



**Macharia v Wandeto (Civil Appeal E060 of 2022)
[2024] KEHC 11091 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E060 OF 2022
MA ODERO, J
SEPTEMBER 20, 2024**

BETWEEN

JULIUS NJOGU MACHARIA APPELLANT

AND

MARY WAIRIMU WANDETO RESPONDENT

(Being an appeal from the judgement of the Honourable E. M. Gaithuma resident magistrate, Nyeri delivered on 6/10/2022 in Nyeri SCC COMM CASE NO. E027 of 2022)

JUDGMENT

1. Before this Court for determination is Memorandum of Appeal dated 13th October, 2022 by which the Appellant Julius Njogu Macharia seeks the following orders:-
 - “(a) The appeal be allowed and the judgement delivered on 6th October, 2022 and all orders made therein be set aside.
 - b. The judgment delivered on 6th October, 2022 be substituted with one dismissing the case in entirety with costs to the appellant.
 - c. Costs of the Appeal.”
2. The Respondent Mary Wairimu Wandeto opposed the Appeal. The appeal was canvassed by way of written submissions. The Appellant filed the written submissions dated 15th November 2023 whilst the Respondent relied upon her written submission dated 28th June 2024.



Background

3. This appeal emanates from the decision of the Magistrates Court in SCC Comm No. E027 of 2022. In that case the claimant (the Respondent herein) filed a statement of claim dated 8th April 2022 in which she prayed for
 - a. Judgment in the sum of Kshs. 47,500
 - b. Costs of the claim
 - c. Any other appropriate relief.
4. The claim arose from a cow which the Respondent had purchased from the Appellant. Upon taking delivery of the cow the Respondent took it to her home. She claims that he attempts to later milk the cow resulted in the animal producing bloody milk. The Respondent reported the matter at Karatina Police Station and police advised her to return the cow to the seller.
5. Two (2) days after taking possession of the cow the Respondent sent a man called 'Gakunga' to return the animal to the Appellant (seller). The Respondent then filed a claim in the small claims court seeking a refund of the money she had paid the seller to purchase the cow.
6. Vide a judgment delivered on 6th October 2022, Hon. E. M. Gaithuma Resident Magistrate allowed the Respondents claim and awarded her Kshs. 46,000/= together with interest at court rates.
7. Being aggrieved by the decision of the trial court the appellant filed a Memorandum of Appeal dated 13th October 2022 which appeal was premised upon the following grounds:-
 - a. The Learned Trial Magistrate erred in law and in fact in stating that the agreement was not produced when it clearly appears and is attached to the claimant's list documents.
 - b. The Learned trial magistrate erred in law and in fact in failing to look at the agreement tendered by the claimant and not considering it while writing her judgment.
 - d. That the learned magistrate erred in law and fact in failing to appreciate that the sold cow was milked and inspected by the claimant to her satisfaction and thus it is incorrect to state that relied entirely on the information from the Respondent.
 - e. That the Learned Trial Magistrate erred in law and in fact in the wrong interpretation of reasonable time in relation to this case given the fact that an infection as admitted in this case can occur within hours or even minutes since the two days talked about was excessively long time for such an infection.
 - f. The trial court erred in law and in fact in purporting to appreciate that the Appellant was an expert in matters livestock hence demanding an extraordinary high standard of proof on him which was actually not the case.
 - g. The learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent had accepted the sold cow and retained it for two days and indication that she had been satisfied with it.



- h. The learned magistrate erred in law and fact in making a finding that the cow was returned to the Appellant in the absence of any evidence to that effect.
- i. The trial court erred in law and fact in ignoring the submissions by the Appellant.”

Analysis and Determination

8. I have carefully considered this Memorandum of Appeal, the record of the trial as well as the written submissions filed by both parties.
9. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another v Associated Motor Boat Company Limited & Others* [1968 EA 123, the court of Appeal held that:-

“An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
10. Similarly the same court in the case of *Kiruga v Kiruga & Another* [1988] KLR the Court observed that;-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.”
11. The main issue for determination in this appeal is whether the learned trial magistrate erred in finding in favour of the Respondent.
12. The fact that the parties entered into a contract for the sale of a cow by the Appellant to the Respondents is not in any doubt. The Respondent himself does not deny that he sold the cow in question to the Respondent.
13. A copy of the sale Agreement appears at Page 17 of the Record of Appeal. I therefore do agree with the finding of the learned trial magistrate that since neither party disputed the existence of the sale Agreement the issue of whether there was an agreement for sale had been settled.
14. The question of whether the Respondent paid the agreed purchase price is also not in any doubt. The Respondent told the trial court that she negotiated with the Appellant and they finally agreed on a price of Kshs. 46,000 inclusive of transportation which amount she forwarded to the Appellant by way of M-pesa.
15. A copy of the M-Pesa statement shows that a transfer was made from the Respondent Mary Wairimu to Julius Macharia (the Appellant) of Kshs. 46,000 on 3rd December 2022 at 18.00 - 17 hours (See Page 18 of the Record). I therefore find that it was proved that the Respondent paid the requisite purchase price.
16. The next question is whether the cow was merchantable for the purpose for which it had been procured i.e to produce milk for human consumption.



17. The Respondent states that though the cow was milked at the Appellants home and produced three (3) litres of milk when she took it to her home and milked it the cow produced bloody milk which was certainly not fit for human consumption. She states that she did not inspect the cow's udders to rule out the presence of a mastitis infection which was the cause of the bloody milk.
18. On his part the Appellant denies that the cow had any problem. He insists that the cow was milked in his home and produced milk which was used to make tea which they all drank. As such he argues that the cow was of merchantable quality and was fit for purpose.
19. According to the Appellant the cow may have developed problems subsequent to the sale during the process of transportation.
20. The Appellant was fully aware that the Respondent was purchasing the cow for milk production. Undoubtedly this is why he undertook a 'test milking' of the cow before the Respondent took it home. The Appellant clearly represented that the cow he was selling to the Respondent was suitable for milk production.
21. Section 16 of the *Sale of Goods Act*, Cap 31 Laws of Kenya, provides as follows:-

“Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows –

- (a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:

Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;” [own emphasis]

22. There was the implied condition that the cow was suitable for milk production and on the basis of this assurance the Respondent proceeded to pay for the cow.
23. However barely two days later the cow was producing bloody milk which was certainly a breach of the implied condition that it was suitable for the purpose for which it had been purchased.
24. In the case of *Nichol v Godts* 185h 10 Ex 191 it was held that where there is a sale of goods by sample as well as by description, the goods sold must correspond with the description as well as with the sample.
25. There is no contention that the Respondent accepted the goods (the cow) and took it to her home. Does this then prevent her from returning the cow once it was found to be unsuitable for milk production?
26. Section 36 of the *Sale of Goods Act* provides the Legal definition of 'acceptance' as follows:-

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of



a reasonable time, he retains the goods without intimating to the seller that he has rejected them [own emphasis]

27. In this case barely two (2) days after taking possession of the cow the Respondent realized it had a problem. She phoned the Appellant to inform him but the respondent replied that the sale had been completed. The Respondent then reported the matter at Karatina Police Station and police advised her to return the cow to the seller.
28. The Respondent did exactly that and had the cow delivered back to the Appellant. I do agree with the learned trial magistrate that the Respondent did communicate to the Appellant “within a reasonable time’ the fact that the cow had a problem. Moreover she moved to return the cow to the Appellant without any unreasonable delay i.e within two (2) days indicating her rejection of the same.
29. This is a case in which the Appellant sought to sell his goods (cows) by sample being the milk it produced. That is why the cow was milked and the milk used to brew tea.
30. Section 17 of the *Sale of Goods Act* provides as follows:-
 - (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
 - (2) In the case of a contract for sale by sample there is
 - (a) an implied condition that the bulk shall correspond with the sample in quality;
 - (b) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
 - (c) an implied condition that the goods shall be free from defect rendering them unmerchantable which would not be apparent on reasonable examination of sample [own emphasis]
31. It was implied by the Appellant that the cow he was selling would produce healthy milk similar to the sample which milk would be fit for human consumption. As it transpired this was not the case. The cow did not produce milk as per the sample.
32. As such I find that there was a breach of a central condition of the sale which breach entitled the Respondent to vitiate the contract. I therefore find that the learned trial magistrate did not err in finding in favour of the Respondent (claimant).
33. Finally I find that this appeal has no merit. The same is hereby dismissed in its entirety. The judgement delivered by the lower court on 6th October 2022 is upheld. Costs of the appeal are awarded to the Respondent.

DATED IN NYERI THIS 20TH DAY OF SEPTEMBER, 2024.

MAUREEN A. ODERO

JUDGE

