REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Appeal 119 of 1995

SAMWEL MWAURA..... APPELLANT

Versus

JAMES MUCHIRI ..... RESPONDENT

(From Eldoret SPM CC No. 1115 OF 1992)

SAMWEL MWAURA..... PLAINTIFF

Versus

JAMES MUCHIRI..... DEFENDANT

JUDGEMENT

The appellant sued the Respondent in the lower court and averred vide paragraph 4 and 8 that he paid 3,000/= towards dowry for the Respondents girl who was to be married by-appellants son but which marriage did not materialize and as a result of which the appellant demanded refund of the same. In paragraph 6 the plaintiff claimed a further 3,000/= spent on pursuing refund making a total claim of Kshs.11,000.00.

The defendant put in a defence admitting 7,000/= only and denied that the appellant had incurred 3,000.00 in pursuit of the recovery of the above money.

The learned trial magistrate heard both parties and dismissed the plaintiffs claim.

Being aggrieved with that decision the appellant has appealed to this court citing 8 grounds of appeal namely that the learned trial magistrate erred in law in assuming that the claim was for Kshs.11,000.00 instead of 4,000/=, erred by refusing and accepting the evidence of DW2 Wilson N*gare* who Is the

relative of the Respondent, erred by refusing and accepting the applicants receipts for Ksh.2,000.00 spent when hiring a vehicle to ferry people who went to pay dowry, erred in law and fact that money handed over to the parents and grand were parents of the girl *to* be married a receipt had to be issued, erred in her finding that money spent on the preparation of marriage should not be refunded, erred in law and fact that no notice was served for demand of the balance of Kshs.1,000.00, married in law to conclude that the evidence on record was not conclusive, erred in law and fact by dismissing the whole suit.

In his submissions to court the appellant who was appearing in person reiterated the contents of the memo of appeal adding that Kshs.500/= was for food, 500/= for a blanket and 600/= just as gifts.

He was firm he hired a vehicle for 2,000/= and his receipts was not accepted. Since the money was not refunded he filed a suit on 2.12.92 and on 16.4.93 is when the money was paid by the Respondent of Kshs.7,000/= leaving balance of 4,000/= and it was wrong for the learned trial magistrate not to have mentioned that amount.

The Respondents counsel submitted that the appellant had claimed 11,000/= but was paid 7,000/= and w*hen the* case proceeded it was for Kshs.4,000/=. That the agreement was for only Kshs.7,000/= which was demanded, that a relative is not precluded from giving evidence as in marriage ceremonies. It is relatives who are likely to be around, the receipt for hiring the vehicle was not produced neither was the owner called to testify.

Also the appellant did not mention that the 3,000/= was for expenses incurred whe*n* pursing the claim. That the learned trial magistrate rightly ruled that the money given to grand mother cannot be refunded as she was not sued, neither did the son confirm that he paid 500/= for food and they were not asked ad to pay 500/= neither is there proof of the same.

In reply the appellant stated that he could not demand money from the mother and grand mother because a girl is married from the father, that he tried to hand in the receipt for transport but the advocate rejected the same, that the warrant was for 4,000/= the Respondent refused with the girl and he cannot refuse on his money. That even if he gave 600/== voluntarily it was for marriage purposes and the same is refundable.

The duty of this court on appeal is to re-evaluate all the evidence on the record and decide whether the conclusions reached by the learned trial magistrate are to stand or not.

I have re-evaluated the evidence adduced by the lower court on ray own and I find that indeed there is no dispute that the appellants son wanted to marry the Respondents daughter and marriage negotiations took place. Money changed hands. There is no dispute that 7,000/= was recorded in an agreement. This money was paid after the suit had been filed. In her judgment the learned trial magistrate did not give judgment to applicant for this sum already paid which would have attracted costs.

Secondly, there is no mention that the trial was for the balance of 4,000/=. It is indeed on record that the applicants advocate demanded Kshs.7,000/= and there is no demand for 1,000/= to make a total of Kshs.8,000/= claimed as refund of dowry. Lack of demand does not oust ones claim. The most crucial thing is to prove the claim. If I got the appellant well this balance was made up of Kshs.500/= paid for food on I first occasion and Kshs.500/= paid by *his* son and 600/= paid by him as gifts.

These monies were paid to the mother and grandmother of 1 girl who were not sued. There is no agreement for the same and no receipt is produced for the same, As for the first 500/ the appellants

witnesses confirmed this, The 2nd payment of 500/= *was* rightly rejected as the son did not come to testify. As for the 600/= it is only appellant who witnessed the same changing hands. this being a marriage business the court takes judicial notice of the fact that not all marriage gifts are recorded down in writing. Most gifts change hands without any documentation.

It is indeed on record that the recipients are a mother and grand mother. The Respondents counsel submits that these people should have been sued. Once again the most important thing here is proof and I agree with the contention of the appellant that it is the head of the family to be sued for the refund. The Respondent is the head of his family and he was rightly sued alone. As regards proof of the lst 500/=, I am satisfied that the same changed hands as there is no reason for the witnesses who accompanied appellant on this occasion telling lies about Respondent whom they did not know before As for the 600/= the Respondent does not seriously contest this save for alleging that he is not the one who received the money and that the same was given voluntarily. As submitted by the appellant though voluntarily given it was in respect of anticipation of a marriage which did not materialize and the same is refundable. I find it proved.

As for 3,000/, for hired transport charges I agree with the learned trial magistrate that in the absence of a receipt the appellant should have called the owner of the vehicle to confirm this evidence. The record shows that he did not ask for time to call the driver or bring the witness.

That not withstanding the general rule is that a party is bound by his pleadings. The appellant claimed expenses incurred

in pursuing refund and no proof was led as to this claim and it was rightly rejected.

In the premises, I find that the learned trial magistrate erred by not giving appellant judgment for 7,000/= which had been admitted and paid plus interest at court rates. I therefore set aside her dismissal order and substitute there to an order for Judgment of 7,000/= for the plaintiff plus interest at court rates from the date of filing which was on 2.12.1992 until6.4.93 when the same was paid on the first limb.

(2) On the same limb, I enter judgment for appellant for Kshs.1,100.00 with interest at court rates from the date of filing until payment in full.

(3) Since the Respondent paid a substantial part of the claim immediately the suit was filed, the appellant will have 3/4 costs in the lower court and half costs on appeal.

(4) The rest of the claim was rightly dismissed and I confirm the dismissal.

Dated at Eldoret this 9th day of April, 1996.

R. Nambuye,

Judge 9.4.1996

Read and delivered at Eldoret this 28th day of May 1996.

R. Nambuye