



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 270 OF 2003**

**GEORGE NDUATI..... APPELLANT**

**VERSUS**

**HOMELAND FREIGHT LIMITED.....RESPONDENT**

**JUDGEMENT**

1. Homeland Freight Ltd filed a suit by a way of the plaint dated 27.7.98 against George Nduati Munene, the Appellant herein, in the Chief Magistrate's court at Milimani, Nairobi, claiming for interalia payment of ksh.111,650/= for clearing and forwarding a consignment of Arsenic Trioxide in 1996. The Appellant filed a defence denying the Respondent's claim. The Appellant further filed a counter-claim against the Respondent for payment of kshs.144,326/60 being the value of 10 undelivered drums of Arsenic trioxide, Insurance cost and import fees. The suit was eventually heard and on 1<sup>st</sup> April 2003 Hon. T.W. C Wamae, learned S.R.M. entered judgement in favour of the Respondent and dismissed the Appellant's counter-claim. Being aggrieved, the Appellant preferred this appeal.

2. On appeal, the Appellant put forward the following grounds.:

1. ***The learned magistrate erred in law and fact by holding that the appellant's counter-claim was an afterthought and not proved.***
2. ***The learned magistrate erred in law and in fact by finding that the appellant was liable to pay the respondent for the undelivered goods.***
3. ***The findings of the learned magistrate were against the weight of the evidence.***
4. ***The learned magistrate erred in law and fact by finding that the respondent proved its case to the required standard.***

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the same disposed of by written submissions. At the time of writing this judgement, the Appellant is the only party who had filed his submissions.

4. In the first ground of appeal, the Appellant argued that the trial magistrate erred in law and fact by holding that the Appellant's counter-claim was an afterthought and not proved. It is the Appellant's submission that the Respondent had admitted during the hearing before trial court that it had not delivered 10 drums of Arsenic Trioxide out of the twenty drums the appellant had ordered. I have carefully re-evaluated the evidence that was presented before the trial court. It is apparent that the learned Senior Resident Magistrate had stated in page 1 of the judgement that the Appellant's counter-claim was an afterthought and not proved at all. A careful perusal of the record will reveal that the Respondent's witness admitted at page 22 while testifying in cross-examination that the Respondent only delivered 10 drums to the Appellant yet the invoice produced as an exhibit indicates that a sum of ksh.10,500/= was charged for the delivery of 20 drums. The learned Senior Resident Magistrate formed the opinion that the

Appellant had failed to prove evidence for the demand of delivery of the balance. The trial magistrate went ahead to impute that were it not for the respondent filing the suit, the Appellant it appears, would not have demanded the release of 10 drums. With respect, I agree with the submissions of the appellant that the learned Senior resident Magistrate fell into error. It is quite clear that the Respondent's witness, Paul Kagiri Wanyigi (PW 1) stated in cross-examination at page 23 of the Record of Appeal in part as follows:

***“We provided transport for the 10 drums to the Defendant’s (Appellant herein) home at Kileleshwa .....The Defendant (Appellant) did not tell me to deliver the other 10 drums after he paid the balance of our fees.”***

5. With this sort of evidence admitting the claim, it was erroneous for the trial magistrate to dismiss the Appellant's counter-claim. Even in re-examination PW 1, expressly stated that the Respondent was still holding a balance of 10 drums. It cannot therefore be said that the filing of the counter-claim was an afterthought.

6. In ground 2, the Appellant argued that the trial magistrate erred by holding that the Appellant was liable to pay for goods which had not been delivered. The recorded evidence clearly show that only 10 drums out of 20 drums of Arsenic Trioxide were delivered. It was therefore erroneous for the learned Senior Resident Magistrate to arrive at such a holding. It came up clearly from the evidence tendered that the practice was that the Respondent's duty was to first deliver the drums at the Appellant's premises and then demand for payment. There is also evidence that the 10 drums of Arsenic Trioxide expired while in the Respondent's possession. The law cannot allow the Respondent to benefit out of its wrong which led to the breach of contract for delivery of goods. The Respondent failed to deliver 10 drums. It was required to deliver 20 drums but only delivered 10 drums leaving 10 undelivered. It cannot now come before a court of law or equity and ask to be paid kshs.11,650/= for 10 undelivered drums or on account of the part of the contract that was not fulfilled. I find that the Appellant was not liable to pay the Respondent for undelivered goods.

7. Grounds 3 and 4 can be dealt with together. It is argued that the trial magistrate erred in arriving at her decision which went against the weight of the evidence. The Respondent had claimed for payment of ksh.11,650/- being the amount due for services rendered to the Appellant by the Respondent at the Appellant's request in 1996. It is apparent from the recorded evidence that the Appellant had proved his case that the Respondent had not fully performed its part of the contract. It failed to deliver 10 drums therefore it cannot be allowed to take advantage of its wrong which led to the breach of contract to the detriment of the other party to the contract, the Appellant.

8. In the final analysis, I find the appeal to be well founded. This appeal is allowed. The judgment and decree of the learned Senior Resident Magistrate is set aside and the Appellant's counter-claim is allowed. The Respondent is condemned to pay costs of the appeal and suit.

Dated and delivered in open court this 2<sup>nd</sup> day of July 2015

**J. K. SERGON**

**JUDGE**

In the presence of:

N/A for the Appellant

N/A for the Respondent