



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 56 OF 2010

(An appeal from the Judgment of the Principal Magistrate's Court at Molo (Mr. Soita, P. M.) dated 23rd February, 2010 in Civil Case No. 4 of 2004)

ISAAC KIRUBI.....APPELLANT

VERSUS

JUDERAPH MUTURI.....RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the Hon. SMS Soita in Molo Principal Magistrate's Court Case No. 4 of 2004.

The Respondent had sued the Appellant seeking a sum of Kshs. 56,516/70 being value of stolen property from his guest house valued at shs. 41,000/= plus a sum of shs. 15,576.70 being severance pay due to him following termination of his employment with the Appellant.

After a full hearing, the trial court entered Judgment in his favour in the sum of shs. 41,000/= and dismissed the claim on severance pay.

The Appellant's grounds of appeal are:

- 1. The Learned Trial Magistrate erred both in law and in fact by awarding the Respondent the sum of Shs. 41,000.00 contrary to the evidence on record.*
- 2. The Learned Trial Magistrate erred both in law and in fact by disregarding the evidence of the Appellant.*
- 3. The Learned Trial Magistrate erred both in law and in fact by disregarding the legal principal that special damages must not only be specifically pleaded but also specifically proved.*
- 4. The Learned Trial Magistrate erred by finding that the Respondents goods had been stolen contrary to the evidence on record.*
- 5. The Learned Trial Magistrate erred both in law and in fact by holding the Appellant liable for the alleged theft.*

He has urged this court to uphold the appeal and set aside the trial court's judgment.

2. The appeal is opposed.

Parties agreed to dispose the appeal by way of written submissions.

3. The Respondent case is that he had been an employee of the Appellant for 7 years, and had lived in a guest house within the Appellant's farm where he too lived. On the 23rd April, 2003 it was alleged, robbers invaded the farm and stole property of the Respondent from his guest house valued at shs. 41,000/=, but did not gain entry into the Appellant's house that was about 200 metres from the Respondent's house. The Appellant had taken out an insurance cover for the farm houses so when the robbery took place, the Appellant lodged a claim for compensation of the stolen household goods, from the Respondent's house, but did not disclose to the insurance that what was stolen was from the Respondent's house but from his house. He was paid a sum of shs. 43,000/= but refused and failed to pay him as he only used his name to make a false claim of theft of his household goods.

It was the Respondent's contention that the Appellant should have paid him the sum of shs. 41,000/= as that was the value of his stolen goods.

Further, he claimed a sum of shs. 15,576.70/= being severance pay after he resigned from his employment with the Appellant.

Appellant's case

4. On his part, the Appellant stated that he had insured the farm and all the houses against fire, and took out a separate cover for his household goods only, and since the Respondent was not living in the same house, his household goods were not insured; and therefore, he could not claim or be compensated by the insurance. On severance pay, the Appellant stated that he owed the Respondent nothing, and he raised a counterclaim against him in the sum of shs. 92,607/= being value of missing goods from the farm when the Respondent left employment. The Respondent denied the counterclaim and put the Appellant to strict proof.

5. I have carefully analysed the evidence tendered by the Respondent, the Appellant and all the witnesses.

It is not in dispute that there was a robbery in the Appellant's farm, and that certain goods in the sum of shs 41,000/= were stolen from the Respondent's house. It has also come out clearly that the robbers did not gain entry into the Appellant's house, but he the Appellant used the list of stolen items from the Respondent's house to lodge a claim from his insurance, and that he was paid the value of the insured goods.

6. After the hearing, the trial court awarded the Respondent a sum of shs. 41,000/= as value of the lost goods. The Appellant contends that that sum as a special damage was not specifically pleaded neither was it strictly proved. It is further submitted that the said award was contrary to the evidence on record and that the Appellant's evidence was disregarded by the trial magistrate. The trial magistrate held the Appellant liable for the theft when it was testified by the Respondent himself that there was enough security in the farm by way of provision of four watchmen with guard dogs and sirens.

7. I have considered the Respondent's pleadings in his plaint dated the 13th January 2004. Particulars of the alleged stolen goods were not pleaded. He had not insured his household goods. There was no basis upon which the Respondent claimed the said sum from the Appellant as there was no evidence to attach the theft on the Appellant. It was alleged that the Appellant used the Respondent's list of stolen items to claim compensation from the insurance that appears so, but could this illegality, and compensation upon a false claim give a legal right to the Respondent to claim the same amount from the Appellant? In my view, that having been an illegality no claim could be attached. The remedy lies elsewhere for the falsified claim by the

Appellant.

8. I do not agree with the trial court's finding that since the items were stolen from the Respondent's house, the Appellant ought to have transmitted the money to him. It is my finding that the trial court erred in law and fact in arriving at such a conclusion. The Respondent having not insured his household goods, the insurance company was under no obligation to compensate him. He together with the Appellant falsified a claim, and it is my finding that he cannot legally benefit from such false and illegal claim.

9. The Respondent's submission is that the stolen goods were shown in the O.B. at the Police Station as belonging to him, hence the Appellant ought to have paid him, the trial court was ought to award the said amount of shs. 41,000/= to the Respondent as in real sense it is the Respondent whose goods were stolen. That could be so, but as I have stated above, falsification of information is an illegality, and a litigant or party should not benefit from such an illegality.

10. This court observes and agrees with all the parties that indeed it is the Respondent's goods that were stolen, and that he had not insured the said goods. The Appellant was categorical, that he had insured all the houses in the farm against fire, and had also insured his own household goods in his house against theft. I therefore find it naïve that the Respondent lays a claim on the compensation by the Insurance Company yet he testified that he had no insurance cover for his goods. I therefore find it outrageous that the trial court awarded a sum of shs. 41,000/= to the Respondent being compensation for the lost goods as he was neither a party or a beneficiary in the insurance contract. I however agree with the trial court that the claims for severance pay and that the counterclaim meritless and I shall uphold the dismissal.

11. The upshot of the above is that the appeal succeeds. The trial court had no legal basis upon which he based his finding that the Appellant should transmit the compensatory money to the Respondent as the same was obtained through fraud and falsification of the claim. An illegality remains as such, and no party should benefit from such. As stated above, the Appellant's falsification of the claim is a matter for another forum.

To that extent the appeal succeeds. I make an order that each party shall bear its costs both on the primary suit and the appeal.

Dated, signed and delivered at Nakuru this 27th day of March 2015

JANET MULWA

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Omondi - Court clerk