



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 12 of 1997

DAVID MURIITHI APPELLANT

VERSUS

JOHN GITHAE BENDAYE RESPONDENT

(Appeal from the original judgment of the Senior Resident Magistrate's Court at Nyeri in Civil Case No. 601 of 1995 dated 23rd February 1997 by Mr. J. S. Mushelle – SRM)

J U D G M E N T

The respondent had sued the appellant in the Principal Magistrate's Court for a refund of Kshs.16,000/= being the purchase price of a cow which the respondent had bought from the appellant but which died soon after he had taken possession thereof. At the conclusion of the trial, the learned magistrate found for the respondent and ordered the appellant to refund to the respondent kshs.16,000/= plus costs and interest. The appellant was aggrieved by the judgment and decree hence this appeal.

In a memorandum of appeal filed through **H.K. Kiminda Esq., Advocate** the appellant faults the learned magistrate's judgment on the following grounds:

- 1. The learned trial magistrate erred in law and fact by failing to consider that at the time the appellant sold the cow the Respondent had observed it and was satisfied with its condition.**
- 2. The learned trial magistrate erred in law and fact by disregarding the fact at the time the cow died it was in the Respondent custody and other factors may have caused death while the cow was with the respondent.**
- 3. The learned trial magistrate erred in law and fact by not considering that the veterinary Doctor evidence was not tendered to prove the alleged illness of the cow.**
- 4. The learned trial magistrate erred in fact by disregarding the fact that the Appellant not being a veterinary doctor could not have known whether the cow was sick or not and like the appellant the cow on observation was healthy at the time of sale.**
- 5. The learned trial magistrate erred in law by holding that the respondent had proved the case on a balance of probabilities while the pleadings and evidence prove the contrary.**

The respondent's case was that on 3rd December 1994 he bought from the appellant a cow for Kshs.16,000/=. On taking the cow home he noticed that it was not feeding well. He contacted a veterinary officer who upon examining the cow diagnosed it as suffering from an incurable disease. The respondent immediately informed the appellant. The appellant apparently undertook to refund the purchase price to the respondent but take the cow and have it slaughtered and sold. The appellant later changed his mind and refused to take back the cow and or refund the money, hence the suit.

On his part, the appellant's story was that he deals in livestock. The respondent expressed interest in one of the cows in his herd which he personally selected. They agreed on the purchase price of Kshs.16,000/=. The respondent paid the purchase price and left with the cow. Later the appellant was arrested by the police at the instigation of the respondent on the allegation that he had sold him a sick cow but was later released. Later the respondent filed the instant suit. He categorically denied the respondent's claim.

When the appeal came up for hearing **Mr. Kiminda** and **Mr. Macharia** respective counsel for the appellant and respondent agreed to have the appeal argued by way of written submissions. I have carefully read and considered the said written submissions that were filed by the respective counsel.

This being a first appeal I am required to reconsider the evidence, assess it and make appropriate conclusions on such evidence always remembering that I have neither seen nor heard the witnesses. See generally **Peters v/s Sunday Post Ltd (1958) E.A. 424**, **Selle & Another v/s Associated Motor Boat Co. Ltd. & Others (1968) E.A. 123** and **Ephantus Mwangi & Another v/s Duncan Mwangi Wambugu (1982-88) 1 KAR 278**.

The issues for determination in the subordinate court and indeed this court were threefold;

- (i) Whether the respondent proved his case on balance of probability**
- (ii) Whether the appellant was aware the purposes for which the respondent purchased the cow.**
- (iii) Whether the respondent is entitled to the refund of the purchase price.**

From the evidence of the respondent, he purchased the cow on 3rd December, 1994 and it died on 18th December, 1994 allegedly out of an incurable disease. The respondent had seen the cow sometimes in November 1994 and in fact had selected it himself out of the herd that the appellant had. As a livestock trader, I doubt very much whether he could have been able to tell whether the subject cow was ailing or not. I do not think that in releasing the cow the respondent warranted and or guaranteed its health status to the respondent. There was no misrepresentation on the part of the appellant regarding the health status of the cow to the respondent. Indeed and as correctly submitted by the **Mr. Kiminda**, learned counsel for the appellant, the contract of sale was executed and completed on 3rd December, 1994 when the respondent took possession of the cow. The respondent in any event did not in his plaint plead misrepresentation of sorts by the appellant and the particulars thereof. It is also possible that the cow could have fallen sick as a result of the manner it was kept and or handled by the respondent. After all the respondent had kept the cow for 15 days before it succumbed to death. 15 days is not short time. Many other factors could have therefore come into play within the 15 or so days that the cow was under the care, control and custody of the respondent which had no nexus at all direct or indirect with the appellant.

The respondent claims that he contracted the services of a veterinary officer who upon examining the cow acknowledged that it had an incurable disease. However it must be noted that the said veterinary officer did not testify. At best that evidence was hearsay, inadmissible and should not have been acted upon by the learned magistrate. The cause of death of the cow therefore remains a mystery.

Under section 16 of the sale of goods Act there is no implied warranty as to fitness. The appellant delivered to the respondent what he had contracted to sell. The purchaser got what he had bargained for. In entering the contract a man must use his own best judgment so that he may secure in the contract a

specific term that is to his advantage. In the circumstances of this case, the respondent did use his own judgment in agreeing to take away the cow and without insisting on a warranty as to its fitness. Indeed if he was ever in doubt, nothing stopped him from enlisting the services of the veterinary Doctor in choosing the cow at that stage so that he could be assured of its health status.

On my own evaluation of the evidence tendered, I am far from being convinced that the respondent had made out a case on the balance of probability to entitle him to the judgment. The appellant was not made aware the purpose for which the cow was being purchased. That being my view of the matter, I do not think that the respondent was entitled to a refund of the purchase price.

Accordingly, I would allow the appeal with costs. I would set aside the judgment and decree of the subordinate court and substitute therefor with an order dismissing the suit with costs to the appellant.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE