



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.104 OF 2011**

**BETWEEN**

**TONY OCHIENG OTIENO ..... APPELLANT**

**AND**

**MASTERMIND TOBACCO (K) LTD. .... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. Kibet Sambu, Senior*

*Resident Magistrate, dated 18<sup>th</sup> May 2011 in Migori SPMC NO.141 of 2010)*

**JUDGMENT**

**Introduction**

1. The appeal herein emanates from the judgment of the Senior Principal Magistrate's Court at Migori Civil Case No.141 of 2010 where the court found that the appellant had failed to prove his case against the defendant company on a balance of probability as required in law. In his considered judgment the learned trial magistrate found that the appellant's claim against the respondent company was an abuse of the court process and therefore dismissed the suit with costs to the respondent.

**Background**

2. The brief facts of the case are that the appellant herein (as plaintiff) sued the Respondent company (as defendant) vide a plaint dated 8<sup>th</sup> June 2010 claiming the sum of Kshs.115,250/= on account of smoked tobacco sold and delivered to the respondent between the 19<sup>th</sup> January 2010 and 26<sup>th</sup> January 2010.
3. On its part the respondent filed a defence on 24<sup>th</sup> June 2010 denying the appellant's claim in toto and inviting the appellant to strict proof thereof.

***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

***NO.763***

**The Appellant's case**

4. In his sworn testimony the appellant stated that he entered into a contract with the respondent in the year 2008 for the cultivation and supply of smoked tobacco vide Account No.08600556 and that he was to be paid for the tobacco supplied upon delivery. He claimed to have delivered the said tobacco on two occasions namely 19<sup>th</sup> January 2010 and 26<sup>th</sup> January 2010 valued at Kshs.60,750/= and Kshs.51,500/= respectively which amount the respondent had refused to pay despite several demands.
5. On cross-examination by respondent's counsel, the appellant conceded having worked with the respondent company prior to the institution of this suit from the year 2008 to 2009 as a stores clerk in charge of receiving the harvested tobacco from farmers on behalf of the respondent company. He also stated he was responsible for the maintenance of the defendant company's stores and that he had left the defendant company's employment in the month of February 2010. The appellant also admitted that he did not have a contract duly executed between himself and the respondent company for the growing and supply of tobacco save for the buying receipts **P. Exhibit 1(a) and (b)**.
6. The appellant further admitted that he had not at any given time as a person grown tobacco and that the tobacco he had supplied to the respondent company belonged to his relatives namely one Ombinja and Nyabanda who allegedly were unable to maintain accounts with the respondent company for lack of National Identity Card. The appellant agreed he was not a contracted farmer with the respondent company but

### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

a mere agent or conduit between his said relatives and the respondent company.

7. On being recalled for further evidence the appellant produced some delivery notes **P. Exhibit (a) – (e)** which admittedly appeared illegible and not visible at all. Some of the delivery notes appeared blank or faded.
8. The respondent on their part did not call any witnesses nor did the advocates on record file any written submissions in the matter.

#### The appeal

9. Being dissatisfied with the judgment and the decree of the trial court, Hon. Mr. Kibet Sambu delivered on the 18<sup>th</sup> day of May 2011 the appellant set out the following grounds:-
  - a. *The learned trial magistrate erred in law and in fact when he held/decided the case against the weight of the evidence adduced by the appellant herein.*
  - b. *The learned trial magistrate erred in law and fact when he assumed ignored and/or failed, avoided to consider the documentary evidence presented before him by the appellant during the trial.*
  - c. *The learned trial magistrate erred in law and in fact when he held and/or delivered a judgment on a scanty evidence.(sic)*
  - d. *The learned trial magistrate erred in law and fact when he failed to hold that the basis of the evidence led at the trial by the appellant was overriding when the respondent never availed any proper evidence to warrant such mistrials.*

#### Submissions

10. The parties filed their respective written submissions which I have read in detail. They also made oral submissions.

### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

11. In his oral submissions Mr. Sagwe for the appellant contended that the learned trial magistrate was wrong in deciding the case against the appellant when the respondent had failed to controvert the evidence of the appellant; that the documentary evidence produced by the appellant was not considered, especially that the appellant had an account with the respondent being Account No.080600556 Equity Bank. That the existence of the said account showed that the appellant was supplying smoked tobacco to the respondent who was then required to deposit money into the account for the appellant. He submitted further that appellant supplied smoked tobacco worth a total of Kshs.112,250/=, which amount was not paid by respondent hence these proceedings.
12. Counsel finally submitted that it was only the appellant who gave evidence in the lower court as is clear from the record, which evidence was never controverted, and that in the circumstances, the appeal herein ought to be allowed as prayed.
13. On his part counsel for the respondent Mr. Abisai submitted that the appeal lacks merit as the appellant had failed in his duty of proving his case against the Respondent on a balance of probability.
14. He further submitted that failure by the respondent to adduce evidence before the trial court did not in law absolve the appellant from proving his case.

#### Duty of this Court

15. It is the duty of this court to reconsider and evaluate afresh the evidence that was laid before the trial court with a view to reaching its

### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

own conclusions in the matter, only remembering that this court does not have the opportunity of seeing and hearing the warring parties like the trial court did. Thus in carrying out its duty as first appellate court, this court should also remember that this jurisdiction has to be exercised with caution, so that it will only interfere with the findings of the trial court **“if there is no evidence as a whole that can reasonably support or justify the conclusions reached by the trial court. Only in such a situation would this court interfere.”** See **Peters –vs- Sunday Post [1958] EA 424** as restated in **Selle & another –vs- Associated Motor Boat Company Ltd & Others [1968] EA 123**. I have reconsidered and evaluated the whole evidence and also carefully weighed the judgment of the trial court.

#### Regarding the Appellant’s evidence

16. On cross examination at page 16 of the Record of Appeal, counsel pointed out that the appellant stated clearly that he did not have a contract to supply tobacco to the respondent and that he did not have any delivery notes. It was also evident that the tobacco the appellant purportedly supplied did not belong to him. Counsel referred the court to **Cap 321** of the **Laws of Kenya** and in particular **section 4 (1)** which provides that for any farmers to supply and produce under the said Act, there must be a sponsorship agreement whose purpose is to pre-empt tobacco hawking. The court was told the appellant did not comply with the said provision of the law.
17. It was also submitted that the appellant failed to show proof of the existence of his alleged account with Equity Bank. That all that the

### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

respondent knew was that the appellant had been an employee of the respondent up to the year 2009 and that the appellant used his position with the respondent to corruptly obtain documents that purported to give him chance to supply smoked tobacco to the respondent. It was also submitted that the supporting documents purportedly availed to court and found at page 30 of the

Record of Appeal were all made up. Counsel supported the trial court's findings to the effect that there was no evidence to support the appellant's claim against the respondent.

18. Finally counsel urged this court to reject the documents contained in the Supplementary Record of Appeal as such documents were not exhibited during the trial.

#### The Law

19. As has been shown above the appeal herein revolves around an alleged supply contract between the appellant and the respondent under which the respondent allegedly owes the appellant a sum of Kshs.115,000/= for the supply of smoked tobacco. (Or is it 112250/=?)
20. A contract is a legally binding agreement involving two or more people or businesses (parties) that outlines and stipulates what the parties will or will not do. There is mutual agreement between the parties to give each other some benefit (known as consideration) such as a promise to pay money in exchange for a promise to provide specified goods, services or the delivery of such goods and services. The basic fundamentals of a contract include the following legal concepts of capacity, legality and mutual assent.

#### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

#### Issues for Determination

21. From the above simple definition the question arises as to whether the appellant proved his case on a balance of probability in the lower court. Evidence adduced by the appellant speaks for itself. He has admitted that there was no contract between him and the respondent company herein, nor is there any evidence to show that he actually delivered smoked tobacco to the respondent. The documents produced by the appellant are not legible and some of them have faded while others are actually blank. In my view therefore, there is nothing to imply that there was a contract between the parties in the first place, even if the appellant held an account at Equity Bank. The mere holding of that account did not mean that the respondent was obligated to deposit money into it unless the appellant proved such an obligation on the respondent. In this case too, the appellant was under a duty to prove that the respondent was to deposit money into such an account being proceeds of deliveries of smoked tobacco under a valid contract. Taking the whole evidence together, I do find that there was no contract between the appellant and the respondent.
22. The second issue that arises for determination is whether the respondent's failure to adduce any evidence during the trial meant the appellant had proved his case against the respondent on a balance of probability. I do agree with learned counsel for the respondent that the appellant was under a duty to prove his claims, but that he failed to do so. It was not the duty of the respondent to fill the gaps in the appellant's case. It was the appellant's singular responsibility to

#### ***KISII HCCA (KISII) NO.104 OF 2011 (JUDGMENT)***

#### ***NO.763***

demonstrate to the court that his claims were supported by sound and unshakeable evidence. He failed in discharging that responsibility. The respondents have a defence on record in which they deny in toto the allegations by the appellant putting him to strict proof of his claims. The appellant failed the test.

23. I support the learned trial magistrate's findings that the plaintiff's assertions in evidence that he had stepped in and offered himself to be used as an agent by his alleged relatives in the purported

transaction giving rise to the instant suit against the respondents untenable and indeed smacks of some fraud against the respondent company while it is not the duty of this court to consider the apparent criminal elements in this whole scam, the respondent may consider mounting an investigation into it.

Conclusion

24. Having said so I do find that the appeal herein lacks merit. I do uphold the trial court's decision and dismiss the appellant's appeal with costs to the respondent.

**Dated and delivered at Kisii this 11<sup>th</sup> day of July, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. Moracha for S.M. Sagwe for appellant

M/s Abisai & Co. (absent) for Respondent

Mr. Bibu - Court Clerk

***HCCA (KISII) NO.104 OF 2011 ( JUDGMENT***