



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL APPEAL 69B OF 1998

JOHN KINGORI GICHUKI

ELIUD MURAKARU.....APPELLANTS

Versus

CHARLES KIOGORA.....RESPONDENT

(Appeal from original Judgment in Civil Case No.99 of 1997 in the Senior Resident Magistrate's Court at Nanyuki delivered on 7th October, 1998 by M.K. RINTARI - SRM)

J U D G M E N T

By a plaint dated 18th August, 1997 and filed in court the following day, **Charles Kiogora**, hereinafter referred to as "*the respondent*" sued **John Kingori Gichuki** and **Eliud Murakaru**, hereinafter referred to as "*the 1st and 2nd appellants*" respectively claiming from them jointly and severally a sum of Ksh.51,000/=, costs and interest. Apparently this amount was the balance of the money advanced to the appellants by the respondent at the appellants' own request and instance in or about, December, 1996. Despite repeated demands and Notice of intention to sue, the appellants had refused, failed and or neglected to pay the same or any part of it, hence the suit.

In their joint statement of defence, the appellants stated that the suit was incurably defective and ought to be struck out. Further there was no privity of contract between the 2nd appellant and the respondent as he was not a party to the alleged transaction between the respondent and the 1st appellant and hence he was non-suited. As for the 1st appellant he denied ever receiving the alleged amount or at all. They jointly denied the alleged promise to pay and claimed that if such promise was ever made, it was obtained and or extracted through duress.

The suit was thereafter set down for hearing initially before **G.C. Mutembei** then Ag.P.M. He heard the evidence of the appellant. Thereafter in circumstances which are not clear from the record, the case was subsequently taken over by **M.K. Rintari SRM**. The evidence of the respondent was essentially that sometimes in November and December, 1996 he hired motor vehicle registration number KAG 622X from the 1st appellant for purposes of transporting potatoes from Nanyuki to Nairobi on his behalf at Ksh.8000/= round trip. Sometimes in December, 1986, the 1st appellant came along with the respondent's workers namely **Kimani Nderitu** (PW2) and **David Mwangi** (PW3) who prevailed upon

him to advance the 1st appellant a sum of Ksh.59,000/= so as to keep at bay the threatened repossession of his vehicle aforesaid by the financiers. The respondent agreed and parted with the money on condition that he would redeem the same by setting it off against the trips that the motor vehicle would undertake to Nairobi ferrying his potatoes at the same rate of Ksh.8000/= round trip. Upon receipt of the money, the 1st appellant only made one trip to Nairobi and thereafter disappeared from the scene to Maralal. The respondent went about looking for him to no avail. On or about 19th April, 1997 he came across the 2nd appellant, a brother of the 1st appellant in Nanyuki town. He confronted him with regard to the money he had advanced to his brother as aforesaid. However the 2nd appellant told him to pursue the 1st appellant. He caused the 2nd appellant to be arrested and taken to Nanyuki police station. At the police station, the 2nd appellant agreed to pay the amount to the respondent within seven days and he was subsequently released. That agreement was reduced into writing. However the 2nd appellant failed to adhere to the terms of the agreement, hence the suit against the two jointly and severally. In support of his case, the respondent called his workers, PW2 & PW3 respectively. Their evidence was similar and corroborated that given by the respondent.

In their defence, the appellants both testified. Their evidence was along the lines that the 1st appellant's name was not **John Kingori Gichuhi** but **Silas Kingori Gichuhi**. Sometimes in November, 1996 he used to do transport business with the 2nd appellant's motor vehicle registration number KQG 622X in Nyahururu. He was approached by PW2 to transport potatoes from Gathuru to Nairobi. The agreed cost was Ksh.8000/= per round trip. He did so and was paid. Infact he made three more similar trips. Thereafter they parted ways. Later he heard that his brother, the 2nd appellant had been arrested on an alleged debt that he owed the respondent. He came and saw the OCS, Nanyuki police station. Later he was sued. As far as he was concerned he owed the respondent nothing.

The 2nd appellant testified that the 1st appellant was his brother. He did not know the respondent. He was never advanced any money by the respondent. He only met the respondent when he forced him to go to Nanyuki police station on 16th December, 1997. He had come to Nanyuki when he was intercepted by 3 police officers in the company of the respondent. They demanded to know from him where his brother aforesaid was. When he stated that he did not know, they threatened to detain his vehicle. He was told that he must agree to settle the amount owed by the 1st appellant to the respondent if he wished to have his motor vehicle released. He reluctantly agreed. The police officers thereafter concocted the agreement which he signed. Thereafter he and his vehicle were released. As far as he was concerned he owed the respondent no money.

The learned Magistrate having considered and evaluated the evidence tendered by both the appellants and the respondent as well as their respective written submissions found favour with the respondent's case and accordingly entered judgment in his favour as against the appellants jointly and severally. The appellants were angered by the turn of events. Hence they lodged the instant appeal through **Messrs Kebuka Wachira & Company Advocates**. There were 6 grounds advanced by the appellants in their memorandum of appeal. These were:-

- 1. The learned magistrate erred in law and in fact in holding that the appellants were jointly and severally liable to pay the respondent Ksh.51,000/- although the alleged transaction did not involve both the appellants.**
- 2. The learned magistrate erred in law and in fact in confirming that the appellants owed the respondent certain amount of money without proof of exactness of the same.**
- 3. The learned magistrate erred in law and infact in concluding the existence of principal and agent relations between the appellants in regard to the alleged transaction without proof thereof.**
- 4. The learned magistrate erred in failing to make a finding that the second appellant is a stranger to this transaction.**

5. **The learned magistrate erred in concluding that the respondent could handover to a stranger such a colossal amount of money without requiring the same to be written down.**

6. **The learned magistrate erred in concluding that the second defendant agreed to pay the money although it was adduced during the hearing that he was coerced to acknowledge the debt he was not aware of by the police and (sic) the police station.**

The appeal eventually came up for hearing before me on 25th May, 2009 and both **Mr. Mugo** and **Mwangi** learned counsel for the appellants and respondent respectively agreed to argue the same by way of written submissions. Subsequently, they filed and exchanged the written submissions which I have carefully read and considered.

This is a first appeal and so I am obliged to reconsider the evidence assess it and make appropriate conclusions on such evidence, but always remembering that I had neither seen nor heard the witnesses – see **Peters V Sunday Post Ltd (1958) EA. 424, Selle & Another V Associated Motor Boat Co. Ltd & Others (1968) EA. 123** and **Ephantus Mwangi & Another V Duncan Mwangi Wambugu (1982 – 88) 2 KAR 278**. I must therefore bear the injunctions in these authorities as I deal with this appeal.

I have no doubt at all in my mind that the 2nd appellant was non-suited. The respondent in his evidence clearly and categorically stated that he only dealt with the 1st appellant. His witnesses (PW2 & 3) too also stated that all along they only knew and dealt with the 1st appellant. The 2nd appellant only came into the picture 4 months after the alleged transaction having been spotted in Nanyuki town. Indeed the 2nd appellant's own testimony was to the same effect. He was not aware of the respondent's claim until he was stopped by 3 police officers in the company of the respondent in Nanyuki and forced to take his vehicle to the police station. At the police station it is clear he was forced to execute an agreement acknowledging the debt of ksh.51,000/= owed to the respondent by the 1st appellant. The 2nd appellant at that time was not with the 1st appellant. It appears that he had no choice but to execute the agreement if at all he expected to be released together with his vehicle from police custody. He did not therefore sign the alleged agreement dated 19th April, 1997 voluntarily. It was extracted from him under duress. He only did so to buy his freedom. Apart from this document which he signed under duress, the respondent had nothing else to prove that the 2nd appellant owed him any money. Yet the learned magistrate went ahead to rule that the respondent had proved his case against the 2nd appellant. In my view considering the circumstances under which the alleged acknowledgment of the respondent's debt was extracted from the 2nd appellant and the totality of the evidence adduced, the learned magistrate ought to have rejected the said document.

It is trite law that one who alleges must prove and a party is normally bound by his pleadings. In the plaint the respondent was categorical that he was claiming from the appellants jointly and severally a sum of ksh.51,000/= being the balance of the amount given and advanced to the appellants by the respondent at their own request and instance. However in his evidence, it transpired that the respondent met the 2nd appellant for the first time when using police officers, he intercepted his motor vehicle in Nanyuki town on its way from Meru to Nyahururu. He admitted that the 2nd appellant was not present in December, 1996 when he allegedly gave the 1st appellant Ksh.59,000/=. He was not in Nanyuki town then or even later when the first appellant is alleged to have utilized Ksh.8000/=. His name did not feature during these alleged transactions in December 1996. Having been established that the 2nd appellant did not request any money from the respondent and was not in Nanyuki in the month of December, 1996 or at all until April, 1997, the claim as laid out by the respondent as against the 2nd appellant was clearly misconceived. The respondents evidence indeed does not support the averments in the plaint. If anything, it is at a variance with the plaint. Consequently, the claim as against the 2nd appellant was not proved. It was not alleged that during the transaction, the 1st appellant if at all mentioned that he was acting on behalf of the 2nd appellant. It would appear that if at all the 1st appellant acted as aforesaid, he did so independently and on his own accord. Therefore the issue of agency and or vicarious liability cannot arise in the circumstances.

The upshot of the foregoing is that the 2nd appellant was non-suited. On that score I would allow his appeal with costs.

How about the 1st appellant? The evidence on record suggests some sort of dealings involving the 1st appellant and the respondent. If indeed there were no such dealings why would the respondent pick on the 1st appellant out of the 30 or so million Kenyans then. It cannot have been a mere coincidence that the 1st appellant would have dealt with PW2 and PW3 who were employees of the respondent and then plead ignorance of the 1st respondent. These employees of the 1st respondent went into the details as to how they transacted business with the 1st appellant on behalf of the respondent. They ferried potatoes to Nairobi on behalf of the respondent using the 1st appellant's motor vehicle. There is no suggestion that there was any fall out between them and the 1st appellant as would have triggered their wish to testify falsely against the 1st appellant. Their subsequent parting of ways was mutual and not shrouded in mystery. According to the 1st appellant, between him and the respondents employees aforesaid, they did three trips to Nairobi ferrying potatoes and he was paid. On the 4th trip it rained heavily. They then agreed that he goes to Nyahururu. The evidence of PW2 on the issue was that after the 1st appellant had been paid Ksh.59,000/=, they used the vehicle for one trip. The 1st appellant then took the vehicle away. It was not until January, 1997 that he saw the 1st appellant in Nyahururu. As for PW3 he testified that after receiving the money, they used the vehicle for one trip. The next day, which was a Sunday, the 1st appellant took the vehicle saying that he was going to see his grandmother and he never came back. He thereafter went looking for him. When he found him in Maralal, he claimed that the motor vehicle had broken down.

The totality of the foregoing is that there was no grudge prevailing between the 1st appellant, PW2, PW3 and the respondent as would have compelled them to gang up and falsely testify against the 1st appellant. The 1st appellant acknowledges knowing PW2 and PW3. However he denies knowledge of the 1st respondent. PW2 and PW3 also confirmed knowing the 1st appellant and having worked together. However they were so working on behalf of the respondent. They testified that the 1st appellant approached them to talk to the respondent to advance him the sum of Ksh.59,000/= to forestall the possible re-possession of his lorry by the financiers. This testimony was not seriously challenged. How would these witnesses have known that the 1st appellant's lorry was the subject of a possible repossession by the financiers unless they were told by the 1st appellant. The 1st appellant did not seriously dispute this allegation. The two employees then approached the 1st respondent on that account and on his behalf and he agreed. The agreement was subject to the respondent recouping the said outlay by setting off against the trips that the 1st appellant would undertake to Nairobi on his behalf ferrying his potatoes. To my mind this arrangement made good business sense.

The 1st appellant has challenged this evidence that there was no way that the respondent would have parted with such colossal sum of money to a stranger. I do not think that in so far as the respondent was concerned the 1st appellant was anything but a stranger. He had been dealing with the appellant from November, 1996 on routine basis. His employees PW2 & PW3 were familiar with the 1st appellant. They even knew where he came from and where he plied his trade. He even confided into them. That must have been the reason that the 1st appellant opted for them to plead his case with their employer, the respondent. The 1st appellant also takes the position that if he had received such an amount then, there must indeed be a written document in verification of that fact. However, I think that, that is a non-issue. Not every commercial transaction is reduced in writing. There are occasions when money is advanced on friendly and trust basis. To expect that such transaction must of necessity be reduced into writing is to expect too much. It may even amount to an assault to the friendship and trust cultivated between the parties. The circumstances of this case seem to suggest that the agreement between the 1st appellant and the respondent over the advance was a gentleman's agreement. It was hinged on the fact that repayment would be through the 1st appellant ferrying the respondent's potatoes to Nairobi. Accordingly failure to reduce the agreement into writing is neither here or there.

The 1st appellant too have sought to hide behind his real name to avoid his liability to the respondent. According to the 1st appellant he is not **John Kingori Gichuhi** but **Cyrus Kingori Wambugu**. Accordingly he was not the person sued. I think that, this is a mere red herring. In his statement of defence, the 1st appellant categorically and without reservations whatsoever admitted the descriptive paragraphs of the plaint. Those paragraphs described him as **John Kingori Gichuhi**. Further when served with summons, he never entered appearance under protest with regard to the name. In any event there is undisputed evidence by PW2 and PW3 that he was the man they were dealing with on behalf of the respondent. The 1st appellant too admits having dealt with PW2 & PW3. The three dealt with each other on the basis that 1st appellant went by the name **John Kingori Gichuhi**. It matters not therefore that later in his evidence he wished to be known as **Cyrus Kingori Wambugu**. He never raised the issue in his defence to afford the respondent opportunity to challenge and or counter it. Yes, he may have tendered in evidence his National Identity with those names. However, everybody knows that a National Identity Card can be manufactured for purposes of meeting certain exigencies. That possibility cannot be wholly ruled out in the circumstances of this case.

The upshot of all that I have been saying is that the 2nd appellant's appeal is allowed with costs. The judgment and decree of the lower court as relates to him is hereby set aside. In a substitution, I make the order dismissing the suit against him with costs as well. However and in so far as the 1st appellant is concerned, I find that his appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nyeri this 8th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE