REPUBLIC OF KENYA

Namunyu v Daraja

Court of Appeal, at Nakuru June 7, 1985

Hancox, Nyarangi JJA & Platt Ag JJA

June 7, 1985,

Platt Ag JA delivered the following Judgment.

Civil Appeal No 73 of 1983
(Appeal from the High court at Eldoret, Mbaya J, Civil case No 19 of 1981)

There was a very simple agreement between the plaintiff, Mr Suleman Daraja, and the defendant, Mr Japheth Namunyu, whereby the plaintiff loaned the defendant Kshs 12,000, as long as the February 19, 1977. It was a friendly loan, as these loans are called, to distinguish them from the loan of a money lender. According to the plaintiff he thereby aided the defendant to evade execution taken against his property in another case. But the defendant did not repay the loan, and when the plaintiff sued him in 1979, the defendant denied all knowledge of the transaction, and even that of a document, dated February 19, 1977, allegedly written and signed by the defendant.

The resident magistrate hear the plaintiff and defendant give evidence, and referring to the signature of the defendant on his defence, he found that it looked the same sort of signature as that on the document of February 19, 1977. This said at the end – "still remains a debt of Kshs 12,000." In the upshot the learned magistrate believed the plaintiff, disbelieved the defendant, and gave judgment for the sum of Kshs12,000.

The defendant appealed unsuccessfully to the High Court, and now appeals again to this court on matters of law or mixed law and fact. It is probably easier to understand the situation if I still refer to the appellant as the defendant and the respondent as the plaintiff.

Mr Oluoch argued the appeal attractively pointing to several lapses in the trial and first appellate proceedings. It is a great pity that Mr Oluoch did not appear at the trial, where the defendant was unrepresented, and on first appeal, if one may say so without disrespect to Mr Kamau or Mr Dhanjal. Mr Oluoch has formed a very clear view of the reasons why the magistrate wrongly applied the doctrine of non est factum and the burden of proof, and the intervention of Patel, J, in this matter. Indeed the matter was not very well tried in the way of setting out the issues and refining the pleadings, by way of further and better particulars and so forth. But there is no doubt, that the signature on the document dated February 19, 1977 is remarkably alike, in the formation of its individualistic lettering, to that of the defendant's signature in the defence he drafted himself. The learned magistrate was no doubt persuaded, by virtue of section 76 of the Evidence Act (cap 80) to hold for the plaintiff, whose evidence in general the trial court preferred. Indeed the defendant emerged poorly from his cross-examination, where he had at first denied having had any business dealings with the plaintiff, only to recant because they had had a land transaction and a case on it, but to be fair, the plaintiff had agreed to set off of Kshs 1,300 against the Kshs 12,000 which neither of the lower courts took into account.

At this stage Patel, J was asked to grant a stay of execution, and apparently he did give an order on terms, according to Mr Anassi's brief – the record as missing. Then Mr Justice Patel noticed the problem of the set-off of the Kshs 1,300 and continued:-

> ***"The main point in issue appears to be Exhibit 1. Was it written by the appellant/defendant? Or was it at least signed by him? This document is hotly contested and both parties feel that the document examiner's opinion on it be sought***

to help the appeal judge in arriving at his decision on it. There may well be other grounds of appeal."

In view of the above, to say time later, I direct that the Exhibit 1 as well as the written statement of defence, which said defence is signed by the applicant, and which the learned resident magistrate used for his comparison, be sent to the document examiner, Nairobi asking for his opinion on the signature on Exhibit 1 and the defence. The opinion to be submitted to the court and placed on the file.

As Mr Olouch rightly points out this was an unusual thing to do, but both parties felt that the document examiner's opinion on it be sought to help the appeal judge in arriving at his decision; and that was a stand they could take to facilitate the appeal decision. When Mr Kamau came on the scene he raised no objection in his memorandum of appeal. When Mr Anassi referred to this document as in his address, no plea in limine was taken by Mr Dhanjal that the document was inadmissible, and could not be looked at by the High Court judge.

Mr Dhanjal made a half-hearted reply to Mr Anassi. It is of course true that the document examiner's report was not part of the evidence and that leave must be sought to adduce additional evidence. There was no further evidence taken. But as Mr Anassi contended, as this was a procedure wanted or accepted by the parties, that the examination be made for the benefit of the judge's decision, Mr Dhanjal's objections are beside the point. The parties wanted the judge to take the opinion into account in deciding the matter. Where does Mr Dhanjal argue that his client was unaware of or disagreed with this procedure? When does anyone tell the High Court that Patel, J's record was not the truth or was a misunderstanding of the situation. Mr Anassi said that the record is exactly what was agreed. Mr Oluoch dienied that, but he was not in court. Mr Oluoch has not 'challenged the record' as mis-representing the situation. The record therefore, must stand.

In that circumstance, then the High Court decided the matter largely on the strength of the document examiner's report.

However, looking at this matter as a whole, despite the irregularities and oddities of procedure, the result produced appears to have been quite correct. A record is by no means all that there is to a trial. But a plain reading of the record does not suggest that the result was at all wrong. Indeed it seems right and for these reasons the judgment of the lower courts should be affirmed on the facts to the extent of Kshs 10,700.

On the technical question, there was no doubt sufficient evidence on the record, for the lower courts to decide that this was not a transaction within the Money Lenders Act (cap 528). For one thing no interest was charged and all the circumstances show that there was a casual loan between businessman, which was not meant to be a money-lending transaction. Apart from the set-off, I would dismiss the appeal with costs. Hancox JA. I have had the advantage of reading in draft the judgment of Platt Ag JA. I agree with it and do not wish to add anything.

As Nyarangi, JA, also agreed the appeal is dismissed save to the extent that for the original decretal sum there is substituted Kshs 10,700. Nyarangi JA. I concur.