



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL No. 34 OF 2005

BETWEEN

VERONICA KAMENE MUSOMI.....APPELLANT

VERSUS

BENEDICT MALOMBE NZOVORESPONDENT

(Being an appeal from the original Judgment and Decree of the Senior Resident Magistrate's Court at Kitui by Hon. E.K. Makori in Civil Suit No. 78/2002 on 7/6/2005)

JUDGMENT

The appellant was the 1st defendant and the respondent was the plaintiff in a suit instituted in the Principle Magistrate's Court, Kitui whose judgment and decree is the subject of this appeal. The respondent had sued the appellant jointly with her son, **Japheth Mutua Musomi** for Kshs. 6,330/=, general damages for defamation, costs and interest.

The background to the suit according to the respondent was that on or about 21st February, 2002, the appellant's son aforesaid was arrested and locked up in police cells on allegation that he stole a weighing machine belonging to the respondent. In a bid to free her son, the appellant approached the respondent with a view to having the charges if at all dropped. With the assistance of clan elders an agreement was struck whereby the appellant was to pay the respondent Kshs. 12,330/= as consideration for the respondent to drop the charges. Pursuant to the said agreement, the appellant on 23rd February, 2002 paid a deposit of Kshs. 4000/=, and the appellant's son was released from police custody. It was further agreed that the balance of Kshs. 8,330/= was to be paid on or before 26th February, 2002. Come this day and the appellant only paid Kshs. 2,000/= leaving a balance of Kshs. 6,330/= promoting the respondent to issue a demand notice for the same through his lawyers. In response, the appellant denied the claim and published in the reply a defamatory statement calling the respondent an extortionist. It is this denial of the respondent's claim as well as defamatory statement made against him by the appellant that precipitated the suit.

In response to the suit, the defendant and her son filed a joint statement of defence and counterclaim. They all denied the respondent's allegations against them. They claimed that the appellant's son never stole the weighing machine, any reconciliation meeting; the agreement thereof and that the amount paid thereunder if at all was extorted. With regard to defamation, they pleaded that the respondents actions were illegal, and the fact that the appellant was forced, deceived and coerced to pay the respondent Kshs. 6,000/= amounted to extortion. In the premises the respondent had suffered no loss or damages. The element of extortion aforesaid formed the basis of the appellant's counterclaim. That on or about 21st

February, 2002, the respondent without justifiable cause and or excuse made allegations that her son had stolen his weighing machine which allegations the respondent knew, or had reasons to know that they were false. Following the allegations the appellant's son was arrested and held in custody at Kitui Police Station as a suspect of the alleged theft. When she visited her son at Kitui Police Station, she was coerced, intimidated, threatened and deceived that if he did not undertake to compensate the respondent, her son would be tortured to the extent of being maimed. Due to motherly instincts she reluctantly signed an undertaking in order to secure her son's release. In the premises, the total of Kshs. 6,000/= paid to the respondent was unlawful, illegal and or amounted to extortion, hence the counterclaim.

The suit was eventually heard and determined on merits. The appellant and her son testified. On his part, the respondent testified and called 2 other witnesses, who participated in the deliberations leading to the agreement. Having carefully considered the evidence tendered by both the appellant and the respondent, the learned magistrate was of the opinion that:-

“Looking at the agreement the way it stands, it does not bind the 2nd defendant herein because he never signed the same. The agreement too does not bind the 1st defendant because as it will appear the money actually was received by way of extortion. She was acting to release her child from police but she can also not use the court to recoup it.

On whether the plaintiff was defamed or not, its far from it. No evidence on defamation was put across. For the 2nd defendant, he has not been defamed per the record. Actually the agreement entered was to have him released for theft.

The net effect is that the plaintiff's claim against the defendant will be dismissed with costs and the counterclaim will also be dismissed with costs. To avoid doubts as to costs that will mean each party will bear own costs. The plaintiff will be at liberty to pursue his criminal case.”

This determination prompted this appeal by the appellant. The appellant has sought to impugn the judgment and decree of the learned magistrate on 2 grounds to wit;

“1. The learned trial magistrate erred in law when he failed to allow the appellant's counterclaim even after he found that the appellant was not bound by the alleged agreement in execution whereof the amount counterclaimed had been involuntarily paid.

2. The learned trial magistrate erred in law when he failed to award the cost of the suit as well as the costs of the counterclaim to the appellant.

The appeal was canvassed by way of written submissions. I have carefully read and considered the written submissions alongside cited authorities.

The appellant has submitted that once, the trial court found that:-

“...the agreement too does not bind the 1st defendant because as it will appear the money actually was received by way of extortion. She was acting to release her child from police...”.

It ought to have entered judgment for the appellant on her counterclaim. That the payment was illegal and is thus recoverable. For this proposition, the appellant has relied on the case of **Kiriri Cotton Company Ltd v Dewani [1959] E.A. 239.**

The response by the respondent is that the appellant has not demonstrated to this court the error or mistake allegedly committed by the trial magistrate in refusing her counterclaim as the same was not supported by evidence or facts tendered in court.

In refusing to grant the counterclaim, the trial magistrate stated and rightly so in my view that much as she paid the money by way of extortion, she could not also use the courts to recoup it. Essentially what

the trial magistrate is saying is that the agreement that led to the release of the appellant's son from police custody and the dropping of the contemplated plated charges was illegal. It could not be enforced either by the appellant or the respondent. It was calculated to and indeed, did thwart the cause of justice. This holding no doubt finds favour with the case of **Kiriri** (*supra*). In that case it was held that;-

“ ... the ordinary rule is that the court will not assist any party who comes before it to recover money if it is necessary for the party presenting the cause of action to rely on the commission by him of an illegal act...”

Clearly in this case, a criminal act had been committed. A suspect had been arrested and was about to be arraigned in court. His mother walks into the fray and enters a compromise to have the criminal prosecution of her son dropped on condition that he pays the victim of the theft Kshs. 12,330/=. Such an agreement is obviously illegal as it seeks to thwart or interfere with the cause of justice. It is unenforceable. As much on the respondent cannot enforce it, so is the appellant.

Even if I am wrong on this aspect of the appeal, I could still have dismissed the first ground of appeal on the basis that the appellant was not a credible witness. On one hand, she testified she did not give the respondent any money but that she gave the brother who allegedly in turn passed it over to the respondent. On the other hand she claimed that she gave the money to **Mr. Geoffrey Mutua** to pay **Nzovo** to pay police. Yet again she reiterates that she paid the money for police bond. Further, she testified that she never participated in arbitration and that she did not sign any agreement with the respondent. Yet evidence is galore that she participated in the arbitration and or reconciliation meeting. Indeed she picked 2 clan elders to represent her in the proceedings if the agreement tendered in evidence is anything to go by. Yes, she may not have signed the agreement. However, the same was signed on her behalf by her chosen representatives in the meeting. In the counterclaim, the appellant seeks that Kshs. 6,000/= she paid the respondent was though extortion, but later in her *viva voce* evidence, she denied ever entering into such agreement. Now if indeed she paid the money, and the evidence on record supports that fact, was it for police bond or was it in consideration of the respondent dropping the charges he intended to mount against the appellant's son. In my view, by the appellant mounting the counterclaim, she was attempting to steal a match on the respondent. Pursuant to the agreement, albeit illegal, the appellant had her son released much as she had not fully complied with the terms. On being asked to pay the balance of the consideration she backs out of the agreement claiming extortion. Yet evidence on record suggests that she entered the agreement voluntarily contrary to the finding by the learned magistrate. By claiming extortion after the appellant had benefited from the said agreement smacks of deceit. Again if indeed it is true as the appellant would want this court to believe that the money was extorted from her, why did she not invoke criminal justice system against the respondent? After all, extortion is a criminal offence.

Costs are at the discretion of the court. In the instant case, the learned magistrate ordered that each party bears own costs. The trial court having dismissed the suit and the counterclaim, exercised its discretion not to award costs to any party. In doing so, the appellant has not demonstrated that there was element of impropriety and or misuse of discretion. This court can only interfere with this discretion of the trial court on this issue if it is shown that the trial court failed to exercise its discretion properly. I do not discern such misgivings nor has the appellant pointed out any. If anything the appellant seems to have abandoned this ground of appeal as she made no submissions in support thereof.

The appeal is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE