



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal Case 1103 of 2004

KINYANJUI WANJU.....APPELLANT

VERSUS

WINFRED NYAWIRA MAINA T/A MANNO STYLES.....RESPONDENT

RULING

On 1/11/05, the Appellant herein moved to this Court, by way of an appeal, challenging the judgment of the Resident Magistrate's Court – Milimani Commercial Courts, dated 1/12/04 in RMCC No. 7684 of 2002, on the following six grounds:

1. That the Learned Magistrate erred in finding judgment for the Plaintiff whereas the Plaintiff did not prove sale, delivery to the Defendant or acceptance of any goods by the Defendant.
2. The Learned Magistrate erred in finding judgment in an alleged oral agreement whereas the Plaintiff did not testify in person to prove the existence of the contract.
3. The Learned Magistrate erred in law in finding judgment against the defendant whereas the alleged contract was legally unenforceable.
4. The Learned Magistrate erred in holding that the Defendant had received the Plaintiff's statement but did nothing on it whereas there was no evidence of delivery of the same.
5. The Learned Magistrate erred in holding that the Defendant did not dispute the invoice sent to him or notified him by the Plaintiff whereas there was no evidence of delivery or postage of the said invoice to the Defendant or notification of the same by the Plaintiff.
6. Wherefore the appellant prays that this appeal be allowed with costs and the Plaintiff's suit be dismissed with costs.

The brief facts from the record in the file before me, and from which the dispute arose are as follows. The Plaintiff's suit, filed on 1/10/02, claims KShs.93,500/- being the price of goods sold and delivered to the Defendant and which the Defendant failed or neglected to pay despite demand and being invoiced for the same by the Plaintiff. In her evidence, the Plaintiff stated that she first met the Defendant in 2001 when he came and took some clothes. She further produced in court, detailed account of the entries in

respect of the Defendant's account, stating that the Defendant did make some payments in settlement of the account sometimes by cash, credit card or cheques. Some of the cheques were drawn by Dolphine Auctioneers of which the Defendant is the proprietor.

In defence, the defendant denied getting the claimed goods for the said sum. He however stated that whenever he bought goods he would pay for the same and denied that he was allowed any credit facilities. He would pay by cheque, credit card or cash. He denied becoming aware of the claim until it was brought to court. He further, denied receiving any invoice or demand from the Plaintiff.

The Subordinate Court gave judgment in favour of the Plaintiff which sparked this appeal, on the grounds herein above.

In the course of the hearing and submissions, the Appellant's Counsel, Ms Njeri Mucheru, concentrated on ground of appeal No. 1 and abandoned the rest. In her submissions the Learned Counsel averred that the Respondent never demanded payment, and that no demand notice was produced in court, and hence the lower court erred and arrived at a wrong conclusion regarding the issue. She further averred that the Lower Court had no evidence upon which to conclude that the Appellant received the goods, given that the Respondent had stated that when people deny receiving the goods, they, the Respondent, have no evidence. The Appellant's Counsel further submitted that no particulars were given in support of the claim for the K.Shs.93,500/- and no proof or part payment for specific goods received by the appellant. She concluded by urging the court to allow the appeal and an order that the Respondent do refund the decretal amount paid to the Respondent on 28/5/05. She finally submitted that the Respondent's evidence was full of contradictions and the Lower Court erred in basing its judgment on it.

In response, the Learned Counsel for the Respondent, Ms Githu, submitted that none of the grounds of appeal have been covered by the appellant's submissions; that this was a simple contract and the appellant received goods and made part payments for the goods, which the lower court agreed with by holding that there was part performance; the appellant's appeal had no merit – given that the appellant first denied existence of any contract between the parties only to turn round and admit being a customer of the Respondent for quite a number of years; that the Respondent has proved his case against the appellant and showed that the appellant owed her an outstanding balance of KShs.93,500/- for goods received from the Respondent.

I have considered the grounds of the appeal and the submissions by Learned Counsel for both sides and have reached the following findings and conclusions.

The appeal – all the grounds which were reduced into one during the hearing and submissions by the counsel for the appellant – can be fairly summed up by saying that it hinges on an argument that the Subordinate Court had no evidence upon which to base its findings and conclusions, and whatever evidence was adduced was not correctly interpreted by the Learned Magistrate to warrant the conclusions arrived at, by the Lower Court.

As a result of the foregoing, I have gone through the entire proceedings in the Lower Court and unfortunately the record does not support the appellant's selective picking of parts of the evidence and totally ignoring the rest.

From the proceedings, the appellant's evidence is nothing but denials of everything alleged by the Respondent, only to turn round, in the cross-examination, and admit it all. Three examples should suffice. The appellant denied receiving the goods from the Respondent, only to turn around and say that he used to pick items from the Respondent's shop, but that he paid for everything that he received. Further, he denied being given any credit facility by the Respondent during the years he dealt with her. The records, particularly the accounts for the Appellant, show that he collected items and paid either cash, credit cards or cheques, many times long after the goods had been collected/received. For example, he made some payment on 18/6/02 for goods received on 10/4/01, and on 9/11/01 and 14/3/02 for goods received on 15/8/01 and 23/10/01 respectively.

If the above is not evidence that the appellant received goods, and on credit, from the Respondent, then the appellant must have his own definition of receiving goods, and having a credit facility with the respondent.

The appellant also denied getting any receipts and or invoices from the Respondent, only to turn around and admit that he did not want receipts as that would have meant having VAT added to the price. On not having received any invoices from the Respondent, the Appellant, during cross-examination admitted that an invoice, dated 7/1/02, bore his Post Office Box No. 22497.

The final example is on the appellant's denial that he received any goods from the Respondent and on credit only to admit making a payment on 14/3/02 for K.Shs.20,000/- which ridiculously enough, he says he did not know what the payment was for.

I must point out that ordinarily at this appellate level, this court should be dealing with matters of law, rather than issues of fact. However, given the Appellant's challenge that the lower court had no evidence upon which it reached its conclusions, I had to review the relevant parts of the evidence, at the lower court's level. That has left no doubt in my mind that the Learned magistrate was totally right in concluding that the defendant(Appellant) was untruthful in his evidence, and that the appellant's evidence was mere denials.

On the basis of the foregoing re-evaluation and analysis of the evidence at the Subordinate Court, I have no doubt in my mind that the Learned Magistrate has a right in arriving at the conclusions he arrived at.

In the result, I hereby dismiss the appeal herein, and order that the Appellant do pay the costs of this appeal to the Respondent, with interest, at court rates, from the date of filing of this appeal till payment in full.

It is so ordered.

DATED and delivered in Nairobi, this 28th Day of July, 2008.

O.K. MUTUNGI

JUDGE