



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CIVIL APPEAL NO. 18 OF 2015

FRANCIS MAINA

T/A ST. OLIVES SEC. SCHOOL APPELLANT

Versus

LUCY HETA RESPONDENT

(Being an appeal from the Judgment in Nanyuki Senior Principal Magistrate's Court Civil Case No. 36 of 2006

by Hon. Ndungu H. N. Senior Principal Magistrate on

25th August 2010).

JUDGMENT

1. **LUCY HETA (Lucy)** filed a claim before the Senior Principal Magistrate's Court at Nanyuki against **FRANCIS MAINA (Francis)** who was trading as St. Olive School. Lucy's claim is for Kshs. **49,759/=** being amount due for goods sold and delivered to Francis. Francis by his defence denied her claim and pleaded that he did not owe Lucy the amount claimed because he did not request for the goods which Lucy is claiming.
2. After hearing the evidence of the parties and their witnesses the trial court awarded judgment for Lucy as prayed. Francis was aggrieved by that decision and has filed his appeal.
3. This is the first appellate court. The duty of this court was well set out in the case of **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES VS JOHN PATRICK MACHIRA T/A & CO ADVOCATES (2013) EKLR** as follows:-

“Being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

“On a first appeal from the High court, the Court of Appeal should reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt

with by the parties in the evidence.”

4. Lucy in evidence before the trial court stated that Francis was the proprietor of St. Olives Secondary School while its principal was called Cosmas. She began to supply goods to the school in the year 2004. The order then was for report books and examination papers. It was made to her orally. In July 2005 Cosmas made a written order for various laboratory equipment to be supplied by Lucy. The equipment were to be used at the mock exam at the school. That order was in writing and was produced as an exhibit at the trial. It was hand written order made on plain piece of paper. Lucy supplied those goods on 13th July 2005. According to her testimony Lucy stated that those goods were received by Cosmas and that at that time Cosmas did not tell her that the goods were not required by the school. By the time Lucy delivered those goods, the school already owed her kshs. 31,235 for a previous order. She was not paid for the order made in July 2005 when she delivered the goods. Subsequent to that delivery Lucy testified that various promises were made by Francis to her even sometimes in the presence of third parties to pay her the amount he owed her. By the time she was testifying before court Lucy confirmed that Francis had paid kshs. 31,235 for the previous order. He however had not paid her for the order made in July 2005.

5. One of the 3rd parties in whose presence Francis promised to pay Lucy the amount he owed her was her uncle namely Francis Kirubo Mihango. He stated in evidence that he had lent Lucy kshs. 50,000 to enable her meet the order made in July 2005. He said that when he met Francis in the company of Lucy Francis informed him that the school was experiencing financial problems but he promised to pay Lucy once his cheque he had banked had matured. Lucy's uncle stated that Francis made several other promises to pay Lucy but he never paid. He stated that it was later he received a copy of a letter written by Francis dated 15th February 2016. That letter was addressed to Lucy. It is important to reproduce that letter in this judgment as follows:

Rev. Francis Maina

P.O Box 736

Nanyuki

15/2/2006

Lucy Heta

P. O Box

Nanyuki

Dear Madam,

REF: LABORATORY EQUIPMENTS AND MATERIALS.

You are hereby notified to come for the laboratory equipments and materials that you supplied to the then St. Olives High School. Note that the director Rev. Francis Maina had warned you not to supply more until the first order had been paid in full. The principal Mr. Cosmas told you the same thing then you told him you were rushing to town to get a taxi but you never showed up again. Later you started claiming for payment.

Note that we has no dispute concerning the first order which you supplied materials worth Kshs. 32,225/- of which we paid Kshs.5000 and has balance of 26,225/-. Come for Kshs.10,000/- to be deducted from the Kshs.26,225 of which the balance of Kshs.16,225/- will be paid soon.

Thanking you in advance.

Yours faithfully

(signed)

Rev Francis Maina

For: Directors

C C Mr. Mihang'o

6. In his defence Francis stated that the suit where he was sued as trading as St. Olive School was an error because he was one of the directors of the school. It is important to state that Francis by his defence filed in court admitted paragraph 2 of the plaint and that paragraph in the plaint was in the following term:-

“The defendant is an adult male trading under the name of St. Olives School.”

7. Having admitted the above paragraph 2 of the plaint Francis could not in evidence proceed to give contrary evidence. This is a well-established principle of law that parties cannot depart from their pleadings. The court of appeal sitting in Mombasa in the case **COASTAL BOTTLERS LIMITED VS GEORGE KARANJA** (2015)eKLR, quoting another case where this principle had been discussed stated:

“William Muthee Muthami vs Bank of Baroda (2014)eKLR, when it restated the principle thus:-

“It is a firmly established rule of evidence that the evidence produced in court to prove a claim must flow from the pleadings.”

It follows that the evidence of involvement of other directors of the school which Francis wanted to introduce when he testified will be ignored in view of the above holding.

8. Francis further testified that Lucy supplied the items in July 2005 without authorisation either from him or from Cosmas. He stated that had the goods been ordered by the school, the principal of the school (Cosmas) would have signed for their delivery. Finally he stated that the goods delivered by Lucy in July 2005 were still at the school awaiting her collection.

9. The second defence witness was Cosmas Gicheha. He said he first met Lucy in 2005 and she told him that she had supplied laboratory equipment which were in two sealed cartons. He said that since he did not know anything regarding those items he did not open the cartons. He said that he called Francis on telephone and he too denied having ordered for the items from Lucy. Cosmas denied having given Lucy the list of items produced in evidence. He said that when he informed Lucy that the goods had not been ordered for, Lucy said she will collect the items later to take them to a bookshop and that she never returned to collect them. He said that he therefore kept the goods in the office at the school awaiting collection by Lucy. However by the time he was testifying before court that is, August 2010 he said that the school had ceased to exist but that the sealed cartons were still in Francis' office.

10. The grounds of appeal presented by Francis for consideration in this appeal relate to the following issues.

- a. **That there was no valid contract between Lucy and Francis for delivery of lab equipment.**

- b. **That Lucy failed to prove her claim which was in the form of special damages.**
- c. **That the trial court failed to consider the defence on record.**

11. On the first issue it was submitted on behalf of Francis that Lucy failed to meet the requirements of **section 6(1)** of the **Sale of Goods Act Cap 31**. That section provides as follows:-

“A contract for the sale of any goods of the value of two hundred shillings or upwards shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives them, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the part to be charged or his agent in that behalf.”

12. A careful consideration of **section 6(1)** above is necessary. That section provides that a contract such as the one Lucy seeks to enforce in this matter is unenforceable in an action unless firstly the buyer accepts the goods sold and actually received them or gives something in earnest to bind the contract or the contract is in writing signed by the parties.

13. The trial magistrate who had the opportunity to receive the parties evidence and observe the parties as they testified, believed the testimony of Lucy and her witness over that of Francis and his witness. This is what the trial magistrate observed in her considered judgment:-

“In other words the plaintiff (Lucy) struck me as an honest and straight forward. Maybe she was simple minded, but all the same honest. The defendant (Francis) on the other hand did not strike me as quite straight forward.”

14. I have no reason to depart from the finding made by the trial magistrate. If the trial court believed the evidence adduced by Lucy then her testimony that Cosmas ordered the laboratory equipment received them in two cartons from Lucy on 13th July 2005 and failed to pay for them due to what he stated was the absence of Francis from the school is satisfactory proof of a contract required under Section 6(1) of Cap 31. Cosmas who represented Francis accepted and actually received the goods delivered by Lucy. Those actions meet the requirements of section 6(1) making the contract between Lucy and Francis enforceable. Further **Section 6(3) of Cap 31** was also fulfilled by Cosmas on behalf of Francis. Section 6(3) of Cap 31 is in the following terms:-

“There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.”

15. By virtue of section 6(3) Cosmas and Francis accepted the goods delivered by Lucy because they did not prove before court that the goods that were delivered were not used by the school. The letter written by Francis dated 15th February 2006 was intended in my view to be a red herring. There was no explanation given by Francis why that letter was not written immediately the goods were delivered by Lucy. It would be noted and indeed it is not denied by Francis and Cosmas that the goods were delivered by Lucy in July 2005. By the time the trial commenced in the year 2008 and concluded in the year 2010 it is to be noted that the items were still in the possession of Francis. The onus and the burden of proof was upon Francis to prove to the court that the lab equipment was not used in the school. The court could have been invited to visit the scene where the goods were. This was not done by Francis and in accordance with the provision of **Section 108** of the **Evidence Act Cap 80** Francis would be taken to have received the goods and thereby having satisfied the provisions of Section 6(3) of Cap 31.

Section 108 of cap 80

“The burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side”.

The burden of proof to prove that the goods were not used lay on Francis.

16. In view of the above I find that the courts response to the first issue identified above is that there was a valid and enforceable contract between Lucy and Francis.

17. The second issue for consideration is whether Lucy's claim is defeated by failure to produce before court the invoice for the amount claimed. In response to that issue I wish to note that Lucy produced in evidence the list of items ordered by Cosmas. It is therefore not correct to state that she did not prove her claim for special damages because she did by virtue of that exhibit. Further the Court of Appeal in the case of **JACOB AYIGA MARUJA & ANO vs SIMEON ABAYO, Civil Appeal No. 167 of 2002** refuted the notion that only documentary documents can prove a claim in special damages. The court in that case stated as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

18. In respect to the second issue this court finds that Lucy did prove her claim for the amount of Kshs.49,759 on a balance of probability.

19. On the last issue it was submitted that the trial court failed to consider the defence on record. The defence filed on behalf of Francis was a denial of indebtedness to Lucy and a denial that the goods were requested for by the school. As stated before the trial court found the testimony of Lucy to be believable whereas that of Francis was not. That was a finding of fact and this court as an appellant court shall be reluctant to interfere with that finding of fact. The circumstances under which this court can interfere with that finding of fact were discussed in the case of **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 -88 1KAR 278** as follows:-

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finds he did The Court of Appeal would hesitate before reversing the decision of a trial judge on his finding of fact and would only do so if:-

- a. ***It appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or;***
- b. ***that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally.”***

20. The basis upon which this court can interfere with the trial court finding set out in the above case do not apply to this case. That being the case the denial of the debt or the denial of the receipt of the goods by Francis and Cosmas is rejected even by this court.

21. It follows that the response to the last issue raise in this appeal is in the negative. The defence on record before the trial court was considered but was rejected by the trial court.

22. In the end the appellants' appeal is dismissed and the trial court finding and judgment is upheld. The costs of this appeal are awarded to Lucy Heta the respondent.

DATED AND DELIVERED THIS 31ST DAY OF MAY 2016

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant:.....

Appellant:

Respondent:

For Appellant:

For Respondent:

COURT

Judgment read in open court.

MARY KASANGO

JUDGE