



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MERU

HIGH COURT CIVIL APPEAL NO. 29 OF 2012

MURIUNGI KANORU JEREMIAHAPPELLANT

Versus

STEPHEN UNGU M'MWIRABUA..... RESPONDENT

JUDGMENT

The primary suit

[1] The Appellant sued the Respondent in the Chief Magistrate's Court at Maua Civil Case No 175 of 2007 claiming(1) a sum of Kshs. 98,200 with interest at bank rates from 2nd March 2006 until payment in full; (2) cost of the suit; and (3) any other relief the court may deem fit to grant. The Appellant pleaded in his plaint that him and the Respondent were business people dealing in miraa in Igembe District and Mombasa respectively. That the two had a mutual agreement that the plaintiff shall purchase miraa shoots within Igembe District and sent them to the Respondent at Mombasa at an agreed price. And that, it was a term of the said mutual agreement that upon sale of the miraa, the Respondent would send back to the Appellant the proceeds of sale less any profits over and above the agreed price.

[2] Further, the Appellant pleaded that on various dates between 16th February, 2006 and 2nd March 2006, he sent to the Respondent at Mombasa miraa shoots worth agreed price of Kshs. 98,200/=--which the Respondent received and agreed to send back to the Appellant a sum of Kshs. 98,200 but he failed to do so even after demand was made. As a consequence, he filed the suit herein above.

[3] The Respondent defended the suit; filed a defence dated 11th September, 2007 and denied ever agreeing to buy any miraa from the Appellant and put the Appellant to strict proof thereof. He also denied having received any demand letter from the Appellant. He urged the court to dismiss the claim with costs.

The Appeal

[4] The trial magistrate, Hon. J. G. Kiogora, Chief Magistrate, heard the case and in the judgment delivered on 23rd February 2012 dismissed the Appellants claim with costs to the Respondent. Being aggrieved by that decision the Appellant filed this appeal and proffered the following six (6) grounds of appeal in the Memorandum of Appeal:

1. *That the learned Chief Magistrate erred in law and in fact in holding that it was incumbent upon the appellant to prove that the respondent did not repay to him the claim in the plaint.*

2. *That the learned Chief Magistrate erred in law and in fact in shifting the burden of proof to the appellant with respect to the repayment of money sent to the respondent instead of the other way round.*
3. *That the learned Chief Magistrate erred in law and in fact in attacking the practice of miraa business wherein the miraa receiver does the invoicing and this misconception misled the learned magistrate to dismiss the appellant's suit.*
4. *That the learned Chief Magistrate erred in law and in fact in dismissing the claim on the evidence adduced.*
5. *That the learned trial magistrate erred in law and in fact in relying on the respondent's evidence and that of his witnesses as compared to the appellant's evidence and that of his witnesses.*
6. *That the judgment is against the weight of the evidence and the law.*

Analysis

[5] The Appellant called four (4) witnesses including him. He testified as PW1. His main testimony was that he used to send miraa to the Respondent through Gitonga, a clerk of the bus company. He said that the said clerk used to record the miraa send in a book but from the record, he neither called the said clerk as witness nor produce the book in which the entries of miraa he send to the Respondent were recorded. The Appellant also testified that he reported this dispute to Njuri Ncheke elders and that the elders had told him that the Respondent agreed to pay his money. He called three (3) of the Njuri Ncheke elders, i.e. PW2, PW3 and PW4 and all denied ever sitting to resolve this dispute. They said that they received the complaint and summoned the two disputants but the Appellant did not appear. PW2 and pw3 told the trial court that only the Respondent appeared on the appointed date and so they did not sit to resolve the dispute. The elders told the trial court that the Appellant had decided to take the matter to the chief. The foregoing is the evidence that the trial magistrate was faced with.

[6] There is no doubt that; (1) the two did some miraa business; and (2) the Respondent paid into the Appellant's account at Consolidated Bank a total of Kshs. 100,400. But the question that the trial magistrate asked himself, and which this court shall also seek to answer in this appeal is:

“On the evidence produced during the trial, did the Appellant prove his claim against the Respondent on a balance of probabilities?”

As a matter of law, the legal burden of proof that the Respondent owes the debt herein rested with the Appellant. See Section 107 of the Evidence Act 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”.

[7] The trial court evaluated the evidence and found it to be a strange business practice that, instead of the Appellant raising invoices for miraa delivered; it was the Respondent who was raising the invoices. Indeed, it was strange given the evidence provided. The Appellant did not adduce any professional or expert opinion or testimony to the effect that in miraa business it is the person receiving delivery of miraa who raises the invoice and not the person delivering as is the case in ordinary businesses. There is nothing to show that this is special and acceptable norm, custom or practice or usage in this trade. Therefore, in the absence of such evidence, the magistrate cannot be said to have misconceived the practice of miraa as it has been argued by the Appellant in this appeal. In light thereof, ground no. 3 of the appeal fails.

[8] The banking slips, the invoices which I have dealt with already, the statement of account showing last deposit as well as the deposit receipts produced do not at all prove that the Respondent owes the Appellant a sum of Kshs. 98,200. Crucial evidence such as the alleged entries in the bus company book

by Gitonga was absolutely essential, for, it would have shown: (1) the amount of kilograms of miraa he was sending; and (2) that the Respondent was the recipient of the parcel of the quantity that was sent. But, nothing of the sort was placed before the trial magistrate. The Appellant merely mentioned these facts in passing and categorically told the court that he was not calling Gitonga as a witness. Accordingly, the Appellant did not prove that the Respondent owed him Kshs. 98,200 as claimed. Therefore, the trial magistrate correctly found and held on the evidence adduced that the Appellant did not prove his case on a balance of probabilities, and dismissed the claim. One other thing; the Appellant's evidence was fatally punctured by the evidence of his own witness. Their evidence did not come anywhere close to supporting the Appellant's claim as pleaded. As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the Respondent did not pay the sum claimed as agreed; i.e. into the account provided. Therefore, contrary to the argument by the Appellant, the trial magistrate was right in holding that the burden of proving that the banking of the proceeds of miraa supplied was not done in accordance with their mutual agreement was the Appellant's and not the Respondent's. The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant. The Appellant claimed in his evidence that deposits made by the Respondent were not in accordance with the mutual agreement and were not commensurate to the quantity of miraa purportedly supplied to the Respondent. The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove. Banking money into the account provided was part of the mutual agreement, at least as per the pleadings and the evidence by the Appellant. The Respondent simply testified that he paid for all the miraa he received and deposited into the account provided the agreed prices after deductions of his expenses. That averment does not place or create any burden, legal or evidential, on the Respondent to prove that he deposited a sum of Kshs. 98,200 as he has already denied the debt claimed in toto. In the circumstance of this case, the Respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs. 98,200- the debt being claimed herein. What he said he deposited as the entire agreed sum reached the Appellant and was acknowledged. With due respect, the submission by the Appellant on this aspect of shifting burden of proof is misconceived and totally indefensible in law. The ground fails.

[9] The Appellant in his submissions seems to infer that, since there was a business relationship between the parties, therefore, the Respondent owes the sum claimed. The law will not support such inferences which are not drawn from a given set of facts and proven by evidence. I have already stated and I will repeat it again; there is no doubt that the two had a business relationship- this fact has not been denied by any party. But, the Appellant ought to have adduced evidence to prove that the Respondent owes him a sum of Kshs. 98,200. Deposit into the Appellant's account of the proceeds of miraa is not proof of the debt. I have stated that the evidence presented does not show that the Respondent owed the Appellant a sum of Kshs. 98,200.

Alleged oath

[10] Again, the Appellant's submission seems to place a lot of emphasis on the alleged oath that had been taken on his behalf before the Njuri Ncheke by Kabu M'imara as proof of the debt herein. I note that, according to the Appellant, the alleged oath was withdrawn later. As I stated earlier, the elders who were called as witnesses by the Appellant did say that they administered any oath or to any person or Kabu M'Imara. Those elders who allegedly administered the oath upon and Mr. Kabu M'Imara himself were not called as a witness to give evidence on this piece of evidence that the Appellant seems to stress much. There is absolutely no independent evidence to show that the oath was administered as alleged. Thus, nothing would turn on this evidence as it remained a mere allegation without proof. Secondly, I doubt the legality or legitimacy of such oath as a means of proving or recovery of a legal debt. But, the less I say about this issue the better.

The upshot

[10] Now, therefore, given the above analysis, (1) the judgment by the trial court was not against the weight of evidence adduced; (2) the trial magistrate did not rely on the evidence of the Respondent instead of that of the Appellant in deciding the case; (3) the trial magistrate did not shift the legal burden

of proof to the Appellant in respect of payment of money herein; (4) ultimately, the trial magistrate did not err in law and fact in dismissing the Appellant's claim. The upshot is that all the grounds of appeal contained in the Memorandum of Appeal filed herein fails. Accordingly, the appeal is fails and is dismissed with costs to the Respondent. It is so ordered.

Dated, signed and Delivered in court at Meru this 4th day of November 2015

F. GIKONYO

JUDGE