



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL CASE 59 OF 2004

MICHAEL WANJOHI MATHENGE....PLAINTIFF/APPELLANT

Versus

LYDIAH NYAGUTHII AGATHA.....1ST RESPONDENT

WANJIKU KABURI.....2ND RESPONDENT

(Being an appeal from the Judgment of District Magistrate II (prof.) M. W. MUTUKU dated 11th June 2004, Nyeri CMCC NO. 434 of 2003)

JUDGMENT

The Appellant by his action in the lower court sought judgment against the Defendants for Ksh.3,620/=. He averred in his Complaint that there was an agreement between him and the Defendants whereby he was to supply the Defendants with 14 sacks of vegetables at the cost of 420 per sack. The Defendant paid to the Plaintiff Ksh.8,000/= leaving a balance of Ksh.320/= being the value of the vegetables and Ksh.420/= being the value of the sacks. The Defendants in their defence averred that the agreement was for the Plaintiff to supply them with 10 bags of vegetables at the cost of Kshs.800/= per bag the total being 8,000/=. They paid the Plaintiff 3,000/= at first as deposit leaving a balance of 5,000/=. which was payable on delivery of those bags. The Plaintiff was supposed to supply the vegetables on 23rd June 2003. The Plaintiff breached their agreement and instead supplied the vegetables on 24th April 2003 and on that day the Plaintiff supplied in excess of the bags that had been ordered by the Defendants, that is, he supplied 14 bags. The Defendants refused to take the excess bags but were later persuaded by the Plaintiff to take the excess and to pay him once they sell the same. Those were the pleadings that were before the lower court and the evidence that were supplied by the parties followed that line of argument.

The Defendants were able to procure a witness who gave evidence with regard to the advance payment of the bus fare made by the Defendants. He identified receipts in respect of those payments. The witness also was able to give evidence about the excess bags of vegetables supplied by the Plaintiff. The Defendant's evidence that because of the Plaintiff's failure to supply the vegetables in time when they arrived in Mombasa they sold them at a loss. The Plaintiff was also able to produce a witness who stated

that the Defendants went to the place where the Plaintiff was trading and left a message that they needed 14 bags of vegetables. The witness was able also to give evidence that the Defendants did not complain about the alleged excess bags of vegetables. In the judgment of the lower court the court found that the Plaintiff had failed to prove his case on a balance of probability. Rather the Court found that the Defendant had proved their defence. The Plaintiff being aggrieved with that judgement preferred the present appeal.

The Appellant in his grounds of appeal on the whole faulted the Learned Magistrate for failing to recognize inconsistencies between the Defendants' evidence and their pleadings. I would respond to those grounds by saying that the burden of proving the case was upon the Plaintiff. The Defendants on their part could have, if they so wish, kept quiet without presenting their defence. The burden therefore did not shift to the Defendants to prove their defence. I have examined the evidence presented in the lower court and I am of the view that the Plaintiff/Appellant failed to prove his case on a balance of probability. In that regard I find that I am in agreement with the lower court's judgment and accordingly I do hereby dismiss the Appellant's appeal.

Dated and delivered at Nyeri this 27th day of July 2007.

MARY KASANGO

JUDGE