



REPUBLIC OF KENYA



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**Nyolmo v Rabadiya t/a Shruti Enterprises Hardware (Civil Appeal
159 of 2018) [2023] KEHC 19268 (KLR) (23 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 159 OF 2018
JRA WANANDA, J
JUNE 23, 2023**

BETWEEN

DAVID KIPSANG NYOLMO APPELLANT

AND

**NARAN LALJI RABADIYA T/A SHRUTI ENTERPRISES
HARDWARE RESPONDENT**

JUDGMENT

1. This Appeal arises from the Judgment delivered on 23/11/2018 in Eldoret Chief Magistrate's Court Case No 844 of 2016. In that suit, the Respondent had sued the Appellant claiming general damages for breach of contract plus costs and interests of the suit.
2. The background of the matter is that by the Plaintiff filed on 8/08/2016 through Messrs Kimaru Kiplagat & Co. Advocates, the Respondent alleged that on diverse dates in the year 2014 to 2016 the Appellant ordered and was supplied by the Respondent, several hardware merchandise amounting to Kshs 600,000/=, despite numerous pleas to have the Appellant pay, the Appellant refused and/or ignored to do so, as result, the Respondent suffered financial losses and the same has compromised the performance of his business which has led to uncalculated losses within the business.
3. The Appellant filed his Statement of Defence on 17/08/2016 generally denying the Respondent's claim.
4. The case then proceeded for trial. The Respondent and the Appellant each called 2 witnesses.

Respondent's evidence before the trial Court

5. PW1 was the Respondent, Maran Lalji. He testified that he ran a hardware and produced invoices allegedly issued for goods supplied to the Appellant. In cross-examination, he conceded that there written documents supporting what was supplied and part-payment done and that one Kiproop who was employed by the Appellant was the one who would collect the materials, the Appellant would



come to the shop and make delivery notes, he would make calls and the Respondent would deliver, the said Kiprop would come with the Appellant. In Re-examination, the Respondent stated that the Appellant was a client for many years, he would call then send Maxwell.

6. PW2 was one Maxwell Kiplimo. He testified that he is a driver, he knows the Respondent's hardware, he was taking building materials from them to the Appellant, he collected items from July 2014, they used to pay in instalments until 2016 when there were arrears, the Appellant would call in advance and he PW2 would then go to collect the items, he was keeping records of what was taken. He confirmed the invoices produced by the Respondent, he knows one Donald Banzu who worked for the Appellant but was not the who was collecting the items, Donald was dealing with the workers and not materials. In cross-examination, he too conceded that he had nothing to show that he worked for the Appellant, he did not have his book, the Respondent would issue invoices and he would take copies, the Appellant would call the hardware and he PW2 would go to collect, he was not paid to come and testify.

Appellant's evidence before the trial Court

7. DW1 was the Appellant, David Kipsang. He testified that the said one Maxwell Kiprop was not the one who used to collect the materials on his behalf but it was one Mr. Banza. He stated that he only saw the invoices much later,
8. DW2 was one Donald Banza. As a point of interest, he admitted that he was seated in Court when the Respondent's witnesses testified. He then testified that he works for the Appellant, he was the Appellant's foreman, he was the one receiving materials, the said Maxwell Kipsang was a casual.

Judgment of the trial Court

9. Upon considering the evidence and testimonies on record, by its Judgment delivered on 33/11/2018, the Court found that the Respondent had proved his case and on a balance of probability and entered Judgment in his favour in the sum of Kshs 600,000/= as prayed.
10. Being aggrieved with the said decision, the Appellant filed this Appeal vide the Memorandum of Appeal filed on 7/12/2018. 9 grounds were raised as follows:
 - i. That the learned trial Magistrate erred in law and fact in finding that the Respondent had proved their case on a balance of probability against the Appellant.
 - ii. The learned trial Magistrate erred in law by failing to consider the Appellant's submissions and evidence tendered during trial.
 - iii. That the learned trial Magistrate erred in law and fact in holding that the Appellant's agent was one Mr. Maxwell Rop.
 - iv. That the learned trial Magistrate erred in law and fact in considering the invoices produced by the Respondent despite the Appellant questioning its credibility hence reaching a wrong decision.
 - v. That the learned trial Magistrate erred in law and fact in finding that the Appellant owed the Respondent Kshs 600,000/=.
 - vi. That the learned trial Magistrate erred in law and fact in finding that there was contract of sale between the Plaintiff and defendant.
 - vii. That the learned trial Magistrate erred in law and fact in finding that the Defendant was to pay cots of the suit.



- viii. That the learned trial Magistrate erred in law and fact in finding that the Plaintiff supplied the Defendant with building material through one Maxwell Rop.
- ix. That the learned trial Magistrate erred in law intaking into account irrelevant issues and failing to take into account relevant issues.

Hearing of the Appeal

11. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellants filed their Submissions on 24/5/2023 through their Advocates, Messrs Onkangi, Onkangi & Associates and the Respondent filed on 14/12/2022 through Messrs Kimaru Kiplagat & Co.

Appellant's Submissions

12. Counsel for the Appellant submitted that the Respondent failed to prove his case on a balance of probability against the Appellant, to prove that the Appellant was indebted to him, the Respondent had the duty to establish that indeed delivered goods to the Appellant, a duty he failed to do as there was no delivery or proof of delivery of the alleged goods in the first place. He refuted the assertion that the alleged goods were delivered to the Appellant and urged the Court to consider whether the invoices on record were credible evidence so as to warrant the Respondent's success at the trial Court, whether there was a local purchase order issued to the Respondent and if also there are delivery notes to support the Respondent's claim that he delivered the goods, whether there was a valid contract for sale between the parties and whether one Maxwell Kiplimo, PW2, was an authorized agent for the Appellant within the meaning of the law of agency.
13. Counsel argued further that there is no evidence to indicate that he Appellant issued any local purchase order to the Respondent for supply of the alleged goods, the invoices that were produced by the Respondent contained serious errors rendering them defective and incapable of admission as evidence before the trial Court, the said errors were properly addressed in the Appellant's closing submissions but the trial Magistrate failed and/or ignored to consider their serious implications to the matter, the overall burden of proof was upon the Respondent to prove that on a balance of probabilities, he received a local purchase order from the Appellant and delivered the goods. He cited the case of *Re H (Minors)* [1996] AC 563 at 586 and the case of *Miller v Minister of Pensions* [1947] 2 ALL ER 372 and added that regarding the issue of a valid contract, there existed no contract between the parties, a fact that the trial Court failed to consider, the alleged agency relationship between one Maxwell Kiplomo (PW2) and the Appellant was not proved by any documentation evidencing that he had the authority to act as an agent of the Appellant. He cited the provisions of Section 6(1) of the *Sale of Goods Act* Cap 31 Laws of Kenya.

Respondent's Submissions

14. On his part, Counsel for the Respondent, on whether there was a contract between the parties, cited Section 3 of the *Sale of Goods Act*, Cap 16, Laws of Kenya in defining what constitutes a sale of goods contract. He maintained that from the record it is evident that the parties entered into an agreement on or about the year 2014 to the year 2016 wherein he was to supply the Appellant with building materials, it was the Respondent's testimony that the Appellant sent one of his employees and or agent by the name Maxwell Rop to collect the goods which were to be paid later by the Appellant, this continued until when the Appellant started defaulting in payment, the Respondent called PW2, the Appellant's said agent, Maxwell Rop who stated that he used to work for the Appellant and that on several occasions he was sent by the Appellant to collect buildings material from the Respondent's hardware and that the Appellant would make payments of the sourced materials. Counsel submitted



further that PW2 stated that there was no contract between the Appellant and the Respondent, however on cross-examination he admitted knowing the Respondent. He cited the cases of *William Muthie Muthami v Bank of Baroda* [2014] eKLR and *Ali Abdi Mohammed v Kenya Shell Company Limited* [2017] eKLR and submitted that a contract can be written, oral and/or express by conduct of the parties, a contract need not to be in writing but can be inferred from the conduct of the parties.

15. Counsel argued that all the witnesses who testified for and on behalf of the parties stated that they knew each other, they had daily business interactions prior to the filing of this matter, the Respondent did not just wake up one day and demand for payments from the Appellant as there must have been a relationship that existed between the parties, there existed a contract between the parties, the fact that the contract was not written is not fatal to the Respondent's case. Regarding whether the said Maxwell Rop (PW2) was an agent of the Appellant, Counsel submitted that during the hearing the said Maxwell Rop testified that that he worked for the Appellant and that he was the one being sent by the Appellant to go collect materials from the Respondent's hardware, the Defence witnesses denied knowing the said Maxwell Rop, however during cross-examination, they admitted that they knew him. On whether the Appellant owed the Respondent Kshs 600,000/=, Counsel submitted that during the hearing the Respondent produced invoices totalling up to Kshs 600,000/= which amount the Appellant was aware of but refused to pay, it was the evidence of PW2 that the Appellant took goods worth Kshs 600,000/= but did not pay for them, the Respondent having produced the invoices and having called a witness who received the said goods on behalf of the Appellant, was enough proof that the Appellant was indebted to the Respondent.
16. Regarding costs, Counsel submitted that costs are at the discretion of the Court and follow the event. He cited the cases of *Party of Independent Candidate of Kenya v Mutula Kilonzo and 2 others* and *Jasbir Singh Rai & others v Tarlochan Rai & others* [2002] eKLR.

Analysis and Determination

17. As the first appellate Court, the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter (See the case of *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123). This Court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and also in *Kiruga v Kiruga & another* (1988) KLR 348).

Issues for determination

18. In my view the issue that arises for determination is "whether on a balance of probabilities, the Respondent did prove that he supplied the Appellant with building materials amounting to Kshs 600,000/- and which amount remains unpaid"
19. The *Black's Law Dictionary* defines a contract as follows: -

"An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"
20. In *RTS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co, KG (UK Production)* (2010) UKSC14, [45] the Supreme Court of the United Kingdom stated as follows:

"...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not



upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

21. On implied contracts, the Court of Appeal in *Ali Abid Mohammed v Kenya Shell & Company Limited* (2017) eKLR, stated that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court stated as follows:

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.”
22. It therefore follows that a contract need not be in writing but can be inferred from the conduct of the parties. It must be noted that the elements of offer, acceptance and consideration must be proved. In implying a contract, the conduct of the parties remains paramount,
23. In *Charles Mwirigi Miriti v Thananga Tea Growers Sacco Limited and another* (2014) eKLR, the Court of Appeal reiterated that it is trite law that there are three essential elements for a valid contract., that is, an offer, acceptance and consideration.
24. In this case there was no written contract. Therefore, this Court is enjoined to ascertain whether the pleadings, the evidence and the general conduct of the parties reveal any contract.
25. At the trial Court, the Respondent called two witnesses in support of his case. The Respondent testified as PW1 wherein he stated that he deals in hardware business. He further testified that on diverse dates between 2014 and 2016 he entered into a contract with the Appellant for the supply of hardware merchandise. He told Court that the Appellant used to order for goods and pay at a later date. He also told Court that the Appellant used to send his agent one Maxwell Rop (PW2) to collected the said merchandise on his behalf.
26. Maxwell Rop himself testified that he used to work for the Appellant and on diverse dates between 2014 until 2016, he used to collect hardware merchandise from the Respondent on behalf of the Appellant. He also told Court that the Appellant used to call the Respondent in advance regarding the same. He also told the Court that the Appellant used to make the payments in instalments.
27. The Appellant also testified as DW1. He claimed that he did not have any contractual relationship with the Respondent for the supply of any hardware merchandise amounting to Kshs 600,000/= . He also denied the allegations that the said Maxwell Rop was his agent or that he had received any invoices from the Respondent.
28. PW1 and PW2 both gave consistent evidence as to the agreement that existed between the parties for the supply of hardware merchandise. The Respondent also produced invoices to show that the said good were delivered and that PW2 is in fact the person that delivered them. From the evidence tendered it is also not in dispute that the Appellant had been the Respondent’s customers for a while.



29. With the foregoing in mind, it is my finding that a valid implied contract existed between the parties. All the elements of a valid contract such as offer and accepted consideration and consent of the parties were present. The terms of the contract were also clear. I therefore find that the Respondent proved his case on a balance of probabilities and I accordingly find no reason to depart from the trial Court's findings that the Appellant is liable to pay for the materials collected.
30. On whether an agent-principal relationship existed between the Appellant and the said Maxwell Rop, *Bowstead and Reynolds on Agency* Seventeen Edition, Sweets Maxwell Page 1-001, defines such a relationship as follows:
- “... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.”
31. Existence of a consent was considered in the case of *Branwhite v Worcester Works Finance Ltd.* [1969] 1 A.C. 552 at 587 where Lord Wilberforce stated thus: -
- “While an agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from the agency.
32. From the evidence on record, it is not in dispute that the said Maxwell Rop, was an employee of Appellant for the period stated. Although the Appellant denied knowing the said Maxwell Rop, in cross-examination he admitted that indeed he knew him and that he was the one bringing the merchandise on his behalf. This turnabout raises doubts on the Appellant's credibility as a truthful witness. Further, DW2, one Donald Baraza also told the Court that he is an employee of the Appellant and that the said Maxwell Rop used to work as a casual for the Appellant. In re-examination, he further told the Court that the said Maxwell Rop could make orders on materials.
33. Needless to state, a principal-agency relationship can be created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his or her behalf. I find that in this instant case, an agency relationship was created between the Appellant and the said Maxwell Rop. The same can easily be discerned from the conduct of the Appellant's conduct.
34. In the present case, the burden of proof lay on the Respondent to prove that the Appellant owed him the alleged outstanding amount. It is trite law that he who alleges must prove. The Respondent claimed Kshs 600,000/= from the Appellant being the alleged outstanding amount. To prove his claim, the Respondent produced invoices issued in the name of the Appellant. I also note from the evidence adduced at the trial that the said evidence was uncontroverted by the Appellant and thus there is prima facie evidence that the Appellant owes the said amount. In any event, the Appellant did not deny knowledge of the invoices. He contention was that he only saw them much later. The trial Court Magistrate saw and heard the witnesses from both sides and chose to believe those from the Respondent's side. On this point, the Court of Appeal, in the case of *Kirua v Kiruga and another* [1988] KLR page 348 held as follows:
- “An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine



whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution.”

35. After going through pleadings, evidence and submissions on record, I do not find any grounds to fault the trial Court for its finding that the Respondent successfully discharged his evidentiary burden of proof and proved his case on a balance of probabilities. It is therefore the finding of this Court that this Appeal lacks merit.

Final Orders

36. In the circumstances, this Appeal is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE

