



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)**

**CIVIL APPEAL NO. 19 OF 2015**

**BETWEEN**

**ISCA ADHIAMBO OKAYO ..... APPELLANT**

**VERSUS**

**KENYA WOMEN FINANCE TRUST ..... RESPONDENT**

***(An Appeal from the Judgment and Decree of the High Court of Kenya at Homa-Bay, (Hon. D. Majanja, J.) dated 18<sup>th</sup> December, 2014***

**in**

**HCC APPEAL NO. 9 OF 2014)**

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**JUDGMENT OF THE COURT**

1. This is a second appeal. The first appeal was to the High Court (Majanja, J.) sitting at Homa-Bay. In a judgment delivered on 18<sup>th</sup> December 2014, that court set aside the decision of the Magistrate's court granting judgment in favour of the appellant, Isca Adhiambo Okayo, against the respondent, Kenya Women Finance Trust, for Kshs.33, 000.00; return of 1700 matts; general damages of Kshs.100, 000.00 and interest thereon; and costs of the suit.

**Background**

2. The judgment in favour of the appellant by the Magistrate's court was granted on the basis of findings of fact by that court that on 23<sup>rd</sup> February 2012, officers of the respondent wrestled the appellant to the ground and took Kshs. 33,000.00 that was in her purse as well as her keys to her business premises; that those officers opened and entered the appellant's business premises and took away 1700 matts purportedly in a bid to recover a loan that the respondent had extended to one Winfred Awino Onyango, the appellant's co-wife, and which the appellant had allegedly guaranteed.

3. On appeal by the respondent against the decision of the Magistrate's court, the High Court held that the appellant had not discharged her burden of proof that the respondent through its servants or agents had wrongfully attached the appellant's properties.

4. According to the Judge, the appellant's case "was predicated on the fact that certain people came to her shop and attached goods" but that she did not identify the people who took the matts or who attached her property. The learned Judge concluded that the appellant had failed to prove her case on a balance of probabilities having held that:

*"The [appellant] failed to establish its case in accordance with section 107(1) of the Evidence Act. As the [appellant] did not disclose the names of the person (sic) who came to attach her property where it was possible to do so, the appellant was not obliged to call all the evidence in the world to disprove or rebut such an allegation. KWFT, on its part, discharged its evidential burden by demonstrating that it was unlikely that it could have authorized the attachment of someone who was neither its customer nor guarantor to its customer. The learned magistrate therefore erred in imposing on the KWFT the burden to disprove a case which had not been established by the [appellant]."*

5. Dissatisfied with the decision of the High Court, the appellant lodged the present appeal.

### **The appeal and submissions by counsel**

6. Learned counsel for the appellant, Mr. A. O. Oyuko, referred us to the appellant's memorandum of appeal and submitted that the Judge erred in holding that the appellant did not discharge her burden of proof; that the evidence tendered demonstrated that the appellant did in fact identify the persons who took away her matts as officers of the respondent; that the appellant's evidence on identification of the officers of the respondent was corroborated by the testimony of the Chief (PW4) as well as by PW2.

7. Counsel for the appellant further submitted that the respondent did not tender any evidence to rebut the appellant's evidence by calling any witness from its Mbita office to confirm that none of the respondent's officers had been sent to recover the alleged debt.

8. Opposing the appeal, learned counsel for the respondent, Mr. R. Abisai, urged us to uphold the decision of the High Court and dismiss the appeal on grounds that the High Court correctly applied Sections 107 and 109 of the Evidence Act; that the onus was on the appellant to prove that the persons who unlawfully attached her property were from the respondent, and that the appellant failed to discharge that burden; that the appellant's witnesses readily admitted in cross examination that they did not know, either by name or appearance, the persons who took away her matts.

9. Counsel for the respondent concluded by submitting that the appeal is devoid of merit and is incompetent, as it does not raise any issue of law.

### **Determination**

10. We have considered the appeal and the submissions by learned counsel. The nine grounds of appeal in the appellant's memorandum of appeal raise the sole question whether the holding by the High Court that the appellant did not establish her case in accordance with Section 107(1) of the Evidence Act is well founded.

11. Section 107(1) of the Evidence Act provides that:

**"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

12. The appellant's claim as pleaded in her plaint was that "employees, servants and or authorized agents" of the respondent "trespassed" into her person and premises and took away Kshs. 33,000.00 that was in her person and 1700 matts that were in her business premises.

13. In its statement of defence, the respondent denied the appellant's averments in totality and pleaded further that it did not send or authorize any of its employees to take away or remove the appellant's

goods.

14. In her testimony before the trial court, the appellant stated that “*an officer from*” the respondent wrestled her to the ground and took a bunch of keys from her inner wear attached to a small wallet that contained Kshs.33, 000.00; that “*they went to my store and opened it using the key*” and took away 1700 matts to AP camp, Sindo allegedly on the basis that “*they had lent the co-wife Kshs.100, 000.00*”; that she informed the area chief, Samuel Obado (PW4) who came to the scene.

15. Under cross-examination, the appellant stated that she did not know “*the people who were there, not even physically*” and that on asking them they said they were from the respondent. She went on to say that the following day they went to the D.O’s office with those people and the chief and they confirmed they were from the respondent; that they had a motorcycle written “KWFT”. She went on to say that “*the people who loaded the matts to the cart (sic) were group members*” and that she could “*identify them*” and that “*they are the ones who took the matts to the police station*” while “*the KWFT officer is the one who took the money.*”

16. Zadock Kisiara, (PW2), a farmer, stated that he was at Sindo market on 23<sup>rd</sup> February 2012 when he saw somebody chasing the appellant, wrestled her to the ground and took her wallet; that “*they went to the store*” and he “*saw them loading matts to a vehicle, pick up*” and “*the vehicle took off with the matts*”; that he saw the area chief and that “*I heard the people say that Isca had refused to pay and that they were from KWFT.*”

17. On cross examination, PW2 stated that “*I saw three women carrying matts from Isca’s*” and that he “*saw one pick up when the women were loading.*” He “*overheard the people telling the chief they had come from KWFT*” and “*even showed the chief their ID card.*”

18. Samson Ochieng Odhiambo, (PW3), an Mpesa agent, was at Sindo town on 23<sup>rd</sup> February having a haircut when he heard people wailing; he “*saw a pick up and some matts inside*”; he saw some women removing matts from the store and throwing outside and that the people loading the matts were not familiar and were many.

19. The area chief, Samuel Wasaga Obado, (PW4), recalled that he was at Sindo town on 23<sup>rd</sup> February 2012 when he received a phone call from the appellant informing her that some people from KWFT had raided her place of work; that he rushed there “*but the people had carried the matts to the Do’s office*”; that he spoke to them and they told him they were from KWFT; that the people who carried the matts had job badges from KWFT and that he spoke to them and they identified themselves as such and that he was “*sure they were KWFT officers because they identified themselves.*”

20. That remained the only evidence seeking to link the respondent to the incident. The respondent’s witness, Okemo Mulindi Edwin, a unit manager of the respondent responsible for approving and recovery of loans in Mbita stated that the appellant was a stranger to the respondent; that the appellant’s husband was however known to the respondent as he had guaranteed a loan advanced by the respondent to one Winfred Awino Onyango, a member of a women’s group known as Alfa Suba Women Group; that it is not true that the respondent took the appellant’s matts; that in any event, if a member of a group defaults in the repayment of a loan, the group ordinarily pays the bank after which it seeks recourse against the defaulting borrower; and that the respondent does not “*go for individual members*” unless approval is obtained from the legal department.

21. Based on that evidence, the trial court found that, “*the evidence tendered by the plaintiff’s witnesses to be corroborative on the fact that she had a purse that was snatched from her, that her goods were taken away forcefully, and most important, that the people who did this said they were acting on behalf of KWFT.*”

22. The appellant in her testimony mentioned one person, an officer wrestling her to the ground and taking money and keys. She then said, “*they went to my store and opened it using the key*”. It is not clear at what point the culprit, (the officer) became, “*they*”. The appellant then stated that the people who

loaded the matts into a vehicle/cart were “group members” whom she said she could identify having earlier stated in examination in chief that she did not know “the people who were there, not even physically”.

23. PW2’s testimony was not very helpful in establishing the identity of the culprit(s). He said he saw the appellant being wrestled to the ground and that he then saw women loading matts into a vehicle and that he “overheard the people telling the chief they had come from KWFT” and “even showed the chief their ID card.”

24. Samson Ochieng Odhiambo, (PW3), did not assist in the identification of the culprits either as his evidence was merely that he “saw a pick up and some matts inside” and that he saw some women removing matts from the store and throwing outside and that the people loading the matts were not familiar.

25. The testimony of the appellant and that of PW2 and PW3 when considered together appears to support the suggestion by the respondent’s witness that it well could have been members of the women’s group who descended upon the appellant’s store.

26. The area chief, Samuel Wasaga Obado, (PW4), got to the scene after the fact and was persuaded that the culprits were from the respondent because the “the people who carried the matts had job badges from KWFT” and that “he spoke to them and they identified themselves.”

27. In our view, whereas there was evidence to support the finding by the trial court that the appellant’s goods were taken away, there was no evidence, on a balance of probabilities, to support the finding that that the culprits who “trespassed” into the appellant’s person or premises were “employees, servants and or authorized agents” of the respondent so as to found liability on the part of the respondent. There was mention of a motorcycle bearing the respondent’s name and a motor vehicle that allegedly was used to carry the matts away. It would, perhaps, have been useful for the appellant to establish the registration numbers of the motorcycle and the vehicle and to establish a connection with the respondent.

28. In the circumstances, we are not persuaded that the learned Judge of the High Court can be faulted for concluding as he did, that the appellant did not establish her case in accordance with Section 107(1) of the Evidence Act. Accordingly, the appeal is devoid of merit. It is dismissed with costs to the respondent.

Orders accordingly.

**Dated at Kisumu this 21<sup>st</sup> day of April, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

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**DEPUTY REGISTRAR**