REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 15 OF 2015

JACKSON KAIO KIVUVA.....APPELLANT

-VERSUS-

PENINA WANJIRU MUCHENE.....RESPONDENT

(Being an appeal from the judgment and decree (Hon, D M Mbicha Resident Magistrate) delivered on 9th January 2015 in PMCC No, 9 of 2011)

JUDGMENT

1. This is an appeal from the judgment and decree (**Hon. E. A. Mbicha,** Resident Magistrate), delivered on 9th January 2015. In that judgment, he entered judgment in favour of the respondent for Ksh. 350,000/=, costs and interests but dismissed the appellant's counter claim.

2. That decision aggrieved the appellant who filed a Memorandum of Appeal dated 9th February 2015 and raised the following grounds of appeal, namely:

> ***a. The learned trial magistrate erred in law and fact by failing to analyze the evidence on record;***
>
> ***b. The learned trial magistrate erred in law and fact in making an assumption that the Defendant (Appellant) frustrated the Partnership without supportive evidence;***
>
> ***c. The learned trial magistrate erred in law and fact by dismissing the defendants (Appellants) counter-claim without relying (sic) any evidence nor considering the evidence on record'***
>
> ***d. The learned magistrate erred in law and fact by considering extraneous matters thus arriving at a wrong decision***
>
> ***e. The learned magistrate erred in law and fact by failing to make a finding that in partnership, partners share profit and loss equally.***

3. The appellant prayed that his appeal be allowed; the judgment and decree of the trial court be set aside; the respondent's suit in the lower court be dismissed and judgment be entered in his favour prayed for in the counter-claim.

4. The appeal was disposed of by written submissions and oral highlights. Mr. Osoro, learned counsel for the appellant submitted highlighting their written submissions dated 17th June 2019 and filed in court on 24th June 2019. Counsel argued that the trial magistrate failed to find as a fact that the appellant and respondent were partners in equal share; that had the court made this finding, it would have applied the principle of equal sharing of profit and loss among parties and would not have allowed the respondent's claim of Kshs. 350,000/=.

5. Referring to the separation agreement dated 19th September 2009 at page 10 of the record of appeal, which the respondent claimed to be a business separation agreement, counsel argued that although it showed that the appellant had agreed to refund the respondent Kshs. 420,000/= , it was forged and the appellant did not sign it.

6. According to counsel, the appellant denied signing that agreement and even the appellant's wife who was named as a witness did not sign it. He submitted that only the respondent's witnesses had signed the agreement but even then, only PW2 testified. Counsel pointed out that the document has handwritten notes at the bottom inserted by the respondent only which she admitted during the hearing of the case (Page 115 line 16 of the record of appeal)**.**

7. Mr. Osoro submitted that the motor vehicle was purchased by both the appellant and respondent, each contributing Kshs. 350,000/=; that they were to pay the balance by installments and that each party paid a further Kshs. 70,000/= to convert vehicle into a matatu making a total of Kshs. 420,000/= before a disagreement arose over the management of the vehicle in September 2009.

8. According to counsel, the motor vehicle developed mechanical problems almost immediately but was not repaired. It was eventually repossessed by the seller on 25th May 2012. He submitted that the respondent filed the suit on 9th February 2011 for the refund based on the disputed agreement; that the trial court did not evaluate the evidence to determine whether or not it was a true agreement and that even if it had been found to be true, it was signed at a police station and was therefore not executed voluntarily. He also pointed out that although made on 19th September 2009, it was only signed on 27th April 2010. In Mr. Osoro's view, had the court properly evaluated the evidence, there would have been no basis for allowing the respondent's claim.

9. Regarding dissolution of partnerships, learned counsel argued that the Partnership Act, Cap 29, provides how a partnership should be dissolve. According to him, section 31(1) (c) of the Act requires that a notice be given or alternatively, section 39 should be invoked by applying to court. He relied on a number of decisions to support his case and urged the court to allow the appeal.

10. Miss Mureithi, learned counsel for the respondent, submitted also highlighting their written submissions dated 5th July2019. She argued that the trial court did not find the relationship between the parties to be a partnership and therefore the relationship could only be termed as a joint venture.

11. According to counsel, the agreement between the parties was implied from the sale and hire purchase agreement at page 9 of the record of appeal; both parties had agreed to contribute towards the purchase of the vehicle; the agreement was between the appellant and respondent on the one hand and the vendor on the other and there was no intention on the part of the parties to enter into a partnership relationship. In Miss Mureithi's view, that was the reason why each party paid the amount for purchasing the vehicle separately.

12. Counsel contended that the appellant took control of the motor vehicle and although parties would have shared profits and loss equally, they never went to that extent since the business was rocked with misunderstandings leading to the separation agreement. She submitted that the separation agreement was voluntarily signed; that there was no forgery; that the appellant breached the terms of the separation agreement and that the respondent was entitled to refund of her money. Counsel argued that the appellant refunded only Kshs. 85,000/= and urged that the appeal be dismissed with costs.

13. I have considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

14. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal stated that;

> ***"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"***

15. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"***

16. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR, the same stated with regard to the duty of the first appellate court;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

17. The respondent who testified as PW1 told the court that he, together with the appellant, purchased a motor vehicle they intended to operate as a matatu. They purchased a Nissan and each party contributed Kshs. 350,000/=. She told the court that she withdrew the money from her account at Barclays bank and deposited it into the vendor's account while the appellant did the same. They both signed a sale and hire purchase agreement with the vendor; that the agreed purchase price was Kshs. 1,540,000/=; that they paid Kshs. 700,000/= and were to pay the balance of Ksh. 840,000/= by monthly installments within 1 year.

18. The respondent told the court that each party paid a further Kshs. 70,000/= for conversion of the vehicle into a matatu, and when it was ready, the appellant told her off arguing that she did not know how to run a matatu business and, therefore, left the vehicle to the appellant. She testified that she tried to have the matter resolved through a mutual friend but all the appellant did was promise to refund her the money she had contributed.

19. She testified that they wrote down the separation agreement to the effect that the appellant was to refund her Kshs. 420,000/=and this was done in the presence of witnesses. She told the court that the appellant gave her Kshs. 50,000/=on 27th April 2010 and later gave her a further Kshs. 35,000/=. making a total of kshs, 85,000/=. The appellant never paid any other money leading to filing of the suit to claim the balance of Kshs. 350,000/=.

20. In cross-examination, she told the court that they were purchasing the motor vehicle on equal basis and that they were to pay the balance at Ksh. 60,000/= per month, she however did not know whether repayment was done since she had been excluded from the management of the business. She stated that the agreement was signed on 27th April 2010 because the appellant was refusing to sign it and only signed after she reported the matter to the police.

21. PW2, Susan Mwangi, told the court that she accompanied both the appellant and respondent to Mombasa to purchase the vehicle; that she later learnt from the respondent that the appellant had excluded her from the management of the matatu business and that they had eventually parted ways. She told the court that she was present when the business separation agreement was made at the appellant's home and was signed on 27th April 2010 at Ngong Police Station.

22. The appellant, DW1, told the court that the respondent informed him that she had some money and that they could purchase a vehicle for matatu business if he added some; that they went to Mombasa and purchased motor vehicle Registration No. KBJ 105K, a Nissan, through hire purchase at Kshs. 1,540, 000/=; that they paid a deposit of Kshs. 700,000/=, each one contributing Ksh. 350,000/=,.and that the balance was to be paid by monthly installments.

23. He told the court that each party contributed a further Ksh. 70,000/= for conversion of the vehicle into a matatu and after it was ready, it worked briefly during which period he paid the respondent Ksh. 85,000/= as her share of profits. The appellant testified that a disagreement arose over the management of the vehicle which they were unable to resolve even after mutual friends, including PW2, tried to intervene.

24. The appellant further testified that the vehicle developed engine problems on 28th September 2009 and his request to the respondent for assistance to have it repaired bore no fruits. He told the court that on 25th May 2012 the vehicle was repossessed for failure to pay Ksh. 1,149,500/= as no single instalment had been paid. He denied knowledge of the separation agreement since by the date of the alleged agreement, 19th September 2009, the vehicle had not even operated for 3 months.

25. After considering the above evidence, the learned magistrate found in favour of the respondent and dismissed the appellant's claim of a partnership between him and the respondent. The appellant has faulted the trial magistrate's decision contending that he did not evaluate or analyze the evidence and therefore fell into error.

26. I have gone through the record of the trial court as well as the judgment. I am satisfied that the trial magistrate analyzed the evidence adduced by the respondent her witnesses as well as that of the appellant before arriving at a decision. I must also point out that there is no formula or specific mode of analyzing or evaluating evidence as long as the court has taken time to look at the evidence adduced before it and considered before making a determination based on such evidence.

27. The appellant has also faulted the trial court for not making a determination on whether there was a partnership or not. In the appellant's view, had the court done so, it could not have found in favour of the respondent. I have again gone through the record and the judgment of the trial court. on this issue, the court summed up the essence and meaning of a partnership and after evaluating the position of each party, stated at page 32 of the judgment:

> ***"As stated earlier, the partnership herein was premised and envisaged on both parties herein contributing capital, actively participating in the day to day running of the said business and enjoying profits. The Defendant's position did not hold water. He cannot casually argue that he developed cold feet on the whole business partnership first because the plaintiff*** (Appellant) ***asked him to open business account with PW2. PW2 cannot be used as a red herring herein."***

28. It is clear from the above statement that the learned magistrate rejected the appellant's argument of partnership since the business did not end up there. For my part, I do not think the issue of partnership was not properly addressed by the trial court as argued by the appellant. Parties may have had an intention to enter into a partnership and that is why they contributed equally towards the purchase of the vehicle. They were intent on running the business jointly. However, the business did not pick up given that as soon as parties were ready to go, it faltered and their intention collapsed. They thus did not actualize the partnership as intended.

29. For instance, they did not open a joint account, did not operate the account by depositing money from the business into that account and they never held joint meetings to take stock of the profit or loss the vehicle made or how the vehicle was operating generally. This would have brought the business to the level of a partnership even if it was an oral one. What is clear from the evidence on record is that the parties never proceeded beyond putting the vehicle on the road.

30. A disagreement on the management of the vehicle, including who was to be either the driver or conductor, stalled the business soon after and it is not denied that the appellant single handedly operated the vehicle. The money he argues was paid to the respondent as her share of profit was, according to the respondent, a refund of part of the money she contributed towards the purchase of the vehicle.

31. Furthermore, the appellant did not produce any accounts to show the income from the business for the period he says the vehicle operated. I therefore find no merit in the appellant's argument that the trial court failed to address the issue of partnership. Even If he had not, then from evidence on record, I do not find merit in the argument that there was a partnership that was capable of being subjected to termination in accordance with the law governing partnerships.

32. This view is buttressed by the definition of partnership in section 3 of the Partnership Act, Cap 29 that; ***"Partnership is the relation***

which <u>subsists</u> between persons carrying on a business in common with a view of profit." The relationship between the appellant and the respondent did not subsist beyond the purchase of the vehicle. It could not pass the test in section 4 regarding the rules that determine existence of partnership. As already pointed above that there was no evidence that there was sharing of profits.

33. The appellant has also argued that there was no separation agreement; that he did not sign it or undertake to refund the respondent Kshs. 420,000/=. In their submissions, Mr. Osoro argued that the agreement, if any, was in any event signed at a police station and was therefore not signed voluntarily.

34. Addressing this issue, the trial magistrate found that the appellant's claim that the document was a forgery was not sustainable; that in any case the appellant had not reported the matter of forgery to the police and that it was not even clear when he paid Ksh. 85,000/= to the respondent. He dismissed the appellant's argument holding that he had observed the demeanor of the witnesses and found the respondent and her witness to be forthright and honest but the appellant had struck him as dishonest who blew hot and cold.

35. I have reviewed the evidence and the decision of the trial court on the issue. The respondent told the court that the agreement was made in 2009 but was only signed in 2010 because the appellant had been refusing to sign it. PW2 also told the court that the agreement was made in the appellant's house in her presence; that it was signed in 2010 at Ngong Police Station and that she was present and the appellant signed that document. That is, she was present when it was made and signed. The appellant did not deny that it wa not made in his place. His argument was that he did not sign it,

36. For my part, I find no reason to fault the trial magistrate's finding on this issue. The appellant alleged that the did not sign the separation agreement but his advocate submitted that if he signed it, it was in any event signed at the police station and could not have been made voluntarily.

37. The trial magistrate saw the witnesses testify and was satisfied with the evidence of the respondent and her witness. They were candid and honesty. He was however not impressed with the appellant who struck him as dishonest and blew both hot and cold.

38. The appellant either signed the agreement or he did not. It was not certainly a forgery as the learned magistrate found. It is clear from the evidence of both the respondent and PW2 that the appellant signed the agreement on 24th April 2010 at Ngong police station. The fact that it could have been signed at the police station alone did not make it invalid.

39. The appellant was required to adduce satisfactory evidence to show that the agreement was procured through duress. In my view, the appellant is not candid. He either signed the separation agreement or did not where he signed it notwithstanding. If his argument is that it was not signed voluntarily, that is different from not being signed at all. He had not raised it as a bonafide defence to the respondent's claim that is was procured by duress to enable parties call evidence to prove otherwise. It is also worth of note that whereas the agreement was signed in 2010 and the suit filed in 2011, the appellant did not question its validity.

40. Secondly, as pointed by the learned magistrate, the appellant paid the respondent Ksh. 85,000/= on an unknown date but according to the respondent, this was a refund after the separation agreement had been made. The appellant argued that the money was the respondent's share of profits.

41. According to the appellant's amended defence and counterclaim, this was a share of profit and was paid on 20th September 2009. If this is true, then the money was paid a day after the separation agreement had been made on 19th September 2009. The appellant did not adduce evidence to show the amount the vehicle had made, how much expenses were and what the net income was to give rise to Kshs. 85,000/= he gave the respondent as her share of profits and how much he himself took as his share of profit, if indeed there was profit.

42. It is also on record that the appellant himself told the court that no single installment re payment of the loan was made. How then could there be profit before loan repayment? From the same amended defence and counter claim, the vehicle broke down on 28th September 2009. It was not repaired and was repossessed on 25th May 2012. There is no evidence that the appellant attempted to mitigate that eventuality by informing the vendor, Panij Automobile Limited given that the problem arose about one month after its purchase. He kept the vehicle until it was repossessed almost two and half years later. There is no doubt the appellant's explanation could not hold.

43. In the end, having considered the appeal, submission and the law, and upon independent review of the evidence on record, the conclusion I come to is that the appeal has no merit. It is dismissed with costs.

Dated, Signed and Delivered in open court at Kajiado this 11th day of October 2019

E. C. MWITA

JUDGE