REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Civil Appeal 58 of 1998

SOLOMON WAGITHU
IRURA…….APPELLANT

Versus

CLEMENT MAINA)
ROWAN(E.A.)LTD)…..
…….RESPONDENTS

(Being an appeal from the judgment of Kiarie

Waweru, S.R.M, delivered on 26th August 1998 in

the Senior Resident Magistrate's Court, Karatina

C.C. No. 80 of 1997)

JUDGMENT

The Appellant who had listed seven grounds of appeal abandoned the seventh ground and remained with six grounds that the learned trial magistrate erred in fact and in law in not considering that the Appellant had proved his case on a balance of probabilities; that the learned magistrate erred in fact and in law by basing his decision on the wrong ratio descidendi; that the learned trial magistrate erred in law in arriving at a decision per incuriam; that the learned trial magistrate erred in basing his ratio descidendi on matters neither pleaded nor proven; that the learned trial magistrate erred in finding matters not proved on a balance of probabilities; that the learned trial magistrate erred in fact and law by dismissing the Appellant's case while the same had been proved on a balance of probabilities.

The Appellant filed this suit in the Senior Resident Magistrate's Court, Karatina against both Respondents claiming the sum of Ksh.16,000/=; damages for breach of contract and costs of the suit. He stated that the First Respondent was working for gain as an employee, servant or agent of the Second Respondent who was a limited liability company registered under the provisions of the Companies Act, Cap. 486 Laws of Kenya.That sometime in the year 1994 the First Respondent acting as an employee, servant and/or agent of the Second Respondent sold, on behalf of the Second Respondent, one knitting machine, make "Elite" to the Appellant and the Plaintiff paid a deposit of Ksh.16,000/=. That on or about 9th March 1996 the First Respondent unlawfully repossessed the said machine from the Appellant without giving any reason thereby breaching the contract.

When the Appellant demanded refund of the deposited money, the Respondent promised to repay the money before May 1996 but failed to do so and did not pay the money subsequently despite demand by the Appellant.

In their joint defence, Respondents did not accept the Appellant's demand although they accepted the Appellant had deposited Ksh.16,000/=. They claimed there was a balance of Ksh.7000/= to complete the purchase price of Ksh.23,000/= and that the Appellant had failed to pay the balance by the end of December 1994. The Respondents claimed that the Appellant had agreed with them that the First Respondent will sell the machine and from the proceeds refund the Appellant Ksh.16,000/=. If no buyer, they had agreed the Appellant would still pay Shs7000/= so that the machine is handed over to him. It meant the Appellant was full aware why the machine had been re-possessed.

Evidence was adduced and documentary exhibits produced, the totality of which revealed that when the Appellant said in his plaint that the First Respondent on behalf of the Second Respondent on 9th March 1994

"unlawfully repossessed the said ELITE

knitting machine from the Plaintiff and

never gave any reason as to the

repossession thereof and therefore

breached the contract",

the Appellant was not telling the court the truth. The truth is that he was told why the machine was being repossessed and even went to the extent of agreeing with Respondents as to under what circumstances the deposit of Ksh.16,000/= he had paid was going to be refunded to him. Instead of bringing out that truth, he stated that the Respondents had agreed to pay him before May 1996. He himself in the Plaint used the words "a Deposit of Ksh.16,000/=" clearly conveying the notion that he was to add more money to the Kshs.16,000/= he had deposited but he subsequently turned round to say that he had nothing more to add – in the form of payment.

In those circumstances, although I have fully taken into account what the Appellant's advocate told me, and he had the advantage of saying it without opposition as neither the Respondents nor their advocate was present before me, I would not allow the appeal of the Appellant. He decided to rely on what was not truth and at the moment that untruth is not taking him to success in this suit.

I have come to the same conclusion as that reached by the learned trial magistrate whose judgment is well reasoned and I have no good ground to interfere with it.

Accordingly, this appeal is hereby dismissed. Since Respondents and their advocate did not attend the hearing, each party to bear its own costs of this appeal.

Dated this 27th day of May, 2005.

J. M. KHAMONI

JUDGE

Present:

No party.