



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.70 OF 2004

ANTHONY KANGAI.....APPELLANT

VERSUS

BERNARD NJENGA KARIUKI.....RESPONDENT

**[An Appeal from the Judgment of Hon. H. W. Wasilwa, Principal Magistrate, in Nakuru
R.M.C.C.No.551 of 2000 dated 5th May, 2004]**

JUDGMENT

The brief uncontroverted facts giving rise to this dispute may briefly be stated as follows:

On 7th December, 1999, the appellant purchase from the respondent a used electric welding machine at a consideration of Kshs.30,000/=. A few days thereafter, the appellant rejected the welding machine on the ground that it was defective and demanded the refund of the purchase price from the respondent.

According to the appellant, the respondent was unwilling to refund the purchase price and began to avoid him. The respondent was arrested and confined in the police cells at Eldama Ravine Police Station for four days without charges being preferred.

The respondent then brought an action against the appellant in Nakuru R.M.C.C. No.55 of 2000 for:

“a) an order for compensation

b) an injunction restraining the defendant, his agents and/or servants from harassing (sic) the plaintiff within his place of residence and business

c) costs of this suit

d) interests on (a), (b) and (c) above.....”

The appellant in his defence denied that the arrest of the respondent was unlawful and unjustified as the latter had committed the offence of obtaining money from him by false pretences; that the investigations into that claim was still on-going.

In his counter-claim, the appellant deposed that the welding machine was defective despite the assurance by the respondent to the contrary; that as a result of the defect of the welding machine, the appellant lost a contract for welding works with Baringo High School. For those reasons, he sought judgment in the sum of Kshs.30,000/= being the refund of the purchase price, damages for loss of business, costs of the suit and interest.

In support of his case, the respondent testified that he was not satisfied with the respondent’s claim that the welding machine was defective. He maintained that the machine was in a working condition and that the appellant must have simply changed his mind. He further stated that the appellant called him a thief and a dog in the presence of members of public in his (the respondent’s) garage. That using his office as an intelligence officer, the appellant caused him to be arrested and detained at the police station from where he was released without charges being preferred.

On the other hand, the appellant gave evidence that he inspected the welding machine before he purchased it and noted that it “*looked okey.*” After the delivery, it worked well briefly but later he discovered its defects from D.W.2 Mohammed Said, a technician. The appellant maintained that he only had the machine for one week; that he returned it due to the defects. According to D.W.2, Mohammed Said, the machine’s transformer was leaking oil, emitting electric shock and could not weld.

After considering the foregoing evidence, as well as submissions by both counsel, the learned trial magistrate (H. Wasilwa, Senior Resident Magistrate) found that the appellant having kept the machine for sometime, the defects complained of could not have been attributed to the respondent; that the machine had a guarantee from the original owner and the appellant ought to have claimed against the original owner. The learned magistrate concluded that:

“Plaintiff has established his case as prayed and I find for him and enter judgment as prayed with costs. The counter-claim is dismissed with costs.”

It must be recalled that the respondent’s claim was that of loss of business and injunction. I will shortly return to this issue suffice to state that the appellant was aggrieved with that decision and brought the instant appeal on the grounds that:

- i) the learned magistrate failed to evaluate the evidence, submissions and authorities before her;
- ii) the learned magistrate erred in holding that the guarantee by the original owner could be extended to the appellant
- iii) the learned magistrate relied on extraneous matters;
- iv) there was no proof of the claim for loss of business while the prayer for injunction had been overtaken by events.

In support of his claim for loss of business, the respondent merely stated in the plaint that he was working

for gain at Nakuru and in his evidence that he was engaged in business without clearly providing details of the kind of business he was engaged in and the income derived from it. That information was essential in view of his claim which is in the nature of special damages. The learned trial magistrate therefore erred in failing to analyse the evidence presented by the respondent in support of the prayer for compensation for loss of business.

Similarly, on the issue of injunction, apart from the fact that the respondent was arrested following a complaint by the appellant and the fact that he was not charged, there was no evidence that the appellant harassed the respondent to warrant the granting of an injunction against the appellant.

I turn to consider the appellant's counter-claim. I reiterate that the learned magistrate found that the defect in the machine could not be linked to the respondent as the appellant had had the machine for sometime. In any case, she held that the appellant ought to have claimed against the initial owner who had guaranteed it.

The question before the learned magistrate in respect of the appellant's counter-claim was whether or not he (the appellant) was entitled to a refund of the purchase price and damages for loss of business. No doubt there was a sale in terms of **section 3(4)** of the **Sale of Goods Act** which was preceded by a written contract of sale.

The appellant purchased the machine for a particular purpose – welding. It was his uncontroverted evidence that one week after purchasing it, it was found to be incapable of welding as it emitted shock waves and had oil leaks. This was so despite the assurance from the respondent that the machine was in a good working condition. The defect, therefore, amounted to a breach of a condition which entitled the appellant to repudiate the contract and reject the machine. In view of the nature of the machine and the appellant's profession (an intelligence officer) he relied on the respondent's word that the machine was in good condition.

Regarding his claim for loss of business, like that of the respondent, the appellant did not supply the necessary information to prove the loss. In the counter-claim, it is averred that the appellant had a welding contract with Baringo High School. Yet in his testimony he merely said:

“I suffered loss of business. I used to have contracts with some scholars. That is why I was buying the machine.”

That cannot amount to proof of special damages. That claim, for that reasons fails.

In a nutshell, the appeal succeeds and the judgment of the court below is set aside with the result that the respondent's suit, Nakuru R.M.C.C. No.551 of 2000 is dismissed with costs while the counter-claim succeeds to the extent that the respondent shall refund to the appellant the purchase price of Kshs.30,000/= plus interest at court rate from the date of this judgment until payment in full. I also award costs of this appeal to the appellant.

Dated, Delivered and Signed at Nakuru this 9th day of June, 2011.

**W. OUKO
JUDGE**