



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**HIGH COURT CIVIL APPEAL NO. 13 OF 2015**

**JACKAN MURIUKI KONJI T/A JAPHONE STATIONERS.....APPELLANT**

**VERSUS**

**THIRIKWA FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT**

*(An Appeal against the Judgment Delivered on 17<sup>th</sup> March, 2015 by The Principal Magistrate*

*Honourable K.K. Cheruiyot Kerugoya Law Courts in Civil Case No. 16 of 2013)*

*Between*

**JACKAN MURIUKI KONJI T/A JAPHINE STATIONERS.....PLAINTIFF**

**VERSUS**

**THIRIKWA FARMERS' CO-OPERATIVE SOCIETY LTD.....DEFENDANT**

**JUDGMENT**

The appellant had filed a suit in the Principal Magistrate's court at Kerugoya vide a plaint dated 21<sup>st</sup> January, 2013 claiming:

1. Payment of Kshs; 302,000/= plus interest.
2. Costs of the suit
3. Interest.

The appellants claim was that the respondent was awarded a tender 1,000 gunny bag at a cost of Kshs; 302,000/=. He was given the order on 21<sup>st</sup> March, 2012 to supply the said bags. The order was signed by the General Manager, Chairman and Treasurer of the Respondent.

It is the contention by the appellant that he delivered the goods vide delivery note dated 21<sup>st</sup> March, 2012. The bags were inspected by the Respondents' Factory Manager one Mureithi who signed a goods receipt to confirm that they were in good condition.

The appellant then issued the Respondent with an invoice dated 21<sup>st</sup> March, 2012 for Kshs; 302,000/=. The respondent refused to pay for the gunny bags and the Appellant filed the suit in the Magistrate's court. In the Judgment of Trial Magistrate dated 17<sup>th</sup> March, 2015 held that the plaintiff had failed to prove his case to the required standard and dismissed the suit with costs.

It is the Plaintiff's claim that the Trial Magistrate erred in Law and in fact by finding that the order was issued mysteriously and fraudulently to the plaintiff before verification which was required to be done by PW2 the Respondent Factory Manager.

The Respondent had denied the claim by the plaintiff and filed a defence and counter claim. He denied the appellants claim and claimed Kshs; 33, 400/= being storage charges for the gunny bags from 20<sup>th</sup> October, 2012 to 5<sup>th</sup> April, 2013. The Trial Magistrate entered judgment for the Respondent in the counter claim.

The Appellant was dissatisfied with the Judgment of the Principal Magistrate and filed this appeal based on the **following grounds;**

1. The Learned Magistrate erred in law and in fact by failing to hold that the plaintiff had proved his case on a balance of probabilities.
2. The learned magistrate erred in law and in fact by failing to find that the plaintiff had duly received an order dated 21<sup>st</sup> March, 2012 from the respondent factory supply 1000 gunny bags at a cost of Kshs; 302,000/= which order he fulfilled and supplied.
3. The learned Magistrate erred in law and in fact by failing to find that the order dated 21<sup>st</sup> March, 2012 was duly signed by the General Manager, Chairman and Treasurer of the respondent society meaning that the respondent society had duly agreed the appellant to supply the gunny bags.
4. The learned magistrate erred in law and in fact by failing to find that the gunny bags were duly received by the respondent society as exhibited by the delivery note and goods receipt issues meaning that they were in good condition as per the tender.
5. The learned magistrate erred in law and in fact by failing to find that the respondent society had during its full management committee meeting held on 15<sup>th</sup> March, 2012 resolved to award the tender for gunny bags to the appellant.
6. The learned magistrate erred in law and in fact by failing to find that the factory manager of the respondent factory had duly inspected the gunny bags and found that they were in good condition and thereby issued a good receipt.
7. The learned magistrate erred in law and in fact by believing the Factory Manager's unsupported evidence that he received the gunny bags on instructions of the Secretary Manager yet there was no proof to that effect.
8. Without prejudice to the foregoing and in the alternative the learned magistrate erred in law and in fact by failing to hold the respondent society vicariously liable for the acts and/or omissions of its factory manager.
9. The Learned magistrate erred in law and in fact by finding that the gunny bags were delivered fraudulently.
10. The learned magistrate erred in law and in fact by finding without proper evidence/prove that the appellant had colluded with the Secretary Manager to supply the gunny bags without following the right procedure.
11. The learned magistrate erred in law and in fact by showing outright bias against appellant case by even believing that the sample of gunny bags produced in court (defence exhibit No. 5) were the same ones supplied by the appellant.
12. The learned magistrate erred in law and in fact by failing to find that the gunny bags were inspected by the Factory Manager who had worked in that capacity for 5 years inspecting gunny bags among other duties hence he had no reason to accept them if they were old and worn out.
13. The learned magistrate erred in law and in fact by failing to read foul play in the whole transaction. When the gunny bags were supplied and received by the factory manager, the Chairman was present in the office yet the factory manager did not raise any doubts as to quality of the gunny bags with the Chairman.
14. The learned magistrate erred in law and in fact by showing outright bias against the appellant case by choosing to believe the factory manager evidence over the Secretary Manager.
15. The learned magistrate erred in law and in fact by allowing the respondent counterclaim.

The appellant prays that the appeal be allowed, Judgment of the Lower court be varied and/or set aside and costs of the appeal.

The respondents opposed the appeal.

When the matter came up for directions, the parties agreed to proceed by way of written submissions.

The submissions by the appellant were filed by **Wangechi Munene & Company Advocates;**

She submits that; the Trial Magistrate erred in Law and in fact by finding that the order was issued mysteriously/ fraudulently to the appellant before the verification was done by Pw2 who was the Respondents Factory Manager.

That the magistrate erred in law and in fact by finding that the order was released to the appellant before verification by the respondent Secretary Manager and yet her signature appears in the order.

The trial magistrate erred in law and in fact by failing to find that the order dated 21<sup>st</sup> March, 2012 was duly signed by the General

Manager, Chairman and Treasurer of the respondent society meaning that the respondent society had duly agreed that the appellant should supply the gunny bags.

That the issue of whether or not it had passed through audit was neither here nor there as the respondent society had approved the appellants tender to supply the gunny bags.

That on the issue whether the gunny bags corresponded with the description and sample given, it is their submission that - the bags were received by the Factory Manager Gakuyi-ini Coffee Factory known as Mureithi, and he signed a goods receipt to confirm that they were in good condition.

That the respondents' second witness said that he was instructed by the Secretary Manager to receive the gunny bags and he stated that he was misled by the Secretary Manager to receive the goods.

That the Secretary Manager who was the appellant's witness denied ever giving such instructions to the Factory Manager.

The Appellant further submits that the testimony of the factory manager laying all the blame on the secretary manager materially differed with his letter dated 22<sup>nd</sup> January, 2003 (sic) which he wrote to the respondent management committee explaining why he received the bags.

That in the said letter he said that he received the bags as the Secretary manager had not provided with a sample of the types of bags to be delivered.

It is submitted that if this was the case, nothing would have been easier than asking for a sample from the respondents main office.

That he further said that no report had been given by the secretary manager concerning the delivery of the bags. A fact which contradicts his testimony when he said the Secretary Manager authorized him to receive the bags.

It is further submitted that the Trial magistrate was biased, by choosing to believe the evidence of the Factory Manager.

That the Trial Magistrate failed to read foul play in the whole transaction, and yet the Factory Manager and the Chairman was present in the office, and yet the Factory Manager did not raise doubts as to quality of the gunny bags with the Chairman.

That the trial magistrate erred in Law and in fact by failing to find that the gunny bags were inspected by the Factory Manager who had worked in that capacity for five years inspecting gunny bags among other duties. Hence he had no reason to accept them if they were old and worn out.

It is further submitted that the trial magistrate erred by making a finding that the appellant had colluded with the secretary manager to supply the gunny bags without following procedure without proper evidence or proof.

The Secretary Manager explained that he only communicated to the appellant about winning the tender. There was no evidence tendered that they communicated with the Factory Manager or the appellant while he was delivering the goods to the Respondent's society or that he issued him with the order before audit.

That the trial magistrate erred in law and in fact by finding that the appellant was told about the alleged status of the gunny bags and to collect and yet there was no proof of posting of the letters dated 15<sup>th</sup> October, 2012.

It is finally submitted that the learned trial magistrate erred in law and in fact by allowing the respondents counter claim of Kshs; 33,400/= for bags storage charges from 20<sup>th</sup> October, 2012 to 5<sup>th</sup> April, 2013.

No criteria was laid out by the respondent on how they arrived at Kshs;200/= per day, the appellant was not a party to the urgent meeting held on 15<sup>th</sup> October, 2012 in particular minute number. 14/2012/2013 Gakuyu-ini requirement/ gunny bags. Which the Respondent has relied on in setting out the counter claim. The size of the space the gunny bags occupy was not stated or mentioned. No expert was called to justify Kshs; 200/- per day charges.

The appellant prays that the appeal be allowed.

**For the Respondent Submissions were filed by Munene Wambugu & Kiplagat;**

The Respondent submits that the trial court arrived at a proper determination when it held that the order was released to the appellant in mysterious circumstances and before verification as required.

That it was the appellant's testimony in the lower court that he received the order on the day he received the gunny bags that is 31<sup>st</sup> March, 2012. However Pw2 contradicted this when she testified that the order has never been released to the appellant.

On the issue whether the gunny bags corresponded with the description and the sample given, the appellants own witness who testified as PW2 stated that she went to see the goods later and that they did not correspond with the description and the

sample given.

She further confirmed that the bags were old and torn out. That the appellant was to supply gunny bags that were new by description and that resembled the sample earlier supplied by him.

The Respondent refers to **Section 15 of The Sale of Goods Act** which provides;

**“ Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and if the sale is by sample as well by description, it is not sufficient that the bulk of goods corresponds with the sample.**

**If the goods do not correspond with the description.”**

That on the issue that the trial magistrate erred in Law and in Fact by failing to find that the gunny bags were inspected by the Factory manager who had worked in that capacity for five (5) years and had no reason to accept them if they were old and worn out, the evidence on record is clear that the gunny bags were packed in 100 bundles each containing 10 bags.

Defence witness 2 testified that the top bag would be placed strategically to hide the old torn worn out bags in it.

Dw2 further testified that, he was busy supervising and coordinating loading of coffee beans for transportation to Thika Coffee Mills and he did not have a reasonable opportunity to thoroughly inspect the gunny bags. He relies on **Section 35 (1) of The Sale of Goods Act.**

which provides;

**“ where goods are delivered to the buyer, which he has not previously examined. He is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.”**

It is submitted that on the issue whether the appellant was told on the state of the bags and asked to collect them, his own witness PW2 confirmed that, she personally sent the letters via registered post using the address that the appellant had indicated in his quotation.

That none of the letters had been returned as being unclaimed and that the appellant did not dispute that the said address was his.

The Respondents submits that on the issue that no expert was called to justify the Ksh; 200/= per day charges, they submit that the respondent did not need to call a witness to testify that 1,000 bags occupies space, as the same is rather obvious as especially the trial court noted in its Judgment the parties were even in agreement that the gunny bags be released after the hearing since they were bulky.

We urge the court to dismiss the appellants appeal with costs and we also urge the court to rely on the submissions filed and the authorities cited by the Respondents in the lower court which are at par with the present submissions.

### **ANALYSIS AND DETERMINATION**

I have considered the appeal, the submissions and the proceedings before the trial magistrate. See the case of; **SELLE & ANOTHER -VERSUS- ASSOCIATED MOTOR BOAT COMPANY AND ANOTHER (1988) E.A. 123** where it was held that the duty of the 1<sup>st</sup> appellate court is to evaluate and examine the evidence, adduced in the trial court, in order to reach a finding taking into account the fact that the appellate court had no opportunity of hearing, or seeing the parties as they testified.

### **The issue which arises for determination is**

- Whether the Plaintiff proved his claim on a balance of probabilities.

The appellant's claim is that he was contracted to supply 1,000 gunny bags at the price of Kshs; 302/= per piece giving a total of Kshs; 302,000/=

The appellant claims that he delivered new empty gunny bags on 21<sup>st</sup> March, 2012 and the goods were accepted on delivery.

The respondent refused to pay and hence this suit.

### **Three Issues arise for determination;**

1. Whether there was a contract to supply 1,000 bags at a consideration of Kshs; 302/= per bag giving a total of Kshs; 302,000/=.

2. Whether the goods were supplied and accepted.

3. Whether the Respondent failed to pay Kshs; 302,000/= for the goods.

**1. Whether there was a contract to supply the goods:**

The appellant Jackan Muriuki Konji ( Pw1) testified that he supplies gunny bags in a general shop.

That he supplied the Respondent 1,000 gunny bags at its Factory. They were in 50 bundles of 20 bags each. He said that he is a member of the Coffee Factory Gakuyu-ini and he saw that they needed gunny bags and he supplied the bags.

That on 15<sup>th</sup> March, 2012 he was called by the General Manager at Thirikwa Coffee Factory who asked him to take the gunny bags immediately.

He testified that he received an order on 21<sup>st</sup> March, 2012 to supply the bags, and the order was signed by the Chairman, Secretary and General Manager.

He was given a photocopy of the order by the Chairman when he issued the demand letter.

The appellant produced a delivery note, a goods receipt and an invoice.

He testified that he was told to take the invoice to their main office at Kiamutugu to the General Manager. He visited them twice and did not find the General Manager, and he got fed up, as he had borrowed the money.

The Respondent did not pay the sum of Kshs; 302,000/=.

During cross -examination the appellant testified that he delivered a quotation for the supply of gunny bags and put it in the tender box.

He gave the defendants, a sample of the gunny bags of 60kg capacity and the sample was of a new bag.

He testified that he was not given an order for the goods that day and that the original order is with the Society and that is the reason why he produced a copy of the order.

He admitted during Cross-examination that the Chairman gave him a copy of the LPO in early June, 2012 when he met him and that he supplied the gunny bags without the LPO. That he supplied the gunny bags before the order could be completed and that he did not have the order when he supplied the gunny bags.

Prisca Njeri Karia ( Pw2 ) testified that she had previously worked for the defendant as the Secretary Manager, she told the court that there was a tender for the supply of 1,000 bags which was awarded to the appellant.

She informed the appellant that he had won the tender, and she called him on phone and informed him. She later came to know that the appellant supplied the 1,000 gunny bags when she saw the delivery notes and goods received, and she told the court that she was not at the factory when the bags were supplied at Gakuyu-ini.

She(Pw2) told the court that the Factory Manager (Peter Mureithi Njogu) was present when the bags were supplied.

On the issue of the order to supply the bags, Pw2 told the court that the order had not been issued to the plaintiff by the time he supplied the gunny bags. She told the court that the order was ready on 22<sup>nd</sup> March, 2013. After it had been availed and authorized by the Union's Accounts Department.

She further told the court that someone could supply without the order, if he had a go ahead from the Board. She told the court that she prepared the order on 21<sup>st</sup> of March, 2012 and it was approved on 22<sup>nd</sup> March, 2012.

She further told the court that she did not give the plaintiff the order. She told him to go on and supply even though the order had not been issued and she further stated that she did not give the plaintiff the order after 22<sup>nd</sup> of March, 2012 when it was completed since the book keeper had indicated that the goods supplied were not proper a day after they were supplied.

She further stated that the order was not ready earlier otherwise she would have released it innocently.

She further stated that the order has never been released to the plaintiff.

James Gitari (Dw1) who is the Chairman of Thirikwa Co-operative Society and he told the court that the appellant supplied the society with gunny bags in the year 2012.

He (Dw1) told the court that the appellant had tendered for the supply of gunny bags. The appellant provided a sample of the gunny

bags which he had tendered to supply.

An Order dated 21<sup>st</sup> March, 2012 was issued by the Auditor on 22<sup>nd</sup> March, 2012. He produced the original order and testified that it was never released to the Appellant and he told the court that he did not give the appellant a copy of the order.

He (Dw1) further told the court that, they do not issue oral orders. They did not call the plaintiff to advise him that he had won the tender, and he stated that a person cannot supply without an order and the order was not released to the appellant.

From the foregoing it is clear that the Appellant supplied the goods without an order issued to him by the Respondent.

The appellant admitted that he received the order much later after supplying the goods. There was therefore no binding contract between him and the Respondents to supply the goods.

The finding by the trial magistrate was based on the evidence which was tendered by the appellant and his witness and it was confirmed by the DW1 that the order was never released to the appellant.

The trial magistrate found that;

**“ I find that there was an order for the supply of 100 gunny bags Exhibit. 1, also ( Exhibit 4) the gunny bags were delivered to Gakuyu-ini Factory and received by the Factory Manager ( DW2) apparently the sample was at the defendant’s main office on 21<sup>st</sup> March, 2012. The order was released to the plaintiff in mysterious circumstances, and before verification as required by Pw2 who was the defendant’s secretary manager.”**

He stated further that;

**“ therefore I find that a proper order was not issued since the order used as a basis for supply of gunny bags had not been verified by the Accountants/ Auditors.”** (See page 44 of the record).

At the time the Appellant supplied the goods, there was no binding contract of Sale of Goods.

There was material contradiction as to when the order was issued to the appellant and if the order was to be issued to the appellant, it would have been expected that he would be issued with the original order and it emerged that the appellant was never issued with the original order to supply the goods.

**Under Section 5 of The Sale of Goods Act ( Cap 31) Laws of Kenya.**

The formality of the contract and it provides;

**“Subject to the Provision of this Act and of any Act on that behalf, a contract of sale may be made in writing ( either with or without a seal ) or by word of mouth or partly in writing and partly by word of mouth, and may be implied by the conduct of the parties. Provided that nothing in this Section shall affect the law relating to Corporations.”**

The appellant failed to prove that there was a contract of the Supply of the goods at the time he supplied the goods.

The appellant had tendered for the supply of the goods, no binding relationship was entered into between the appellant and the respondent as the respondent never gave the appellant the order to supply the goods. The relationship of the buyer and the supplier was not concluded.

The trial magistrate found that the respondent and the appellant colluded with the PW2 who was an employee of the defendant and found that the gunny bags were fraudulently delivered with assistance of Pw2.

In the circumstances of this case the essential of a valid contract were not met. In the case of; **Charles Mwirigi Miriti -vs- Thagana Tea Growers Ltd & another ( 2014) EKLR**, For a valid contract there must be an offer and acceptance supported with consideration.

There was no binding contract which bound the respondent to pay the appellant.

The Respondent had stated in his Statement of Defence that there was an intention by the defendant to contract the plaintiff for the supply of 100 gunny bags and an order for the same had been prepared. However, the said order has never been dispatched by the defendant to the plaintiff despite the fact that the plaintiff delivered the gunny bags.

The Respondent further stated that he was not aware of how the plaintiff got his hands on the order since the Defendant was still in possession of the original order.

He further stated that the said delivery was unprocedural since the original order had not been released and the place of

delivery had not been agreed.

The evidence tendered before the trial magistrate by the appellant was that, he indeed received the order after he had delivered the goods.

It therefore follows that the appellant supplied the goods without a contract in place and the respondent was under no obligation to pay for the goods.

## **2. Whether the goods were supplied and accepted.**

The appellant testified that he delivered the goods on 21<sup>st</sup> March, 2012 at the Respondent's Factory and they were inspected by the Factory Manager one Francis Mureithi and he signed to confirm they were in good condition.

The receipt was produced as Exhibit. No. 3. He also issued an invoice dated 21<sup>st</sup> March, 2012.

In cross -examination he accepted that he supplied the goods without the L.P.O and as such, wherever he supplied them was not on instructions of the Respondents.

According to the evidence of PW2 and that of DW1 they had a tender for the supply of gunny bags.

The appellant gave the lowest quotation which was received on 15<sup>th</sup> March, 2012. The appellant gave his address as P.O. Box 435 Thika.

The gunny bags were for 60 Kgs.

The management called a meeting on 15<sup>th</sup> March, 2012 and Pw2 was in attendance.

The Plaintiff provided a sample of the gunny bags, the order was signed by the accountant Kirinyaga District Co-operative Union and the order was issued on 22<sup>nd</sup> of March, 2012.

The order was never released to the defendant. The appellant delivered the gunny bags on 21<sup>st</sup> of March, 2012. The gunny bags were delivered at Gakuyu-ini Factory. When he saw the bags ( according to DW2) he saw that the bag which was on top was almost new, but the ones which were inside were torn, and worn out and he produced the sample and the bags which were supplied.

He (Dw2) called a meeting on 29<sup>th</sup> of March, 2012 and the Appellant and the Secretary Manager were present.

The appellant promised to substitute the gunny bags with fresh ones. But he did not. Another meeting was held on 15<sup>th</sup> March, 2012 where it was resolved that the Appellant should collect the gunny bags which he had supplied, failure to which he would be charged Kshs; 200 per day since they were occupying space in the factory.

Pw2 confirmed that the letter was sent to the appellant, to his known address.

Defence witness 2 Peter Mureithi Njogu who was the Factory Manager at Gakuyu-ini Factory testified that he was instructed by Prisca Njeri (Pw2) to receive the gunny bags which were delivered by the appellant and he told the court that he had not been supplied with a sample of the gunny bags by the Secretary Manager. He did not check each of the bags at the time of receiving them.

Later, when he checked, he found that they were not new, but were worn out, old and torn and were not save for packaging coffee. They could not be used. He reported to Pw2 but she did not take any action.

He testified that he was misled by Pw2 to receive the gunny bags and to issue goods receipt as new, when in fact they were old.

One bag was placed strategically to hide the old, torn worn out bags in them.

From the evidence tendered by the appellant and the respondent it is clear that the appellant had supplied a sample of the gunny bags.

The Respondents have proved that the bags supplied were old and torn and not suitable for use.

**Section 15 of The Sale of Goods Act** which is quoted above, stipulates that where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with that description, and where a sample is given as well as the description it is not sufficient that the bulk of the goods correspond with the sample if they do not correspond with the description.

If the goods do not correspond with the description, in this case the appellant was supposed to supply new bags of 60 Kgs. The evidence tendered was that the gunny bags were torn and worn out.

The Respondent produced the minutes of the meeting held on 15<sup>th</sup> of March, 2012 which showed that the Respondents had resolved to award the tender to the appellant who had quoted the fairest price and for presenting a quality sample, and the meeting resolved that new gunny bags would be bought and the quantity was 100 pieces.

PW2 confirmed that she was in that meeting and she saw the sample and she retained it and in her testimony she confirmed that she saw the goods and they did not correspond to the order and the sample presented, the bags were old and worn out.

The Respondent produced the sample and the gunny bags which were supplied.

The trial magistrate found that the gunny bags supplied were old and worn out and did not correspond with the description given and the agreed sample and he found that the gunny bags supplied were not fit for the purpose for which they were produced. He cited the case of; **Gonstar Enterprises Limited -vs- Oumo No 8 of 2003 (2006) 1 EA**

Where the court held that:

**“ Old Section 35 of The Sale of Goods Act provided that, where goods had been delivered to a buyer who had not previously examined them, the buyer was not deemed to have accepted them until he had a reasonable opportunity of examining them to ascertain that they were in conformity with the contract.**

**The Justices’ of Appeal had rightly held that the respondent had not accepted the tractors because he had not had the opportunity to ascertain that they were fit for the purpose for which he bought them. This opportunity was afforded them when they were tested in the presence of both the Respondent and the appellant, and it was on that occasion that two tractors had failed to perform.”**

**Section 35 (1) of The Sale of Goods Act ( Supra)** it is provided that the buyer has a right to examine the goods. It is stated, where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them, unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

In this case the Respondent examined the goods, and held a meeting on 29<sup>th</sup> March, 2012 of the full management committee and the appellant was in attendance and the Chairman informed the meeting that the appellant had supplied gunny bags and was demanding payment and he further informed the meeting that the goods supplied are not of the quality agreed as per his sample which was in the office.

The meeting found that the appellant had not been served with the order and he agreed to replace the worn out gunny bags and thereafter the respondents held a meeting where it was agreed that the Manager was mandated to write to the appellant instructing him to collect the poor quality gunny bags. supplied by his firm to the society before 19<sup>th</sup> of October, failure to which the society would start charging a storage fee of Kshs: 200 per day with effect from 20<sup>th</sup> October, 2012.

The letter was written to the appellant communicating the decision of the board, and asking him to collect the gunny bags.

The trial magistrate stated that the Plaintiff was duly notified to collect the goods since they were examined and were found to be unfit albeit after two weeks.

He further held that the Plaintiff had conspired with PW2 to deliver gunny bags at unauthorized premises, and it took a while before the defendants management came to learn of the delivery.

The goods were never accepted by the respondents as they never intimated to the seller that they had accepted the goods.

The seller promised to supply goods which conformed to the sample but he never honoured that promise.

The Respondent never accepted the goods and as stated earlier there was no binding relationship of seller and buyer in the circumstances of this case.

### **3. Whether the Respondent failed to pay Kshs; 302,000/= for the goods**

The Respondent did not pay for the goods, he was not under any obligation to pay for the goods for the reasons that I have stated above.

That there was no valid contract of sale goods between the appellant and the respondent.

There was no offer and acceptance, and no consideration was paid.

Having considered the circumstances of this case based on the evidence which was tendered before the trial magistrate,

**I find that :**

- He arrived at the proper and inevitable conclusion that the appellant had failed to prove his case on a balance of probabilities as required under the law and the case was dismissed.
- I find no reason to interfere with the finding of the trial magistrate.
- I therefore find that the appeal has no merits.

**On the counter claim,**

- The Respondent informed the appellant that his goods were rejected as they were not in conformity with the samples that he had supplied and they invited him to collect the goods. Section **37 of The Sale of Goods Act provides that;**

“ the buyer is not bound to return the rejected goods. It was therefore upon the appellant to collect the goods from the premises of the respondent. He failed to do so and the notice issued to him to collect the goods, failure to which he would be charged 200/= came into effect from 20<sup>th</sup> October, 2012.

- Considering that there were 1000 bags which were bulky the fee charged of Kshs; 200 was reasonable.
- I therefore find no reason to interfere with the finding of the trial magistrate on the counter claim.
- The upshot is that the Appeal is without merit and is dismissed with costs.

**Dated, signed at Kerugoya this 29<sup>th</sup> day of May 2020**

**L. W. GITARI**

**JUDGE**