REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL 73 OF 1997

(From Original Civil Case No. 44 of 1996 of the Senior Principal Magistrate'sCourt at Kitui: Njeru Ithiga .Esq. of 20th June 1997)

PETER KANGETHE.....APPELLANT

VERSUS

GEOFFREY GIKONYO..... RESPONDENT

Coram: J. W. Mwera J.

Mr. Mulula Advocate for Appellant

Mr. Kalili Advocate for Respondent

Court Clerk Muli

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JUDGEMENT

In a plaint filed at Kitui on 15th March 1996 the Appellant who was the Plaintiff sued his partner Geoffrey Gikonyo, the Respondent, averring that the two in 1992 started off trading insecond-hand clothes at a certain market at Kitui. They prospered and bought a motor vehicle registration No. KYK Pick up - part of the partnership assets. That in 1995 the respondent drove the motor vehicle to Nyeri and convened it to his own use. He refused to return it to Kitui. Thatthat led to what amounted to dissolution of the partnership and each went his separate way.The Appellant further pleaded that after some time the Respondent demolished his part of theclothe business stall thereby causing the Appellant much loss and damage. That coupled with the deprivation or the Joint use of the said pick up, the Appellant was compelled to sue for reliefof declaration that destruction of his part of the stall and exclusive use of their pick up by theRespondent was unlawful and wrong. That the Respondent be ordered to reconstruct thedamaged stall and that the Respondent return their pick up in good order for the same to be soldand proceeds shared between them. He also prayed for lost profits and general damages for loss of business. That plaint was accompanied with an application for injunction - not a subject of this appeal.

A defence filed in court on 6th May 1996 denied the Appellant's claim. Instead it statedthat it was the Respondent in whose name the clothe seller's stall was licensed. He invited theAppellant to do business

with him there but then the latter acted in a certain dishonest way bywhich act the Respondent threw him out and once again exclusively occupied the stall. The Respondent denied ever demolishing any part of this stall and or that any part belonged to the Appellant. There was no reference to a motor vehicle in this pleading but the Appellant was put to strict proof of his claim.

The trial opened and the Appellant only testified about the joint purchase of the motorv ehicle registration No. KYK 217 from one Abdullah Mohamed. He produced the purchase agreement(s) to this effect and that is not in dispute. He told the Learned Trial Magistrate that both litigants traveled to Nyeri in early January 1995 because when the Respondent went with the motor vehicle there over December 1994 it developed mechanical problems and it could not be brought back to Kitui, So in January 1995 the two attempted to repair it at Jacaranda Garage Nyeri. When it appeared that the motor vehicle would move to Kitui, the Appellant left the Respondent behind to do just that - follow the Appellant to Kitui.That was not to be because the Respondent arrived to report that the motor vehicle developed more problems at Nyeri. TheAppellant produced the motor vehicle's log book and claimed that it used to bring to themSh.5, 000/- per day by its matatu operations.

In cross examination the Appellant claimed that this motor vehicle was jointly owned.He knew one David Ndungu who repaired it at Nyeri. That David Ndungu sued them in NyeriRMCC. 159/97 claiming storage charges since the motor vehicle had continued to lie at hispremises. That the two also had a joint business account at a bank in Kitui which they wereoperating even as at 30th December 1995. That at about December 1995 the motor vehicle wasready for collection. Then the Appellant surprisingly heard that it had been involved in anaccident. He himself never traveled to Nyeri to try to retrieve that motor vehicle.

Then the Respondent was heard. He too testified mainly about the motor vehicle beingjointly owned. But lying at Jacaranda Garage, Nyeri, and his story was that this followed abreakdown of the motor vehicle at a place called Gatitu when he and the Appellant weretransporting goods for some people from Kitui to Mweiga on 29th December 1995. They got amechanic at Nyeri who advised them to buy a broken lock arm for Sh. 6,000/-. They withdrewSh. 6,000/- on this account but the item could not be found in Nairobi. They went to Kitui butthe Appellant who was having the money changed his mind about buying the spare part, yet hesued the Respondent. That the Respondent was also sued by the garage owner at Nyeri for the storage charges of their motor vehicle. That at no time did he decline to get the motor vehicle back to Kitui. The Respondent was cross examined. He told the Learned Trial Magistrate that when the motor vehicle broke down and a mechanic advised them to buy a spare part, theywithdrew Sh.6, 500/- from a bank at Nyeri and paid for due charges because their own bank wasat Kitui. That the Respondent was not acing alone in the mailer and that he did not collude withthe garage owner to bring the suit alluded to fur any ulterior motive - against the Appellant'sinterest in the motor vehicle. He never left it in the custody of his relatives. And it was only theend of the cross-examination that the issue of the stall was touched on. The Respondent told theLearned the Learned Trial Magistrate that the Appellant had a grudge against him; he had suedthe Respondent first about the stall.

The Learned Trial Magistrate went over the pleadings and evidence as set out above andfound that as the motor vehicle lay at a garage at Nyeri both litigants were sued over it as regards storage charges. The case was still pending though; the Learned Trial Magistrate concludedfrom that angle that the Appellant could not blame the Respondent alone for the motor vehiclebeing in Nyeri and not at Kitui. He was of the view that the claim by the Appellant against the Respondent that the latter kept or retained the motor vehicle in Nyeri in order to deny the Appellant use or earning from its operations could not be sustained because both had been jointly sued for instructing Jacaranda Garage to repair and store the motor vehicle and for having not paid for its repairs and accrued storage and security charges. The Learned Trial Magistrate found that the litigants were still in a partnership when it was shown to him that the motor vehicle was still jointly owned by them. It broke down when the two of them were using it to deliver some goods to Mweiga; they together took it to a garage for repairs. That they withdrew money from their joint trading account to repair the motor vehicle. But that when they failed to take it away, the Nyeri garage owner sued them jointly. In fact none of the litigants told the lower court that their joint enterprise had ceased. This court agrees with the lower court that the Appellant failed to establish his claim. First he abandoned the stall case and did not show that the Respondent alone and by himself took their motor vehicle to Nyeri so that he could deny theAppellant of it or its trading operations. This court would have arrived at the

same conclusion as the Learned Trial Magistrate did. So the suit was dismissed and properly so. It was not shown to this court that the Learned Trial Magistrate was biased and therefore excluded the Appellants testimony etc. On appeal, the appellate court is bound to go by the certified lower court proceedings and nothing alleged outside it. If such allegations were to be allowed, only immense lots of chaos would reign in litigation. Both of them had then neglected or failed to retrieve that motor vehicle from there, it can be added, jointly or severally, That is the light inwhich the Learned Trial Magistrate dismissed the Appellant's claim in the suit that the Respondent had caused the motor vehicle to remain in Nyeri denying him the benefit of it or its operations.

When the Learned Trial Magistrate found that the 2 men still held a joint bank account,he went off to observe that they either pay the sum claimed in the Nyeri case together or theydefend the suit against them together. Because by clearing the claimed sum at Nyeri or jointlydefending the suit against them successfully they will be able to get the motor vehicle in Kituiand probably sell it and divide the proceeds or simply continue to trade with it since (with a jointbank account still in existence) their partnership is still in existence.

Having considered the pleadings, evidence and the lower court judgement in the light of the memorandum and the submission thereto, this court is inclined to and indeed it dismisses the appeal.

Going over the grounds of appeal as Mr. Mutula argued them, this court is not of the view that the Learned Trial Magistrate based his judgement on the Nyeri case. If anything it assisted him to see clearly the trading relationship of the litigants with their motor vehicle KYK 217 and how it got at Nyeri and ultimately saw them jointly going on appeal. It is a time-honoured practice that only the recorded proceedings form the basis of hearing on appeal and that the integrity of the lower court he guarded and maintained at all time, without allowing what could amount to unjustified and ungrounded claims of bias. We still record evidence in long hand in our courts and such a practice as to honour the record as certified must see to justice to the litigants.

The court further notes that no evidence was misinterpreted by the Learned TrialMagistrate. He approached it as laid before him and gave a conclusion this court thinks was proper.

In sum the appeal is dismissed with costs.

Judgment accordingly.

Delivered on 12th July 2000

J.W.MWERA

JUDGE