



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 97 of 2003

MERU SCHOOL

**THROUGH CHAIRMAN BOARD OF
DIRECTORS.....APPELLANT**

AND

**CAROL MBIJIWE T/A CAROL INVESTMENTS.....
RESPONDENT**

*(Being an appeal from the Judgment of the Senior Principal Magistrate Mr. Njeru Ithiga dated
8/8/2003).*

JUDGMENT OF THE COURT

1. By her amended plaint dated 12/7/2000, and filed in court on the same day, the respondent (as Plaintiff) sued the appellant (as Defendant) claiming the recovery of Kshs. 108,000/= plus interest which amount was allegedly money due and owing from the appellant to the respondent in respect of the supply by the respondent to the appellant of neck-ties sold and delivered to the appellant by the respondent at the request and instance of the appellant on diverse dates in the year 1999. The respondent averred that despite demand made, the appellant failed and/or refused to pay the said sum of Kshs. 113,800/=.
2. In addition to the principal sum of Kshs. 108,000/=, the respondent prayed to be paid interest and costs.
3. The appellant filed defence on the 14/2/2000 by which it denied the respondent's allegations of indebtedness and also pleaded breach of contract on the part of the respondent.
4. The respondent (as plaintiff) told the court that in the year 1999, she had business dealings with the appellant during which she was issued with a Local Purchase Order (LPO) for the supply of 600 neck-ties as per exhibit 1. She stated further that she supplied the 600 neckties through Local Purchase Order No. 391724 dated 29/9/99 which LPO was issued by the appellant's then school Principal one Mr. Muthuri. That the 600 ties, all valued at Kshs. 108,000/= were duly delivered through Delivery Note No. 270 of 18/10/1999 and that the goods were received by the appellant's storekeeper by the name Doris Gatwiri. The said Doris Gatwiri duly stamped the Delivery Note a copy of which was produced as exhibit 3.
5. The respondent testified further that when the appellant failed to pay her, she made a demand for the payment as per Plaintiff exhibit 5. The appellant acknowledged in its defence that the demand was made; but stated that the goods supplied by the respondent were made of sub-standard material and that they

were duly returned to the respondent as per Plaintiff exhibit 7. The respondent however denied breaching the supply contract and also denied that she supplied sub-standard goods.

6. During her further testimony in cross-examination the respondent testified that the complaint about the goods being sub-standard was made after the delivery and after she had raised the invoice for payment. The respondent also denied that the allegedly substandard ties were returned to her. She also testified that the storekeeper, Doris Gatwiri was the appellant's authorized officer for receiving supplies made to the school and that it was not necessary for the appellant's principal to verify the deliveries made, and further that at the time when the ties were delivered and received by Gatwiri, no complaints were raised. A copy of invoice No. 162 was produced as Plaintiff exhibit 4.

7. The appellant called for witnesses. DW1 was Geoffrey Muthuri, former Principal of the appellant. His evidence was that the respondent was one of the appellant's suppliers for school equipment and that on 29/10/1999, after due approval by the Board of Directors, the appellant issued an LPO – Plaintiff Exhibit – 2 – to the respondent. He testified further that the finished product, to wit 600 neck-ties at the unit cost of Kshs. 160/= - did not answer to the specification, thus forcing him to reject the same.

8. DW1 testified further that the appellant's storekeeper Doris Gatwiri (DW2) received the ties before the ties were rejected by the School Management. He also testified that from information he received from his deputy, Bundi Marete and also from the storekeeper, Doris Gatwiri, the respondent refused to take back the returned ties. In his further testimony, DW1 testified that the unit price for the ties had not been agreed with the respondent and that he only saw the unit price from the unsigned invoice Plaintiff Exhibit – 4, sent to the school by the respondent. DW1 Also disputed the rate of interest demanded by the respondent and went further to state that the respondent was to supply the goods as per the sample and not what he wanted to supply. According to DW1, M/S Tikkoo Limited of Nariobi later supplied the appellant with the right kind of ties.

9. When DW1 was cross-examined by counsel for the respondent, he stated that the LPO, Plaintiff Exhibit 2 did not specify whether the ties to be supplied were to be of local or imported material. He also testified that according to the delivery note dated 18/10/1999 – Plaintiff exhibit 3 – 600 school ties were supplied to the appellant and received by the storekeeper, Doris Gatwiri, DW2. He stated further that though the price for the ties had not been agreed the delivery was still accepted and added that the price for the ties was to be given by the respondent before invoice. DW1 also testified that when the ties were allegedly returned to the respondent on 19/10/1999 he was not present, but that the respondent refused to sign for the same. DW1 could however not produce any evidence to show that the consignment of 600 ties and had been returned to the respondent.

10. DW1 testified in further cross examination that the storekeeper made a mistake by receiving the ties without consulting him. It was also his evidence that there was no minute of the Board of Governors rejecting the 600 ties as supplied by the respondent. In the same breath, DW1 testified that the storekeeper could not have refused to take delivery of the ties when the respondent delivered them; and that before the case was filed were on-going negotiations for replacement of the ties by the respondent.

11. DW2, Doris Gatwiri, the appellant's storekeeper told the court that while she was on duty on 18/10/1999 she received from the respondent a consignment of 600 ties packed in a cartoon. She took the ties to the Principal's office, but on 19/10/1999, the Principal (DW1) rejected the consignment on the ground that the same did not comply with the sample.

12. DW2 testified further that after DW1 had consulted the School Captain and the School Chairman, he directed her (DW2) to return the consignment to the respondent. DW2 stated that though the consignment was returned to the respondent the respondent did not sign any document as proof of the returned delivery.

13. When questions were put to her during cross-examination, DW2 admitted having received the ties and signed the delivery note which she identified at the hearing of the case. DW2 also admitted that when she returned the consignment to the respondent on 19/10/1999, she (DW2) did not ask the respondent to

acknowledge receipt of the returned ties. DW2 also stated that she did not know the unit price of the ties. Finally, DW2 stated that though the respondent was issued with an LPO, the parties operated on mutual trust.

14. DW3, Jonathan Gituma told the court, that he was Chairman of the Parents Teachers Association (PTA) between the years 1998 and 2001. He stated that in the year 1999, the appellant decided to place and did place an order with the respondent for the supply of 600 ties, but that the PTA was not involved. DW3 stated however that he knew of the order placed with the respondent and that he personally saw the ties at the respondent's shop at Ntugi house in Meru Town before the delivery was made.

15. In this further testimony, DW3 stated that he personally authorised DW1 to place the order for the supply of ties with the respondent and further that he was personally involved with the sampling of the ties and that he did not give a definite specification for the ties. DW3 also stated that the appellant's principal had the discretion to order the ties from any supplier anywhere. DW3 could not however say whether the respondent signed for the returned ties nor could he say for certain whether the ties were infact returned to the respondent since he himself did not accompany those who allegedly returned the ties to the respondent.

16. DW4 Bundi Marete, a former Senior Lecturer at Meru Technical Institute testified that he was the deputy head-teacher of Meru School the appellant herein. He stated that on 18/9/1999, after the respondent had supplied and delivered to the appellant the 600 ties as ordered, the boys rejected the ties on the ground that the same were sub-standard. That after the rejection, he and DW2 took the ties back to the respondent, but that the respondent did not sign for the returned items , he testified further that as far as he knew, the ties were returned to the respondent. As regards the person who decided to return the ties DW4 stated that it was the appellant's principal, DW1, who made the decision to return the ties.

17. On the basis of the above evidence and submissions made by both counsels, the learned trial Magistrate entered judgment in favour of the plaintiff (respondent) as prayed. In the court's finding, there was no evidence to support the allegations by the defence that the respondent breached the contract and that it was in fact the appellant who had not honoured it's part of the bargain. The respondent got Judgment for the claimed amount of Kshs. 108,000/= and interest thereon from 18/10/1999 until payment in full. The respondent was also awarded costs of the suit.

18. It is against that judgment that the appellant appealed. The memorandum of Appeal filed in court on 5/9/2003 sets out six grounds of appeal, namely;-

1. That the learned Senior Principal Magistrate erred in law and facts (sic) in granting the respondent judgment contrary to the facts of the claim and the law which was clear especially Section 17 of the Sale of Goods Act Cap 31 Laws of Kenya.
2. That the learned Senior Principal Magistrate erred in law and facts (sic) in disregarding the overwhelming defence evidence which clearly showed that the respondent was in breach of contract and was not entitled to claim any payment when the alleged goods were returned to her for failure to comply with the sample which the defence produced as exhibit.
3. That the learned Senior Principal Magistrate erred in law and facts (sic) in his judgment for requiring a proof (sic) by the defence beyond reasonable doubt when proof should be on a balance of probabilities in civil litigation.
4. That the learned Senior Principal Magistrate erred in law and facts (sic) by disregarding the defence evidence and witnesses.
5. That the learned Senior Principal Magistrate (sic) judgment is bad in law as there was a clear defence (sic) evidence which showed the contract of sale was breached by the respondent and she was not entitled to any judgment at all.

6. That the appellant shall seek leave of the court under Order XLI Rule 22 to produce additional evidence for the reasons that the trial court refused an adjournment to call the last crucial witness in defence who was not present when the court had granted the last adjournment which has caused injustice to the appellant owing to the fact that some crucial evidence was left out and the court came up with a judgment without the full facts of the case.

19. The appellant prays that the learned trial Magistrate's judgment be set aside and the suit in the lower court be dismissed with costs to the appellant.

20. My duty as the first appellant court is to reconsider and re-evaluate the evidence on record with a view to reaching my own conclusions. See **PETERS vs SUNDAY POST LIMITED [1958] E.A. 424.**

21. I have carefully reconsidered the evidence on record, whose summary and highlights I have given above. On the basis of the reconsideration and re evaluation of that evidence, I am not persuaded that there is any basis to warrant an interference with the judgment of the learned trial Magistrate.

22. In the first place, it is not disputed that there was a contract between the appellant and the respondent for the supply for 600 ties, the said contract was in writing through the issuance of an LPO. There is also un-controverted evidence that the respondent delivered the 600 ties as per the agreement and that the consignment of 600 ties was duly accepted and acknowledged by the appellant's store-keeper, Doris Gatwiri, DW2.

23. It is not clear to me how and when the consignment of the 600 ties was returned to the respondent if at all. There are two pieces of evidence that have left me puzzled;- one is that whereas the contract was in writing through issuance of the LPO, the parties decided to act on trust after the delivery of the ties was made.

24. Secondly, it is interesting to me when from the record, the appellant's Principal and store keeper did not know what the unit price of the consignment was but of course these facts are beside the point on this case. What is important is that the respondent delivered the ties as ordered by the appellant and further that the consignment was duly received, with or without the unit price. The respondent was to give the price at the time of invoicing which she did. In effect therefore, the price given by the respondent at the time of invoicing was the correct and acceptable price. In therefore see no reason why both DW1 and DW2 alleged that the price for the 600 tie consignment was neither agreed nor known.

Thirdly, I have found it strange that DW1 did not require the respondent to sign for the returned ties, if at all the ties were returned. In my considered view, there were no returned ties to the respondent as alleged by the appellant.

26. In the result, I find no merit in any of the six grounds of appeal raised by the appellant in its Memorandum of Appeal dated 3/9/2003. Of particular interest is ground six of appeal in which the appellant has complained that the trial Court refused an adjournment to call the last crucial witness in defence who was not present when the court had granted the last adjournment. The record shows that on 3/6/2003, the appellant called DW4, Bundi Marete and after DW4's testimony, Mr. Gikunda Anampiu, Advocate for the appellant said the following to the court;-

"I close the defendant's case I view of court orders of 16/5/03 when I was given last adjournment. I also do not have another witness."

After the above remarks, the court marked the defence case as formally closed.

27. On the 16/5/2003, counsel for the appellant had informed the court that his witness was not in court. He then proceeded to ask for an adjournment. There being no objection from counsel for the respondent, the application for adjournment was granted by consent of the parties on the understanding that that would be the last adjournment to the appellant. On 3/6/2003, DW4 testified. The record does not show, nor did counsel for the appellant indicate whether DW4 was the witness who had not turned up on the

16/5/2003. The presumption the court has made is that DW4 was the absent witness spoken of by appellant's counsel on 16/5/2003, and DW4 having testified, there was no other witness, as stated by Mr. Gikunda Anampiu, for the appellant to call.

28. What I have outlined above does not in any way show that the court refused the appellant an opportunity to call another or other witnesses. In any event, there was no attempt by counsel for the appellant to beseech the court to allow another adjournment despite the order of 16/5/2003. In essence no injustice was caused to the appellant when it chose to close its case on 3/6/2003.

29. Accordingly, the appeal is dismissed in its entirety with costs to the respondent.

These are the orders of the court.

Dated and delivered at Meru 8th day of February 2007.

R.N. SITATI

JUDGE

Delivered for and on behalf of Sitati J by Lenaola J

8/2/2007