



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 464 of 2005**

**RICHARD GIDONGO ..... APPELLANT**

**VERSUS**

**OLIVER KIAMA ..... RESPONDENT**

**(An Appeal from the Judgment of the Senior Principal Magistrate at Milimani Commercial Courts  
Hon. Mrs. C. Meoli dated 23<sup>rd</sup> June, 2005)**

**JUDGMENT**

By a Plaint filed in the Lower Court on 9<sup>th</sup> February, 2004, the Appellant (Plaintiff in the Lower Court) claimed general and special damages from the Respondent arising out of the Respondent's breach of contract to clear and register in his name a motor vehicle imported by him from the United Kingdom. As a result of the Respondent's alleged breach of contract, the Appellant's motor vehicle was auctioned by Kenya Revenue Authority resulting in a substantial loss to the Appellant. The Respondent denied ever having had such an agreement with the Appellant.

The Appellant did not testify at the trial, but gave evidence through PW2, Sam Magale, his cousin, under a Power of Attorney. The trial Court found that the Appellant had not established his case on a balance of probability and dismissed the case. This is how the Lower Court expressed itself:

*“Although the Defendant did not testify, the onus was on the Plaintiff to prove his case. The evidence of PW2 does not prove the alleged agreement which is the basis of this suit. Exhibits produced as showing this agreement refer to a job, lending arrangement between the parties (see exhibit 3A, B). The intent of those agreements contradicts PW2's evidence. The agreements are quite vague as to the real intent. But the true reason must lie in the admission in cross examination by PW2 that the vehicle in question was supposedly destined for Uganda i.e. on transit. The parties apparently wanted to sell it locally. But it is not clear whether due duties were paid in that regard and how the Defendant was to ensure the local registration. Moreover other individuals were involved. There is no evidence of the auction of the vehicle by Kenya Revenue Authority or the reason thereof. The Plaintiff has failed to establish his case, on a balance of probabilities.”*

It is against that decision that the Appellant has preferred this Appeal on the following 8 grounds:

- “1. The learned magistrate erred in law and fact in failing to appreciate that on the evidence on record the appellant had established a case on a balance of probabilities that entitled him to judgment as prayed.*
- 2. The learned magistrate erred in her analysis of the evidence presented and the law applicable thereby making wrong conclusions and deductions.*
- 3. The learned magistrate misdirected her mind in failing to sufficiently and properly evaluate the evidence before the court and to consider the appellant’s case vis-à-vis the respondent’s defence.*
- 4. The learned trial magistrate erred in law in totally disregarding the link between the oral evidence of PW2, WILSON MAGALE and the documentary evidence produced in court, which evidence established the nexus between the appellants and the respondent and that the latter had been contracted to clear and register the motor vehicle the subject matter of the dispute.*
- 5. The learned trial magistrate erred in law and fact in entertaining and/or giving credence to extraneous correspondence and/or matter that was not properly produced in court.*
- 6. The learned magistrate had a distorted view of the evidence tendered to court and in the final analysis erred in dismissing the appellants suit with costs.*
- 7. The learned trial magistrate erred in law in failing to invoke the provisions of Section 119 of the Evidence Act, and thereby find the respondent culpable for breach of contract.*
- 8. The learned trial magistrate erred in failing to look at the totality of the evidence and pleadings before the court.”*

At the hearing of this Appeal, Mr. Kahonge, Counsel for the Appellant, argued that the Appellant had indeed established his case on a balance of probability; that the written agreement (Exhibit 3A, B) together with the oral evidence of Mr. Magale, who was present when the Agreement was signed, was sufficient to prove the Appellant’s case; and that there was indeed evidence of importation of the motor vehicle and acknowledgement of part-payment by the Respondent.

The Respondent chose not to be present at this hearing.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the Lower Court, bearing in mind that this Court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

This Appeal is based primarily on questions of facts. There is no legal issue before this Court. Now, the evidence relied on by the Lower Court is a hand-written document, allegedly “the Agreement” (Exhibit 3) and oral testimony from the Appellant’s cousin. I have examined both. The alleged Agreement is vague and says very little. This is what it says:

*“This is to confirm that I have today reached amicable understanding with Mr. Richard that I will finish his job within one week from today 17<sup>th</sup> March 2003, failure to fulfill this obligation I will refund his part payment that I have received amount (200,000/=) (Two Hundred Thousand Only) without fail.”*

There are no details of the “job”. The Respondent had denied any Agreement. The Appellant himself was not present to assist the Court. With regard to the oral testimony, it was equally vague and contradictory, and certainly not sufficient to form the basis of a contract.

I am satisfied that the Lower Court came to the correct conclusion, and I dismiss this Appeal, with no order as to costs.

Dated and delivered at Nairobi this 12<sup>th</sup> day of June, 2007.

**ALNASHIR VISRAM**

**JUDGE**