



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 528 of 2003**

**GEORGE MUNGAI T/A ADD-VICE PROMOTIONS.....**  
**.....APPELLANT**

**VERSUS**

**CARNAUD METAL BOX (K) LTD.....RESPONDENT**

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

By a plaint dated 19<sup>th</sup> November, 2001, Carnaud Metal Box (K) Ltd, (hereinafter referred to as the respondent), filed a suit in the Resident's Magistrate Court at Nairobi seeking judgment for Kshs.133,446/= against George Mungai T/A Add-Vice Promotions (hereinafter referred to as the appellant). The claim arose in respect of the balance of the amount due for goods sold and delivered to the appellant by the respondent.

The appellant filed a defence denying the plaintiff's claim, contending that he did not owe the respondent the sum of Kshs.133,446/= or any other amount. The appellant contended that he ordered for posters from the plaintiff at an agreed price of Kshs.133,446/= which the appellant paid through a deposit of Kshs.60,000/= and the balance on delivery of the posters.

During the trial, two witnesses testified for the respondent. These were the respondent's assistant Sales Manager cum good technologist Daniel Nganga and the respondent's former sales and marketing manager, John Kihara Kanyenje. The two witnesses maintained that the appellant ordered for 2,000 pieces of A2 size posters, paying a deposit of Kshs.60,000/=. 1,934 posters were delivered to the appellant. Subsequently the respondent raised an invoice for Kshs.266,892/=. The appellant paid a sum of Kshs.73,446/= bringing the total paid to kshs.133,446/=. There was therefore a balance of Kshs.133,446/=. The witnesses explained that although the appellant contended that he was supposed to pay for 1,000 posters he failed to return the 934 excess posters. The witnesses produced various e-mails and faxes exchanged between the respondent and the appellant for the quotation and supply of the posters.

John Kihara Kanyenje, who prepared the initial quotation, denied having agreed to supply smaller posters. He maintained that 1,934 posters were delivered to the appellant.

On his part the appellant testified that he asked for a quotation from the respondent, and that following discussions it was agreed that the respondent would supply posters of size 420 by 594 i.e. A2. The appellant maintained that he ordered 2,000 pieces of metal posters at an agreed price of Kshs.138,000/= inclusive of VAT. The appellant paid a total sum of Kshs.133,446/= because 64 posters were not supplied. The appellant was surprised to receive a further demand of Kshs.134,000/=. He denied having agreed on the sum of Kshs.266,000/=. He maintained that the percentages charged were not discussed. He maintained that only 1,000 sheets were to be used and not 2,000 sheets as alleged by the plaintiff. He denied having signed any formal contract with the plaintiff.

In her judgment the trial magistrate found that the defendant ordered 2,000 posters which were made from 2,000 sheets at an agreed price of Kshs.138 per sheet. The trial magistrate found that the appellant was supplied with the posters and that he was liable to pay the sum of Kshs.136,446. Being aggrieved by that judgment, the appellant has filed a memorandum of appeal raising 8 grounds. The gist of the grounds raised is that the trial magistrate misdirected herself in considering the evidence which was adduced before her, and in failing to properly address the issues, and also in failing to recognize that the respondent's witnesses were not reliable. The court was urged to find that the property value that was attached to the evidence of the plaintiff has contrasted with that of the sole witness of the defendant was not adequate. For the respondent, it was submitted that the issues were properly appreciated by the trial magistrate. Relying on the Case of *Shah vs Abuto 1970 EA 264* the court was urged not to interfere with the finding of the trial magistrate who had the opportunity to see the witnesses and assess their evidence.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial court. I find that the issues which arose were as follows: the quotation that was given to the appellant by the respondent; the agreed price if any; the order that was given by the appellant to the respondent; the number of posters supplied and the sheets used; the amount due for what was supplied and whether the same has been paid by the appellant.

It is not disputed that the initial quotation given by the respondent was for Kshs.138/= for a poster of 406 x 660 mm size for a minimum of 1,000 posters. In his fax dated 28<sup>th</sup> June, 2000, the appellant ordered for 2,000 pieces of A2 size metal posters. There was no reference to the initial size which was quoted by the respondent or the price. According to the respondent's e-mail produced as P.exhibit 8, there was little difference between the A2 size and the original size of 406 x 660 mm. The posters supplied to the appellant were said to be in actual fact A2 size in three colours and made from one sheet.

The appellant has relied heavily on a purported discussion between him and the witness Mr. Kanyenje that allegedly varied the quotation with regard to the size. There is however nothing to confirm this alleged conversation which was denied by Mr. Kanyenje.. The appellant's own order which was produced as P.exhibit 2 was for supply of 2,000 pieces of A2 size metal posters. There is no evidence of any variation in the price initially quoted of Kshs.138/= per poster nor is there any evidence of the price being based on the number of metal sheets to be used. The respondent's version of what was agreed was quite consistent with the communication between the parties. In her judgment, the trial magistrate misdirected herself in finding that the price of Kshs.138/= was the price per sheet. The evidence before the trial court was clear that the price was per poster and not per sheet.

It is clear from the respondent's evidence, and indeed it was not denied by the appellant, that the total of 1,934 posters were supplied to him. Although the appellant claimed he only ordered 1,000 posters, he has not to date returned the alleged excess of 934 posters. That being so, the appellant is liable to pay the sum of Kshs.266,892/= for the total posters supplied to him based on the quoted unit price of Kshs.138/=. The appellant having paid a total sum of Kshs.133,446/=, there is a balance of Kshs.133,446/= due and owing to the respondent.

I am satisfied that the respondent's case was proved to the required standard. Accordingly, I find no substance in this appeal and do therefore dismiss it with costs.

**Dated and delivered this 17<sup>th</sup> day of June, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Advocate for the appellant absent

VB Ms Wambani for the respondent