REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

civ case 773 of 1981

JOHNSON NDAKWA MISIKO…….…….. APPELLANT

AND

A B KIMANYALA ……..…… RESPONDENT

(Appeal from a Judgment and decree of the High Court of Kenya at Mombasa (Bhandari, J) dated the 24th January, 1983

In

In Civil Case No. 773 of 1981)

JUDGMENT OF CHESONI, AG J A

The appellant Johnson Ndakwa Misiko and the respondent Alexander Buduma Kimanyala had an oral agreement for Johnson, who operates a transport business within Kakamega District, to transport Alexander's sugar cane to Mumias Sugar Factory within the same district. Alexander has a sixacre farm in the district on the whole of which he had planted sugar cane and this was his first crop. It was agreed between the parties that the charges per trip would be shs. 500/= although Alexander said that after the first ten trips he was to pay shs. 400/= per trip, but that was denied by Johnson. He parties stated in their evidence in court that Johnson was paid shs. 5,000/= in advance. Johnson made only five trips and then stopped, but Alexander had cut down all his cane and it rotted there.

He suffered a loss of shs. 65,000/= which he claimed in his plaint, but at the hearing this figure was adjusted to shs. 61,900/= made up as follows:-

Value of sugar-can shs. 59,400/=

Refund of transport

Charges shs. 2,500/=

Total: shs. 61,900/=

Alexander therefore sought to recover that loss and Bhandari, J who heard the case gave judgment for him but deducted from that figure shs. 27,500/= which Alexander would have spent on transport after the first five trips leavings shs. 34,400/= which Johnson was ordered to pay Alexander plus costs of the suit with interest thereon. Johnson has appealed from that judgment on seven grounds.

The first ground is that the Learned Judge erred in law and in fact in holding that there was a contract

between the appellant and the respondent for the transportation of the whole of the respondent's crop namely 480 tons of cane. In paragraph 4 of the Defence the appellant states as follows:

"WITHOUT PREJUDICE to the foregoing, the Defendant avers that:- (a) There was a oral agreement between the parties to the effect that the Defendant would be paid shs. 500/= for every trip transported and that the sugar-can would be cut as it was transported and not that whole sugar cane would be cut down to await transportation."

What I read from this statement is that the parties agreed for the appellant to transport an unspecified quantity of the respondent's sugar-can, but that the sugar-can would be cut only whenever means of transport was available. The pleadings do not therefore deny that the appellant was to transport the whole crop of the respondent, but only disputes the time for cutting down the whole crop. In court the appellant said:

"In 1980 I had an agreement with the plaintiff. He came to me at my shop. He wanted me to transport his sugar cane to Mumias Sugar Factory.

We agreed that he would be paying shs. 500/= per trip. We did not discuss as how many trips I would make. We only agreed the price of each trip that I did. We just agreed the price of each trip shs. 500/=." The appellant's evidence in court also shows that the only agreement was for transportation for an unspecified quantity of sugar-can. The respondent on the other hand said this in his evidence:

"I told him six acres.

He asked me how many lorry loads would that make.

I replied, approximately 35 to 40. The he said in that case you must pay me another shs. 4,000/= to make in all Shs. 5,000/= for the first ten trips at shs. 500/= per trip. He told me further that I would pay him later for the rest of the trips for which he would charge me only shs. 400/= per trip. I agreed to his proposal.

Whether the oral agreement related to transporting the whole of the respondent's crop or not was a question of fact and the Learned Judge after hearing the parties found as a fact that the appellant was to transport the whole crop. In my opinion that finding was sound and is supported by the evidence that is on record.

The second ground alleges that the Learned Judge erred in law and in fact in failing to appreciate that the arrangement or contract, if any, between the appellant and the respondent for the transportation of the respondent's cane was frustrated by the unexpected poor weather conditions. The appellant said that after the first five or seven trips there was a heavy rainfall and his lorry got stuck in mud on the respondent's farm for two days, but the respondent denied that there was any rainfall during that month. He Learned Judge believes the respondent and did not believe the appellant. He was entitled to reach that view. It as a question of fact whether there was any rainfall and having believed the respondent it must be that the Learned Judge found that there was no rainfall and so the contract was not frustrated.

I have no ground for supposing the Learned Judge did not consider Exhibit 1 which was the respondent's counsel's letter to the appellant. Paragraph 1 of that letter by mentioning the words "your fees of shs. 5,000/=" has no effect to the decision reached by the Learned Judge that the oral agreement related to the whole crop. I can, therefore, see no merit in the third ground of appeal. The letter did not say that that was the whole payment to be made.

As to the fourth ground of appeal there is no requirement in law or as a matter practice for the evidence of the respondent as to the terms of the oral agreement to have been corroborated. If any corroboration was, and in my view it was not, required then it was there in the appellant's own evidence.

What has been said for the 1st ground applies to the fifth ground and the Learned Judge did not err in

finding that the respondent was right in assuming that the appellant was to transport the whole of the respondent's crop.

The respondent pleased a loss of shs. 65,000/= but on evidence he established that the correct figure was shs. 61,900/=. The Learned Judge deducted from that figure what the respondent would have paid for transport i.e. shs. 27,500/= the Learned Judge did not, therefore err in awarding the respondent the sum of shs. 34,400/= as alleged in the sixth ground.

As to the seventh ground it was the duty of both parties to bring before the court expert evidence if necessary. The subject matter of the suit was known to both parties. It was not necessary for the Learned Judge to require the assistance of expert evidence as to the value of the crop. The appellant did not dispute that value, and, if he, the appellant, wanted he could have placed before the court expert evidence to show that the value of the cane was other than what the respondent said it was. There is no merit in this ground of appeal.

Having evaluated the evidence on the record as a whole I arrive at a incurrent finding as Bhandari, J did and I can see no merit in the whole of this appeal. I would, in the result, dismiss the appeal with costs.

Delivered at Mombasa this 27th day of July 1983

Z R CHESONI

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AG. JUDGE OF APPEAL

JOHNSON NDAKWA MISIKO…….. APPELLANT

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JUDGMENT OF POTTER, J A

I also agree. Accordingly this appeal is dismissed with costs.

Delivered at Mombasa this 27th day of July 1983

K D POTTER

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JUDGE OF APPEAL

JOHNSON NDAKWA MISIKO…….. APPELLANT

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JUDGMENT OF KNELLER, J A

I read the judgment of Chesoni, Ag J A in draft and I agree that the appeal should be dismissed with costs.

Delivered at Mombasa this 27th day of July, 1983

A A KNELLER

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR