alia* as follows,

> ***"The fees are to be paid upon completion and submission of the final report acceptable to FAWE"***.

The fees by extension would be what the appellant would have been paid and completion refers to the report to be submitted by her. It also meant that it was going to be the final report acceptable to the defendant's principal.

Only the appellant gave evidence in support of her pleadings while the respondent did not call any evidence. The appellant confirmed under cross-examination that she was to be paid if the report was accepted and insisted that it had been accepted. She also testified that her report had been implemented and that her inquiries confirmed this. At some stage, a consent was recorded for the appellant to be paid Kshs. 430,000/= which she subsequently declined as it did not take into account any interest.

In some correspondence contained in the record of appeal, and in particular from page 139, it would appear there was dissatisfaction on the part of the respondent as to the quality of the report and performance of the appellant. It is clear that the report prepared by the appellant was not accepted by the principal of the respondent and that it had to be re- done.

That being the case, the respondent offered to pay for part of the work done limited to five days. This is what was subsequently awarded by the court. The judgment of the lower court read in part as follows,

> **"In the contract that was to be signed, she was to be paid on successful completion of the total 15/19 days assignment.**
>
> **There is a dispute raised as to whether the work done was to the required standard and the defendant did notify the plaintiff early enough. She also chose not to sign the contract and cannot rely on it.**
>
> **Having considered the evidence as a whole and the submissions, the court finds that on a balance of probability the plaintiff has established that she did work for the defendant and is entitled to payment. Instead of 19 days claimed, the court will award her half of the period of 9.5 days at the rate of 200 Euros per day which total 1,900 Euros in law converted into 18 hours. That as indicated in the plaint comes to 190,000/=".**

There was no written contract between the appellant and the respondent. She had declined to sign what was placed before her. Courts cannot and should not write contracts between parties. That notwithstanding, the appellant did some work which however was not acceptable to the respondents principal. The evidence was there in writing. There is no evidence that the appellants report was accepted and implemented as she alleged in her evidence. In my assessment of the entire record, I am persuaded that the lower court could not have reached a different determination.

This appeal must therefore fail and is dismissed. Each party shall bear their own costs.

Dated and delivered at Nairobi this 26th Day of April, 2017

A. MBOGHOLI MSAGHA

JUDGE