



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL APPEAL NO. 444 OF 2000**

JACINTA WANGARI KAMAU ..... APPELLANT

VERSUS

STEPHEN MUTURI WANG'ONDU .....RESPONDENT

**J U D G E M E N T**

On 28th October, 1998, the plaintiff, the respondent in this appeal, filed a suit in the court of the Principal Magistrate, Milimani Commercial Courts Nairobi to claim from the defendant – now appellant, a sum of Kshs.148,260/= plus costs of the suit and interest and any other relief the court may deem fit to grant.

He alleged that on or about 9th March, 1998, he entered into an agreement with the appellant to buy from the latter her molasses business at Kahawa West Railway Good shed at Kshs.111,000/= but that after he paid her Kshs.101,000/= and taken over possession thereof, she backed out of the agreement and repossessed the premises wherein she sold off the remaining molasses worth Kshs.13,260/=.

That a part from this, she took kshs.50,000/= which the respondent had left in the premises during the day the appellant reoccupied the premises.

In a defence filed by the appellant to this suit and dated 11th December, 1998, she denied ever entering into a sale agreement with the respondent over the sale of her molasses business or receiving any money on account of the alleged agreement.

The case was placed before the Senior Resident Magistrate (M.W. Wachira (Mrs)) for hearing on 12th January 2000, 13th February, 2000, 14th March, 2000, 20th April, 2000, and 11th July 2000 when the parties and their witnesses testified.

The respondent and his witnesses testified as to the purchase deal and the part payment he made while the appellant and her witness testified as to how the respondent was her casual employee.

The learned Magistrate wrote and delivered his judgement on 14th August, 2000 in which she dismissed the appellant's defence as dishonest and entered judgement of Kshs.148,260/= as prayed in the plaint.

This appeal arose from that decision and was filed in court on 5th September, 2000, in a memorandum of appeal which listed 10 grounds of appeal.

They faulted the Magistrate for entering judgement for the respondent as prayed in the plaint, or for finding that the respondent had paid the appellant Kshs.85,000/= or that the appellant had taken the respondent's Kshs.50,000/= from the go-down; and/or that the appellant should pay the respondent Kshs.13,260/=.

According to the memorandum of appeal; the Magistrate ignored the appellant's defence, evidence and the submissions; that she did not consider all the evidence and that she failed to apply correct legal principles in determining the issues before the court.

It complained that the learned Magistrate failed to apply the law of evidence correctly; and that she was wrong in finding that the appellant was not truthful.

The appeal was placed before this court for hearing on 23rd September, 2002. When counsel for both parties appeared and submitted thereon.

Counsel for the appellant submitted mainly on the court order for payment of Kshs.50,000/= saying there was no evidence to support this claim because none was adduced to show that the appellant opened premises.

He also contented that if the respondent had paid the appellant Kshs.85,000/= and had taken over the business and was running it as his, he could not again claim the Kshs.85,000/= paid as purchase price.

He also maintained that the respondent was the appellant's casual employee and since the respondent had not filed reply to the amended defence which raised this issue, he should be taken to have accepted this line of defence.

Counsel also submitted that since all the receipts for the business were in the name of the appellant, this was evidence that the respondent was the appellant's employee.

That the respondent was awarded the Kshs.13,260/= irregularly as there was no evidence to show it was the respondent who sold the molasses or the value of the said molasses.

That the lower court should have considered the contradictions in the amount claimed in the plaint and in the evidence.

Counsel urged the court to allow this appeal with costs. Counsel for the respondent opposed the appeal and said the respondent was making payment for a molasses business for which an agreement would only be entered into after full payment had been made but that when he went to make the final payment the appellant became difficult. That together with her husband they went and closed the premises.

Counsel stated that Kshs.50,000/= which the respondent had left in the premises before it was locked up went missing and that it would have been taken by the appellant who had, after locking them to the respondent, opened it and sold of the remaining molasses therein.

That he reported this to the police and made a statement there. He reiterated that the respondent was not a casual worker of the appellant but that he had bought the business and paid the first installment of Kshs.85,000/=.

That the respondent was in possession of the appellant's receipts because the business had not been transferred to his name. That the respondent was to use the receipts for purchasing molasses up to the time the business would be transferred to him but this was not to be because the appellant refused to accept the last payment.

Counsel submitted that there was overwhelming evidence that the appellant had sold the business to the respondent and had received Kshs.85,000/= as part payment.

That the appellant witness had admitted he had sold the molasses which had been left in the premises by the respondent.

He prayed that the appeal be dismissed with costs.

These are submissions made in this appeal which I heard, recorded and have considered.

The lower court saw and heard witnesses testify and learned Magistrate had the opportunity to assess their credibility from the way they testified and their demeanor.

The respondent called 4 witnesses who attested to this transaction in one way or the other. They all supported the respondent's evidence that he had been sold the business and had paid up to Kshs.101,000/= though he did not complete the payment as the appellant refused to receive the remaining Kshs.10,000/= because the respondent insisted on having a written agreement entered into.

The learned Magistrate did not accept the evidence of the appellant that the respondent was her causal worker. She thought this evidence was untrue.

Given the evidence the Magistrate heard and the statement the appellant made at Kasarani police station and which was admitted as evidence in the case, she was entitled to hold this view.

The evidence in the appellant's statement to the police was at very great variance with her defence and evidence in court and this is the reason why the Magistrate called her evidence untruthful and refused to accept it.

As regards Kshs.50,000/= the respondent alleged he left it in the premises when the appellant locked up and repossessed the same, I tend to agree that there was no sufficient evidence to show he left such money there.

Where in particular did he leave this money? Did he have a safe there or a simple drawer?

This is not small money by a mwananchi standard and it would be a huge risk for a trader to leave this kind of money in such small premises situate in a place like Kahawa West Railway depot.

Moreover, it should have surprised the learned Magistrate as it does to me that loss of such large sum of money, was not reported to Kasarani police station when the respondent made his statement there about this failed business transaction between the two parties.

I do not think the respondent forgot about it but that there was no issue of Kshs.50,000/= having been left in that premises. In fact it was not clear who of the appellant and her witness actually looked up the shop or sold the molasses after the shop was reopened or who of these two could have stolen the Kshs.50,000/=, if at all.

There was the claim of Kshs.13,260/= being the proceeds of molasses which either the appellant or her husband sold when she repossessed the shop.

The appellant conceded to this in her statement to the police though she gave a less figure (Kshs.7,990/=) than that in the claim – alleging that she was setting off this amount from some profits from the business the respondent owed her. But this claim could not be entertained because there was no counterclaim in the original or amended defence to claim such money.

Apart from the Kshs.85,000/= the respondent had paid to the appellant a further Kshs.16,000/= was paid but that when the plaint was drawn this latter payment was not included and since this amount was not pleaded in the plaint – being a special claim, testifying about it in court did not help.

Otherwise the evidence adduced in the lower court tilted the respondents' favour and the appellant did

not sufficiently traverse the claim.

Apart, therefore, from reducing the award made by the lower court by Kshs.50,000/= this appeal is dismissed with half costs to the respondent in this appeal and the case in the lower court.

Delivered and dated this 7th day of October, 2002.

**D.K.S AGANYANYA**

**JUDGE**