



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 49 OF 2017**

**1. ALFRED NDIANG'UI GICHOHI.....1<sup>ST</sup> APPELLANT**

**2.ANN MUMBI NDIANG'UI.....2<sup>ND</sup> APPELLANT**

**3.ANN MUMBI NDIANG'UI**

**T/A CUMULUS SERVICES COMPANY.....3<sup>RD</sup> APPELLANT**

**-VERSUS-**

**1.WILLIAM GITITI.....1<sup>ST</sup> RESPONDENT**

**2.BIASHARA SACCO SOCIETY LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

***(Appeal from the judgment and decree of the Cooperative Tribunal Case no. 4 of 2013 delivered on 7<sup>th</sup> November 2017)***

1. The Appellants ALFRED NDIANG'UI GICHOHI, ANN MUMBI NDIANG'UI who are husband, wife and their business entity CUMULUS SERVICES COMPANY were members of the 2<sup>nd</sup> Respondent Sacco society where they operated some accounts. The 1<sup>st</sup> Respondent WILLIAM GITITI was a field officer and agent of the 2<sup>nd</sup> Respondent BIASHARA SACCO SOCIETY LTD 's agent. According to evidence, he would collect member contributions and record them in duplicate cards which he would sign together with each member. He retained the 1<sup>st</sup> respondent's copy while the member would retain his or her own. At the end of each month he would surrender the card to the 2<sup>nd</sup> Respondent who would issue a receipt for the member's contributions.

2. The appellants' claim was that the 1<sup>st</sup> Respondent had collected the sum of Kshs. 1,235,500/- from them but failed to remit to the 2<sup>nd</sup> Respondent, causing them to lose their savings.

3. The matter was heard and the tribunal dismissed the claim for lack of evidence provoking this appeal, on the following grounds; That

*a) The tribunal erred in failing to appreciate that the evidence of the Appellants on how the money was lost was corroborated by the statement of the 1<sup>st</sup> Respondent, who admitted that he received the money from the Appellants and destroyed the original documents. The 1<sup>st</sup> Respondent further admitted to have forged the documents that he submitted to the 2<sup>nd</sup> Respondent.*

*b) The tribunal erred on relying on forged documents which the 2<sup>nd</sup> Respondent relied upon as proof that the money the Appellants claimed was not paid by them to the 1<sup>st</sup> Respondent, as the 2<sup>nd</sup> Respondent's agent. These documents had been proved as forgeries by the document examiner and the 1<sup>st</sup> Respondent admitted to forging the said documents in his statement to the police.*

*c) The tribunal erred in expecting the Appellants to have the custody of the documents the 1<sup>st</sup> Respondent admitted to have destroyed and forged.*

*d) The tribunal erred in finding that the statement recorded by the 1<sup>st</sup> Respondent to the police was under duress in the absence of anything to suggest so.*

4. The issue for determination is

**a) Whether the Appellants proved their claim of Kshs. 1,235,500/-on a balance of probabilities.**

THE EVIDENCE

According to the 1st appellant he had 2 Accounts with the respondent while his wife had one – numbers 418, 845 and 1270. That the 1st respondent always served them from their home – that there were 2 forms- one would be left with the member, the other the 1st Respondent would take with him. He referred the court to the sample forms in his bundle of documents. At the end of every month, the account would be reconciled and a receipt be issued for total contribution received during the month. He attached sample receipts. The collections were taken on a daily basis except on Sundays.

From the month of March 2011, he found that certain amounts collected were not credited to their accounts. He set out the tables below.

<b>Account Number 6432-01-00418 in the name of Alfred Ndiangu'i</b>			
	Money paid to the 1 <sup>st</sup> respondent	Money forwarded to the 2 <sup>nd</sup> Respondent by the 1 <sup>st</sup> Respondent	Shortfall (Money lost)
<b>YEAR 2011</b>	KSHS.	KSHS.	KSHS.
January	31,000.00	31,000.00	0
February	26,000.00	26,000.00	0
March	33,000.00	14,500.00	18,500.00
April	30,000.00	12,500.00	17,500.00
May	31,000.00	25,000.00	6,000.00
June	30,000.00	24,000.00	6,000.00
July	30,000.00	25,000.00	5,000.00
August	29,000.00	22,000.00	7,000.00
September	31,000.00	18,000.00	13,000.00
October	31,000.00	7,000.00	24,000.00
November	30,000.00	3,000.00	27,000.00
December	31,000.00	2,000.00	29,000.00
<b>YEAR 2012</b>			
January	31,000.00	2,000.00	29,000.00
February	29,000.00	2,000.00	29,000.00
March	31,000.00	1,000.00	30,000.00
April	30,000.00	2,000.00	28,000.00
May	62,000.00	8,000.00	54,000.00

June	30,000.00	1,000.00	29,000.00
July	31,000.00	4,000.00	27,000.00
<b>TOTAL</b>			<b><u>377,000.00</u></b>

**Account Number 6432-01-00845 in the name of Ann Mumbi Ndiangu'i**

January	31,000.00	31,000.00	0
February	26,000.00	26,000.00	0
March	33,000.00	14,500.00	18,500.00
April	30,000.00	22,000.00	8,000.00
May	31,000.00	25,000.00	6,000.00
June	30,000.00	24,000.00	6,000.00
July	30,000.00	25,000.00	5,000.00
August	29,000.00	22,000.00	7,000.00
September	31,000.00	18,000.00	13,000.00
October	31,000.00	7,000.00	24,000.00
November	30,000.00	4,000.00	26,000.00
December	31,000.00	1,000.00	30,000.00

**YEAR 2012**

January	31,000.00	2,000.00	29,000.00
February	29,000.00	2,000.00	27,000.00
March	31,000.00	1,000.00	30,000.00
April	30,000.00	2,000.00	28,000.00
May	96,000.00	8,000.00	88,000.00
June	30,000.00	1,000.00	29,000.00
July	31,000.00	4,000.00	27,000.00
<b>TOTAL</b>			<b><u>401,500.00</u></b>

**Account Number 6432-01-01270 in the name of Cumulus Services**

January	31,000.00	31,000.00	0
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February	26,000.00	26,000.00	0
March	33,000.00	21,500.00	11,500.00
April	30,000.00	12,500.00	17,500.00
May	31,000.00	16,000.00	15,000.00
June	30,000.00	1,000.00	29,000.00
July	30,000.00	7,000.00	23,000.00
August	29,000.00	4,000.00	25,000.00
September	31,000.00	1,000.00	30,000.00
October	31,000.00	6,000.00	25,000.00
November	30,000.00	3,000.00	27,000.00
December	31,000.00	1,000.00	30,000.00
<b>YEAR 2012</b>			
January	31,000.00	2,000.00	29,000.00
February	29,000.00	2,000.00	27,000.00
March	31,000.00	1,000.00	30,000.00
April	30,000.00	2,000.00	28,000.00
May	62,000.00	8,000.00	54,000.00
June	30,000.00	1,000.00	29,000.00
July	31,000.00	4,000.00	27,000.00
<b>TOTAL</b>			<b><u>457,000.00</u></b>

By a letter written on 3rd August, the 2nd respondent informed them that the 1st respondent had been suspended for gross misconduct. Upon visiting the SACCO offices, he learnt that the misconduct was misappropriation of client's money. That is when he learnt that some receipts were missing. He testified that he realized that the 1st respondent was lying to him about missing receipts. He reported to the Sacco who called him to a meeting where the 1st Respondent allegedly admitted to misappropriating the money.

When the Sacco failed to take action against the 1st respondent he reported to Nyeri Police Station where the 1st Respondent was called. He testified that upon the 1<sup>st</sup> respondent's arrival at the Police station, he admitted misappropriating the money and the police did not take any action because according to the 1st appellant, the 1<sup>st</sup> respondent made a commitment to refund the money. When he failed to pay the money 1st appellant wrote to a demand letter to the SACCO 2nd Respondent who requested him to bring documents supporting his claim.

He testified that there were forgeries committed by the 1st Respondent at the 2nd respondent offices.

On cross-examination he told the tribunal that he had been a member of the Sacco since 2008. That the 1st Respondent always endorsed on his (1st appellant's card) every time he collected money from him. He said he could not confirm how he had arrived at the missing sum of money neither did he have evidence of his contributions for the months he alleged to have lost money. He said he used to file away his receipts. That despite reporting to the police he did not have a police abstract that there was evidence that 1st Respondent had committed forgeries. He did not have audit report from his company. He claimed that the 1st Respondent made him believe that receipts were with his wife – the 2nd appellant – that he had also guaranteed the 1st Respondent a loan in 2011.

On re-examination he opined that the 1st respondent could have destroyed the cards/receipts in the custody of the 2nd respondent.

That the 2nd appellant was misled to believe that the receipts were given to him.

The 2nd appellant's testimony agreed with 1st appellants to the extent that 1st respondent would collect their contribution from them at their shop and they would both sign the cards. That when they received the latter about the suspension of the 1st respondent, she discovered that Kshs. 401,400/- was missing from her own account, Kshs. 377,000/- from 1st appellant's account and Kshs. 457,000/- from the 3rd appellant's account.

On cross-examination she confirmed that she and 1st respondent would sign the collection card. She said that between March 2011 and July 2012 she never got any receipts but never raised any complainant. That she would contribute Kshs.1080/- per day but that money was never remitted to the 2nd respondent.

On re-examination she said the 1st respondent would carry both cards – hers, and his. That she had nothing to show the amounts she had lost. That the 1st respondent would tell her he had given the receipts to her husband. The appellants called David Oguttu, a document examiner. He testified that he had been supplied with Documents vide an exhibit memo form on 6th November 2014 by a PC Muturi of Nyeri DCI.

*-Biashara Sacco daily collection receipts.*

*-signature specimens from 1st appellant, known writings and signatures.*

*-Specimens signatures from 1st respondent, known writings and signatures.*

He concluded that the signatures on the specimen receipts were not made by the same person but that the handwriting on the specimen receipts, the known writing of the 1st respondent, and the specimen writings of the 1st respondent were made by the same person.

On cross-examination he conceded that there was a signature on the documents he was not asked to examine.

The 1st Respondent testified. He denied the appellants' claims. He told the tribunal that the customers would keep their own cards, that every month he obtained receipts from 2nd respondent and would take them to the customers- that a statement was issued every 6 months but one would be availed on demand. He said there were different Accounts at the 2<sup>nd</sup> Respondent's – one was FOSA, the other was BOSA- that he was only concerned with the latter Account.

He conceded that there were some monies he had not remitted to the 2<sup>nd</sup> respondent but that he paid the same. He said he was known to the appellants before he began working for the Sacco -2nd Respondent.

The 2nd Respondent was represented by its chairman- Joseph Kamau Nyamuku. He conceded that the 1st respondent was a field officer of the 2nd respondent who was sacked for failure to remit some members' moneys. That the field officer had 2 cards – one for the customer, one for the office. He retained the one for the office, the customer retained his.

At the end of every month, the cards would be reconciled, closed and signed by the field officer and the member.

Upon the sacking of the 1st respondent the Sacco called upon members to make their claims. The Sacco confirmed that he had misappropriated Kshs. 168,500/- which he paid back before he left employment.

That when the appellants raised their claim, the 2nd respondent called a Board meeting, went through their records and found that nothing was missing from the appellants' accounts.

On cross-examination he said he unlike for the other claimants who were able to establish their claims- the appellants failed to establish their claim as they produced no evidence of loss. He said that though 1st respondent is said to have admitted to destroying documents – he claimed to have been threatened to record that statement at the police station. He said it was up to the appellants to establish their claim.

## **THE SUBMISSIONS**

For the appellants it was argued that they had produced evidence to show that there were short facts in their contributions, that the 1st respondents statement to the police was an admission, and that the document examiner established that documents he examined were made by the 1st respondent.

Further that the statements relied on by 2nd respondent were produced after the forgery and manipulation of the accounts. That the 1st respondent had admitted to forging and destroying documents. That there was no evidence that the statement/confession he made to the police was made under duress. That the appellants' consistency in their contributions could be relied upon as proof that their money was lost.

Relying on **Lucy Nungari Ngigi & 4 others vs. National Bank of Kenya & Another, Mohamud vs. Morrison Supermarket PLC, 2017 IALL ER 15**, Counsel argued that the 2nd respondent was liable for the acts/omissions of the 1st respondent.

The 1st Respondent appeared in person and submitted that the procedure was that he would have 2 cards – one would remain with the customer, the other he would take to 2nd respondent. Each card was designed to take 30 days' contribution for shares, loan repayments. At the end of the month there would be a reconciliation, and he would submit the same to 2nd respondent who would issue a receipt. For him to be issued with the receipts he had to submit the daily collection sheet from every customer, and upon deposit in the BOSA Account by the accountant he would be issued with a deposit slip attached to the daily collection sheet.

He took time to compare entries in some receipts, daily collection sheets and the appellant's statement to confirm that money was received, deposited and acknowledged.

He submitted that appellant's failed to prove their claim, failed to prove that he forged/destroyed documents, that the document examiner did not assign any blame on him. He denied recording any admission/confession. He urged the court to find that his dismissal and the appellant's claims were distinct, that there was no way the tribunal could have relied on the appellant's alleged pattern of deposits without proof. That the appellants were ok with their accounts until the time he was dismissed. It was not possible not to notice.

The counsel for 2nd respondent urged the court to examine whether there was any nexus between the acts of the 1st respondent and the 2nd respondent, and whether there was any legal connection, and whether the appellants had proved any loss. Starting with the alleged confession by 1st respondent to police he pointed the court to s.25A of the Evidence Act and the fact that the tribunal had determined that the alleged confession was inadmissible, that before employing the 1st respondent, the 2nd respondent conducted due diligence and even obtained certificate of good conduct- satisfying itself that 1st respondent was not involved in any criminal activity. That the appellants' claims at paragraph 10 of their claim remained unproved. A specific claim requires specific proof. That the tribunal carefully analyzed the evidence and made the right decision.

## ANALYSIS

This court is bound to re assess, analyse the evidence on record and arrive at its own findings

### **Selle vs. Associated Motor Boat Company Ltd [1968] EA 123**

*“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.*

*However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul **Hammed Sarif V Ali Mohammed Solan [1955] 22 EACA 270**).*

The appellants made a very specific claim- that they lost Kshs. 1,235,500/- which they claim was collected by the 1st respondent to be remitted to 2nd respondent but he never did so. The appellants are annexed documents to their claim. They made a breakdown of the loss – however they produced no specific evidence to prove each specific claim.

For instance, for A/C 6432-10-00418 in name of Alfred Ndiangui for March 2011 he claimed to have paid Kshs. 330,000/-, only Kshs. 14,500/- was forwarded to 2nd respondent losing Kshs. 18,500/-. It was prudent upon the appellants to avail supporting documents for every specific claim of loss. Or documents to support the alleged pattern of collection and theft. A receipt, a card and the statement confirming that this was indeed the case. No effort was made by the appellants to lay a basis from the bundle of documents to prove their claim. In fact, the only one who made the attempt to connect the dots was the 1st respondent and he demonstrated with one transaction that money was collected, acknowledged and accounted for in the appellant's statements.

The appellants simply placed their bunch of documents on the table so to speak and left it to the court to make inferences and or deductions. It was their case, and the onus was on them to analyze each document and explain its relevance and tie it up with the alleged lost money. In this case, case of the appellants, except from stating the global sum lost, produced no evidence to show how that money was lost.

The appellants submitted that their contributions were consistent and that that was evidenced by some documents. The appellants testified about sample forms and sample receipts but did not go into the details of how each of these went on to support their claim.

### **Whether the Appellants proved their case for a claim of Kshs. 1,235,500/-, being special damages, on a balance of probabilities.**

Numerous authorities point out at the necessity of particularizing with certainty any special claim. In **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR** the Court of Appeal held: -

*“We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof. See **BANQUE INDOSUEZ vs. DJ LOWE & CO. LTD [2006] 2KLR 208**. **HAHN vs. SINGH [1985] KLR 716**. That proof having lacked, the learned Judge was perfectly entitled to dismiss the huge claim and to grant only the satisfactorily proven amount of Kshs. 153,000 paid as appraisal fees.”*

Regard should be had to the court of Appeal decision in **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR** wherein it was observed.

*“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.*

In the **Jivanji** case (supra), a decision of the Court of Appeal differently constituted, held that *the degree of certainty and particularity depends on the nature of the acts complained of*. Quoting from **Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (UR)** the court said:

*“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:*

*“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded.”*

In **Ouma v Nairobi City Council [1976] KR 304** after stressing the need for a plaintiff in order to succeed on a claim for specified damages Chesoni J quoted in support the following passage from Bowen LJ’s judgment at 532-533 in **Ratcliffe v Evans [1892] QB 524**, an English leading case of pleading and proof of damage.

*“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”*

The appellants put a lot of weight on an alleged confession made to the police regarding the criminal acts of forgery and destruction of evidence.

The law of Evidence on confessions is very clear and the appellants cannot be heard to rely on a recanted confession as proof of admission of the claim. They ought to have produced at least the judgment in the criminal case showing that the 1st respondent had been tried, found guilty and convicted of the offence of stealing. The appellants also put much weight on the document examiners report. It was a report whose purpose was not clear but demonstrated that the 1st respondent had written on the samples produced before the court.

The 1st respondent did not deny collecting money from the appellants and keeping records that fact is not in dispute and therefore it would not be a surprise for documents to bear his handwriting. The document examiner did not state that 1st respondent forged any of the signatures – A1-A6 were samples of daily contribution sheet.

FI –F6 were samples of specimen writings by the 1st respondent.

E1-E2 were known writings of the 1st respondent.

The person who allegedly took the specimens from the 1st respondent did not testify hence the document examiner’s report is not reliable.

The 2nd respondent’s witness said that no document was collected from its offices by the police. So what was the source of the primary documents- A1-A6? If the appellants had samples of collection sheets which they could give to the police – then they ought to have produced the rest to support their case. In any event, a comparison of what they held by the 2nd respondent from the 1st respondent would have given some authenticity to the document examiner’s report. If the police were serious in their investigations, they ought to have collected samples from the 2nd respondent as well.

It is also noteworthy that the daily collection sheets –A1 to A4 did not bear either the 1st or the 2nd appellant’s names. On the parts that were examined by the document examiner marked in red and black-members name and number are blank.

For A5 to A6, they had name and number of 3rd appellant.

The report cannot be admissible as evidence of 1st respondent’s alleged forgery. The claim came only after the 1st respondent was dismissed from work. For 1 ½ years the appellants received their statements and dividends without any complaint. So what happened?

The appellants expected to piggy ride on the opinion of expert of alleged forgeries which the tribunal was not bound to follow.

The appellants had no proof of fraud on the part of the 1<sup>st</sup> respondent. They hand onto the document examiner’s report, which the tribunal was not bound to rely on. I have clearly demonstrated how the report could not have been sufficient proof of forgery. I am well guided by the decisions in **Shah & Another -vs- Shah & Others [2003] I EA 290**, the court held:

*“The opinion of the expert witness is not binding on the court but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so---*

---if there is a conflict of expert opinion, acceptance of the expert evidence is the responsibility of the court – properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach his own opinion.”

In **Dhalay -vs- Republic [1997] KLR**, the Court of Appeal rendered that:

“It is now trite law that while the courts must give proper respect to the opinion of experts, not, as it were such opinions are binding in the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and congenial basis for rejecting the expert opinion, a court would be perfectly entitled to do so.”

In any event no forgery or fraud was demonstrated as required by law. The cases below speak for themselves.

In **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** the Court of Appeal held:

- “*. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:*

“*It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].*

. The standard of proof is as seen in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** where the court expressed itself as follows; -

“*..It is trite law that any allegations of fraud must be pleaded and strictly proved.*

See **Ndolo vs Ndolo (2008) 1 KLR (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 that 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 cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”*

I have carefully considered and analysed all the evidence on record, the submissions, the authorities and the law. The appellants had raised a specific claim. They did not produce evidence to prove the same.

I find that there is no reason to disturb the determination by the tribunal. The upshot is that the Appellants failed to prove their case on a balance of probabilities before the tribunal and the appeal must fail with costs to the respondents.

**Dated, signed and delivered in open court at Nyeri this 7th day of June 2019.**

**Mumbua T. Matheka**

**Judge**

In the presence of: -

Court Assistant: Nancy

Ms. Macharia for Ms. Lucy Mwai for appellants

1st Respondent in person

Mr. Kinuthia holding brief for Ng’ang’a Munene for 2<sup>nd</sup> Respondent

**Judge**