REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 34 OF 2013

VIPUL DODHIA.....1ST APPELLANT

CHERENGANI HILLS LIMITED …….....2ND APPELLANT

VERSUS

MOHAMMED HASSAN…….....1ST RESPONDENT

THE HON. A.G. …….2ND RESPONDENT

An Appeal arising out of the judgment of Bungoma Civil Case No.394 of 2011 delivered by HON. INNOCENT MAISIBA on the 10th July 2013)

J U D G M E N T

1. This Civil Appeal is set against the background of criminal proceedings which first commenced as Bungoma Criminal case No.1478/08 (Republic –vs- Mohammed Hassan & Josephine Kemunto Oyaro).
2. There, the 1st Respondent (hereinafter Mohammed) was convicted of the offence of Handling Stolen property contrary to Section 322(2) of the Penal Code. The particulars of the charge being that on 22nd June 2008 at Royal Trading Stores in Busia Township otherwise than in the course of stealing dishonestly handled 46 bags of sugar (forty six bags) the property of Vipul Rikal Dodhia the 1st Appellant (hereinafter referred to as **Vipul**).
3. Mohamed had been tried in the same criminal proceedings as Josephine Kemunto Oyaro (Oyaro). The latter was charged and convicted of a similar offence of Handling Stolen property contrary to Section 322 (2) of The Penal Code. Allegations against her was that she dishonestly handled 641 bags of sugar the property of Vipul. The allegations and conviction against Oyaro will turn out to bear some significance in the outcome of this Appeal.
4. Aggrieved by the decision of the Lower Court Mohamed mounted an appeal against it being Busia Criminal Appeal No.33 of 2010 **Mohamed Hassan –vs- Republic**. Judgment was on 22nd September 2010 delivered in his favour by Onyancha J. in which the conviction was quashed. There is then this holding by the Judge that has given raise to the controversy herein,

> **"Since the appellant paid the fine, the same should be refunded to him. The 687 bags of sugar impounded were exhibits. They should be returned to the appellant in the circumstances of this case, without barring the complainant of filing a civil suit to show that the bags were actually his and were part of the consignment purchased from Nzoia Sugar Co. Ltd but stolen in course of being transported by the complainant.**

Orders accordingly."

5. As it later turned out the sugar was not released to Mohamed as the Police had already released the sugar to Vipul on the basis of an earlier order of the Trial Court. That stunned Mohamed and so he commenced Civil Suit No.394 of 2011 which is the subject of this Appeal.
6. In the Civil proceedings, he pleaded the order of Onyancha J and the refusal, failure or neglect of the Respondents to release the 687 bags of sugar. Ultimately he prayed for the following orders:-

" a) Delivery of 687 bags of white sugar to the plaintiff.

b) In the alternative, payment to the Plaintiff of 1,800,000,2,738,000/= the current value of the Bags of white sugar.

c) Interest at 20% on the Ksh.1,800,000/ 2,738,000/= being interest on commercial rates since 2008 to the date of full settlement.

d) costs of this suit."

7. The Trial Court received evidence of Mohamed (PW1) who basically sought to rely on the order of The Judge in Appeal. He also showed Court a letter of 14/12/10 written by the DCIO Bungoma to Vipul indicating that the sugar had been released earlier to Vipul and asking Vipul to return it. He claimed a monetary value of ks.2,738,000/= which he arrived at ks.4000/= per bag. In cross-examination he confirmed that his conviction was related to 46 bags he is said to have handled and so did the Appeal.
8. In Defence, Vipul sought to prove that he had on 21/7/2008 bought 700 bags from Nzoia Sugar Company. That sugar was picked by his trailer m/v KAV 864V but the sugar never reached its destination as the vehicle was hijacked. Sadly his driver and turnboy were murdered in the incident. And although the trailer was found, only 650 bags were recovered. It was his testimony that of these, 46 bags were found to be in the possession of Mohamed. He also confirmed that the sugar was released to him on the very day the Trial Criminal Court rendered its decision. It was his further statement that he was not party to the Criminal Appeal Proceedings.
9. After considering the above evidence, the Learned Trial magistrate entered judgment in favour of Mohamed in the sum of ksh.3,322,000/= plus costs. He also made an award of interest and 14% "at Court rates" till payment in full. That decision excited this Appeal.
10. The Appeal is premised on 15 grounds which the Appellant condensed into broad arguments. Firstly that the Appellant failed to prove ownership of the sugar and its value. On this, the Appellants argument was that of the recovered sugar only 46 bags of sugar were found with Mohamed and the substantial amount of 641 bags with Oyaro. It was also argued that Mohamed failed to produce any evidence, primary or secondary, to prove purchase of the said sugar. On the value of the sugar, the Appellant relied on the principle that special damages must be specifically pleaded and strictly proved. That Mohammed never proved the value.
11. On the Court order by Onyancha J, the Appeal case was that it did not create any obligation on the Appellants. I heard the Appellants to be arguing that the Court order was directed at the State and not the Appellants.
12. This Court was also asked to find that the pleadings of Mohammed were fundamentally defective and bad in law, it being pointed out that the Plaintiff gave two values for the sugar. These were ksh.1,800,000/= and ksh.2,738,000/=. That the Plaintiff's claim was not clear.
13. As a first Appellate Court I am required to consider the Appeal against a re-evaluation of the evidence before the Trial Court. This Court is obliged to draw its own conclusion after such re-evaluation but must keep in mind that it is somewhat handicapped in that it did not have the advantage of seeing and hearing the witnesses testify. (**Selle –vs- Associated Motor Boat Company Ltd** [1968] E.A. 123.
14. Looking at the pleadings and the evidence, Mohammed's case was based entirely on the order of Onyancha J. The speaking portion of that order is again reproduced:

"Since the appellant paid the fine, the same should be refunded to him. The 687 bags of sugar

impounded were exhibits. They should be returned to the appellant in the circumstances of this case, without barring the complainant of filing a civil suit to show that the bags were actually his and were part of the consignment purchased from Nzoia Sugar Co. Ltd but stolen in curse of being transported by the complainant. Orders accordingly."

15. Mohamed did not attempt to give any other evidence of the ownership of the sugar as there was already an unchallenged Court order in his favour. And the Learned Trial Magistrate was generally right when he held,

> **"It is obvious that I cannot overturn the judgment of Justice Onyancha where ordered return of the sugar to the Plaintiff. The judgment was not appealed from."**

16. But that could not be the end of the matter as there was a significant admission by the Plaintiff at cross-examination. This was his evidence:-

"**There was another accused in that case Josephine Kemunto Oyaro she was charged with handling 641 bags of sugar. I was filing an appeal against a conviction relating to the 46 bags of sugar. I see my statement with the police I said I had been offered the sugar by one Nderitu a son of the owner of Teresa supermarket it also says he offered to sell 700 bags. What came into my possession was 46 bags on 22/7/2008. The rest of the bags went to Josephine Kemunto Nderitu delivered directly to Kemunto. The same sugar was confiscated on the same day. My statement says the police took 46 bags from my store. I had not paid Ndritu for that sugar. It is the sugar that was given erroneously to Ms Vipul Dodhia. (my emphasis).**

Mohamed is stating, quite unequivocally that the bags that belonged to him were 46 bags of sugar and not 687 bags of sugar that were ordered by the Judge. In a sense, Mohammed was admitting that it was in error that the Judge ordered that 687 and not 46 ba be "returned" to him. He was found only in possession of 46 bags and so only 46 bags could be "properly returned" to him. This, again, is the sugar he says to have purchased from one Nderitu.

17. This aspect of the Defence case was emphasized in the written submissions filed by Appellants at the close of trial. The Trial Court did not address this at all. And discussing it would not amount to overturning the judgment of the High Court. The Plaintiff's case was not only grounded on the Court order but also the oral testimony of Mohammed. And although Mohammed was flaging the Court order, he readily admitted that what he deserved was 46 bags. The Trial Court was under a duty to consider the totality of the evidence before it and had it done so then it would have reached a decision that Mohamed had only proved his claim to the extent of 46 bags. To hold otherwise would be to endorse an unjust enrichment of Mohammed.
18. I now turn to consider whether either on the Court order or on the other evidence Vipul was obligated to release or pay up the 46 bags to Mohammed. The Court order must yet again be reproduced:-

"Since the appellant paid the fine, the same should be refunded to him. The 687 bags of sugar impounded were exhibits. They should be returned to the appellant in the circumstances of this case, without barring the complainant of filing a civil suit to show that the bags were actually his and were part of the consignment purchased from Nzoia Sugar Co. Ltd but stolen in curse of being transported by the complainant. Orders accordingly."

19. An argument by the Appellants is that the Court order was not directed at them. It is true that the Court order was not specific as to who should return the impounded bags to Mohamed. Logically it could be argued that the person who was under an obligation to ensure the Court order was obeyed was the person who impounded the sugar and that was the police. As it turned out at the time the order was made the Police had long released the sugar to Vipul. Vipul himself confirmed this when he testified,

"The sugar had been produced in court. I took it same day after judgement before the 14 days appeal lapsed. I didn't have a court order releasing the sugar to me. I have no sugar to release. I refuse to pay 2 million because the sugar was not even his."

Court orders are not made in vain. If Vipul had taken the 46 bags then, on failing to establish ownership thereof by way of a civil claim, he was under an obligation to either return the 46 bags to Mohamed or pay him its value. That is my finding.

20. Perhaps I should make the following observation. Granted Vipul did not participate in the Appeal and it could be argued on his behalf that he should not be condemned unheard. But as held earlier, on proper construction of the Court order, it granted Vipul a window of avoiding that liabililty by establishing ownership thereof by way of a civil claim. For some unexplained reason Vipul did not commence such proceedings. Even more surprising, he did not set up a counterclaim when Mohammed filed his own civil suit. Vipul must rue his own inaction.
21. I have reached a decision that Vipul was under obligation to release 46 bags of the impounded sugar to Mohammed. But according to him, he had already sold the sugar by the time he received a demand for its return. Given those circumstances, he was under an obligation to pay the money value of the sugar or to give Mohammed 46 bags of other sugar of similar quality and quantity. Mohamed chose to pursue the money value.
22. A criticism of the Court decision as that the Court made an award when Mohammed did not establish the value to the required standard of proof. To stress this point, Counsel for the Appellants referred this Court to the decision in **Ouma –vs- Nairobi City Council** 1976 KLR 297 for the well settled principle that special damages must be specifically pleaded and strictly proved.
23. I have looked at the evidence placed before the Trial Court in its entirety. And I must accept that Mohamed failed to lead any serious evidence as to the value of the sugar. On the other hand Vipul produced documentary evidence that demonstrated that he bought 700 bags of 50 kg sugar from Nzoia Sugar Company at a price of ksh.1,750,000/= on 21/7/2008. The 46 bags of sugar found in possession of Mohammed were of 50kg from Nzoia sugar Company (see page 17 of the Criminal Proceedings). They were found in possession of Mohammed on or about 28th July 2008. This would be one day after Vipul purchased "similar" sugar. On a balance, they would be sugar of the same value from the same source. I have to find that Vipul 's evidence on value of the sugar unwittingly assists Mohammed in establishing the value of the 46 bags. Vipul bought one bag at ksh.2500/= and so 46 bags would be worth ksh.115,000/=.
24. That brings me to the final aspect of this Appeal. The following parts of Amended Plaint are relevant:-

a. **"Delivery of 687 bags of white sugar to the plaintiff.**
b. **In the alternative, payment to the Plaintiff of ksh.1,800,000 2,738,000/= the current value of the 687 bags of white sugar.**
c. **Interest at 20% on the ksh.1,8000,000/2,738,000/= being interest on commercial rates since 2008 to the date of full settlement.**
d. **Costs of this suit."**

This Court is told that because of having two values, the Plaint creates a doubt as to what is the Plaintiff's claim. That the pleadings, to that extent is not specific and sought to be struck out. It is quite clear that the pleadings talk of two values. It is however not the business of this Court to speculate as to why this is so. It is not for me to bring it down to a clerical error. That said, there are two specific amounts given, ksh.1,800,000/= and ksh.2,738,000/=. I have found that the loss proved by Mohammed is only ksh.115,000/=. This is much less than any of the two pleaded amounts. I do not understand the law to be that a claimant will loss an entire claim because of proving only a portion of the amount claimed. The law is not that the claimant should prove all or get nothing. Conversely though a claimant cannot be awarded special damages of a sum greater than that pleaded. I therefore hold and find that the confusion created by the untidy pleadings does not disentitle Mohamed to the proved amount of ksh.115,000/=.

25. On interest, the Court made an award of interest at Court rates. Court rates for now are at 12% p.a. and not 14% p.a. as awarded by the Trial Court.
26. The Appeal succeeds to the extent that the judgment of the Trial Magistrate is hereby set aside and in its place, judgment entered for the 1st Respondent against the Appellants for the sum of ksh.115,000/= with interest therefore from 12% p.a. from the date that the Lower Court suit was filed. Since there has been no outright winner of this Appeal, each party shall bear its own costs.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 15TH DAY OF MAY 2014.

IN THE PRESENCE OF:

……..COURT CLERK

…….....FOR RESPONDENTS

……..FOR APPELLANTS