



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 163 OF 2009

JANET AKINYI OCHIENG.....APPELLANT

VERSUS

EMILY AWUOR OMBOTO.....RESPONDENT

[Being an appeal from the judgment and decision of the Senior Resident Magistrate in Winam SRMCC No. 244 of 2007]

J U D G M E N T

- 1). The respondent filed this suit on 12-7-2007 against the appellant at the Senior Resident Magistrate's court at Winam seeking to recover Kshs. 154,000/= from her. She further sought to attach the appellant's account No. **[Particulars withheld]** at the Co-operative Bank Ltd, Kisumu where the alleged money was. Lastly, she asked for costs. The Kshs. 154,000/= related to a dealing between the two over the supply of 300 bags of dry maize by the appellant to Kibos prison. It was the respondent's case that the appellant had the tender to supply the maize but did not have the money to buy the product. The two agreed that the respondent funds the purchase and that they share in the profits equally. The profit was to be Kshs. 232,000/=. At the end of the transaction, the appellant had failed to give the respondent Kshs. 154,000/=: hence the suit.
- 2). The appellant denied the claim for Kshs. 154,000/= but admitted owing only Kshs. 8000/=. She pleaded that the two equally raised Kshs. 150,000/= to buy the maize and agreed to share the profits equally. The respondent used Kshs. 8000/= to ferry the maize to Kibos prison. At the end of the dealing, the appellant had paid the respondent all the dues, except for the Kshs. 8000/=:
- 3). The respondent and the appellant each testified before the trial court. The court found that the respondent was owed Kshs. 180,000/= by the appellant after apportioning liability at 2:1 in favour of the respondent. It gave judgment for the amount. Costs were not awarded because this was a transaction between friends.
- 4). The appellant was aggrieved and filed this appeal. In the grounds of appeal, he alleged as follows:
 - a. the court erred when it apportioned liability at the ratio 2:1;
 - b. the court erred when it decided that the respondent was entitled to $\frac{2}{3}$ and that the appellant was entitled to $\frac{1}{3}$ of the sum of Kshs. 180,000/=:
 - c. the court was right to find that it was not possible to discern the intention of the parties, but misdirected itself when it apportioned liability;
 - d. the court considered extraneous matters in arriving at the judgment, and
 - e. it erred when it entered judgment on matters not tendered in the plaint.

5). Counsel for the parties agreed to have the appeal heard and determined on the basis of written submissions. I have considered the submissions.

6). This court has the duty to subject the evidence tendered before the trial court to fresh and exhaustive scrutiny. It is sufficient that, on questions of fact, this court having itself considered and evaluated the evidence and having tested the conclusion arrived at by the trial court, drawn from the demeanour of the witnesses against the whole of the evidence, is satisfied that there was evidence upon which the trial court could properly and reasonably find as it did (**Geoffrey Kihunyu Wanjira -VS- Gichini Kiguta & Another, Civil Appeal No. 67 of 1997**).

7). The record shows that the respondent testified that she was well known to the appellant, and that the appellant got a tender to supply 300 bags of 90 Kg of dry maize to Kibos prison. The appellant, however, did not have capital. She approached the respondent who bought the maize and transported it to the prison. It was agreed that the parties would share the profit equally. The respondent spent Kshs. 300,000/= to buy the maize and used Kshs. 8000/= on transport. The profit was Kshs. 232,000/=. In the plaint, she stated that she had in total received Kshs. 270,000/= from the appellant leaving a balance of Kshs. 154,000/= which she was claiming.

8). The appellant's evidence was that when she got the tender, she agreed with the respondent that each pays half of the value of the maize. They would then share the profit equally. She stated that she paid the respondent as agreed, but left a balance of Kshs. 8000/= which was for transport. That is the money she owed the respondent.

9). The trial court considered the evidence. It observed that the failure on the part of the parties to reduce their dealing into writing was a handicap. It said that:

“I am tempted in the absence of written agreement that plaintiff ought to have lion's share of the 2nd payment. It looks like plaintiff contributed more to the deal than the defendant. The defendant however got the tender for them. Every party has a share of the remaining Kshs. 180,000/= at Co-op Bank. For failing to put things straight, in writing from onset of deal, I will apply ratio of 2:1 to make each party not suffer. On balance of probability, I order that the Kshs. 180,000/= be shared between plaintiff and defendant in the ratio of 2:1. The plaintiff shall have $\frac{2}{3} \times 180,000 = 120,000$ /. The defendant shall have 60,000/=.…….”

10). It does appear that, in the absence of written account of the dealings between the parties, the trial court chose to be “fair” to the parties. It did not want either side to suffer. The court was saying that neither gave it a clear account of what had happened.

11). However, there was sufficient evidence to prove the respondent's case. She testified that she paid fully for the 300 bags of maize. Both parties agreed that each bag was going to cost Kshs. 1800/=. It cost Kshs. 300,000/= to buy the maize. Profit was Kshs. 232,000/= and was to be shared equally. The respondent stated that he was paid a total of Kshs. 270,000/=. If she expected Kshs. 116,000/= in profit, she was entitled to a total of Kshs. 416,000/=. If the admitted transport was added, the total was Kshs. 424,000/=. She stated that she was paid Kshs. 270,000/=. The balance would be Kshs. 154,000/=. This is the amount in the plaint.

12). The appellant stated that each party was to make half contribution towards the purchase of the 300 bags of maize. If the maize was costing Kshs. 300,000/=:, each was to contribute Kshs. 150,000/=. The projected amount from Kibos prison was Kshs. 540,000/=. It meant that the respondent was entitled to Kshs. 270,000/=. She (the appellant) stated that when the first instalment of Kshs. 270,000/= came she gave the respondent Kshs. 220,000/=. That left a balance of Kshs. 50,000/=. The second payment of Kshs. 90,000/= came and from it she gave her Kshs. 50,000/= balance. What was left was Kshs. 8000/= transport.

13). The respondent produced her bank account statement to show that following the request by the respondent she withdrew Kshs. 300,000/= from her account. This was after the appellant came to her to

say she had a tender to supply the maize. That evidence of withdrawal supported her case that she wholly sponsored the purchase of the maize. If that was the case, then the respondent was owed the amount in question.

14). There was also unrebutted evidence that the parties would transact through Kenya Commercial Bank. However, when the last payment of Kshs. 180,000/= came from the prison, the appellant quietly went to deposit at the Co-operative bank. She told court that she informed the respondent that she had received the payment, got her to come to the Co-operative Bank to confirm the banking. She even gave the respondent a copy of the slip. The respondent, however, got nothing from the money. Why was she going to this trouble to involve the respondent if she had been settled? `Why move to the Co-operative Bank? The respondent's testimony was that she just discovered that the appellant had moved to a different bank. It is clear from the evidence that the respondent was still owed money by the appellant. That money, it is clear, was the Kshs. 154,000/= sought in the plaint.

In conclusion, there was sufficient evidence to back the respondent's case. The trial court had no reason to resort to the question of "fairness", or to calculate the ratios. The determination that the respondent was owed Kshs. 120,000/= was without basis. It is set aside, and in its place the respondent shall be paid Kshs. 154,000/= plus costs. The result is that the appeal is dismissed with costs.

Dated, signed and delivered at Kisumu this 7th day of May 2014.

**A.
JUDGE**

O.

MUCHELULE