

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO.458 OF 1999

PEOPLE'S TRAVEL AGENCY LIMITED APPELLANT

VERSUS

MUSIARA LIMITED RESPONDENT

JUDGMENT

This is an appeal from the Judgment of Mrs. Matheka, Senior Resident Magistrate's Court at Milimani Commercial Courts Nairobi Civil Case, No.EJ.559 of 1998 dated 12th October, 1998. The Appellant in his memorandum of appeal has submitted the following grounds of appeal:-

1. The learned Magistrate erred in finding that the goods supplied by the Appellant to the Respondent were of unmerchantable quality.
2. The learned Magistrate erred in failing to apply the requirements of Section 14 of the Standards Act Chapter 496 of the Laws of Kenya in evaluating the Respondent's evidence regarding the quality of the subject commodity.
3. The learned Magistrate erred in failing to apply the general principles of Common Law and the Sale of Goods Act, Chapter 31 of the Laws of Kenya.
4. The learned Magistrate erred in failing to diligently record the evidence tendered on behalf of the Appellant.

The Learned Counsel for the appellant and the defendant dully submitted by their consent their argument for and against the appeal respectively in writing and also further elucidated the same. I have considered these submissions in the light of the grounds of appeal.

As an Appellate Court of first instance I have considered the entire evidence. I have perused it with great attention and I have considered it fully with a view to arrive at independent assessment and re-evaluation of the evidence afresh. This I have done keeping in mind the grounds of the appeal argued before this Court. As for the first ground of appeal I find that there was ample evidence before the Learned Trial Magistrate to have come to her conclusion that the goods supplied to the plaintiff for which the amount was being claimed in the suit was of an unmerchantable quality. The Respondent has relied upon the evidence of Kenya Bureau of Standards. P.W.2 had testified before the Learned Trial Magistrate he is an official of Kenya Bureau of Standard's. He states the permitted viable count for mineral water is 20 M whereas the samples examined were more than 300M. This rendering the water in his report, unfit for human consumption. This evidence was not challenged, this Court notes, by the Appellant before the Learned Trial Magistrate Court. The Learned Trial Magistrate had the opportunity to see and hear the witnesses testify. This evidence she heard and arrived at a conclusion as to the credibility of the witnesses. I have no reason to interfere with her conclusions which she arrived at by compelling evidence. She accepted as a fact that the plaintiff were verbally notified about the contaminated delivery of their water by the defenant.

As for the ground No.2 and ground No.3 it is evident that the Appellant and the Respondent had commercial relationship for the supply of water this water was a consumable commodity to be used at the Respondent's various outlets. This mineral water supplied by the defendant was for Human consumption. The fact the defendant fully knew and consequently, was aware about the purpose of the purchase. It is however noted that the Appellant did not contest this evidence and contended the water had been contaminated when in the possession of the Respondent yet these were sealed bottles, The evidence was

produced with sealed bottles and the Magistrate heard and found that this could not have been contaminated when in the possession of Respondent.

There is somewhat a justification in the complaint of the Plaintiff the examination of the water was carried out without proper notice of the Appellant however there was nothing to stop the Appellant to have challenged the water tested and exhibited and to establish that the Respondent's contention that this water was not fit for human consumption was not correct. This he did not do so except to make a bare statement.

The appellant and the Respondent had commercial relationship for some time and it was common ground that all previous payments for goods supplied had been paid. This was the only part of the supplies which was not consumed and was rejected.

I find little merit in the contention made in ground No.3. The Defendant/Respondent could only reject goods when it become aware that the goods did not conform for the purpose for which they were ordered.

As for grounds No.4 I note that the evidence recorded by the Learned Trial Magistrate at the trial is short and crisp. Yet it covers essential subject. It is noted that at no time the Learned Counsel for the Appellant/Plaintiff raised any objection to the manner in which the trial was conducted or the evidence was adduced at the proceedings, hearing of the application for summary judgment, and the trial. I find consequently little merit in this ground of appeal.

For this reason the appeal is dismissed with costs.

Order accordingly.

Read and delivered at Nairobi this 18th day of October 2001.

SHAIKH M. AMIN

JUDGE