Chamken Bookshop Limited v Board of Management Dedan kimathi High School (Civil Appeal 189 of 2018) [2025] KECA 23 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 23 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 189 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JANUARY 17, 2025

BETWEEN

CHAMKEN BOOKSHOP LIMITED ..... APPELLANT

AND

BOARD OF MANAGEMENT DEDAN KIMATHI HIGH SCHOOL ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (Matheka, J.) dated 28th May, 2018, in Civil Appeal No. 7 of 2016)

JUDGMENT

1. The appellant instituted a civil suit against the respondent before the Chief Magistrate's Court at Nyeri vide an amended plaint dated 19th August 2014, for recovery of a liquidated sum of Kshs.455,130. It was the appellant's case that between the months June 2010 and June 2012, they supplied to the respondent assorted laboratory chemicals, textbooks, stationery and sports items worth Kshs.597,350. The appellants averred that by a letter dated 12th November 2012, the respondent admitted to owing the said sum and sought the appellant's indulgence to clear the said amount. That by a cheque dated 6th June 2013, the respondent made part payment to the appellant of sum Kshs.142, 220. The balance of Kshs.455,130 remained unpaid which prompted the appellant to file this suit. The respondent, in its amended statement of defence dated 30th January 2015, denied owing the amount claimed by the appellant.

2. The case was heard by way of viva voce evidence. PW1, Charles Mwaniki Kariuki, the managing director, testified on behalf of the appellant. He reiterated the averments made in the plaint. It was his evidence that the appellant sent a demand letter to the respondent to settle the amount owing, and that the respondent's Principal replied vide a letter dated 12th November 2012, acknowledging the amount owed, and requested for more time to settle the same. The respondent, which was under

new leadership at this point, did not settle the debt. PW1 produced delivery notes and correspondence between the parties into evidence.

3. Francis Koira Ndirangu, the Principal and Secretary to the respondent's Board, gave evidence as DW1. It was his testimony that the respondent noted discrepancies between the delivery note dated 11th January 2011 and the corresponding invoice number 33537 dated 19th January 2011. He stated that the delivery note indicated delivery of five (5) tubes of Riso Ink CZ100 and five (5) Master Riso CZ100, while the corresponding invoice charged for nine (9) tubes of Riso Ink CZ100 and seven (7) Master Riso CZ100. DW1 averred that the total sum overcharged amounted to Kshs.41,600. He stated that the total amount owed, according to the respondent, was Kshs.413,530. DW2, David Wachira Maina, the respondent's store keeper, stated that he received five (5) tubes of Riso Ink CZ100 and five (5) Master Riso CZ100 from the appellant.

4. The learned magistrate, after hearing the parties, found in favour of the appellant, and ordered the respondent to pay Kshs.413,530, as the amount determined as owing to the appellant. This amount comprised of the sum claimed by the appellant in his pleadings less the disputed amount of Kshs.41,600, which the respondent alleged was an overcharge.

5. Aggrieved by this decision, the appellant lodged a first appeal before the High Court at Nyeri. The issue for determination by the court was whether the respondent owed the appellant the disputed sum of Kshs.41,600. In its memorandum of appeal, the appellant faulted the learned trial magistrate for failing to appreciate that: the respondent wholly admitted the appellant's claim; the respondent admitted to receiving the disputed nine items, being 9 tubes of Riso Ink CZ100 and 7 Master Riso CZ100; and, that the appellant's entire claim had been sufficiently substantiated.

6. The learned Judge (Matheka, J.), upon re-evaluating and re- assessing the evidence before the trial court upheld the decision of the trial magistrate. The learned Judge determined that there was no admission on the part of the respondent, for the alleged receipt of the disputed items, worth Kshs.41,600.

7. The appellant is now before us on a second appeal. In the memorandum of appeal, the appellant was aggrieved that the learned Judge misdirected herself on the evidence adduced before the trial court and made inferences that were not supported by the evidence. The appellant further faulted the learned Judge for applying the law on admissions and thereby arriving at the wrong determination.

8. The appeal was canvassed by way of written submissions.

   Learned counsel Mr. Nderi appeared for the appellant. It was his submission that the full amount claimed by the appellant was admitted by the respondent, even before the suit was lodged before the trial court, vide their letter dated 12th November 2012. He averred that during trial, the respondent's produced their ledger detailing the goods received into their custody, and that the entry dated 26th May 2010 clearly showed that the respondent received the disputed six tubes. Counsel urged that the store keeper (DW2), upon cross-examination, admitted to receiving the disputed items on 26th May 2010. He was of the view that the decision of the first appellate court was against the evidence on record.

9. The respondent, on the other hand, submitted that the appellant failed to discharge its evidentiary burden of proving the supply of the disputed items. It was the respondent's submission that the disputed amount of Kshs.41,600 was never admitted by the respondent, and that the admitted debt of Kshs.413,530 had already been fully paid to the appellant.

10. This being a second appeal, our duty was well stated in Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR, where this Court held:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and Another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
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> > 'We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law'."

11. Having carefully considered the rival submissions, the pleadings, the proceedings before the trial court and the High Court, we discern the issue for determination to be whether the appellant established to the required standard of proof that it supplied the said stationery to the respondent.

12. According to the appellant, it delivered the nine (9) tubes of Riso Ink CZ100 and seven (7) Master Riso CZ100. The respondent denies receiving the said items as listed by the appellant. The respondent stated that it only received five (5) Riso Ink CZ100 and (5) Master Riso CZ100 from the appellant. The respondent produced its store's receipt which showed the receipt of the above items less what indicated in the invoice by the appellant.

    This fact was supported by the appellant's own delivery note.

13. The trial court and the 1st appellate court believed the evidence adduced by the respondent while it disbelieved that which was adduced by the appellant in that regard. The two courts below concurred on this fact. As the second appellate court, we can only upset this concurrent finding of fact by the two courts below if the decision was arrived at without any evidence or proof or it was otherwise perverse.

14. In our re-evaluation of the evidence adduced before the trial court, we are satisfied that indeed the appellant was unable to prove or establish that it had delivered the extra four (4) tubes of Riso Ink CZ100 and the extra two (2) tubes of Master Riso CZ100. The onus and burden of establishing that the items appearing in the invoice was indeed delivered to the respondent was on the appellant. It was clear that the appellant failed to discharge this burden hence the concurrent decision of the trial court and the 1st appellate court.

15. In the circumstances, we are unable to find any fault with the decision rendered by the 1st appellate court. The decision was based on documentary evidence that was produced in court and established by oral evidence adduced on behalf of the respondent.

16. The appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar