



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 706 of 2007**

**TAWS LIMITED.....APPELLANT**

**VERSUS**

**HEIDELBERG EAST AFRICA LIMITED.....RESPONDENT**

**(Appeal from the Judgment of the Nairobi Resident Magistrate's Court dated the**

**19<sup>th</sup> day of July, 2007 in Nairobi Senior Resident Magistrate's (Milimani) Court Civil Suit No. 8314 of 2004)**

**J U D G E M E N T**

1. This is an appeal arising from a suit which was filed in the Chief Magistrate's Court at Nairobi by Heidelberg East Africa Limited hereinafter referred to as the respondent. The company had sued Taws Limited hereinafter referred to as the appellant, seeking judgment for Kshs.251,517/=. The claim was in respect of goods supplied and or services rendered to the appellant by the respondent.
2. By a statement of defence filed on 13<sup>th</sup> September, 2004, the appellant denied the respondent's claim. In particular the appellant denied that the respondent completed the services it had been allegedly contracted for, and contended that the respondent was not entitled to any sum or any remuneration having failed to complete its contractual bargain. The appellant further maintained that there was total failure of consideration. Without prejudice the appellant further contended that the services provided by the respondent were shoddy and did not rectify the machine problem resulting in loss of use of the machine by the appellant.
3. During the hearing in the lower Court, two witnesses testified in support of the respondent's case. These were Francis Ouma Ojwang, (Ojwang) a mechanical engineer employed by the respondent, and Peter Kinyanjui Mukoma, (Kinyanjui) a print engineer also employed by the respondent.
4. Their evidence was briefly as follows: The appellant, who was a security printing firm, was a customer of the respondent as it had Heidelberg printing machines which were being maintained by the respondent. On 23<sup>rd</sup> November 2001, the appellant reported a problem with one of the machines. Ojwang went to examine the machine at the appellant's premises. He worked on the machine until 6<sup>th</sup> October, 2001 when he was joined by Kinyanjui. The two worked on the machine until 5<sup>th</sup> December, 2001 when they succeeded in repairing the machine.
5. A total of 87 hours was spent by the respondent's officers in repairing the machine. The respondent later produced an invoice to the appellant for Kshs.251,517/= including VAT. The appellant did not however settle the invoice. The respondent therefore wrote a letter of demand but the amount was not paid.
6. The appellant called three witnesses. These were: Geoffrey Kamau Njuguna, (Njuguna) then employed by Gazelle Limited and formerly a printing mechanic with the Old East Africa Trading Company Ltd (the predecessor of the appellant company), John Kariuki Macharia, (Macharia) a sales and service coordinator with Gazelle Limited and Mustafa Khan, (Khan) the master printer and production manager of the appellant. The evidence was briefly, that the appellant had a Heidelberg GT0Z-P machine. The machine had a problem in that it was only printing one colour instead of two colours. In the year 2001 the appellant engaged the respondent to repair the machine. Two officers were sent to

the appellant's premises. They spent about 85 to 90 hours repairing the machines but they did not rectify the problem.

7. In the year 2004, the appellant contracted Gazelle Limited. Njuguna and Macharia went to the appellant's premises, examined the machine and estimated the cost of repairs. In the year 2006 the officers from Gazelle Limited repaired the machine and invoiced the appellant for Kshs.83,502/= which the appellant paid. Khan produced service reports and invoice from the respondent for the year 2000 which he contended were paid. He maintained that all service reports from the respondent which were signed for were paid. He explained that the service report for 2002 was not signed as Ojwang and Kinyanjui were unable to repair the machine and did not therefore complete the work. The respondent was therefore not entitled to the amount claimed.

8. In his judgment, the trial Magistrate found that the respondent's officers worked on the machine for about 100 hours. He noted that the respondent's officers were not able to demonstrate that they had repaired the machine as they were not allowed by the appellant to leave the appellant's premises with the tested work. The trial Magistrate believed the respondent's statement that they actually carried out the repairs. He pointed out that although the appellant claimed that the repairs were not successfully done, nothing to that effect was noted on the service report. The trial Magistrate found it baffling that although the suit was filed in 2004, the appellant claimed to have had the machine repaired in the year 2006. The trial Magistrate concluded that there was no failure of consideration, and that the respondent was therefore entitled to judgment as prayed.

9. Being dissatisfied with that judgment the appellant has lodged this appeal raising 9 grounds as follows:

(i) The learned trial Magistrate erred in law and fact in finding that the respondent herein, the plaintiff in the subordinate Court, had made out a case on a balance of probabilities when this was not borne by the evidence tendered.

(ii) the learned trial Magistrate erred in law and fact in finding that there was a valid contractual agreement between the parties with all the attendant ingredients of a contractual relationship whereas this was not the case as the alleged 'contract' was vitiated by failure of consideration and lack of certainty of terms.

(iii) The learned trial Magistrate erred in disregarding the evidence of DW1, MR. GEOFFREY KAMAU and DW3, MR. PARTAN MUSTAFA which was corroborative and which evidence clearly showed that the Respondent herein had failed to render any contractual services for which the appellant would have been in law liable.

(iv) The learned trial Magistrate misdirected himself and made assumptions on the alleged hours the respondent's employees worked at the appellant's firm and/or the hourly rate charged for such labour/work and in the end based his judgment on these wrongful assumptions to the prejudice of the appellant herein.

(v) The learned trial Magistrate erred in failing to find that the respondent, who claimed a specific monetary award in its suit, was in law required to prove such claim strictly and that at the trial it failed in proving the same to the required standard.

(vi) The learned trial Magistrate misdirected his mind in failing to sufficiently and properly evaluate the evidence before the court and to consider the appellant's defence vis-à-vis the respondent's case.

(vii) The learned trial Magistrate had a distorted view of the evidence tendered to court and in the final analysis erred in upholding the respondent's suit with costs.

(viii) The learned trial Magistrate erred in his analysis of the evidence presented and the law applicable thereby making wrong conclusions and deductions.

(ix) The learned trial Magistrate erred in failing to look at the totality of the evidence and pleadings before the court."

10. Mr. Kahonge who argued the appeal on behalf of the appellant submitted that the respondent did not prove that there was any contract between it and the appellant as there was no evidence of any offer, acceptance, consideration, or the terms of any contract. He therefore argued that the contract was voidable *ab initio*. Mr. Kahonge contended that the respondent's claim for Kshs.251,517/= was not proved as there was no evidence of any hourly rate having been agreed. He therefore urged the Court to allow the appeal and dismiss the respondent's claim.

11. For the respondent, it was submitted that the appeal had no merit as the trial Magistrate addressed himself to all the relevant issues and found that there was no failure of consideration. The Court was thus urged to uphold the judgment of the lower Court.

12. I have carefully reconsidered and evaluated the evidence which was adduced before the trial Magistrate. I

have also considered the submissions made before the trial Magistrate and before me. From the evidence adduced before the trial Magistrate, it was not disputed that the appellant had a problem with its machine, and that the appellant sought the respondent's services in having the machine repaired. It is also not disputed that two officers of the respondent went to the appellant's premises and spent about 90 hours working on the machine. Although the appellant denied that there was any contract between it and the respondent, it is evident from the conduct of the parties that there was an agreement for the respondent to repair the appellant's machine.

13. The issue that arises is whether the respondent's officers actually repaired the machine, and if so, whether the respondent was entitled to the amount claimed. The appellant's witness Khan maintained that the machine was not satisfactorily repaired. However as pointed out by the trial Magistrate, the appellant did not make any comments to that effect on the sales service sheet. Moreover, although the respondent issued the appellant with an invoice, statement and a letter of demand between 23<sup>rd</sup> July, 2002 and 12<sup>th</sup> August, 2003, there was no response from the appellant denying that the services were ever rendered or that the machine was not satisfactorily repaired.

14. Moreover although the appellant claimed that the machine was not satisfactorily repaired, the appellant did not take any action to have the machine repaired until the year 2004 when they asked for an estimate from Gazelle Limited, and the year 2006 when the machine was allegedly repaired by Gazelle Limited. The question is: why did the appellant take so long to have the machine repaired if indeed it was not repaired by the respondent in the year 2001? The trial Magistrate who saw and assessed the demeanor of the witnesses believed the respondent's witnesses that they actually repaired the machine. Given the evidence before me, I have no reason to depart from that finding.

15. With regard to the actual amount claimed, no evidence was adduced regarding the actual hourly rate to be charged. The trial Magistrate properly considered this aspect of the evidence and noted that there were previous transactions between the parties and that the exhibits produced by the appellant showed that in the year 2000, the respondent had billed the appellant at a unit rate of 2,900/= for similar repairs. The unit rate of Kshs.3000/= claimed by the respondent for work done in October and November 2001 was therefore reasonable. The upshot of the above is that I find no merit in this appeal and do therefore dismiss it with costs. Those shall be the orders of this Court.

Dated and delivered this 25<sup>th</sup> day of September, 2009.

**H.M. OKWENGU**

**JUDGE**

In the presence of:

Kahonge for the appellant

Advocate for the respondent, absent

Eric, court clerk