



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS Civil Appeal 28 of 2002

BENEDICT NGULA NGULI APPELLANT/APPLICANT

VERSUS

GEDION NDUVA MWENDO 1ST RESPONDENT

PRISCILA MWENDO 2ND RESPONDENT

(Being an appeal from the Judgment of Honourable Mr E. Makori Resident Magistrate dated 12th March 2002 in Kitui Civil Suit No. 204 of 2000)

JUDGMENT

1. This appeal raises the following issues:

- i. whether there was a valid contract between the parties and;
- ii. whether in fact the contract, if at all was entered into by coercion or not.

2. In the Complaint dated 17/3/2003, the Appellant had alleged that on 1/2/2000, the 1st Respondent went to his home at midnight and demanded sex from the Appellant's daughter. It was his case that the act amounted to trespass and the ensuing chaos amounted to an act of nuisance. That when he threatened to take legal action, the 2nd Respondent, mother of the 1st Respondent, pleaded that the matter should be settled amicably and parties then agreed that the Respondents would give the Appellant two cows, each valued at kshs.15,000/=, as compensation. They only gave one cow and the claim was for the remaining one cow plus costs of the suit.

3. The Respondents in their Statement of Defence denied the claim and instead pleaded that it was the Appellant who assaulted the 1st Respondent and criminal charges had been preferred against him. That when the Appellant and his son detained the 1st Respondent against his will, the 2nd Respondent had to give them a cow to secure her son's release and that being the case and since the cow was given

involuntarily, it was obtained by coercion and the alleged contract was thereby vitiated. They filed a counter-claim whereby they sought return of the cow, kshs.1,500/= which the 1st Respondent allegedly used in treatment after assault plus general damages and costs of the suit.

4. I have read the evidence tendered before the subordinate court. Of interest is an agreement dated 3/2/2000. It was signed by Joshua Muthiani, Phillisila Elijah, B Ngula Nguli, one Nduva, Lasalo Elijah, Paul M Kimeu and Ndunda Nzoli. The agreement is worded thus:

“Agreement between Ngula Nguli and Phillisila Eliya in respect of the matter of the son of Phillisila who went to the home of Ngula Ngula to settle the matter amicably without reporting to the police.

In prosuance (sic) therefore, Ngula has asked to be compensated with two bulls and Phillisila has agreed before the elders and in part performance of the agreement, has paid one bull and has promised to give the other bull on 5:5:2000.

And Nduva has admitted that he had gone to the home of Ngula at night to visit the daughter of Ngula whom he had impregnated.

The Elders present

Joshua Muthiani - Signs

Phillisila Elijah - Signs

B Ngula Nguli - Signs

Nduva - Signs

Lasalo Elijah - Signs

Paul M Kimeu - Signs

Ndunda Nzoli - Signs”

5. How was this agreement reached and what value should be attached to it? In his evidence, the Appellant stated that when the 2nd Respondent came to his home on the material night, he thought that it was a thief but on raising the alarm, he realized that it was an ex-employee whom he had dismissed from service for incompetence; the 2nd Respondent. The latter insisted that he had come to see his girlfriend, daughter of the Appellant who he said was already pregnant with his child. The Appellant “detained” him at his home until 5 a.m. Later that morning he went to see the 1st Appellant, mother of the 2nd Appellant and threatened to report her son to the police. She pleaded with him not to do so and on 3/2/2000 the agreement reproduced above was signed. One cow was delivered but on 5/5/2000 when the second cow was to be delivered, she failed and/or refused to do so and so he filed the suit before the subordinate court.

6. The Appellant admitted that he was later charged in Criminal Case No. 223/2000 with the assault of the 2nd Appellant but he stated that the case was instituted to dilute his claim for one cow. He confirmed

that he never reported the 2nd Appellant to the police.

7. Paul Mutuku Kimeu, PW2 supported the Appellant's claim and stated that he was present when the agreement was signed and that he drafted it for all present to execute.

8. The evidence by the Respondents was that according to the 1st Respondent, when the Appellant came and told her that the 2nd Respondent was at his home, she went there and found him tied with ropes, and bleeding. He could not talk and the Appellant confirmed that the 2nd Respondent had been beaten up for entering the Appellant's home at night. When she pleaded with him to release him so that she could take him to hospital, he demanded a cow as a pre-condition and after more pleas, one cow was delivered to the Appellant at 6 p.m. and the agreement elsewhere reproduced above was drafted by one Muthiani. The 1st Respondent said that she only acceded to the conditions set as she was fearful that her son would die of the injuries inflicted on him.

9. It was her case and that of the 2nd Respondent that the one cow was involuntarily given; that the contract was entered into by coercion and that the cow taken by the Appellant should be returned to them. I should only add that in his evidence, the 2nd Respondent stated that he indeed went to the Appellant's home with the intention of seeing the Appellant's daughter whom he intended to marry. He was then viciously attacked by the Appellant and his son, one Philip Ngula. He was tied to a table and whipped until 4 a.m. and he was only freed later in the day after the Appellant had dictated his terms.

10. Joshua Muthiani, one of the persons who signed the agreement aforesaid confirmed the evidence of the Respondents and insisted that he was the one who drafted the agreement on the terms that the Appellant dictated. It was done to enable the 2nd Respondent to be released and to be taken to hospital.

11. Having heard that evidence, the learned magistrate concluded that the agreement was forced; that there was no consensus *ad idem* and it was void. He dismissed the Appellant's claim and allowed the counter-claim to the extent that the cow given to the Appellant should be returned to the Respondents.

12. At the beginning, I posed two questions and my answer to the first is as follows:-

“Coercion” is defined as ‘*browbeating, bullying, compulsion, constraint, duress, force, intimidation, pressure, strong-arm tactics, threats*’ – Collins Concise Thesaurus, 1997 ed.

Further In Cheshire, Fifoot and Furmstoms Law of Contract, at page 280, the authors state thus;

“Since agreement depends on consent, it should follow that agreement obtained by threats or undue persuasion is insufficient. Both common law with a limited doctrine of duress and equity with a much wider doctrine of undue influence have acted in this area.”

13. Further at page 281, they add as follows:-

“Both common law and equity agree that a party cannot be held to a contract unless he is a free agent, but the contribution made by common law to this part of the subject has been scanty. It is confined to the avoidance of contracts obtained by duress, a word common law, or what is sometimes called legal duress, means actual violence or threats of violence to the person, i.e. threats calculated to produce fear of loss of life or bodily harm.^[1] It is a part of the law which nowadays seldom raises an issue.”

14. That is the law as I understand it and the contract between the parties was clearly obtained forcefully because I believe that the 2nd Respondent was indeed assaulted and detained before the agreement was signed. He could only be released upon the terms dictated by the Appellant and which led to Muthiani

writing down what the Appellant wanted. I also accept the evidence of the 1st Appellant that she acceded to those terms to save her son who had been in detention for more than 12 hours. Such an agreement cannot have been voluntary and is void.

15.I have by extension answered the second question and once I have done so, it follows that I find no merit at all in the Appeal and the same is dismissed with costs to the Respondent.

16.Orders accordingly.

Dated and delivered at Machakos this 9th day of October 2009.

ISAAC LENAOLA

JUDGE

In presence of: Mr Mutia h/b for Mr Muithya for Appellant

N/A for Respondent

ISAAC LENAOLA

JUDGE

[1] Co. Litt.253b. For a modern example see *Friedeberg-Seeley v. Klass (1957)*, *The Times*, February 19th; 101 Sol. Jo.275.