



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO 85 OF 1985**

**MWANZO SHIRANDULA.....APPELLANT**

**V**

**MARKO MUKHWESO.....RESPONDENT**

**JUDGMENT**

**Cases**

1. *Harilal & Co v Standard Ltd* [1967] EA 512

March 19, 1987, Nyarangi, Platt & Gachuhi, JJA delivered the following Judgment.

This is the plaintiff's appeal from the judgment of Mrs Justice Aluoch on May 15, 1984 dismissing the plaintiff's claim against the defendant for the sum of the Kshs 34,320.

The plaintiff won a tender to supply to the Nairobi Area and in September 1976 he received a LPO NO D799849 dated November 1976 addressed to his firm. The plaintiff obliged, prepared an invoice and the goods ordered were supplied on November 4, 1976. The plaintiff's firm supplied foodstuffs to various government departments and on receiving LOPs Vouchers were prepared and sent to various Ministries for payment. The plaintiff had supplied the prisons department for 40 years during which time, normally, government of Kenya vehicles collected the goods. According to the plaintiff, it is not the case that the Headquarters of the prisons department does not place orders for food rations for prisons although orders are made by officers in charge of particular prisons. Prior to this material order, the plaintiff received orders from the Headquarters of the prisons Department and he supplied direct to the Headquarters.

On this occasion, after dispatching the invoice he was promptly informed that the particular LPO had not been completed and sent to him by the prisons Department. That was supported by the then supplies Officers to the prisons Department who received the LPO, checked it and ascertained that the series of LPO out of where the material LPO was issued had been issued to the Natural Resources Ministry. An official of the Government Printer confirmed that the book which contained the LPO is one of those issued to the natural Resources Ministry. This officer said that the prisons Department Headquarters does not place orders for foodstuff. The judge had the evidence and appreciated, correctly, that the plaintiff "had acted in good faith on the basis of the LPO." To my mind, that sentence is the keystone of the judgment.

The judge then observed that the plaintiff was " in a special position as opposed to the suppliers ..... " with respect that was error. The material LPO had been extracted from a book whose series had been

issued to another government department. On the face of it, the LPO was in order – it was completed, dated, signed and stamped in the normal way.

The LPO was addressed to the plaintiff and it quoted a tender reference number. The LPO was not the subject – matter of a Gazette Notice notifying its loss for general information of the public as is the practice with Government Departments whenever it is intended that the government shall not accept any liability for service or good ordered against the lost LPO. Besides, strangely, notwithstanding that the plaintiff furnished the details of the LPO, the registration mark of the vehicle which transported the goods and gave Kenatco Limited as the proprietor of the vehicle, no report was made to the police by the supplies officer and no investigations were carried out.

I cannot see any circumstances which would have caused the plaintiff to doubt the LPO. It would appear there existed a course of dealing which would be regarded as trade usage: *Harilal & Co v Standard Ltd* [1967] EA 512. The plaintiff had dealt with the prisons Department for 40 years and so his evidence that the Headquarters of the Department did place orders carries weight. There was no evidence adduced about the tender.

So there is just the plaintiff's evidence about who and what was supplied.

The sole effective cause of the loss of the goods was the LPO and its contents.

One main argument of the respondent's counsel as I understood it was that the plaintiff should have cautioned himself before loading goods into a vehicle other than a GK vehicle. But then, after the plaintiff reported the swindle and pointed out the proprietor of the vehicle, it is interesting to observe that no action was taken and no explanation at all was given for the rather extra-ordinary attitude.

It is conceivable that the plaintiff's goods might have been traced if a report had been made to the police. It seems to me, therefore, that the plaintiff was not negligent both at the time of supplying the goods and subsequently. It seems to me that this case falls fairly and squarely within the business practice which had been developed over the very long period and that the evargument in the defence that there was no agreement of sale is not sustainable. The vital matter is that the plaintiff supplied the foodstuffs according to the LPO.

On the whole I find comparatively greater weight in the arguments based on the grounds of appeal which were advanced by Mr Sheth.

I think the judge was wrong in the decision to which she came and I would allow the appeal with costs and costs of the High Court, set aside the judgment of the High Court and enter judgment for the plaintiff as prayed in the plaint and as Platt and Gachuhi, JJ A agree, it is so ordered.

**Platt J A** The learned judge found that the plaintiff acted in good faith on the basis of the local purchase order, If that was so, then was the Government responsible for the goods supplied as required on the local purchase order?

The local purchase order in question came to the plaintiff / appellant, because the latter had won tender NO 76/77 which he described as a Government Tender for all Departments who came with their local purchase orders. The plaintiff had won the tender to supply the Nairobi Area. The actual terms of the tender were not an evidence; but as far as the evidence goes, the appellants' description of the relationship under the tender does not appear to be wrong. The relationship appears to have been the various persons on behalf of Government could sign local purchase orders and present them to appellant. He would then invoice that department and deliver the goods.

In this case, the local purchase order was in proper form, and quoted the tender NO 76/77. It was signed on behalf of Senior Supplies Officer, vice-president's Office, Ministry of Home Affairs. But there was a fraud.

Without the plaintiff knowing, the local purchase order was not one issued to the Ministry of Home Affairs. The Ministry of Natural Resources did not however notify the public of the loss of the order. The appellant in good faith delivered the goods. That means that the queries by the Ministry were not thought by the judge to be sufficient to warn the appellant that this was a fraud.

The result is that the Government had the local purchase order printed and supplied to its servants and agents in the department of the Government. They used them to order supplies. The government then permitted its agents to bind the Government to pay for the goods supplied. That was how the trade was carried out, and the plaintiff was entitled to rely on the ostensible authority of the person who signed as Senior Supplies Officer. The government is stopped from denying liability.

I agree with the orders proposed by Nyarangi, J A.

**Gachuhi J A** I Agree with the judgment of Nyarangi J A and the orders proposed this court should make.

I would add, the evidence adduced does not show any iota of negligence on the part of the appellant. The plaintiff acted in the normal practice of trade usage. There was nothing suspicious with the LPO. In the evidence, the defendant dealt with internal matters but did nothing to warn the public at large not to honour LPO No d 799849 if presented to any trader. The trader having complied with the order, which on the face of it is good and in the absence of any warning the defence offered should be rejected and the plaintiff should succeed.

**March 19, 1987**

**NYARANGI, PLATT & GACHUHI, JJA**