



REPUBLIC OF KENYA



**Okoro v Kanasembo Investment Limited (Civil Appeal E003 of 2024)
[2024] KEHC 14348 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E003 OF 2024
RE ABURILI, J
NOVEMBER 11, 2024**

BETWEEN

DANIEL OKORO APPELLANT

AND

KANASEMBO INVESTMENT LIMITED RESPONDENT

(An appeal arising out of the Judgement of the Honourable G.C. Serem in the Small Claim's Court in Kisumu delivered on the 19th December 2023 in Kisumu SCC No. E308 of 2023)

JUDGMENT

Introduction

1. The respondent sued the appellant DANIEL OKORO vide a statement of claim dated 25th September 2023 in which it sought Kshs. 668,000 together with the cost of the suit and interest from the 7th September 2023 till payment in full and interest on the costs.
2. The respondent averred that on or about the 21st August 2023, the appellant engaged it in the provision of services for catering, seating, public address systems, lighting and transport at an agreed amount of Kshs. 953,000 with the appellant required to pay 70% (Kshs. 667,100) of the said total amount before 5th September 2023 with the balance of 30% (Kshs. 285,900) to be paid before 7th September 2023.
3. It was the respondent's case that on the 2nd September 2023, the appellant paid it Kshs. 50,000 in a bid to honour the terms and conditions of the said agreement and subsequently the respondent provided the said services from the 5th September 2023 to 7th September 2023 but that the appellant subsequently failed to pay the remainder of the agreed sum of Kshs. 903,000 before the 7th September 2023.
4. The respondent further averred that on the 8th September 2023, the appellant in a bid to honour his obligations paid Kshs. 235,000 to the respondent however as at 20th September the same year outstanding amount and or balance owed by the appellant was Kshs. 668,000.



5. In response, the appellant filed a response dated 17th November 2023 stating that he only owed the respondent Kshs. 24,800 having paid the sum of Kshs. 331,200. The appellant further averred that the food as agreed was not supplied. It was the appellant's case that he never signed the agreement with the respondent and that the same was forged.
6. It was the appellant's defence before the trial court that he engaged the respondent on or about the 25th August 2023 to offer catering services at his deceased father's funeral and that the respondent gave him an invoice for the costs of the services at Kshs. 716,000. The appellant averred that on the 25.8.2023, he sent the respondent a commitment fee of Kshs. 50,000 via M-Pesa, Kshs. 30,000 on the 1.9.2023, Kshs. 50,200 on the 5.9.2023 paid by his son, Kshs. 145,000 on the 6.9.2023 via M-Pesa.
7. The appellant further averred that his son paid the respondent's driver Kshs. 10,000 for usage at the ferry, that on the 7.9.2023, his friend paid the respondent Kshs. 26,000 and Kshs. 20,000 on the 8th September 2023.
8. The appellant averred that collectively, he, his family and friends paid the respondent a total of Kshs. 331,200. It was his case that the respondent failed to supply foodstuff upon arrival at the appellant's home and as such, he would not pay the amount of Kshs. 360,000 that was to cater for food and thus the only amount that he owed the respondent was Kshs. 24,800.
9. In her judgement, the trial magistrate held that the allegations that the agreement relied on by the respondent was invalid for forgery of the appellant's signature was never proven by the appellant thus there was a valid contract between the parties herein and further that the appellant similarly failed to prove that he had paid the sums alleged in his response thus the sums still owing to the respondent was the claimed sum of Kshs. 668,000. The trial magistrate proceeded to enter judgement in favour of the respondent in the claimed sum of Kshs. 668,000.
10. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 15th January 2024 raising the following grounds of appeal:
 - a. The learned magistrate erred in law by failing to uphold the terms of the initial contract between the appellant and the respondent in its entirety and therefore arrived at an erroneous conclusion pertaining to and/or concerning the monies at the foot of the contract in question.
 - b. The learned trial magistrate erred in law and fact by disregarding and/or ignoring the pleadings filed by and on behalf of the appellant herein in particular the amount in question which has specifically been pleaded in accordance and in line with the law and rules pertaining pleadings.
 - c. The learned magistrate erred in law and in fact in holding that the respondent be awarded the sum of Kshs. 668,000, a finding emanating from an erroneous contract. Consequently, the decision of the learned magistrate is at variance with the pleadings, evidence and the submissions on record.
 - d. The learned magistrate misdirected herself by failing to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before her (trial magistrate) and thus arrived at an erroneous conclusion, contrary to and on contradiction of the uncontroverted evidence.
 - e. The learned magistrate erred in law and in fact and thus arrived at a slanted and erroneous decision therein, based on the failure to appreciate and/or discern the claim by and/or at the instance of the appellant; and



- f. The judgement of the learned trial magistrate does not capture issues for determination thereof and the reasons for such determination. Consequently, the judgement of the trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules.
11. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

12. The appellant submitted that the respondent's quotation drawn in the sum of Kshs. 716,000 that set out catering services to be provided and various unit prices constituted a valid offer and thus the trial court erred in finding that the same was a mere invitation to treat and thus by accepting the Kshs. 50,000 in partial payment of the sum said quotation, this demonstrated an acceptance of the offer and intention of the parties to be bound.
13. It was further submitted that the respondent never proved that food was supplied at the deceased's funeral and given that food was quoted to cost Kshs. 316,000, he was bound to pay Kshs. 356,000 out of which he had paid Kshs. 331,200.
14. It was submitted that the second quotation produced by the respondent as claimant's exhibit no. 5 for Kshs. 1,037,600, the said quotation came along with fresh terms and further no evidence was adduced by the respondent that the same was ever brought to the attention of the appellant who was only served with the 1st quotation of Kshs. 716,000.
15. The appellant submitted that by issuing another quotation containing different terms and prices, the respondent unilaterally introduced terms at variation with the first quotation thereby rendering the second quotation of no legal effect and not binding on the appellant. Reliance was placed on the Court of Appeal case of Kenya Breweries Ltd v Kiambu General Transport Agency Ltd 200] EA 398 as cited in Hopetoun EPZ (K) Ltd v Job Mwangi TA Africost Kenya 2019] eKLR.
16. It was submitted that the appellant was not bound by the signature affixed on the second agreement any more than he is bound by a forgery. Reliance was based on the Court of Appeal decision in Josephine Mwikali Kikenye v Omar Abdalla Kombo & Anor [2018] eKLR.

The Respondent's Submissions

17. The respondent submitted that the appellant sought to amend/rewrite the terms of a contract that he solely and willingly entered into thus releasing himself from performing his obligations under this contract.
18. It was further submitted that the law on allegations of fraud is settled in that such allegations must not only be pleaded and particularized but must be proved to a standard slightly above a balance of probabilities and slightly below beyond reasonable doubt as was held in the case of R.G. Patel v Lalji Makanji 1957] EA 314 and reiterated in the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR.
19. The respondent submitted that the appellant failed to tender evidence in support of his allegations on fraud as the burden of proof lies on the person alleging the fraud as was held in the case of Ndolo v Ndolo [2008] 1 KLR (G & F) 742.
20. It was submitted that the appellant's appeal was made with a bid to subject the respondent to hardship and injustice. The respondent submitted that it proved its case on a balance of probabilities and was thus entitled to the prayers sought in its statement of claim.



Analysis and Determination

21. This is the first and last appeal from the Small Claims Court on points of law only. This Court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

22. I have carefully considered the grounds of appeal, the evidence adduced before the learned trial magistrate as well as the parties’ rival written submissions. The main issue for determination before this court is whether the respondent proved her case before the trial court on a balance of probabilities to warrant grant of the orders sought.

23. The trial court record reveals that the appellant was sued by the respondent for Kshs. 668,000 being the outstanding balance owed following provision of services during the appellant’s father’s funeral. It was the respondent’s case that he entered into an agreement (Claimant’s Exhibit 4) with the appellant for the provision of services for catering, seating, public address systems, lighting and transport at a total amount of Kshs. 953,000 with the appellant required to pay 70% (Kshs. 667,100) of the said total amount before 5th September 2023 with the balance of 30% (Kshs. 285,900) to be paid before 7th September 2023.

24. The appellant’s response and testimony in court was that the aforementioned agreement was a forgery as he never signed it and that the signature therein was thus a forgery. Save for the appellant’s testimony, the appellant never adduced any evidence to substantiate his claims of forgery.

25. The law requires that fraud must not only be specifically pleaded but also strictly proved. Although the standard of proof of fraud is not proof beyond a reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims.

26. In the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR, the court dismissed the appeal as it was not demonstrated that the appellants had proved fraud to the required degree and stated that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. see *Ndolo vs Ndolo* (2008)1KLR (G & F) 742 wherein the court stated that “.. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases..” In case where fraud is alleged it is not enough to simply infer fraud from the facts.”

27. In the instant case, the allegation of forgery bordering on fraud was not specifically pleaded. No evidence was adduced to prove the allegation to the required degree or at all. There is no report made to the police to investigate an alleged forgery of the appellant’s signature. There is also no evidence that the appellant had only one fixed signature which he appended to all documents whenever he signed



- them. No evidence of a handwriting expert was called to prove that he was not the person who signed on the agreement for the services and goods rendered by the respondent.
28. The appellant further pleaded in his response to the claim that he received an invoice on email covering all the costs for the services to be offered by the respondent totaling to Kshs. 716,000 and that by paying the commitment of Kshs. 50,000, the said invoice became a binding contract between the parties herein.
29. I do note that what the appellant produced an invoice clearly titled as “QUOTATION FOR FUNERAL SERVICES”.
30. 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.
31. In my view, a quotation cannot in any way be a contract. It does not create any obligations between the parties that are enforceable and in this particular case, it merely amounted, to an invitation to treat.
32. That being said, the only valid legal agreement remaining binding the parties herein is the Agreement for Catering Services signed by both parties on the 28.8.2023 which agreement provided for the provision of services for catering, seating, public address systems, lighting and transport at a total amount of Kshs. 953,000 with the appellant required to pay 70% (Kshs. 667,100) of the said total amount before 5th September 2023 with the balance of 30% (Kshs. 285,900) to be paid before 7th September 2023.
33. Consequently, based on the evidence presented before the trial court, it is clear that the appellant owed the respondent based on the agreement signed on the 28.8.2023. The question that remains is whether the respondent was entitled to the amount claimed of Kshs. 668,000.
34. The respondent pleaded and this remained undisputed by the appellant that the appellant still owed her Kshs. 668,000 particularised as Kshs. 50,000 paid on the 2nd September 2023 and Kshs. 235,000 paid on the 8th September 2023.
35. Similarly, the appellant through his witnesses, RW1 (his son) testified that he paid the respondent Kshs. 50,200 on the 21.11.2023 and a further Kshs. 10,000 to the respondent’s driver. This testimony remained uncontroverted. Further RW3, a friend to the appellant’s family testified that on the 7.7.2023, he paid the respondent Kshs. 26,000. As these sums remained uncontroverted and were substantiated by M-pesa statements, it means that the total amount paid to the respondent was Kshs. 345,200.
36. Thus, the monies owed to the respondent was Kshs. 607,800.
37. In the end, I find that this appeal is partially successful to the extent that it alters the award made by the trial court to the respondent from Kshs. 668,000 to Kshs. 607,800.
38. The appellant shall pay costs of this appeal to the respondent assessed at Kshs 50,000 within 30 days of today and in default, execution to issue.
39. Save for the already assessed costs on appeal, this file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE

