



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL CASE NO. 242 OF 2018**

**MUSITANO ROCCO.....APPELLANT**

**-VERSUS-**

**ANIELLO STORELLI.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Kwale Resident Magistrate, Hon. B. Koech**

**delivered on 7<sup>th</sup> November 2018 in the Residents Magistrate's Court Case No.516 of 2018)**

**JUDGMENT**

1. On **8<sup>th</sup> December, 2017** the Plaintiff/Respondent filed a suit vide a **Plaint** dated **30<sup>th</sup> November, 2017** in which he sought to be refunded **Kshs.2,772,480/=** which he spent on behalf of the Defendant. He also prayed for costs of the suit.
2. It is alleged that the two parties had an oral Agreement that the Plaintiff/Respondent would be reimbursed all the expenses incurred during the course of the construction of the Defendant's/Applicant's house which he supervised. That the Plaintiff/Respondent went on to execute his mandate but it reached a time when the relationship between him and the Defendant/Applicant deteriorated and he abandoned the project. The Plaintiff/Respondent was replaced by one Carlo to continue with the works. When the Plaintiff/Respondent demanded to be paid back the expenses he had incurred, the Defendant/Plaintiff refused and this led to the filing of **CMCC No.516 of 2017 (Kwale)**.
3. The Defendant filed his defence on **12<sup>th</sup> March, 2018** whereby he denied each and every allegation contained in the Plaintiff.
4. Upon hearing the parties, the Learned trial Magistrate entered Judgment for the Plaintiff vide her Judgment dated **7<sup>th</sup> November, 2018** and concluded that:-

***"It is my considered view that the Plaintiff discharged his burden of proof when he produced receipts for cost of materials and labours totaling to Kshs.2,772,480/=. The Defendant disapproved this but did not show any proof of payment/purchase of construction materials or money sent the Plaintiff or proof of money sent to PW1, Mr. Balazi. It is my view that the Plaintiff has proven this case on a balance of probability against the Defendant even though there was no contract signed by the parties.***

***From the forgoing, I do enter Judgment for the Plaintiff for a sum specifically proved which is Kshs.2,772,480/=-."***

5. This decision aggrieved the Defendant/Respondent and he filed a Memorandum of Appeal on **26<sup>th</sup> November, 2018** citing the following grounds.

***1) That the learned Magistrate erred in law and in fact in holding contrary to the preponderous of evidence on record that the Plaintiff had proved its case on a balance of probability and on preponderous of evidence.***

***2) That the learned trial Magistrate erred in law and in fact in failing to appreciate that there was no direct evidence to show that indeed the Plaintiff did any constructions.***

***3) That the learned trial Magistrate erred in law and in fact in failing to appreciate the evidence that was placed before her and in taking into account extraneous issues in reaching a decision hence arrived at a decision that was erroneous and against the evidence that was placed before her.***

4) *That the learned trial Magistrate erred in law and in fact by taking into account factors she was not supposed to consider and failing to take into account factor she ought to have considered and in making assumptions while arriving at the final decision on damages that was manifestly wrong and erroneous as it was inordinately high.*

5) *That the learned trial Magistrate failed to appreciate the submissions, case law and judicial precedent that was placed before her and in awarding the principal sum hence the award is erroneous.*

6) *That the learned trial Magistrate erred in law and in fact in making a decision that did not take into account the Appellant defence as set out in the defence, witnesses statement, evidence and the Defendant's submission hence made a decision based on issues that had neither been pleaded nor placed before her for determination.*

6. The Appellant filed a Record of Appeal on 25<sup>th</sup> July, 2019 and on 18<sup>th</sup> September, 2020, the same was admitted for hearing with directions that the parties dispose of the appeal by way of written submissions. The Appellant filed his written submissions on 3<sup>rd</sup> November, 2020 while the Respondent filed his on 19<sup>th</sup> November, 2020.

### **Analysis and Determination**

7. I have thoroughly read through the Grounds of Appeal in the Memorandum of Appeal (in appreciation of the same), the proceedings of the lower court, written submissions of both parties, the cited statutory case law in consideration of the Appeal.

8. It is trite law that an appellate court of first instance on an Appeal has jurisdiction to analyze and re-evaluate evidence on record and come up with an independent conclusion, either agreeing or disagreeing with the trial Magistrate on a finding of fact and the application of the law. This, the court does this while being cautious of the fact that it neither saw or heard the witnesses testify in the first instance (see the case of **Selle & Another ..Vs.. Associated Motor Boat Co. Ltd (1968)EA 123**).

9. With regard to the first and second grounds of Appeal, I find that the learned trial Magistrate expressed herself in the words quoted verbatim at paragraph 4 of this Judgment. She concluded that after evaluating the evidence of PW1 who was the contractor known to both the Appellant and Respondent, she entered Judgment for the Respondent in the sum of **Kshs.2,772,480/=** together with costs.

In his statement in chief, PW1 stated as follows:-

***“I started constructing the house in 2013. I was called by Aniello Storelli. I knew Aniello and the other guy Musituni Reco. I met him at the restaurant while they were together. When I met them (Plaintiff and Defendant) we went to the Defendant's plot which had a perimeter wall. I continued construction and Aniello was left to manage...”***

PW1 (Respondent) herein gave similar testimony. He stated thus:-

***“The house I was supervising construction, I started in 2015. I was not doing the work directly, but Mr. Balozi was doing the construction..... I was bringing materials and giving to Balozi to construct. I was being given receipts. I was paying the workers through Balozi. I paid all architectural and approvals.”***

On cross-examination, the evidence was not dislodged. He even gave a specific figure he paid for approvals.

10. In his evidence in chief, DW1 admitted that he knew the Respondents herein and denied that he had an agreement with him. Hard pressed during cross-examination, DW1 stated:-

***“Aniello knew about the construction and we spoke many times. I did send money to Aniello to pay for workers while in Italy. I paid 5000 Euros to him. It was a gift to him”.***

11. Having read through the record, and in consideration of the admissions in the evidence of PW1 and PW2, which was not dislodged by the evidence of DW1, I find that the Learned trial Magistrate was right to come to the conclusion that indeed the Respondent was acting under the instructions of the Appellant and carried out the works at his own cost. In conclusion, I confirm the trial Magistrate's finding and hence hold that grounds 1 and 2 must fail.

12. With regard to grounds 3, 4, 5 and 6, on close scrutiny of the evidence that was adduced by the witnesses before the trial court, I find that these grounds have been addressed by the finding and holding of grounds No.1 and No.2. However, it suffices to observe that the weight of the Appellant's submissions is concerned with the proof offered for the special figures sought.

13. I have perused a long list of English decisions on the above subject. I have come across a principle running through them and appreciate the words of ALERSON, J. in the case of **Hadley...Vs...Baendale (1885) 9 Ex341** to the effect that:-

***“We think it is a proper rule in such a case as the present one, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e according to the usual course or thing from such of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, the probable result of the breach of it”.***

14. In the instant case, the parties expected that one party would supervise and incur expenses on behalf of the other during construction of a house whereby the beneficiary party would pay back the expenses. The Respondent did perform, to his detriment part of his bargain and was not rewarded as agreed. The Appellant on the other hand, and trickily, tells court that he gave the Respondent 5000 Euros as a gift of appreciation. He clearly avoided admitting that it was to be part payment of the work being done. This was not so. This wiped out his defence.

15. In my view, the provisions of Article 159 of the Constitution 2010 and Sections 1A, 1B and 3B of the Civil Procedure Act (Cap 21 Laws of Kenya) exist to provide remedy for a litigant who deserves justice in such misfortune. The need to do justice based on factual situations is compelling. For instance, a house was built, it is occupied by the Appellant who has admitted that indeed he is an acquaintance of the Respondent. A witness, PW1 confirms that he met the Respondent and the Appellant at the plot. He said that he constructed the house together with the Respondent who had been left to manage the construction by the Appellant. He also confirmed in cross-examination that the Respondent, who is crying for justice, paid for the supplies, construction materials and workers. Further, while the Respondent produced receipts to prove his claim, the Appellant did not call any proof of the expenses he claimed to have paid for in the construction.

16. In regard to his evidence, I am persuaded by the decisions relied upon by the Respondent being:-

a) **Nicholas Angwenyi Siro T/A Riverside Continental Resort... Vs...Finlay Kirui & Another (2019)eKLR**, where Majanja J. held that:-

***“The law requires that the special damages must be pleaded and proved according to the nature of the claim and in this case a claim for substantial loss of profit cannot stand based on one report whose basis is doubtful. I therefore reject the claim for loss of business”.***

b) **Dan Macharia Kamau...Vs...Stanley Mwangi Kimamo (2007) eKLR** where Makkhandia JA stated:-

***“I do not think that the only way to prove special damages is by documenting evidence. Special damages can as well be proved by oral evidence and it is upto the party challenging the same to counter such evidence by cross-examination or by any other evidence. If a witness states in his oral evidence that the special damages incurred amount to this and he is not challenged at all, I do not think that the court will discount such evidence merely because of lack of receipts or any other document to support the claim”.***

17. In view of my analysis and re-evaluation of the evidence that was adduced before the trial court with regard to the Grounds of Appeal raised by the Appellant, I find and hold that the trial Magistrate was right in finding in favour of the Plaintiff/Respondent, and accordingly dismiss the Appeal with costs to the Respondent.

18. I also proceed to award the Respondent costs and interest as awarded by the trial court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 4TH DAY OF FEBRUARY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.