REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 57 of 2006

KENYA CREDIT TRADERS LTD. ..... APPELLANT

VERSUS

DAVID NGANGA NDUATI ..... RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate's Court at Nanyuki in Civil Case No. 133 of 2002 dated 29th June 2005 by R. N. Muriuki – SRM)

J U D G M E N T

The appellant, Kenya Credit Traders Limited, is a limited liability Company engaged in hire purchase business countrywide. The respondent, David Nganga Nduati, was formerly an employee of the appellant and by the time his services were terminated his position in the appellant's employment was designated as salesman. He had joined the appellant's Company on 24th August 1989 as a messenger earning a monthly salary of Kshs.1480/= plus an undetermined house allowance. By the time he was dismissed from such employment vide the appellant's letter dated 8th June 2001 on account of alleged acts of dishonesty in the performance of his duties, he had risen through the ranks to the position of salesman commanding a global monthly salary of Kshs.6,850/=.

As at the time he was fired from employment there were terminal dues that the appellant owed him. Initially the respondent claimed Kshs.72,596/96 which was subsequently whittled down to Kshs.50,093/09. The appellant on the other hand conceded to owing the respondent some terminal dues but not in the amount claimed by the respondent. As far as the appellant was concerned, having made some deductions on account of monies due to the appellant by the respondent, a paltry sum of Kshs.21,463/95 was left outstanding on respondent's account which it was ready and willing to pay. The respondent would hear none of the foregoing. As a result there was a stalemate. How then was this stalemate to be broken. To the respondent, a recovery suit would do the trick. Accordingly by an amended plaint dated 12th February 2003, the respondent sued the appellant in the subordinate court at Nanyuki seeking judgment for Kshs.50,093/96 on account of:-

(a) Money deposited in his security

account with the Defendant – Kshs.23,897.00

(b) Unpaid leave – Kshs.9,133.33

(c) Unpaid travelling allowance – Kshs.2,086.96

(d) Balance of 2 months pay in lieu

of Notice – Kshs.6,850.00

(e) Salary for unpaid days worked – Kshs.1,826.67

(f) Money irregularly deducted from

his salary – Kshs.7,900.00

(g)May, 2001 salary underpayment – Kshs.500.00

Kshs.52,193.96

Less hire purchase balance – Kshs.2,100.00

Amount due and owing – Kshs.50,093.96

The appellant in its defence dated 3rd August 2002 denied being indebted to the respondent in the sum claimed as aforesaid but owned up to owing the respondent the sum of Kshs.21,463.95 only made up as follows:-

(i) Security account – Kshs.23,897.00

(ii) Pay in lieu of leave – Kshs.9,133.33

(iii) Travelling allowance – Kshs.2,086.96

(iv) 8 days worked in June 2002–Kshs.1,826.67

(v) Two months salary in lieu

of Notice – Kshs.13,700.00

Total – Kshs.50,643.96

Less

(i) Part paid item (v) above – Kshs.6,850.00

(ii) Hire Purchase balance – Kshs.2,100.00

(iii) Deductions for uncollectible

Hire Purchase accounts – Kshs.14,900.00

(iv) Share of lost/stolen stock – Kshs.5,330.00

Amount due to respondent – Kshs.21,463.95

After the pleadings closed, the suit was set down for hearing initially before P.C. Tororey, Senior Resident Magistrate, who presided over the evidence of the respondent, the appellant's one witness and thereafter in unclear circumstances, she ceased to have jurisdiction and the case was thereafter taken over by R. N. Muriuki, Senior Resident Magistrate who proceeded to preside over the testimonies of the

appellant's remaining witnesses, received respective written submissions and thereafter crafted and delivered the judgment. It is worthy noting that for the respondent, only him testified in support of his claim. The appellant however called four witnesses to counter the respondent's claim. The learned magistrate in a considered judgment found for the respondent and entered judgment against the appellant for the sum of Kshs.50,093.96 as claimed by the respondent in the plaint plus costs and interest.

The appellant felt aggrieved by that judgment and hence this appeal premised on three grounds as follows:-

"1. The learned magistrate misdirected herself in

failing to find that the Respondent was in terms of a contract between him and the Appellant responsible for the losses occasioned to the Appellant arising from non-collection of a sum of Kshs.7,900/= due to the appellant on a Hire Purchase Account and a further Shs.15,990/= being proceeds of sale of a Radio Cassette which was unremitted to the Appellant or alternatively in failing to find that the Respondent was an accomplice in the improprieties giving rise to the said losses.

2. The learned magistrate erred in failing pursuant to her finding that the Respondent had failed to prove his part claim of Kshs.500/= to take account of that finding and thereby including the sum in the decretal amount.

3. The learned magistrate erred in failing to find that the Respondent was only entitled to a sum of Kshs.28,130/= as the balance of the claim had been made available to the Respondent prior to the filing of the suit.

At the hearing of this appeal, the appellant was represented by Mr. Kariuki whereas the respondent was represented by Mr. Ngugi, both learned counsel. However Mr. Ngugi was merely holding brief for Mr. Mwangi. The two counsels agreed to argue the appeal by way of written submissions. The court was not averse to the idea. Accordingly an order to that effect was made on 7th May 2008. Such written submissions were to be filed and exchanged by 17th June 2008 when the appeal was to be mentioned for the sole purpose of giving a date for judgment. On the said date, however, the parties had yet to file and exchange written submissions. They requested for a further mention date to which I agreed and stood over the matter to 25th July 2008. On this occasion both parties had filed their written submissions. I have subsequently read and considered them carefully. I have carefully considered the record before me, the submissions, on the rival points both of facts and law as this is a first appeal as well as the judgment of the subordinate court and the law as I am bound to do in law. See the case of Selle v/s Associated Motor Boat Co. Ltd (1968) E.A. 123.

Going by the pleadings and the evidence tendered, both parties are in agreement on amount due to the respondent upon dismissal. The point of departure is however the deductibles. The appellant feels that they were legally entitled to deduct a total sum of Kshs.29,180/= out of the terminal dues of the respondent totalling Kshs.50,643.96 leaving it with a balance of Kshs.21,463/95 due to the respondent that it was ready and willing to pay. The appellant's right to effect those deductions are apparently premised on a letter dated 24th August 1989 addressed to the appellant by the respondent. In pertinent paragraph the respondent bound himself to the appellant in the said letter in the following terms "..... The company will debit my security account with the value of any stock or cash or other defalcation or improprieties which my occur in a shop or an office in which I work while in the employment of Kenya Credit Traders Limited ....." Testifying on this issue, the appellant's General Manager, Ephanson Ngure Ndirangu, (DW1) stated "..... This is an agreement dated the 24th August 1989 David Nganga Nduati Plaintiff (sic). It is an agreement between the staff and company. It relates to the security account paragraph 2 – Commissioner (sic) is at the discretion of the management. It may vary. Part of the commission credited to the security account. Any loss that the company may suffer can be recovered from the employee from the mere fact that you were serving in that shop. We were entitled to make a recovery ....." To begin with I do not think that the letter dated 24th August 1989 is strictly an agreement as understood in law. An agreement cannot be signed by only one party to such an agreement as in this

case. Nowhere in the said letter is there a signature of the appellant. By that letter, the respondent merely bound himself and or undertook to honour certain obligations. And contrary to the testimony of DW1 the letter does not say that the respondent would incur the wrath of the appellant by the mere fact of defalcations or improprieties that may occur in a shop or office in which he was working. The testimony of DW1 would seem to imply that the respondent would even be guilty of sins of omission or commission perpetrated by others whether deliberate or otherwise as long as he was in the same shop or office with them. My literal interpretation of the said letter and there can be no other interpretation really does not give me that comfort. In my view the respondent could only be held accountable for the defalcations and improprieties committed by himself as long as he was in the employment of the appellant. An interpretation to the contrary will not only be absurd but wholly unfair and unjust.

Yet using such absurd interpretation of the agreement, the appellant went ahead to deduct Kshs.7,900/= from the respondent's entitlements on account of the respondent's alleged failure to collect the same from a customer who had bought goods on hire purchase but defaulted in payment. The respondent was again held to account in respect of Kshs.15,990/= being the proceeds of a sale of a radio cassette in a shop that the respondent was working in that was not remitted to the appellant's account.

With regard to Kshs.7,900/= together with the outstanding balance of Kshs.14,900/= I would say that those deductions were wholly unjustifiable. The person who bought the goods on hire purchase entered into a hire purchase agreement with the appellant and not the respondent. The hire purchase agreement tendered in evidence had default clause. The default clause provided for the mechanism to recover the outstanding amount in the event of a default by the hire purchaser in his/her remittance. The appellant could either repossess the items or even file a civil suit for the recovery of the outstanding sum. Finally, I do not think that failure by the respondent to recover the amount from a customer could by any stretch of imagination amount to defalcations or impropriety so as to attract the sanctions contained in the letter under reference even if we were to take it as an agreement which as I have opined, is not. Indeed DW1 conceded in cross-examination by counsel for the respondent during the trial that there was no fault attributable to the respondent for he loss of Kshs.22,800/= due to the appellant as a consequence of non collection of the same from a customer.

What I have said above applies with equal force to the claim for Kshs.15,990/= from the respondent by the appellant on account of sale of a radio, whose purchase price was not availed to the appellant. The appellant's pro-rata deduction was Kshs.5,330/= on the basis that as at the time the radio was sold and proceeds unaccounted for, three employees including the respondent were in the shop. From the record I do not discern any wrong doing by the respondent as to make him culpable. The evidence on record is to the effect that the respondent merely tested and demonstrated the radio to the customer. Thereafter the customer paid the purchase price to the respondent's co-employee by the name, Waweru. It was this Waweru who was responsible for receiving the money and issuing the receipts. According to the customer, Rashid Kathurima (DW2), he paid the money to other men, presumably Waweru and not the respondent and was issued with a receipt. When he asked for the permit, that man and not the respondent told him to collect it after a few days. This customer confirmed that as all these was going on the respondent was in he shop but was sitting at a distance of about 3 to 4 metres and although he stated that they were conversing loudly, he could not confirm whether the respondent heard what they were discussing. After receiving the money, Waweru was supposed to pass it over to another employee, Kimathi who was responsible for banking. According to Peter Mungai Kamau (DW4), a field inspector with the appellant, when he asked the said Kimathi why he had not banked the money, Kimathi had no response. He never implicated the respondent therefore. The witness went on to confirm that the respondent was not even supposed to bank the money. From the foregoing it is clear that the only person who can account for the lost money is Waweru and Kimathi. The respondent's role was to test and demonstrate to DW2 the Sony Radio he was purchasing. It was not his responsibility to receive, receipt and or bank the purchase price. Those roles were left to Waweru and Kimathi. It is them who should be held to account. It is even possible that the amount was paid to Waweru who passed it on to Kimathi for banking but the latter failed to do so. How can that be defalcation and impropriety on the part of the respondent?

It is obvious from the evidence that a criminal offence was disclosed in the manner the purchase price of

Sony radio was handled. However the appellant failed to involve the police. I would imagine that the police would have been able to get to the root of the matter. Who knows, may be the respondent would have been found to be without blemish?

There is also some interesting side show on this whole saga. Apparently the radio fraudulently sold as aforesaid was subsequently replaced with another one on the shelves by the culprit(s). It was DW1's evidence that the radio was replaced. He went on to state that though they retained the replaced radio, he could not tell whether its value was same as the one sold fraudulently. One would have expected that since the appellant was punishing its employees for their mischief, it would have nothing to do with the replaced radio. It would have ordered for its removal from the shelf. It has not. Does that not mean that if a customer came buy and wanted the said radio, it would willingly sell it to him and yet the respondent and his former co-employees have been surcharged. That would amount to a double benefit on the part of the appellant, which is not only unjust but unfair as well.

For all the foregoing reasons, I am satisfied just like the learned magistrate was that the appellant had no reasonable cause to deduct the aforesaid amount from the respondent's terminal dues. If the appellant genuinely believed that it was entitled to those amounts, one would have expected that it would have mounted a counterclaim in the respondent's suit when it was served with the plaint and it filed a defence. It did not do so. That tells a lot on the quick sand upon which the appellant's claim is premised.

The only portion of the learned magistrate's judgment that can be faulted is with regard to the treatment of Kshs.500/= demanded by the appellant as underpayment of his salary for the month of May 2001. Having carefully considered the evidence led on the issue, the learned magistrate came to the conclusion that the respondent had not proved that claim. However in his final order he failed to deduct the said amount from the amount of Kshs.50,098/96 claimed by the respondent. To that extent the appellant is right when it faults the learned magistrate for failing pursuant to his finding that the respondent had failed to prove his claim of Kshs.500/= and to take account of that finding and thereby including the sum in the decretal amount.

The sum total of all the above is that I see no merit in the entire appeal save as aforesaid, which must be and is hereby dismissed. However the decretal sum due to the respondent shall now be less by Kshs.500/= on account of his claim which he was unable to prove. The respondent shall however have the costs of this appeal.

Dated and delivered at Nyeri this 13th day of October 2008

M. S. A. MAKHANDIA

JUDGE