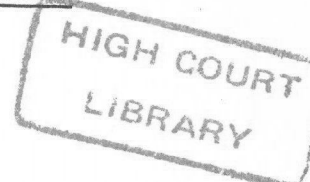


IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 151 OF 1979



BETWEEN:

DEREK B. MALIRE PLAINTIFF

- and -

D. THENGEZE SOKO DEFENDANT

Coram: Jere, J.

Kumange of Counsel for the Plaintiff
Chanthunya of Legal Aid for the Defendant
Mazibuko: Court Reporter
Sonani : Official Interpreter

J U D G M E N T

This is an action by the Plaintiff, Derek B. Malire against the Defendant, Thengeza Soko. The Plaintiff's claim is for K1,258.00 being the balance of the amount due from the Defendant to the Plaintiff for the maize mill sold and delivered by the Plaintiff to the Defendant at his request. The Defendant denies owing to the Plaintiff the sum of K1,258.00. He counterclaims for the return of K1,240.00 being deposit on a certain grinding mill from Bunda and K16.00 being money paid by the Defendant to the Plaintiff for transporting the mill to his home in Nkhota-Kota. Further, in his defence, he alleges that the Plaintiff delivered to the Defendant a different type of a grinding mill from the one contracted for. He says that this mill was of low quality and that he had refused to accept it. The Plaintiff was asked to collect the mill and he has not done so.

I remind myself about the burden of proof in civil cases. The Plaintiff has to satisfy me in order to succeed on the balance of probabilities and the same applies where the Defendant counterclaims.

The undoubted evidence is that early in 1976, the Plaintiff approached the Defendant at the Defendant's village in Nkhotakota district. He wanted to install a maize mill. He had uprooted it from Golomoti in Dedza district. The Defendant was described as village headman



Manjawila. He himself said he is only related to the village headman. The Defendant accepted the Plaintiff's request and subsequently a maize mill was installed at the village. It was 30 horse power. Trade name of the engine is Peter. I will refer to this maize mill as MML. While operating MML, the Defendant asked the Plaintiff if he could sell him a maize mill if he had any to spare. The Defendant's evidence differs from that of the Plaintiff. It is his evidence that the Plaintiff asked him to go to Lilongwe and there offered him MML which by then was removed from the village in his absence during the night time. He then went to Lilongwe and saw the Plaintiff. After discussions, he, the Defendant, agreed to purchase another maize mill from the Plaintiff which was at Bunda. In this judgment, I shall refer to this maize mill as MM2. They had further agreed that the Defendant's son should be sent to Bunda to learn how to operate MM2.

The Plaintiff's story is that the Defendant asked him to sell him a maize mill and he told him that he had nine maize mills and he was willing to sell one. He asked him to find money and the Defendant brought K520.00. He told him the price was K2,400.00. He received K520.00 as deposit. They had agreed that the Defendant will pay the Plaintiff in all K1,200.00 as part payment and then the maize mill will be released to him. He would pay the balance by instalments. This was reduced into writing see exhibit 1. This was on the 9th December, 1976. The Defendant again brought K100.00 in February, 1977. This payment is evidenced by exhibit 2. The total was now K620.00. He then informed the Defendant to let him have the Defendant's son in order to teach him how to operate a grinding mill so that as soon as the balance on the part payment is made, the maize mill can be sent to him and the son would operate the mill. This was agreed. The son, D.W.2, was sent to Bunda to learn operating MM2. There was a balance on part payment of K580.00.

Two weeks later, the Defendant went to see the Plaintiff and told him that he was unable to raise K580.00. The Plaintiff's reply was that in those circumstances, the Defendant would not collect the maize mill for which they had agreed that the Defendant should buy. The Defendant pleaded that he should buy MML. The Plaintiff agreed and the price was fixed at K1,850.00. The deposit of K620.00 was transferred to form part payment for MML. This was agreed and put into writing exhibit 3. He was asked to pay the balance by instalment. His son would return to the village but that he should not instruct anyone to install the mill. He said he would send his competent man to do the job. This was agreed. The grinding mill was dismantled from Ngwangwa and delivered to the Defendant's home. It was conveyed in the Plaintiff's vehicle. The Defendant had paid K28.00 for fuel only. He denied that he had received K16.00 as counterclaimed. He said that he

learned with surprise that the Defendant had installed the mill without his assistance. He denied delivering a different maize mill from that contracted for. He says that he has not received the balance of the purchase price hence the present action.

In cross-examination, he said the maize mill he sold to the Defendant is MM1 for he had failed to purchase MM2. It was his evidence that the Defendant had seen MM1 when it was in working order at his village.

The Defendant's story is different. He said that he had agreed to buy MM1 and this was removed. He had paid in December, K520.00. He was then informed to go and collect another mill which was at Bunda, MM2. He refused to do this but was finally persuaded to accept it. He sent D.W.2. He followed his son after two weeks and said he should operate it until he, the Defendant, had built a maize mill house. The agreed price was first K2,200 and then after negotiations, it was reduced to K1,048.00. He had paid him K520.00, K100.00 and finally K620. Then the Defendant brought a maize mill which was completely different. He paid K16.00 for transporting it. He first rejected it but again he was prevailed over. He installed the maize mill. It had the belt broken. He went to complain to the Plaintiff and he was asked to buy another belt and shortly thereafter, the mortar exploded. He went to see the Plaintiff and he asked him to repair it at K20.00. He tried again. There was something wrong with the engine. He went again to complain and the Plaintiff said he would come to repair it but never appeared; instead, he received a summons.

I find it as a fact that the Defendant paid in total only K620.00 as a deposit for MM2 which was at Bunda. I do not accept that the Defendant paid an extra K620.00 cash to the Plaintiff because first, the transaction between them had always been in writing so if there was this substantial payment of money, a receipt would have been issued. If it was not issued, I would have expected the Defendant to insist that it be issued.

Secondly, his evidence about the payment of K620.00, a lump sum to the Plaintiff is wholly unconvincing. I further find it as a fact that the original price was K2,400.00 for MM2. I do not agree that it was K2,200.00. I prefer the evidence of the Plaintiff which is cemented by exhibit 1. It is my opinion that the Defendant failed to raise enough money for MM2 as a result, the parties had entered into another agreement for the sale of MM1 for K1,800.00 and the original deposit for MM2 was credited for this new agreement.

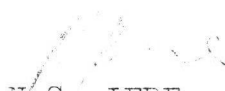
This is certainly the evidence as contained in exhibit 3. The Defendant does not dispute the authenticity of this document. There is evidence that he took it to his home. This is from his own mouth. I find it as a fact that the Defendant agreed to buy MML which he had seen at his village and the Plaintiff agreed to sell MML which was at Ngwangwa. He delivered the same to the Defendant. The date as to when it was delivered is not clear in evidence. The Defendant says it was in April. I am inclined to think that it was delivered sometime in March. The Defendant had installed it by the help of a mechanic who was not approved by the Plaintiff.

According to D.W.2, oil started leaking from the engine. This was not rectified. The Defendant bought a new belt at K40.00 and the mortar burst. It was his evidence that the mill was working with some difficulties up to November, 1977 when it appeared that it finally packed up.

In my judgment, MML was delivered and accepted by the Defendant whatever reservations he had if any which I do believe property passed to him when he finally installed it. He had not rejected it and only invented his present defence when he was asked to pay the balance of the purchase price. The claim therefore succeeds.

There is no merit in the counterclaim in view of the evidence recounted above. It is accordingly dismissed.

PRONOUNCED in open court this 8th day of October, 1980, at Blantyre.


N.S. JERE
JUDGE