



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**

**Civil Appeal 335 of 2003**

**DAMIANO MIGWI.....APPELLANT**

**AND**

**TIMOTHY MAINA WAITUGI.....RESPONDENT**

***(Appeal from the judgment of the High Court of Kenya at Nyeri (Khamoni, J) dated 23<sup>rd</sup> October, 2003***

**in**

**H.C.C.C. NO. 139 OF 2002)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant *Damiano Migwi* filed this appeal on 23<sup>rd</sup> December, 2003. It is an appeal from the judgment of the superior court (*Khamoni, J*) dated 23<sup>rd</sup> October, 2003.

By his plaint filed on 22<sup>nd</sup> June, 2001 in the Senior Resident Magistrate's Court, at Nyeri, the respondent here *Mr. Timothy Maina Waitugi*, claimed against the appellant here, *Damiano Migwi* a sum of Kshs. 18,000/= with costs and interest. The particulars of the claim as set out in paragraphs 3 to 7 of the plaint are as follows:-

“3. On or about 30<sup>th</sup> May, 2001 the defendant together with his two adult sons illegally dug a trench on Nyeri-Kabage road ad (sic) place (sic) a huge log on the said road thus completely blocking the road.

4. The plaintiff had hired vehicle KSX 576 for Kshs.12,000/= to transport potatoes for him from Kabage to Nyeri town and on his return he found the road blocked by the defendant and the plaintiff's hired vehicle was forced to remain there for the night of 30<sup>th</sup> May, 2001 and the day of 31<sup>st</sup> May, 2001 and the vehicle only proceeded to Nyeri after the plaintiff reported the matter to the police who went to the scene and forced the defendant to unblock the road.

5. In the presence of police officers and a game warden, the defendant admitted his wrong and agreed to compensate the plaintiff for the vehicle hire and the potatoes that would go bad.

6. That the agreed compensation was Ksh.23,000/= and the defendant paid Kshs.5,000/= in the

presence of the police officers leaving a balance of Kshs.18,000/=.

7. *In the premises, the plaintiff's claim against the defendant is Kshs.18,000/= particulars whereof, are well known to the defendant."*

The corresponding paragraphs of the defence which was filed by the respondent on 16<sup>th</sup> July, 2001 state:-

*"2. Save what is expressly admitted herein, the defendant denies each and every allegation of fact contained in the plaint as if the same were stated herein and traversed seriatim.*

*3. The defendant denies contents of paragraph 3 of the plaint and says that he is a stranger to those allegations and demands strict proof of the same by the plaintiff.*

*4. The plaintiff (sic) denies contents of paragraph 4 of the plaint as he is a stranger to those allegations and puts the plaintiff to strict proof thereof.*

*5. The defendant denies contents of paragraph 5 of the plaint and denies admitting any wrongdoing against or ever agreeing to compensate the plaintiff for any reason whatsoever and puts the plaintiff to strict proof thereof.*

*6. The defendant denies knowledge (sic) of contents of paragraph 6 of the plaint and denies ever agreeing to compensate the plaintiff with a sum of Ksh.23,000/= or any other sum or at all. The defendant denies ever paying to the plaintiff as part payment of the compensation of Ksh.5,000/= or any other sum all at all and denies owing the plaintiff a balance of Kshs.18,000/= or any other sum or at all and puts the plaintiff to strict proof thereof.*

*7. In answer to paragraph 7 of the plaint, the defendant denies owing the plaintiff Ksh.18,000/= or any other sum or at all putting the plaintiff to strict proof thereof."*

After hearing the parties the trial Magistrate (Olukoye, R.M. )gave judgment for the plaintiff in the sum of Kshs.18,000/= plus costs and interest, which were the prayers sought in the plaint. In making that judgment, the learned magistrate examined the evidence of five witnesses called by the respondent and made findings that it was the appellant who had blocked the road as pleaded by the respondent; that the police visited the scene and arrested the appellant; that the appellant did not call witnesses, other than himself, to show that he was never arrested and taken to the police station; that the respondent's potatoes had been damaged as a result of the road blockage; and that, despite the absence of any documentary proof or oral evidence from the police, the appellant had agreed to pay and did pay Shs.5,000 after his arrest by the police and therefore he must have committed himself to pay the amount claimed by the respondent in his suit.

The appellant was aggrieved by the judgment of the Resident Magistrate and he appealed before the superior court (*Khamoni, J*) who dismissed the appeal in a short judgment which may be reproduced for full appreciation:-

*"In this matter the respondent was not proving the blocking of the road so that he is paid damages assessed by the court. The respondent merely went to claim payment of a sum of money he said was the balance the appellant had not paid out of an agreed sum of money.*

*Details as to whether potatoes could be destroyed within 15 hours or who hired the motor vehicle, at what time, whether that vehicle was blocked and who saw the road being blocked etc. were only necessary if the court was assessing how much to be paid. That was not the case.*

*In this matter therefore, although the police were not called to give evidence, the evidence which was before the court was sufficient to prove the respondent's case on the balance of probabilities and I do not have a good reason to interfere with the learned magistrate's judgment. Accordingly, the appeal is hereby dismissed with costs to the respondent."*

The dismissal of the appeal gave rise to the second and final appeal now before us. The memorandum of appeal which was drawn up by counsel raised five grounds which may also be reproduced, thus: -

*“1. That the learned Judge erred in law when he failed to evaluate the evidence taken before the subordinate court.*

*2. That the learned judge erred in law when he failed to find that evidence taken in subordinate court was insufficient for judgment to have been entered for the respondent.*

*3. The learned Judge erred in law when he failed to give due consideration to submissions made by appellant’s counsel.*

*4. The learned judge erred in law by not taking into account that the respondent had failed to prove his claim for special damages.*

*5. The learned Judge erred in law when he held that:-*

*“In this matter therefore, although the police were not called to give evidence, the evidence which was before the court was sufficient to prove the respondent’s case on the balance of probabilities and I do not have a good reason to interfere with the learned Magistrate’s judgment when there was no sufficient evidence on record.”*

At the hearing of the appeal, the appellant was not represented by counsel since the advocate on record for him had been appointed as a magistrate and the appellant was unable to instruct another one. His submissions were understandably brief and, apart from adopting the grounds laid out in the memorandum of appeal, he merely reiterated his consistent denial that he had agreed to pay a sum of Shs.18,000/= or any other sum to the respondent. He was emphatic that the conclusions reached by the two courts below were without any basis in fact and called for reversal of those decisions. For his part, learned counsel for the respondent, Mr. Gori, submitted that there was no issue of law raised in the second appeal and it was therefore a non-starter. He conceded that the cause of action in the suit was a contract for payment of the sum claimed but submitted that there was proof through five witnesses who were believed by the court despite the absence of documentary evidence or police evidence in support of the claim.

Mr. Gori, is of course, right in his submission that a second appeal must raise issues of law. *Section 72* of the Civil Procedure Act applies and provides in relevant part as follows: -

*“72. (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely –*

*(a) the decision being contrary to law or to some usage having the force of law;*

*(b) the decision having failed to determine some material issue of law or usage having the force of law;*

*(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.”*

See also Maina v Mugiria [1983] KLR 78 where this Court stated:

*“1. On a second appeal, only matters of law may be taken. If the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law.”*

It is an issue of law, as stated in the 1<sup>st</sup> ground of appeal, to consider whether the first appellate court

properly analysed and re-evaluated the evidence on record as it is its duty to do at that stage. A first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court's decision could be supported – see Peters v Sunday Post Ltd [1959] EA 424, and Selle & Another vs. Associated Motor Boat Company Ltd & others [1968] EA 123.

See also Mwangi v Wambugu [1984] KLR 453 where it was held:

*“2. A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistency with the evidence in the case generally.”*

It is evident from the short judgment of the superior court reproduced above that there was no analysis or re-evaluation of the evidence tendered before the trial magistrate. If any attempt was made to examine the record critically, it would have been evident to the learned Judge that there was no factual basis for the conclusions made by the trial magistrate. There was a curious lack of appreciation of the cause of action pleaded by the respondent in his claim, and the onus of proving that claim. For those reasons it is appropriate for this court to interfere with the findings made in the case.

The pleadings reproduced above show that the cause of action was a contract or agreement signed before some police officers and a game-warden for payment of a sum of Shs.23,000/= in damages for damaged potatoes, part of which amount was paid leaving a balance of Shs.18,000/= for which judgment was sought. It was a special claim for a liquidated sum. The onus was on the respondent to prove that claim. The evidence on record however shows that there was no documentary or other evidence of such agreement, save for the respondent's own words which were vehemently denied by the appellant. The respondent stated in his evidence in chief as follows: -

*“I went and reported at Ihururu and in company of police officers went to the scene where the defendant was arrested and taken to station (sic) and the defendant agreed to pay vehicle charges of Kshs.23,000/= and he paid 5000/= and balance of 18,000/= was to be paid next day but he never did and it was resolved he be rearrested.”*

In cross-examination, he stated:

*“Yes defendant agreed to refund the sum of Shs.23,000/=. The document was left with the officers who arrested him. I do not have it.”*

The appellant stated categorically in his statement of defence that none of those facts were true and the respondent had notice therefore that he had to prove the averments in the plaint on a balance of probabilities. The appellant reiterated his denial on oath thus: -

*“The plaintiff did not report me to the police or warders for any monies owed to him. I never agreed to compensate the plaintiff the sum of 23,000 as alleged and neither did I dig a trench across. I have not paid the sum of 5000/= to the plaintiff as alleged. I know nothing about balance owed. I never executed any document acknowledging amount claimed. I know nothing about the amount claimed. I pray suit be dismissed with costs to me.”*

In his evaluation of the evidence on those facts the learned trial magistrate shifted the burden of proof on the appellant, in the absence of which he found the facts proved. We may quote the trial magistrate verbatim:

*“Though there is no document proving the defendant acknowledged owing the amount claim in the*

absence of rebuttal of his arrest common (sic) follows that he must have made such commitments and even paid the sum of 5000/= to facilitate his release. The defendant could not have been arrested nor committed himself to pay such amounts if there was no offence committed as such it is the court's findings that the plaintiff has proved his case on a balance of probabilities."

The first appellate court did not revisit the evidence on record to resolve that issue but simply stated that "although the police were not called to give evidence, the evidence which was before court was sufficient to prove the respondent's case". With respect, there was no evidence on record from the respondent to prove the existence of any agreement for payment of the sum claimed and the finding was thus based on a perverted assessment of the evidence. The appellant had no burden of proof in the matter. We have no hesitation in interfering with the findings made by the two courts below and we now do so.

We allow the appeal and set aside the judgment of the superior court dated 23<sup>rd</sup> October, 2003 and all consequential orders. We substitute therefor an order allowing the appellant's appeal from the judgment of the Nyeri Resident Magistrate delivered on 26<sup>th</sup> August, 2002, with the result that the respondent's suit before that court stands dismissed with costs to the appellant here. The appellant shall also have costs of this appeal and of the appeal before the superior court.

Those shall be our orders.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of July, 2009.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**