



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 29 OF 2014**

**FREDRICK ONDIEK AROKO.....APPELLANT**

**VERSUS**

**MOI UNIVERSITY.....RESPONDENT**

***(Being an Appeal from the Judgment of the Chief Magistrate Honourable C. G. Mbogo in Eldoret Chief Magistrate's Court Case No. 714 of 2003, dated 5<sup>th</sup> March, 2014)***

**JUDGMENT**

The appellant filed a suit in the trial court seeking damages for wrongful dismissal. He was an employee of the respondent and sought payment of kshs. 571,513/- on account of the balance of kshs. 728,019.50/- being the sum agreed upon based on an agreement dated 15/4/1999. He had already been paid kshs. 156,506.50/-. The court dismissed the suit resulting in the current appeal.

**APPELLANT'S CASE**

The appellant submitted that he entirely relies on the grounds on the face of the memorandum of appeal.

The appellant submitted that he availed one witness, Ken Nyaundi who witnessed the agreement entered into between the parties. The agreement was tendered as evidence. The respondent also tendered evidence in court in its defence and called a witness.

The respondent's evidence was to deny that the sum agreed upon as payable between the parties was kshs. 215,045.50/=

The testimony of Mr. Nyaundi was unchallenged and so was the production of the agreement in court. The respondent's testimonies on the agreement were seriously put to question. Mrs. Odede could not recollect the contents of the agreement and confirmed the existence of two versions of the agreement reached.

The appellant submitted that he proved his case on a balance of probabilities. The appellant sought that the court set aside the trial court's judgment and an entry of judgment in his favour for kshs. 571,513/= plus interest at the rate of 14% per annum since May 2003 and costs of the appeal, be made.

**RESPONDENT'S CASE**

The respondent submitted that the appellant failed to prove his case on a balance of probabilities. The appellant produced p-ex 1 and the respondent in its defence stated that it was only privy to the agreement prepared by its lawyers and executed by both parties, produced as Dex4.

The appellant bore the onus to prove that the document was the correct one. The appellant testified that the document was prepared by the respondent's counsel and he signed the agreement which was attested to by Ken Nyaundi who testified as PW1. He acknowledged that the plaintiff requested him to attest his signature. Production of the agreement was limited to the fact that the appellant had executed the agreement and he had witnessed it. The allegation that Roselyn Odede had requested him to attest on his behalf never arose and he testified that the agreement had not been signed by any other person other than the appellant at the time he witnessed it. Roselyn Odede was not called to testify on the same.

DW3 testified that he prepared Dex4 and the agreement was approved by the respondent. The same was signed by the respondent's representative and attested by him (DW3). The agreement was delivered to the offices of the appellant's counsel, Roselyn Odede. The plaintiff signed it and she attested to it. The respondents advocate denied having knowledge of Pex6.

DW2 confirmed that the signature appearing in Pex6 was not his and was a forgery. He discussed the contents of Pex6 and pointed out that

Dex4 was the true agreement that resulted in preparation of Dex5 which he approved. He confirmed the amount approved as per Dex4 was fully dispersed to the appellant who did not express dissatisfaction. DW5 testified that she saw the appellant execute Dex4. The burden of proof was on the appellant to prove that Pex6 was the true document. The respondent called 5 witnesses whose evidence was not controverted in any way. The appellant failed to discharge his burden of proof as per Section 107 of the Evidence Act. The evidence on record did not establish any claim as alleged by the appellant.

The respondent did not report the forgery of signatures to the police for investigation as the amounts due had already been paid and the agreement had already been dispensed with. The assertions that the appellant had been paid by the respondent were not refuted. Failure to institute criminal proceedings against the alleged crimes of forgery does not justify the veracity of the signatures. The burden of proof still rests on the appellant.

The respondents submitted that the trial magistrate did not err in failing to appreciate that a client can take an agreement to another advocate for attestation. The attesting advocate, PW1, testified that the appellant presented to him Pex6 and requested him to attest. He did not say whether he had been instructed by Roselyn Odede to perform that task on her behalf. Roselyn Odede did not state whether she had directed the appellant to have Pex6 attested to by Pw1, Ken Nyaundi. The circumstances in which the agreement reached the offices of Ken Nyaundi from Odede & Company Advocates were not clear and no one explained. There was no nexus between the two in the performance of the attestation.

It appears that the appellant was intending to defraud the respondent through forgery and was discovered.

#### **ISSUES FOR DETERMINATION**

- a) Whether the court erred in determining that the Defendant's agreement was the true and correct agreement
- b) Whether the failure to prosecute for the alleged crime of forgery justified that the signatures were correctly appended
- c) Whether the court erred in dismissing the appellant's suit.

#### **WHETHER THE COURT ERRED IN DETERMINING THAT THE DEFENDANT'S AGREEMENT WAS THE TRUE AND CORRECT AGREEMENT**

The appellant's witness, Ken Nyaundi testified that he was requested to attest to the Plaintiff's signature. He never confirmed that he had been instructed by Roselyn Odede to attest on her behalf. At page 68 of the record of appeal, it was her testimony that the appellant was her client and that she attested to Dex4. PW1, testified that the agreement he attested to was dated 15/04/99 and it did not contain the signature of the Chief Administrator of the University. This begs the question as to who attested the second signature. The burden of proof was on the appellant to prove that there was a genuine signature by the chief administrator and there was someone who attested to it. I find that he failed to prove the same. The respondent on the other hand, proved that Dex4 was the true and correct agreement as DW3 testified that he attested to the respondent's representative signing the agreement. The appellant's advocate further testified that she signed Dex4.

The appellant failed to prove that the agreement he produced was the true and correct agreement. In the premises, the trial court did not err in finding that the defendant's agreement was the true and correct agreement.

#### **WHETHER THE FAILURE TO PROSECUTE FOR THE ALLEGED CRIME OF FORGERY JUSTIFIED THAT THE SIGNATURES WERE CORRECTLY APPENDED**

The institution of criminal proceedings for the alleged crime of forgery were to be at the whim of the respondents. The failure to do so can't prove that the signatures are forged. The appellant should have called expert witnesses to prove the signatures were genuine as the burden of proof rests on he who alleges. It was his case that the document was genuine and it was therefore upon him to prove the same.

#### **WHETHER THE COURT ERRED IN DISMISSING THE APPELLANT'S SUIT**

The trial court dismissed the appellants' suit as he had not satisfied the court that he had a cause of claim against the defendants based on a balance of probabilities. The respondent's evidence on how the document was executed by both parties is corroborated by the appellants' advocate. The appellant's explanation on how the agreement was obtained from his advocate's office while she was out of the country is not convincing. There is nothing to show how the document was taken to the respondent's advocates for execution and therein lies the issue with his version of events. He was unable to prove that his version of the agreement was properly and duly executed by the respondent's representative whereas the respondent was able to clearly demonstrate the chain of events leading up to the execution of the second agreement. The appellant's advocate merely confirmed there were two documents that were prepared and attested to at page 69 of the record of appeal. She did not state who had signed the documents or who had attested to the signature, especially on the part of the respondent. Had she confirmed these details it would have presented an opportunity to determine whether the execution and attestation on the part of the respondent were genuine. Further, the appellant should have produced, as a witness, whoever attested on behalf of the respondent.

The court did not err in dismissing the appellant's suit. In the premises, I find that the appeal fails on all limbs. Costs goes to the respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 22<sup>nd</sup> day of October, 2019**

In the presence of:

Mr. Omusundi for the appellant

Mr. Isiji for the respondent

Ms Abigael – Court assistant