



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 151 of 1991

JOHN NGURE KAMAU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA..... DEFENDANT

RAHAB WANJIRU EVANS..... THIRD PARTY

JUDGMENT

The plaintiff John Ngure Kamau, filed this case against the defendant Bank for:-

(a) A declaration that the payment of Kshs.272,000 to Rahab Wanjiru Evans (third party) by the defendant Bank was based on an order that was illegal.

(b) A declaration that the said payment of Kshs.272, 000 and subsequent closure of A/C number 13585 was unlawful in view of the plaintiffs acquittal by the High Court.

(c) An order directing the defendant Bank to refund Kshs.272, 000 together with interest at bank rates from the date of such payment to Rahab Wanjiru Evans.

(d) Costs of the suit. On application by the defendant, Rahab Wanjiru Evans was brought into the suit as a Third Party. In the defendant's claim against the third party, filed on 16th June, 1992, the defendant claims as follows:-

(a) An indemnity against the plaintiff's claim.

(b) Judgment for any amount that may be found due from the defendant to the plaintiff

(c) Judgment for the amount of any costs that may be payable to the plaintiff; and for the costs of the defendant in defending this action, and for the proceedings against the third party with interest thereon at court rates.

The facts of the plaintiff's case are as follows.

The plaintiff was employed by the third party as a driver. He was the holder of Savings Account Number 13585, at the Defendant Bank. As at 29th December, 1988 the credit balance on that account stood at Kshs.272, 708/90. he produced two passbooks in respect of the account {exhibit 2(a) and 2(b)}.

Sometime during the year 1988, the plaintiff was arrested and charged, before the Resident Magistrate's court at Nakuru, with two counts of theft by servant, contrary to Section 281 of the Penal Code. The first count related to the theft of Kshs300, 000, while the second count related to the theft of Kshs.50,000, property of Rahab Wanjiru Evans, the third party. The plaintiff was convicted on both counts, by the learned Senior Resident Magistrate as he then was, and sentenced to a total of 18 months imprisonment. He appealed against the conviction vide Nairobi High Court Criminal Appeal No.1 of 1989 (NKU). The appeal in respect of the first count and which related to the theft of Kshs.300,000 was allowed, and the conviction was set aside. The appeal in respect of the second count which related to the theft of Kshs.50,000 was dismissed.

A sum of Kshs.49,900 recovered in respect of the second count, had been produced as exhibit and this, was ordered released to the third party, who was the complainant in the criminal case. The High Court judgment (exhibit 1), shows that the trial magistrate, made an order releasing all the money on the plaintiffs A/C number 13585 with the defendant, to the third party, and that was done when the trial magistrate wrote a letter dated 21st December, 1988 informing the defendant's Bank Manager of the orders made in the criminal case with regard to moneys held to the credit of the plaintiff in his account at the defendant Bank. The relevant portion of that letter (D. Exhibit 2) is reproduced below:

"... The court on conviction and after sentence ordered the

following:-

1. ...

2. That the cash held in the second count, in the account of the accused "No. 13585 - John Ngure Kamau", total Kshs.272,708/90 or thereabouts be released to the complainant - MRS RAHAB WANJIRU EVANS." Upon release from prison, and the appeal relating to the theft of Kshs300,000 having been allowed, the plaintiff went to the defendant bank to withdraw some money and it is then that he was told that the account had been closed and all his money paid to the third party vide cheque No.709876 (exhibit D.3). The defendant told him that this was done pursuant to a letter received from the court and dated 21st December, 1988 (D. Exhibit 2). The money was released without notice to the plaintiff, and no court order, for the release of the same, was served upon the plaintiff. The plaintiff then filed this suit against the defendant bank.

It was the further evidence of the plaintiff that this was his own money which he worked hard for. He explained that he had a twelve acre farm at Nyandarua and another at Mau Narok. He planted potatoes, carrots, cabbages and other crops on these two farms which he harvested and sold, and deposited the sale proceeds into this bank account. He said that much later, he sold the Mau Narok piece of land for Kshs.60, 000 and deposited the money into this account. He produced no sale agreement to show that he sold any piece of land. He explained further that, when his father died, some Kshs. 100,000 was owed to him by various people who then paid this money to the plaintiff by installments, and he said whenever any money was paid to him, he deposited it in this account. According to the plaintiff, that is how he raised the money which was on the account at the defendant bank.

He denied that the third party or her daughter gave him any money to purchase maize for her. He said that whenever any maize was to be purchased, he would travel with the third party's daughter who

would pay for the maize purchased. He denied signing any of the petty cash vouchers produced as third party exhibit two (2). It will be noted here that these petty cash vouchers were examined by Mr. Mackenzie Mweu, a hand writing expert, who gave evidence as witness number three for the third party. He came to the conclusion that all these petty cash vouchers (third party-exhibit 2), were signed by the plaintiff because the questioned signature, appearing on each one of them, and the specimen signature of the plaintiff appearing on documents contained in the third party's exhibit 5, and the known signatures of the plaintiff appearing on the wages cards produced as third party exhibit number six (6), were signed by one and the same hand, and that is the hand of the plaintiff.

In defense, the defendant through a witness, Fredrick Mutunga Mutua, conceded that as at 29th December, 1988, the plaintiff's account had a credit balance of Kshs.272,708/90. He said all this money was paid by the defendant bank to the 3rd party on the authority of a letter dated 21st December, 1988 (defense exhibit 2), which the defendant treated as a court order. The plaintiff's account was thereafter debited (see voucher exhibit D.3). After the money had been released to the third party, the plaintiff was notified of that fact by letter.

It is the defendant's case that if judgment is entered for the plaintiff, against the defendant, then the third party should be ordered to satisfy the decree, in the alternative; the third party should be ordered to indemnify the defendant.

As for the third party it is her case that the plaintiff, who was her driver, had stolen a total of Kshs.300,000 from her over a long period of time. The money-held in the plaintiff's account, and which was given to her once the plaintiff was convicted of stealing Kshs.300,00 from her, was her own money and she would not refund it to anybody. She said that although she never gave the plaintiff money for the purchase of maize, her daughter Elizabeth (T/P/W 2) is the one who normally dealt with the plaintiff. She further said that, she referred her cash books and receipt books for the petrol station, to an auditor for audit purposes and the audit disclosed that a sum of Kshs.300,000 had not been accounted for. She said she would not know how this sum of money was arrived at. Her daughter Elizabeth was arrested in connection with this money but she was later released. No audit report was produced as exhibit and the person who carried out the audit did not give evidence.

Elizabeth gave evidence and said that, on many occasions, he gave money to the plaintiff to buy maize. The plaintiff signed petty cash vouchers every time such money was given to him, for instance, the vouchers marked (T/P Exhibit 2), she said that because she trusted the plaintiff, she did not check the maize store to confirm if he had purchased maize every time she gave him money. All the vouchers which the plaintiff signed (TP-Exhibit,2), amount to Kshs.251,560. She said at times, she gave the plaintiff money to purchase maize but he did not sign the vouchers which she produced as exhibit 3 for the third party. There are thirteen vouchers which add upto Kshs. 147,920 (T/P Exhibit 3).

She claimed that the plaintiff was given a total of Kshs.399,480 to buy maize and when both the petrol station of the third party and the maize business were audited, the auditor found that the money given out to the plaintiff to buy maize, was more than the maize he had bought. As I said earlier on in this judgment, no audit report was produced as an exhibit and as such, its contents are not known. In any case there is no evidence to show that once the plaintiff was given money, he did not buy the maize. In the statement of defence which the third party filed, she averred that the plaintiff owed her some money the amount of which she did not specify. She went further to aver that, this money was given to the plaintiff for specific purposes but he converted it to his own use, and so, if the defendant's claim against the third party succeeds, the plaintiff will set off the said amount against what he owes the third party.

Having set out the facts of the case, I shall first consider the plaintiff's case against the defendant.

It is not in dispute that the plaintiff held a bank account at the defendant bank and that as at 29th December, 1988 the account had a credit balance of Kshs.272,708/90. It is also not in dispute that the plaintiff was found guilty and convicted of stealing Kshs.300,000, property of the third party, which conviction was quashed and sentence set aside vide criminal appeal 1/89 (NKU). While the plaintiff was still pursuing the appeal, the defendant concedes that, the bank closed the plaintiff's account and paid the money i.e. Kshs.272,708/90 to the third party. This, the defendant did when it received a letter from the court which letter informed the defendant of the fact that, on conviction, the court had ordered the defendant to pay to the third party all the money due to the plaintiff, on his account with the defendant. It is the defendant's evidence that according to the defendant, that letter (defense exhibit 2) constituted a court order. This letter, in itself is not a court order, and it was reckless of the defendant, to pay the plaintiff's money to the third party on the strength of this letter and without any prior notice to the plaintiff. The defendant bank has itself to blame for not insisting on being served with a certified copy of the judgment in the criminal case, and for closing the plaintiff's account without first ascertaining that there was no appeal pending before the High Court. Had the defendant referred this letter (D-Exhibit 2) to its lawyer, no doubt, the lawyer could have checked the court record, and more particularly the judgment in criminal case number 403/88 to ensure that the money is not paid out before the period within which the plaintiff was required to file an appeal, expired. I say so because it was not in order for the trial magistrate to order release of this money on the day of conviction and just after sentence because the release of the money would be subject to the plaintiff's right to appeal against the conviction. In any case, since the plaintiff had denied stealing the money, subject matter of the criminal case, he was entitled to a hearing in civil law before the decision to release his money to the third party was reached. Had the defendant referred the letter (exhibit D-2) to their lawyer, no doubt the lawyer could have sought a copy of the judgment in the criminal case and advised the defendant or sought clarification from the court. This is so considering the fact that, there is no evidence that the plaintiff was made aware of the fact that the bank intended to close his account.

I am satisfied and I find that the defendant closed the plaintiff's account and paid the moneys thereof to the third party without seeing a certified copy of the judgment or order in the criminal case. Even during the hearing of this case, the defendant made no effort to obtain a copy of the said judgment to be exhibited in court so that the court could ascertain at what stage the money was supposed to be paid to the third party.

Having earlier found that the defendant acted negligently by paying the plaintiff's money to the third party, I find that the defendant is liable to refund the plaintiff the sum of Kshs.272,000 claimed in the plaint.

It was the defendant's case that this money was released to the third party who should be ordered to indemnify the defendant.

The third party on the other hand argues that the plaintiff owed her moneys, which he had stolen over a long period of time and which an accountant who carried out an audit of her petrol station and maize businesses, found to be Kshs.300,000. No audit report was produced and she said she would not know how the figure of Kshs.300,000 is arrived at. She did not give him any money herself but her daughter Elizabeth (T/P/W 2) did. Although the Plaintiff denied having received any money from (T/P/W 2), petty cash voucher produced as T/P Exhibit 2 and signed by the plaintiff showed that he received a total of Kshs.251,560 on various occasions. Elizabeth said that no maize was bought by the plaintiff although she said she in fact did not check the store to confirm how much was taken there by the plaintiff. Her reason for saying that he did not buy maize, or that he bought less maize, is an audit report which was not produced as exhibit. Since the case of the third party is based on an audit report which was never produced in court, it cannot be said that the plaintiff did not deliver maize to the stores, or that he

delivered less than he was required to do, as there is no evidence to that effect. The claim by the third party that the plaintiff owes her Kshs.300,000/- is not supported by any evidence and it cannot stand. The allegation by T/P/W 2 that she gave the plaintiff another Kshs. 147,920 vide thirteen vouchers which he did not sign (T/P Exhibit 2) cannot stand for the simple reason that the plaintiff did not sign those thirteen vouchers.

A look at the plaintiffs account (D-Exhibit 1) shows that he was making deposits so frequently, that when one considers the fact that he was just a driver, the deposits become suspect but that alone is not evidence that he stole the money of the third party. Had the audit report been produced, I could definitely have found that the plaintiff stole, on various occasions, the money of the third party because, although the plaintiff said that the moneys he deposited on his account were the sale proceeds of farm produce, that cannot be true since the deposits were made every other day, while it was his evidence that the farm harvests were made every three months. I am satisfied and I find that these moneys were from sources which the plaintiff, for reasons known to himself, has not disclosed. I further find that the moneys have not been proved to have been stolen from the third party.

Consequently I enter judgment for plaintiff against the defendant for the sums claimed in the plaint with costs and interest at bank rates, from the date the money was paid to the third party (21st December, 1988), till payment in full.

As between the defendant and the third party, I enter judgment for the defendant against the third party and order that once the defendant has satisfied the decree, it shall seek indemnity from the third party who shall make a refund to the defendant of all moneys paid to the plaintiff.

These are the orders of the court. Date this 16th day of September, 1999.

SARAH C. ONDEYO

JUDGE

Delivered this. 16th day of September 1999.

I certify this is not a true copy of the original

High Court of Kenya. Nakuru.



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