



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. 28 OF 2015**  
**(FORMERLY KISII HCCA NO. 32 OF 2011)**

**BETWEEN**

**MAROA CHACHA ..... APPELLANT**

**AND**

**ZACHARY KORONGO ..... RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. J. R. Ndururi, SRM at the Senior Resident Magistrates Court in Kehancha in Civil Case No. 15 of 2010 dated 20<sup>th</sup> January 2011)***

**JUDGMENT**

1. The circumstances leading up to the appeal are set out in the plaint dated 25<sup>th</sup> August 2010. The respondent pleaded that the appellant used to operate a business of distributing bread when he decided to sell the business to the respondent for Kshs. 14,000/- plus the sum of Kshs. 2,000/- which he promised to pay in there event there were no encumbrances of debts. After commencing business, the respondent realized that that the appellant had incurred a debt of Kshs. 56,290/- to the bread supplier which he settled. In addition, the respondent claimed that he had paid the appellant Kshs. 16,000/- rent before assuming the business. The respondent's total claim amounted to Kshs. 96,498/- .

2 In his defence filed on 29<sup>th</sup> September 2010, the appellant admitted that he had sold the business for the Kshs. 14,000/- together with the sum of Kshs. 2,000/- agreed upon. He averred that the sum was to be recovered from the monthly rent. He also denied that he owed the sums due and that since the respondent continued to occupy the premises the demand for rent was not due.

3. After hearing testimony from the appellant and the respondent, the learned magistrate concluded that it was an implied term of the agreement that the business was sold free from encumbrances and that the respondent was entitled to a refund of Kshs. 56,290/- which he was being deducted from his payments by the bread supplier, United Millers. He also found that the appellant had admitted in an agreement dated 4<sup>th</sup> November 2009 that his wife had taken 19 crates of bread valued at Kshs. 9,434/- and that he would refund the said sum together with Kshs. 14,000/- he had been paid as deposit and Kshs. 2,000 which had been lent to him. The trial court adjudged the appellant liable to pay a total of Kshs. 81,714/- costs and interest.

4. The appellant appeals against the judgment and decree on the following grounds set out in the memorandum of appeal dated 17<sup>th</sup> February 2011;

1. *The learned trial magistrate erred in both law and fact when he failed to appreciate that there was no contract of sale of business between the appellant and respondent.*
2. *The learned trial magistrate erred in both law and fact when he entered judgment without the respondent producing agreements and receipts made between the respondent and the appellant.*
3. *The learned trial magistrate erred in law and fact when he found that the appellant was indebted to the respondent in the sum of Kshs. 81,714/- without sufficient proof yet the respondent's claim was for Kshs. 96, 148/-.*
4. *The learned trial magistrate erred in law and fact in ignoring the appellant's evidence, and further ignored that the pleadings were defective as there was no cause of action thereof.*
5. *The learned trial magistrate gravely erred in law in entering judgment in favour of the respondent who had not proved its case on the balance of probabilities as required by law.*
6. *The learned trial magistrate went frolic of his own disregarding the evidence on record and arrived at an erroneous decision.*

5. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).

6. The appellant and respondent were friends when the respondent approached the appellant on 9<sup>th</sup> July 2009 to purchase his bread distribution business with United Millers. Although the parties did not record their agreement in writing, the respondent nevertheless took over the business and continued to use of the appellant's name to supply bread. The testimony of both parties coincided on this point. The appellant cannot therefore argue that there was no agreement between them.

7. During the course of the business, the respondent discovered that appellant's wife was taking crates of bread. After this he reported the matter to the chief and the understanding recorded in an agreement dated 14<sup>th</sup> November 2009, witnessed by the local chief. In that agreement, the appellant admitted that he had received a deposit of Kshs. 14,000/- which he undertook to refund together with Kshs. 9,424/- being the value of 19 crates of bread his wife took and Kshs. 2,000/- loaned to him. The appellant did not dispute this agreement or apply set it aside upon any grounds that would entitle the court to set aside an agreement. The agreement was an express admission of indebtedness and I therefore find that he owed the total sum of Kshs. 25,424/.

8. A substantial part of the respondent's claim was the money owed to the United Millers by the appellant which the respondent claimed that he settled. On this point the learned magistrate found as follows;

*The plaintiff produced a bundle of bank deposit slips showing that he paid various amount to United Millers Ltd and the deductions made by the breadmaker. Further the Plaintiff also produced a bank deposit slip dated 30/11/2009 showing that he the paid Kshs. 36,290/-. This is the amount that was remaining from the debt owed to the breadmaker. This is the amount that was remaining from the debt owed to the breadmaker. The total amount the plaintiff paid to the breadmaker is Kshs. 56,290/-.*

9. I am unable to agree with the trial court that the said sum was proved. I have studied the invoices produced by the respondent. They are invoices and delivery notes that show the value of each delivery of item delivered to the respondent, who at the time was trading in the appellant's name. They do not show that United Millers was demanding a specific sum or that the appellant was paying a specific monthly sum as the debt due to United Millers on account of the appellant. Likewise the sum of Kshs. 36,290/- deposited in the United Millers account through the appellant's account does not show that it was on account of a debt. It could have been on account of the bread deliveries already made. It has been said time and again that special damages must be pleaded and proved and as Lord Goddard stated in ***Bonham Carter v Hyde Park Hotel Ltd [1948] 64 TLR 177***;

*Plaintiff must understand that if they bring action for damages it is for them to prove damage, it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.*

10. I therefore find and hold that the claim for monies deducted by United Millers was not proved to the required standard. I therefore dismiss that part of the claim.

11. Having evaluated the evidence, I set aside the judgment of the subordinate court and substitute it with the judgment for Kshs. 25,424/- together with costs and interest at court rates. The sum shall accrue interest from the date of filing suit.

12. The appellant shall have half the costs of this appeal.

**DATED and DELIVERED at MIGORI this 19<sup>th</sup> day of June 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Odero instructed by Agure Odero and Company Advocates for the appellant.

Mr Abisai instructed by Abisai & Company Advocates for the respondent.