



The Appeal was argued before me on 4<sup>th</sup> May 2011, by Mr. Kipkoech for the Appellant, while Mr. Kipkenei argued against the appeal. Mr. Kipkoech urged one ground of appeal namely, that the learned trial magistrate erred in holding that the Appellant did not lose any business. Mr. Kipkenei argued to the contrary and in agreement with the learned trial magistrate that the appellant did not prove his claim.

I have examined the Record of Appeal and submissions of counsel on either side. The facts are not in dispute as Mr. Kipkoech learned counsel for the Appellant put it. Neither did Mr. Kipkenei for the Respondent dispute the facts.

The Appellant won a tender to supply meat to the Respondent, a High School in Koibatek District, a major school in the greater Baringo County. He was to supply 150 kg per week at the cost of Kshs 120/= per kg. He supplied meat worth Ksh 35,000/= and the Respondent terminated the contract. The Respondent's Board summoned the Appellant and discussions were held between the Respondent's Board of Governors, and the Appellant. The Board expressed its displeasure at the poor quality of beef supplied by the Appellant and informed the Appellant that his services would be terminated from the date of the meeting. The Respondent's Board also informed the Appellant that he would be paid, and he was paid Shs 35,000/= for the meat deliveries he had made to the date of the meeting.

Although the Respondent did not offer any evidence, and the Respondent's case appears to have been surreptitiously closed at the instance of the Appellant's counsel, there was no rebuttal of the Respondent's defence that the contract was mutually terminated to save a dangerous situation where the Respondent's students were agitating against the supply of bad quality meat.

Even without the evidence of the Respondent, the Appellant did not prove his claim even on the balance of probability.

The principle in contract of the measure of damages is that the aggrieved party is to be compensated in full for the proximate damage suffered by the plaintiff. That is the principles of "**restitutio in integrum**" - restoration to the original position. That position was recognized as long ago as 1854, in the case of **HADLEY VS. BOXENDALE [1854]9 Exh. 341, VICTORIA LAUNDRY LTD VS. NEWMAN INDUSTRIES LTD [1949] 2 KB 528**. In **ROBINSON VS. HERMAN (1848)1 Exh. 850, Parke B** said -

***"Where a party sustains a loss by reason of a breach of contract he is, as far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."***

In this case, the Appellant hardly performed the contract. According to his own evidence (*as PW1*), he supplied meat for 19 days only. The Respondent discovered that the Appellant was supplying fresh meat mixed with stale meat which was causing the students tummy upsets, and grumbling commenced. The Appellant offered no evidence that he had a loan of Kshs 1 million in order to purchase animals for slaughter. If he did, there was no evidence that he had used the entire sum in 19 days to purchase animals for slaughter. If he did, he had a duty to either sell those animals to other butchers or find other ways in order to mitigate his losses.

I think the real point here is that it was the appellant who was in breach of the contract and that is why although the appeal was drawn and dated 8<sup>th</sup> February 2008, it was not filed until ten (10) months later on 24<sup>th</sup> December, 2008. A contract to supply any food commodity implies that the commodity would be wholesome for consumption. What the appellant supplied was not entirely wholesome, and that is the reason why he was paid for the deliveries he made, on the principle of "**quantum meruit**". I do not think from all the circumstances the appellant was entitled to more, and I find no merit in his appeal.

The same is therefore dismissed with costs to the Respondent.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 10<sup>th</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**