- ***What is hearsay evidence***
- ***Whoever asserts a fact must prove it***
- ***When does an appellate court interfere with an award of a trial court***
- ***A party claiming interest must prove that he is entitled to claim interest***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA
Civil Appeal 23 of 2003
Arising from Busia SRM Civil Case No. 349 of 2003

KENYA COMMERCIAL BANK LTD……..…APPELLANT

VS

THOMAS WANDERA OYALO……..….RESPONDENT

J U D G M E N T

Kenya Commercial Bank Ltd, the appellant herein was sued by Thomas Wandera Oyalo, the Respondent herein in a plaint dated 19th August 2003. In that plaint the Respondent sought for *inter alia* Ksh.200,000 with interest at 32% p.a. general damages for conversion and costs of the suit. The appellant denied the claim and averred *inter alia* that the Respondent's manager one Andre Ooko Ochola and the appellant's employee one George Onyango conspired to defraud the Respondent of Ksh.200,000/= and that the Respondent did not make the alleged deposit with the appellant. At the end of the trial before the Senior Resident Magistrate's court, Judgment was found in favour of the Respondent as prayed in the plaint. Being aggrieved, the appellant lodged this appeal. The appellant listed seven grounds of appeal which Mr. Onyinkwa argued them all together when this appeal came up for hearing.

Before considering the grounds argued on appeal it is imperative to set out the case before the Senior Resident Magistrate's court. The Respondent, Thomas Wandera Oyalo testified alone. He told the trial magistrate that he was a customer with the appellant bank holding an account with it at its Busia Branch. He claimed that on 27th September 2002 he sent his manager Andrew Ooko Ochola to bank various amounts of money in account No. 230750182. He averred that he gave his manager money to bank in the following manner:

Ksh.480,000/=

Ksh.400,000/=

Ksh.494,000/=

Ksh.200,000/=

He produced statements to show that the money was banked save that the sum of Ksh.200,000/= was not

reflected. The Respondent also produced a copy of the banking slip for Ksh.200,000/= with a date stamp of 27.9.2002 to prove that his manager actually banked the money with the appellant bank. The Respondent says he discovered that the amount was not credited to his account sometimes in the month of August 2003 and instructed his advocates to take action after seeking for assistance from the bank in vain.

On its part the appellant summoned the evidence of one witness, Paul Mitey, its Busia Branch manager. This witness denied the Respondent's assertion that he banked a sum of Ksh.200,000/= with the appellant bank on 27th September 2002. He doubted the genuinity of the banking slip produced by the Respondent and said that the same was still under bank fraud investigation unit. He said that investigations over the dispute took long because the Respondent took 11 months to report the matter. He said that the signature appearing on the banking slip resembled that of George Onyango, a former Busia Branch Manager of the appellant bank. He said that the appellant bank did not possess the counter slip hence he was of the view that the slip produced by the Respondent may have been fake.

The trial magistrate considered the evidence presented before her by both witnesses. She also considered the strong submissions made by Mr. Onyinkwa and Mr. Ashioya for the appellant and the Respondent respectively. The learned senior Resident magistrate came to the conclusion that the Respondent had proved his case to the standard of on a balance of probabilities. She was of the view that the Respondent had proved that he had banked with the appellant bank a sum of Ksh.200,000/= upon which he was issued with a pay in slip by the appellant's employee, George Onyango who later resigned while the matter was under investigation. She also found that George Onyango was on duty on 27th September 2002.

The trial magistrate further formed the opinion that it was the duty of the Respondent to call for the evidence of George Onyango, it is former employee to testify and not vice versa. She held the view that Andrew Ooko Ochola banked the money as evidenced in the documents produced by the Respondent. She Proceeded to award interest at 32% p.a. on the basis that the claim was not challenged by the appellant. She also awarded Ksh. 200,000/= as general damages for conversion on the basis that the Respondent's manager was reckless thus denying the Respondent the use of its money.

On appeal, Kenya Commercial bank Ltd argued that the trial magistrate erred when she arrived at her decision based on hearsay evidence. The appellant bank averred that the person who allegedly banked the money, Andrew Ooko Ochola, was not called to testify, hence it cannot be said that the Respondent proved his case on a balance of Probabilities. Mr. Ashioya who appeared for the Respondent before this court was of the view that the trial magistrate came to the correct decision on the basis of the evidence presented before her. He pointed out that the appellant's only witness, Paul Mitey, admitted that George Onyango was on duty on 27th September 2002 and that this witness admitted that George Onyango appended his signature as the branch manager on the pay in slip. In view of that the learned advocate was of the view that the bank was vicariously liable to the acts of its reckless employee.

I have anxiously considered the submissions of both learned counsels over this ground of appeal. There are certain facts which the parties did not dispute. First, that the basis of the Respondent's claim before the trial court was a pay in slip date stamped 27th September 2002 which was produced by the Respondent as exhibit No. 3. Secondly, that the money was taken to the bank by one Andrew Ooko Ochola who was the Respondent's manager. Thirdly, that the said Andrew Ooko Ochola was not called to testify in this matter. The appellant now says that the Respondent's evidence were of no evidential value to prove the claim because the actor in the whole saga was not called to testify. The question which I wish to ask is whether the evidence of the Respondent could be categorised as hearsay evidence? Hearsay is define in **BLACKS LAW DICTIONARY 7TH EDITION** as follows:

> *"A testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence."*

The Respondent on cross-examination says that the pay in slip was not prepared by his manager, Andrew Ooko Ochola. He says he sacked him but that he was within town at the time of his testimony. The Respondent did not state who prepared the pay in slip. It is clear from his testimony that he did not

personally do the banking hence he would not be in a position to say who received the money at the bank counter. He is not also in a position to state who in particular filled and signed the pay in slip. The only person who could have shed light over the whole transaction is the Respondent's manager Mr. Andrew Ooko Ochola. He was not called to testify. The Respondent says that DW 1, Paul Mitey admitted that the pay in slip (exhibit No. 3) is a genuine document which originated from the appellant bank. The Respondent also stated that DW 1 admitted that George Onyango, a branch manager with the appellant bank, appended his signature on the pay in slip. I agree that the pay in slip could have been a genuine document coming from the appellant bank. The evidence of D.W 1, Paul Mitey, to me amounts to an opinion. His admission cannot be said to have proved the Respondent's case. The fact is that he wasn't at the appellant's branch when the transaction took place hence his evidence was of no evidential value. His evidence shows he was posted to the appellant's Busia branch in the month of April 2003. He was not there when it is alleged George Onyango signed the pay in slip. The sum total is that P.W.1, Thomas Wandera Oyalo and DW 1 Paul Mitey gave evidence which they did not perceive personally. It was incumbent upon the Respondent to prove that Andrew Ooko Ochola actually took the money to the bank by calling him to testify. He shielded this piece of evidence to this detriment. It was upon him to prove that actually the bank's manager George Onyango received the money on behalf of the bank. In a nutshell the Respondent's evidence amounted to hearsay evidence. Such evidence remain worthless unless corroborated by persons who personally perceived the transaction. The Respondent relied on a document in form of a pay in slip. The provision of section 70 of the Evidence Act states as follows:

> *"If a document is alleged to be signed or to have been signed wholly or in part by any person, the signature or handwriting of much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting."*

The Respondent failed to comply with this provision of the law. I have already stated that the evidence of DW 1, Paul Mitey, over the issue cannot be relied upon because he was not there when the pay in slip is said to have been executed by George Onyango.

My conclusion over the matter is that the learned Senior Resident Magistrate misapprehended the point when she came to the conclusion that the Respondent had proved his case on a balance of probabilities. Had the learned senior Resident Magistrate seriously considered weight of the evidence presented and relied by the Respondent she would have come to the contrary view that his evidence were purely hearsay which needed corroboration in all material respects.

The appellant argued its second ground of appeal to the effect that the trial magistrate placed the burden of proving the Respondent's case on the appellant. Mr. Ashioya advocate for the Respondent did not address this court on this ground. In her Judgment the learned Senior Resident Magistrate said in part:

> *"On the witnesses that were left out by the plaintiff it is clear that both Mr. Onyango and Mr. Ooko have left the employment of the defendant and the plaintiff respectively. It was upon the defendant to call their former manager and not vice versa."*

The import of this statement is that the learned senior Resident magistrate placed the burden on the appellant to prove its innocence in the matter by summoning the evidence of its former manager. This is a great misdirection on the part of the trial magistrate. It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove that fact in order to succeed. The Respondent alleged that the appellant converted his money, hence it was incumbent upon him to discharge the burden of proving conversion was committed. He was bound to strictly prove that fact on a balance of probabilities. In this case the respondent miserably failed to discharge that burden. The Respondent's evidence on the alleged conversion was hearsay, circumstantial and inconclusive. It fell short of the standard of proof required in civil cases.

The final ground argued by the appellant was that the trial magistrate's award in respect of interest of 32% p.a. and general damages for conversion had no legal basis. Mr. Onyinkwa argued that the trial magistrate attached no reasons to the awards. On his part Mr. Ashioya was of the view that the learned Senior Resident Magistrate stated her reasons while making the awards. I have considered these powerful

submissions from both learned advocates. The record shows that the trial magistrate made an award in favour of the Respondent in the sum of Ksh.200,000/= as damages for conversion. The learned senior Resident magistrate took into account the fact that conversion was made in bad taste and the fact that the Respondent was doing extremely well from the evidence of daily bankings shown in the bank statements produced in evidence.

It is trite law that an appellate court should not disturb an award of damages unless the trial court has taken into account a factor it ought not to have taken into account or it failed to take into account something it ought to have taken into account or the award is manifestly high or low that it amounts to an erroneous estimate. In this case I am satisfied that the trial senior resident magistrate took into account relevant factors in assessment damages. She however failed to take into account the fact that the Respondent had prayed for interest which she awarded. This entitles this court to exercise its power on appeal to disturb the award. It is always desirable that where a court awards interest on a liquidated sum, that, the fact must be taken into account when considering damages say like in this matter. The Respondent was obviously cushioned by an award of interest. In the circumstances of this matter and in view of the award on interest I think the award of Ksh.200,000/= on account of damages for conversion was manifestly excessive hence the trial Senior Resident Magistrate committed an error..

The trial magistrate should have given minimal award of Ksh.20,000/= for purposes of justifying the fact that the Respondent had proved conversion and that he was entitled to damages. The appellant also contested the award of interest at the rate of 32% p.a. The trial magistrate said that the prayer on interest was not challenged. The appellant complained that the trial magistrate should have considered the provisions of section 26(2) of the civil procedure Act when awarding interest. In her Judgment the learned senior Resident magistrate said:

> *"There were no submissions on interest. There was also no evidence adduced by the defendant, that such monies do not call for interest. The interest rate at 32% p.a. is unchallenged. I order that the defendant do pay the plaintiff Ksh.200,000/= plus interest of 32% per annum from 27/9/2002 until the date of payment in full."*

The trial magistrate was obviously stating that the appellant should have called evidence to prove that such monies do not attract interest. Since there was no submission she formed the opinion that the Respondent had the right to receive the rate of interest as prayed in the plaint. The trial magistrate also misapprehended the point over this issue. It was incumbent upon the Respondent to prove that he was entitled to claim interest at the rate he asserted in his plaint. The record of appeal shows that the Respondent did not offer any evidence to prove that he is entitled to interest. He just plucked from the air that he is entitled to a rate of interest of 32% p.a. His advocate did not also submit over interest. The trial magistrate was of the view that the rate of interest of 32% p.a. was unchallenged. I agree with her to the extend that the appellant did not offer evidence to challenge the assertion. But it is clear also that it was not necessary for the appellant to offer contrary evidence when the Respondent had failed to lead evidence to prove that he was entitled to claim interest at a rate of 32% p.a. The trial senior Resident Magistrate misdirected herself when she came to the conclusion that the appellant did not challenge the rate of interest claimed by the Respondent. Had she carefully perused the appellant's defence dated 15th September 2003 she would have noticed that the claim was resisted at paragraph 6 of the aforesaid defence. That paragraph reads as follows:

> *"6. That the defendant denies that the plaintiff is entitled to general damages for conversion and also denies that the plaintiff is entitled to interest at the rate of 32% per annum on the said amount of Ksh.200, 000/="*

I have already stated that the Respondent should have led evidence to justify why he claims interest at a rate of 32% per annum. Since the Respondent failed to prove that fact, then the trial court should have exercised its discretion to award interest under section 26 of the Civil Procedure Act. In this case the trial magistrate awarded the rate of interest as prayed as though it was a matter of cause yet the same was not proved. The learned trial senior Resident magistrate therefore acted outside the laid down rules governing interest. There was no basis at all to award the interest rate of 32% p.a. At best the trial magistrate should

have awarded the rate within her discretion. In such cases the court will award interest at the contractual rate up to the date fixed for payment and thereafter at the usual court rates. But in this case there was no evidence that a contractual rate existed. In the circumstances the usual court rates prevailing at the time shall apply.

The upshot therefore is that this appeal must succeed. The appeal is allowed and the Judgment of senior resident magistrate dated 20th November 2003 is set aside and substituted with an order dismissing the plaintiffs suit. The appellant shall have costs of the appeal and those of the suit.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE