



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 521 OF 2019

ALICE WANJIRU RUHIU.....APPELLANT

VERSUS

MESSIAC ASSEMBLY OF YAHWEH.....RESPONDENT

(Being an appeal from the judgment and decree of Mr. P.N Gesora Chief Magistrate

delivered on the 06/08/2019 in Milimani CMCC 1848 of 2018)

JUDGMENT

1. Alice Wanjiru Ruhii and Messiac Assembly of Yahweh hereinafter referred to as “the appellant” and “respondent” were the plaintiff and defendant respectively in Nairobi Civil case No. 1848 of 2018. The appellant vide the plaint dated 20th February 2018 claimed for USD 24,417.19 which she had paid on behalf of the respondent in her capacity as the respondent’s agent in the publication and printing of its bibles. She also claimed to be paid the money at the prevailing exchange rates at the time of payment plus interest at 14% from 5th April 2016 and costs.

2. The respondent filed a defence dated 20th April 2018 denying the claim in the plaint and called for strict proof. It particularly denied ever having entered into a contract with the appellant or any agreement at all. After the full hearing judgment was delivered in favour of the respondent.

3. Aggrieved by the decision, the appellant filed through J. M. Mugo & Company advocates as follows;

a) *That the learned magistrate erred in law by striking off the suit.*

b) *That the learned magistrate erred in law and in fact in failing to consider and give probative value to evidence adduced by the appellant in support of her claim for refund of the USD 24,417.19 plus interest and costs as pleaded in the Plaint.*

c) *That the learned magistrate erred in law and in fact in failing to find that the respondent did not prove how they paid for the bible production in full nor did they call their alleged agent who made payments.*

d) *That the learned magistrate erred in law and in fact in failing to take into consideration that the appellant was part and parcel of the bible production team having been so appointed by the respondent.*

e) *That the learned magistrate erred in law and in fact in failing to appreciate that the standard of proof required from the parties to the suit and from the appellant in particular was on a balance of probability and on the strength of the evidence adduced, should have tilted in the appellant’s favour.*

f) *That the learned magistrate erred in law and in fact in failing to take into consideration and to appreciate that the evidence by the appellant was not rebutted nor controverted by the respondent and particularly the fact that the respondent did not pay fully for the bible production works.*

g) *That the learned magistrate erred in law and in fact in failing to consider the consent that was granted by the appellant by the respondent’s media Board to start the bible production work on behalf of the respondent.*

h) *That the learned magistrate erred in law and in fact in failing to consider the contract signed by the appellant and Nanjing Amity*

Printing Company Limited and the terms therein and which ensured that the Bible production commenced.

i) That the learned magistrate erred in law and in fact in failing to consider the overwhelming evidence adduced by the appellant and in particular that the defendant did not pay whether through their alleged agent or to Nanjing Amity Printing Company Limited the costs for the bible production works.

j) That the learned magistrate erred in law and in fact in failing to consider that the appellant having been given the go ahead by the respondent to print the bibles, she was entitled to be indemnified for the expenses incurred and in this case the payment of the balance of the production costs being USD 24,417.19.

k) That the learned magistrate erred in law and in fact in failing to grant the prayers sought by the appellant in the suit.

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions through their advocates.

5. In the trial court the appellant testified that on 24th April 2013 she was contracted by the respondent to negotiate printing of the respondent's Kiswahili bibles with a Chinese Company known as Nanjing Amity Printing Co. Limited which she did. After lengthy discussions the parties agreed on printing 16,000 copies for USD 96,900. The respondent proceeded to pay 75% of the printing costs out of which Kshs. 2,755,500/= was retained and remitted to her by Bible Africa.

6. The Bibles were printed and shipped into the country on 15/08/2013 and were received by the respondent who were obligated to settle the 25% of the outstanding balance of the printing cost amounting to USD 24,417. The respondent refused to pay the balance despite several demands and requests. In a bid to preserve her honour and cordial business relationship with the printing company the appellant paid the said balance which she claims from the respondent.

7. The respondent testified through one witness bishop Peter G. Kihara (DW1). It was his evidence that the contract the respondent entered into was with Alex Njenga of Bible Africa and not the appellant. The contract between Bible Africa and the respondent was dated 26th April 2013 and was availed to the court. DW1 insisted that the appellant only acted as a representative, servant and or agent of the said Bible Africa. He stated that all financial obligations due and owing from itself to Bible Africa for the printing of the bibles were fully paid off and so the respondent did not owe the appellant any money.

8. Ms. Irungu for the appellant submitted that the appellant had been appointed by the respondent as its agent for purposes of coordinating the production and publication of the respondent's Kiswahili bibles. That this was consented to by the respondent's managing editor as could be seen from the email correspondences which signified an agency relationship.

9. She relied on the case of **Jackson Ngechu Kimotho vs. Equity Bank Limited & Another (2013) eKLR** where Justice Odunga quoted with approval **Yafesi Walusimbi vs Attorney General of Uganda (1959) EA 223** where it was held citing **Birmingham and District Land Co. vs L and Nw Rly Co. (1887) 34 Ch D 261**:

“A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. There is a large class of cases, chiefly arising under the law of principal and agent, where one man employs another to do a thing which the employer apparently has a legal right to direct to be done. The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to case of principal and agent, there are other cases which it is not necessary to examine, but they all proceed upon the notion of a request which one makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so. The word “indemnity” means to express a direct right either at law or in equity to indemnify as such and this right has to be contrasted, and not for a moment to be confounded with the right to damages which arises either from a breach of contract or from tort.”

10. Counsel submitted that despite being allegations of the payment of the outstanding balance to Bible Africa, no evidence was adduced by the respondent to support the same. The appellant on the other hand produced an invoice from the publisher and bank transfer confirming the amount that was owing and she had paid it. She relied on **Section 107 of the Evidence Act** states that;

i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

11. She further relied on the case of **Kenya Pipeline Company Ltd v Corporate Business Forms (2019) eKLR** Lady Justice Mary Kasango in a similar matter stated;

[22] “The Plaintiff, particularly through the report presented by PWC, clearly demonstrated, on a balance of probability, that the duty was either not paid or under paid by the Defendant. What other conclusion can one reach when the Plaintiff, through the evidence of PWC, stated that some import entry numbers used in respect to clearance of some consignments of the Plaintiff related to clearance of good of other third parties. Further there are correspondence by National Bank of Kenya which confirm that some of the banking slips, presented by the Defendant, bore stamp or banking staff signature which were different to those being used by the bank. When PWC's report revealed those irregularities in the clearance of the Plaintiff's goods the Defendant had an evidential burden to shift in order to prove the banking slips were genuine and that indeed the taxes were paid. The court of appeal in the case

Mbuthia Macharia v Annah Mutua & Another [2017] eKLR discussed the burden of proof and stated thus:

[16] “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

[23] “The Defendant was the one who supplied the documents to the Plaintiff representing payment to KRA. The Defendant therefore bore the evidential burden of proof to prove that that payment was indeed made to KRA. The Defendant failed to shift that burden of proof.”

12. Counsel submitted that the respondent had a responsibility to pay for the production work as per the terms of the contract and it was not the appellant’s responsibility to pay for the bibles. Further that it was only just that the appellant be reimbursed the amount she expended with interest from the date when she formally demanded for the money.

13. Mr. Mutua for the respondent submitted that the respondent entered into a contract with Bible Africa on 26/03/2013 for production of bibles and that the signatories to the contract were Rev Alexander Wanjenga and Bible Africa who are not parties to the suit. That the appellant’s name appears nowhere in the contract.

14. He drew the court’s attention to the Messanic Assembly of Yahweh Kiswahili Bible Production completion final report in which lines 4 and 5 show that the project was submitted by the respondent through Alexander Wanjenga director of Bible Africa.

15. He further referred to page 24 of the record of appeal incorporating the final report dated 18th June 2014 sub titled Financial Management that states:

“All payments were made from the Media Board Account to Alexander Wanjenga in the Bible Africa Bank Account for onward transfer to the production Centre. Alexander Wanjenga was the official agent through whom all the funds were channeled”

16. Counsel submitted that there were no dues owing from the respondent to the appellant. He added that the appellant’s record of appeal is not only hollow but bears the full hallmarks of deceit. He argues that the record of appeal is dated 22/02/2016 two years after full payment by the respondent had been acknowledged by Bible Africa for the amount paid without any mention of the appellant.

17. It is his submission that the trial Magistrate stated that the appellant did not handle funds as she was the project production coordinator and if she had a claim, then she should have sued Bible Africa who introduced her to the respondent. He urged this to court to dismiss this appeal with costs.

Analysis and Determination

18. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. See ***Selle & another Vs. Associated Motor Boat Co. Ltd & others (1968)E.A 123 Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.***

19. Having considered the grounds of appeal, evidence on record and both submissions and authorities cited I find the main issue falling for determination to be:

a) Whether she proved her claim against the respondent on a balance of probabilities.

20. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

107 “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

21. I rely on the case of **Muriungi Kanoru Jeremiah vs Stephen Ungu M’warabua [2015] eKLR** where the court held as follows with regard to the burden of proof:

“...As I have already stated, in law, the burden of proving the claim was the appellant’s including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed

herein.”

22. I also refer to **The Halsbury’s Laws of England, 4th Edition, Volume 17**, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

23. The appellant submitted that the learned magistrate erred by not taking into consideration and appreciating the evidence by the appellant that they had made the payments and particularly the fact that the respondent did not pay fully for the bible production works. Despite there being allegations of payment of the outstanding balance to Bible Africa, no evidence was adduced by the respondent to support for the same.

24. The appellant on the other hand was able to produce evidence to show that she had paid the outstanding balance of USD 24,417.19. She also produced copies of email correspondences between herself, respondent and several others.

25. An email dated 24th April 2013 has been cited as the “letter of appointment” of the appellant as the respondent’s agent for the production and publication of the bibles. I have read the email which is document No. 1 on the appellant’s document. The said email was by one Dan Mahiri the respondent’s managing editor. In it consent was given to the appellant to process the publication together with Mr. Alex Wanjenga. From the record the latter is the managing editor of Bible Africa.

26. Also on record is a drawn contract between the respondent and Bible Africa. It is signed on 26th April by Bishop Peter Githinji Kihara (for respondent) and Rev. Alexander Wanjenga MD of Bible Africa.

27. The appellant produced a contract between the respondent and Nanjing Amity Printing Co. Ltd (the Printer). It is signed by the respondent ONLY on 18th June 2013. Condition no. 5 of this contract states:

“Terms of payment: CIF Nairobi Kenya: USD 5.39 copy for Vinyl; CIF Nrb Kenya: USD 10.66/copy for Cromwell Bonded leather. 75% down payment to be paid by T/T within 10 days after the date of confirming orders, and the balance of 25% will be paid before the cargo being shipped on board.”

28. According to the available evidence the cargo was received by the respondent on 30th September 2013. It was signed for by:

(i) Peter G. Kihara Wanjenga (respondent’s director).

(ii) Denis Oigara (Secretary Media board).

(iii) Rev. Alex – Director Bible Africa.

29. The only question that arises is how the bibles were shipped by the printing company before payment for the balance was made in breach of the contract signed on 18th June 2013. If indeed the appellant was the respondent’s agent for the production and printing as claimed why was she not at hand to receive the bibles on arrival?

30. The appellant in her witness statement stated that upon payment of the 75% by the respondent to Bible Africa she was paid Kshs 2,755,500/=. Why was Bible Africa paying her Kshs 2,755,500/= if there was no agreement between them?

31. Interesting enough the appellant at paragraph 5 of the plaint pleads as follows:

“The Plaintiff avers that, the Defendant confirmed the above costing and proceeded to pay the 75% of the said production cost to the Printing Company through an entity known as Bible Africa out of which Kshs. 2,755,500 was retained for further remittance to Amity.”

32. She confirmed that indeed the 75% payment was made through Bible Africa out of which Kshs 2,755,500/= was retained for further remittance to the publisher and printer. There is further evidence that indeed the Kshs 2,755,500/= was given to the appellant. What was this money for Paragraph 5 of the plaint clearly sets out what it was for – ‘further remittance to Amity’.

33. This evidence goes further to show that the appellant had a special arrangement with Bible Africa and not the respondent. The respondent had an engagement with Bible Africa who in turn had an arrangement with the appellant. Even the email of 24th April 2013 by Mr. Dan

Mahiri states that the appellant had to work in conjunction with Mr. Alex Wanjega who is of Bible Africa.

34. Among the documents produced by the appellant and in particular the email from Mr. Dan Mahiri to Alex Wanjenga dated 9th July 2014 and copied to the appellant it is clear that the respondent had made all payments into Bible Africa's Equity Bank account.

35. With all these push ups and downs the appellant ought to have demanded for a refund of whatever she may have paid to the printing company in 2016 from Bible Africa with whom she had a deal in particular Rev. Alex Wanjenga. Bible Africa should have been a party to these proceedings for the real truth to come out. It could have confirmed if indeed the respondent had remitted to it all the money due as claimed by the respondent.

36. In the circumstances of this case the court has the appellant's word against that of the respondent. The trial magistrate weighed all this and came to the correct conclusion that the appellant had failed to prove her case as required by law. I find no reason to make me fault the learned trial magistrate.

37. The upshot is that the appeal lacks merit and is dismissed with costs. The judgment by the trial court is upheld.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 1ST DAY OF JULY, 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG'UDI

JUDGE