



**Coastal Bottlers Limited v Aweyo (Civil Appeal 49 of 2019)
[2022] KECA 11 (KLR) (21 January 2022) (Judgment)**

Neutral citation: [2022] KECA 11 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 49 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
JANUARY 21, 2022**

BETWEEN

COASTAL BOTTLERS LIMITED APPELLANT

AND

ROBERT OKECH AWEYO RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Malindi (Korir, J.) delivered on 26th July 2018 in High Court Civil Appeal No. 14 of 2011)

JUDGMENT

1. The main issue in this appeal is whether the learned Judge of the High Court was right in holding that the respondent had established, before the magistrate's court which tried the suit, the existence of a contract between the parties.
2. In his suit before the magistrate's court, the respondent pleaded that he entered into an agreement with the appellant on or about 3rd November 2008 in which he agreed to carry out works, itemized in his amended plaint, at the appellant's premises at Mtwapa Plant for an agreed total cost of Kshs.1,289,000.00. He averred that he carried out the works but was only paid Kshs.64,000.00 leaving a balance of Kshs.1,225,000.00. He sought judgment for that amount and interest from 13th June 2009.
3. In its statement of defence, the appellant pleaded that it employed the respondent as a "casual labourer to be paid on a daily basis for work completed" and "in respect of which he has been fully paid". It denied the agreement as claimed by the respondent.
4. The respondent testified that on 3rd November 2008 he was summoned by the appellant's project manager, one Mr. Sundeep, who showed him the "job of installing machines, piping work"; that he signed the job list thereby agreeing to do the work; that the project manager also signed the job list; that he was supposed to be paid Kshs.1,289,000.00; that he started work and completed on 12th



December 2008 after which he received a letter from the appellant expressing satisfaction with the work; that the appellant did not pay him as agreed but only paid Kshs.64,000.00 leaving the balance claimed of Kshs.1,225,000.00; that when payment was not forthcoming, he instructed his lawyers, who made demand before action on 21st July 2009. He produced as exhibits, carbon copies of the job list, the appellant's letter of satisfaction with the work dated 12th December 2008; agreement dated 14th December 2008, and the advocate's demand of 21st July 2009 among other exhibits.

5. In addition to his own testimony, the respondent called as witnesses, Michael Kasoro (PW2) and Ali Omar Mohamed (PW3). Michael Kasoro testified that the respondent hired him in connection with the works "to write the register of people reporting for duty" as well as doing casual jobs of cutting metals and welding. He did the work for about six weeks and was paid Kshs.350.00 per day.
6. PW3, Ali Omar Mohamed, testified that he worked for the appellant from 1978 to 2008 as a fundi and that he used to see the respondent, who "had been given a contract" working at Mtwapa; that he saw the respondent do and complete his work of "angles welding" but he could not tell whether he was paid or not.
7. The appellant called its Human Resource Manager, Evans Ogutu, as its witness. His testimony was that the appellant did not have a contract with the respondent as claimed; that the respondent was employed by the appellant as a welder on casual basis and paid on daily basis. He produced copies of Daily Casual Payroll to support his claim that the respondent was paid a total of Kshs.68,787.00 for his labour. He confirmed that between 2008 and 2009 the appellant had employed a project manager, Sundipu Desmukh, who was responsible for supervising the appellant's plant and that upon finishing his work, he was discharged; that if the said Sundipu was involved in an agreement with the respondent, the appellant was not involved, and neither was he aware that the respondent was paid a deposit of Kshs.64,000.00 as the respondent claimed.
8. Having heard the witnesses, and upon considered the submissions made before her, the learned trial magistrate (L.W. Gitari, as she then was) framed the issues for determination thus: whether there was a contract between the parties; whether the respondent performed the same; and whether the appellant breached the same.
9. As to whether there was a contract between the parties, the trial magistrate found that the respondent had not discharged his burden of proof to show existence of a contract; that the job list produced by the respondent was not an agreement as it had no terms and conditions; that some of the documents produced in support, apart from the fact that they related to Coca Cola, a different entity from the appellant, and could not have been drafted by the appellant.
10. The learned trial magistrate concluded that the respondent failed to prove that he entered into an agreement with the appellant as claimed and upheld the claim by the appellant that the respondent was employed as a casual labourer and all his dues paid. Accordingly, the trial court stated, the question of breach of an agreement that did not exist did not therefore arise. The trial magistrate also found that the copies of documents that were produced by the respondent, being secondary evidence, were not admissible as there was no compliance with provisions of Section 69 of the *Evidence Act*. In the result, in a judgment delivered on 4th May 2011 the trial magistrate dismissed the respondent's suit with costs.
11. That decision was challenged before the High Court at Malindi. In a judgment, the subject of the present appeal, delivered on 26th July 2018, the High Court held that the trial magistrate erred in holding that the respondent's documents were inadmissible; that the carbon copies of the documents on which the respondent relied were primary documents and Section 69 of the *Evidence Act* was not applicable.



12. On the substance of the claim, the learned Judge found that the respondent had established the existence of a contract between the parties; and that the appellant had breached the same. The Judge entered judgment for the respondent as prayed in the amended plaint.
13. Although the appellant has challenged that judgment on five grounds of appeal, there are two main issues for determination in this appeal. First is whether the learned Judge of the High Court erred in holding that the documents produced by the respondent in support of his claim were admissible. The second question is whether in holding that there was a contract between the parties, thereby overturning the finding by the trial magistrate that no such contract had been established.
14. On the first issue regarding admissibility of the documents produced by the respondent in support of his claim, it was not open to the trial magistrate, having overruled an objection to admissibility in the course of the trial, and having ruled at that stage that the documents were admissible, to subsequently hold in the judgment that the same documents were inadmissible. In effect, having ruled on the matter, the learned trial magistrate could not subsequently, *suo motto*, in the judgment overturn her own decision. Furthermore, as the learned Judge of the High Court found, the documents were carbon copies of the originals and section 69 of the *Evidence Act* was not a proper basis for rejecting them. We are therefore fully in agreement with the learned Judge of the High Court and need not say more on the matter.
15. In addressing the second question regarding whether the respondent established the existence of a contract with the appellant, we are aware that this is a second appeal which by dint of Section 72 of the Civil Procedure Rules must be confined to matters therein set out. A decision of the High Court from a decree of the subordinate court that is not supportable by the evidence on record is a decision that is contrary to law and this Court would be entitled to interfere with such decision. As Madan, JA stated in *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] E.A 898; [1985] eKLR*

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

16. We must therefore review and re-evaluate the evidence ourselves in order to determine whether the High Court as the first appellate court, properly evaluated the evidence so as to reach the decision it did. In reaching the conclusion that a contract between the parties was established, the learned Judge of the High Court had this to say:

“Considering the evidence adduced by the appellant and which evidence was backed by documents, the story that emerges is that the appellant was contracted by the respondent’s supervisor who was also the project manager to do some work in the respondent’s plant at Mtwapa....

...The appellant and the said supervisor entered a contract in which eleven tasks were to be undertaken by the appellant for the cost specified for each task. The total amount



was Kshs.1,289,000.00. By his own admission the appellant was paid Kshs.64,000.00 thus leaving an outstanding balance of Kshs.1,225,000.”

17. Later in the same judgment, the learned Judge stated:

“Everything shows that the contract was between the appellant and the respondent Coastal Bottlers Limited. The project manager/supervisor, as confirmed by DW1 was the in-charge of the project. The appellant needed not to have looked beyond him when entering into the contract. The job list was a contract and it needed not have had a heading stating that it was a contract or agreement. An overall view of the evidence shows that the appellant established his claim on a balance of probabilities. He was entitled to a judgment in his favour.”

18. What then was the evidence? In a bid to establish the existence of a contract between himself and the appellant, the respondent testified that on 3rd November 2008 he was summoned by the appellant's project manager, one Mr. Sundeeep, who showed him the “job of installing machines, piping work”; that he signed the job list thereby agreeing to do the work; that the project manager also signed the job list; that he was supposed to be paid Kshs.1,289,000.00; that he started work and completed on 12th December 2008 after which he received a letter from the appellant expressing satisfaction with the work; that the appellant did not pay him as agreed but only paid Kshs.64,000.00 leaving the balance claimed of Kshs.1,225,000.00; that when payment was not forthcoming, he instructed his advocate to demand payment.

19. In support, the respondent produced a “job list” dated 3rd November 2008 in which tasks were itemized; a letter dated 12th December 2008 from Robert Oketch & Co addressed to CocaCola Company Mombasa confirming that all the work “is tested and confirmed successful” and signed by Mr. Sirndipu, Project Manager, CocaCola Company; a letter dated 14th December 2008 from Robert Oketch & Co under the subject reference “Agreement between the Company (CocaCola) and Robert Oketch & Company through General Manager and Project Manager Sirndipu”; and a letter of demand from the respondent's advocates, Wambo & Co Advocates, addressed to Coastal Bottlers Limited demanding payment of the said sum of Kshs.1,225,000.00; unpaid salaries of Kshs.147,000.00 and Kshs.36,000.00 being “one month payment in lieu of notice of termination of employment.”

20. A close examination of those documents reveals the following:

The job list dated 3rd November 2008, on the basis of which the respondent stated that he undertook the works, contains 11 items. Under some of the items, a charge for “labour charge & man power” is indicated. There is also indication of the “material used” under most of the items. There is no indication in the Job list who was supplying such material. The job list is signed by the respondent as “contractor” and Sirndipu as “contract manager”. There is provision for signing by General Manager which is blank. The job list is on the appellant's letterhead. It was the respondent's testimony that it was the project manager who gave him the job list when he (respondent) was called for the work on 3rd November 2008.

21. The next document is the letter dated 12th December 2008. It is from the Robert Oketch & Co. It is however on a letterhead of the appellant. It is addressed to CocaCola Company. The subject reference is “testing and checking of the pipework”. It is stipulated in the letter that “I hereby wish to inform you that all the work (pipework) is tested and confirmed successful. It has no leakage.” And later in the same letter the following appears:

“The job is confirmed by: Mr. Sirndipu (Project Manager, CocaCola Company).” In his testimony, the respondent stated that he received that letter when he finished the work on 12th December 2008. In the end, it is unclear whether the author is the respondent, as it



is indicated as emanating from “Robert Oketch & Co”. If it is from the respondent, it is somewhat baffling, and the record does not indicate that any explanation was offered, why it would be on the appellant’s letterhead or whether it is from the appellant. If the letter is from the appellant, it is also baffling why it would be addressed to CocaCola Company.

22. Two days after the alleged confirmation by the letter of 12th December 2008 that “all the work (pipe work) is tested and confirmed successful” after the work is said to have been completed, another document dated 14th December 2008 is generated, retroactively signifying the „agreement reached# between the parties. The respondent’s testimony in that regard was that after completing the work, the appellant “did not pay as agreed. They paid Kshs. 64,000/=”; that the Project Manager told him to serve as a casual employee for six months “as they looked for money to pay” him and that they wrote an agreement.

It is necessary to reproduce that „agreement#:

“REF: AGREEMENT BETWEEN THE COMPANY (COCACOLA) AND ROBERT OKETCH & COMPANY THROUGH GENERAL MANAGER AND PROJECT MANAGER SIRNDIPU:

On the noted date, I Robert Oketch & Co. We had reached an agreement with the above noted company (CocaCola) that my balance of Kshs.1,225,000 (One million, two hundred and twenty-five thousand) would be cleared.

The total amount of money was Kshs.1,289,000 minus Kshs.64,000 being the deposit.

This balance was to be paid after six months during which the job was tested successful.

Robert Oketch

(Contractor)

Sign...14/12/008

Sirndipu

(Project Manager)

Sign...14/12/008”

23. Although, on the face of it, that agreement emanates from the Robert Oketch & Co., like the letter of 12th December 2008, it is also on the letterhead of the appellant. It again makes reference to agreement with the appellant “through General Manager” but the General Manager is not privy to it.
24. These documents, on which the respondent relied in a bid to establish existence of a contract between him and the appellant, raise pertinent questions in so far as the issue of existence of a contract is concerned. Firstly, it is evident that despite the provision for signature of the General Manager of the appellant in the Job List and reference to him in the “agreement” of 14th December 2008, the General Manager did not sign either document. The record of proceedings before the trial magistrate does not show that the respondent offered any explanation for this. Secondly, it is not clear why the “agreement” of 14th December 2008 is drawn or written subsequent to work having been completed on 12th December 2008. Third, it is rather curious, in our view, that documents emanating the respondent, or his business entity Robert Oketch & Co are printed on the appellant’s letterheads with no explanation.



25. In view of the foregoing, we think the learned trial Magistrate was justified in stating, as she did in her judgment as follows:

“The plaintiff produced the job list as exhibit P1. I have perused the document which is a job list signed by Robert Oketch as contractor and Sundipu as Project Manager. The slot for General Manager is not signed. The defendant through its witness Evan Ogutu testified that Coastal Bottlers is not aware of the agreement exhibit P1. I have looked the document exhibit P1. The document has no stamp nor does it have the seal of the defendant enclosed (sic) (embossed) on the purported agreement. The document is a job list and does not state in any way that it is a contract or an agreement. The document does not in any way show that the plaintiff and the defendant entered an agreement as alleged by the plaintiff.”

26. We think it is significant that the job list on which the respondent said he undertook the work was not signed by the General Manager of the appellant despite provision for signature by such officer. The appellant denied, in its defence, having entered into a contract with the respondent. Despite his claim that he was paid Kshs.64,000.00 by the appellant in part payment for the job, he did not produce any evidence in support. Evidence of such payment by the appellant to the respondent would no doubt have given credence to the respondent's claim of existence of a contract with the appellant. In the agreement of 14th December 2008 which the respondent stated „they# wrote, it is again stated to be between the appellant and Robert Oketch & Company “through General Manager and Project Manager” and yet the General Manager is not privy to it. In case of *Ashok Morjaria vs. Kenya Batteries [1981] Ltd. & 2 others, [2002] eKLR*, the Court stated:

“So where, as here, a director of a company executes a loan agreement on behalf of the company and stamps it with a company stamp, as the second defendant did, the company cannot wriggle away from its obligations to pay by contending that the borrowing was not authorised, or one director's signature was not enough or the company seal was not affixed to the agreement if what he did was within his ostensible authority as director of the company as in deed it was.”

27. The absence of involvement of the General Manager should have concerned the respondent. Although a party dealing with a limited liability company need not be concerned with compliance with internal procedures, there is no evidence that the appellant held out the project manager as having the authority to bind the company. At best the evidence presented by the respondent showed that the respondent did work in collaboration with the project manager but there is insufficient evidence, in our view to establish existence of a contract with the appellant. Had the learned Judge of the High Court properly evaluated the evidence tendered before the trial court, he would no doubt have come to the conclusion that there was insufficient evidence to establish existence of a contract with the appellant. In our view, the respondent fell short of establishing, on a balance of probabilities, the existence of a contract between himself and the appellant.

28. Moreover, the appellant led evidence before the trial court to show that the respondent was employed by the appellant as a casual labourer. The respondent's testimony was that he was asked to work as a casual employee for six months to enable the appellant raise money to pay him. As already noted, the appellant's witness produced daily casual payroll with respect to the respondent for the period January 2009 to May 2009. In the respondent's advocate's demand letter of 21st July 2009, the respondent, in addition to the demand for Kshs.1,225,000.00, the subject of the suit, also made demand for “unpaid/ underpaid salaries from Dec, 08 - 1st Jul, 09” in the amount of Kshs.147,000.00 on the basis that “prior



to the 1st day of July, 2009” he was an employee of the appellant. Also claimed in the demand letter was unpaid overtime and one month payment in lieu of notice of termination of employment.

29. Although, eventually, the respondent did not in his suit pursue any of these claims pertaining to his employment, the learned trial magistrate was justified in expressing doubts regarding the authenticity of the respondent's claim for alleged breach of contract. She noted that, in cross examination, the respondent denied that he was employed by the appellant as a casual employee and paid Kshs.36,000.00 in that regard and it was not until he was confronted with his advocates demand letter that he admitted having been so employed. In her view, the claim was a sham as he could not fathom how the respondent was a contractor “carrying such a huge contract and the next day he is a casual labourer.” There was sufficient basis therefore for the trial magistrate to doubt the credibility of the respondent.
30. In the result, we are satisfied that the learned Judge of the High Court erred in failing to properly appraise and review the evidence presented before the trial court. The decision reached by the High Court is contrary to the evidence. It is therefore erroneous. We are entitled therefore, to interfere with the same. Accordingly, we allow the appeal. We set aside the judgment of the High Court and reinstate the judgment of the trial court dismissing the respondent's suit with costs. The appellant shall have the costs of this appeal and the costs of the appeal before the High Court.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

