



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 187 OF 2015**

**BONIFACE MUSEMBI KISOME.....APPELLANT**

**VERSUS**

**JULIUS MUSEE NDAMBUKI.....RESPONDENT**

***(Being an Appeal from the Judgment and Order in Kitui Chief Magistrate's Court Civil Suit No. 299 of 2012 by Hon. A. S. Lesootia (Ag. SRM) on 20/11/13)***

**J U D G M E N T**

1. **Boniface Musembi Kisome**, the Appellant, sued the Respondent **Julius Musee Ndambuki**, claiming **Kshs. 119,104/=**, interest and costs. It was pleaded that the Respondent intimated that he had necessary skills of constructing a granary and made him to purchase necessary construction materials. However, the granary collapsed before it was complete hence all the materials went to waste.
2. The Respondent filed a statement of defence denying the allegations although at the hearing he admitted having undertaken the work for the Appellant's wife but denied the allegation of the granary having collapsed.
3. The learned trial Magistrate considered evidence adduced and dismissed the suit basing his determination on the reason that there was no written agreement between the parties.
4. Aggrieved, the Appellant appeals on grounds that:
  - The learned Ag. SRM erred and misdirected himself in law and fact when he held that the construction agreement between the parties had to be reduced into writing while this was not a mandatory legal requirement.
  - The learned Ag. SRM having found as a fact that an agreement existed between the parties, each party has a duty to complete his part of the bargain, and he further erred when he failed to find that the Respondent never successfully completed his part as the granary collapsed one month after completion, and this was evidence of negligence.
  - The learned Ag. SRM erred and misdirected himself in both law and fact when he failed to find that the Respondent owed a duty of care to the Appellant and that he breached this duty when he did substandard work which collapsed within a month of its completion.
  - The learned Ag. SRM erred and misdirected himself in law and fact when he failed to find that the Appellant was entitled to compensation of the materials and labour being **Kshs. 119,104/=** that went into waste as a result of the Respondent's negligence.
  - The decision of the learned Senior Resident Magistrate was against the weight of the evidence that was adduced.
5. The Appeal was to be canvassed by way of written submissions per the directions given but only the Appellant filed submissions.
6. It was urged on the part of the Appellant that his loss was as a result of the negligent acts of the Respondent as well as negligent misstatement that he was skilled to do the work when in actual sense he was not.
7. That the Respondent admitted there was an agreement to construct a granary for the Appellant and that the granary collapsed and the contract being in writing was not a legal requirement. That the fall of the store was not shown to have been caused by natural cause or external force therefore the Respondent was liable for the shoddy work.
8. This being a first Appeal, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing

or hearing witnesses who testified so as to assess their credibility (**See Selle vs. Associated Motor Boat Company Limited (1968) EA 123**).

9. Although the Respondent denied allegations set out by the Appellant, in his defence he stated that he entered into an oral agreement with **Elizabeth** the wife of the Appellant to construct a granary, work that he performed and completed.

10. In reaching the decision that the agreement was not enforceable, the learned trial Magistrate misdirected himself. An oral agreement is legally enforceable depending on its peculiar nature. An oral agreement may not show the record of offer, acceptance and consideration but evidence called is what proves it.

11. It is trite law that in Civil Cases, the burden of proof is on the Plaintiff and the standard of proof is on a balance of probabilities. In the case **Miller vs. Minister of Pensions (1947) 2 ALL ER 372 Lord Denning J.** stated thus:

*“That degree is well settled. It must carry a reasonable degree of probability; but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say: ‘We think it’s more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”*

12. This is a case where the Respondent admitted having been engaged to carry out some work of construction of a granary, though his argument was that the verbal agreement was not between him and the Appellant but his wife.

13. The Appellant called a witness, PW2 **Thomas Kitonga Kisome** who testified that the Appellant, his brother had a granary constructed in the year **2010** by the Appellant but it collapsed after 1 – 2 months due to poor workmanship. On cross examination he stated that the Appellant called him to witness but no photographs of the granary were taken.

14. The Appellant adduced in evidence receipts of some materials. Exhibit 1 is a receipt for nails in the sum of **Kshs. 28,600/=**. Exhibit 2 is for timber, in the sum of **Kshs. 72,754/=**. Some other sum of money was alleged to have been given to the Respondent. However, crucial evidence of the actual damage occasioned was not produced in evidence. How could the Court tell if the granary collapsed where there was no photograph *per se* to prove the allegation. Further, how could the Court tell if the alleged result was due to poor workmanship if there was no assessment of the damage occasioned.

15. In the case of **Douglas Odhiambo Apel & Another vs. Telkom (k) LTD CA 115/2006** the Court of Appeal stated that:

*“... a Plaintiff is under a duty to present evidence to prove his claim, such proof cannot be supplied by the pleadings or submissions. Cases are decided on actual evidence that is tendered before the Court ... It behooves the claiming party to produce evidence to prove ... damages claimed ...”*

16. This is a case where the Appellant failed to show the alleged damage occasioned to the granary constructed so as to enable the Court reach a decision on how he would be compensated. Therefore, he failed to discharge the burden of proof that was upon him.

17. In the result, the Appeal fails and is dismissed with costs to the Respondent.

18. It is so ordered.

**Dated, Signed and Delivered at Kitui this 18<sup>th</sup> day of July, 2019.**

**L. N. MUTENDE**

**JUDGE**