THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO. 19 OF 2002.

DIRECTOR KOROSHO (T) ..... APPELLANT

VERSUS

ABDALLAH S. KIGUMI ..... RESPONDENT

Date of last Order: 22/05/2009
Date of Judgment : 28/05/2009.

JUDGMENT

Mlay, J.

The appellant in this appeal, is DIRECTOR KOROSHO (T) LIMITED represented by the learned Advocate, Mr. Zacharia Maftah and the respondent is one ABDALLAH S. KIGUMI, represented by Mr. H. H. Mtanga learned advocate. The appeal is from the decision of the District Court of Rufiji at Utete, in Civil Case No.3/2000, in which the respondent was the successful Plaintiff and the appellant, the Defendant and Judgment/ Debtor. The appeal has been brought on the following grounds:-

1. *The learned Magistrate has erred in have and fact in holding that there sufficient [sic] evidence that the Plaintiff*

bought cashew nuts on credit without evidence to support.

2. *the learned Magistrate has erred in law and fact in holding that the Plaintiff is entitled to both a salary and a commission.*
3. *The learned Magistrate has erred in law and fact in holding that the Plaintiff had delivered to the Defendant 95418 kg instead of 92911 kg.*
4. *The learned Magistrate has erred in law and fact in introducing matter within his knowledge without any evidence.*
5. *The learned Magistrate erred in not resolving all the issues framed in the case.*
6. *The learned Magistrate has erred in law and fact in holding that the Plaintiff paid storage charges without any evidence.*
7. *The learned Magistrate has erred in law and fact in holding to pay attention to evidence adduced by the witnesses.*

On the above grounds, the Appellant has prayed for the appeal to be allowed with cost and "judgment be entered for the counter-claim"

The advocates for the parties filed written submission on the grounds of appeal but before considering them, the facts of the case can be stated briefly.

According to Paragraphs 10 and 11 of the plaint filed in the District Court, ABDALLAH SULTANI KIGUMI in his capacity as the agent for purchasing cashew nuts for the Director Korosho (T) Ltd, sued the principal (appellant) for

> *"10" (a) Commission for 104001 Kilogram collected at Shs. 20/= per Kilogram, thus Shs. 2,080,020/=*
>
> *(b) The storage charge for 104,00/ Kilogram at shs. 10/= per Kilogram thus 1,040,010/=*
>
> *11. That the difference between the cashewnuts collected and the cashwnuts consigned is owing to shrinkage and in fact the supervisor Mr. Makarakara ordered the cashwnuts be dried, therefore the plaintiff claims for the deficit of Shs. 6,100,079 which the formers*

are demanding from the plaintiff (Agent)".

The above claims are repeated in the prayer clause plus costs, except for the claim of Shs. 2,080,020 contained in paragraph 10(a), which in the prayer, only refers to the "**Different of money and the actual money spent in buying the 104,001 Kilograms",** without specifying the actual amount of money involved. According to the evidence adduced by both parties during trial, it was a common ground that the Appellant/Defendant engaged the Respondent/Plaintiff as an agent for the purchase of cashwnuts at Kibiti in Rufiji District for the season 1999/2000. It was also a common ground that the Appellant/Defendant gave the Respondent/Plaintiff, the total sum of Shs. 53,710,850/= (fifty the Million, seven Hundred Ten Thousand, Eight Hundred and fifty) for the purpose of the said purchase. The Respondent/plaintiff claimed during trial to have purchased a total of 104,001 kg at Shs. 59,810,929 which after being dried, he delivered to the Appellant/Defendant in Dar es Salaam 95,418 kg worth Shs. 54,463,590 (Fifty four million four Hundred sixty Three Thousand and fifth hundred Ninety). The difference between the sum provided for the purchase and the value of the cashewnuts delivered, is the subject of the first claim amounting to Shs. 6,100,079/=. The Appellant/Defendant on the other hand, claimed that only

72,911 kg of cashewnuts worth Shs. 52,800,000/= (Fifty two Million Eight Hundred Thousand) were delivered, as the result the Respondent/Plaintiff, retained the sum of Shs.910,000/= out of the total sum provided by the Appellant/Defendant for the purchase of cashewnuts.

The Respondent/ Plaintiff further claimed that the Appellant/ Defendant had engaged him as an agent at a commission of Shs.20/= per Kg of cashenuts he purchased. He therefore claimed the sum of Tshs.2,080,202 as his commission for the 104,001 kg of cashenuts he purchased. The Appellant / Defendant on the other had, claimed and adduced evidence that the Respondent/ Plaintiff was engaged at monthly wage of Tshs.200,000/- for 30 days of work. He further claimed that the agent had worked for 53 days and was therefore entitled to shs.354,000/-. The Appellant / Defendant claimed the amount should be deducted for the sum of shs.910,000/= which the Respondent / Defendant had allegedly retained from the amount provided to purchase cashewnuts. Lastly, the Respondent/ Defendant claimed to have stored the purchased cashewnuts at the cost of shs.10/= per kg, amounting to shs.1,04,00/-. The Appellant / Defendant on the other hard, apart from disputing the storage charges, made a counter - claim of shs.556,000/- being the balance on the

amount of Tshs.910,000/- after deducting the wages due to the agent of shs.354,000/=.

During trial, the following issues were framed:

1) *Whether there was a Principal Agency relationship.*
2) *Whether the Plaintiff delivered 95,418 Kilograms to the Principal.*
3) *Made of Payment*
4) *Whether to defendant is entitled to counter claim*
5) *What reliefs plaintiff is entitled to.*

In the judgment of the District court, the trial District Magistrate stated at page 5 last paragraph, as follows:

"On the answer provided for the various issues this court do all issue have been answered in farvour of plaintiff the Defendant Company is therefore found liable and has to be pay plaintiff.

1. *Cash 6,000,000/= for cashewnuts brought on credit which would be paid to the various farmers who have not been paid todate by plaintiff who was the agent of the Principal the Korosho Tanzania Ltd.*
2. *Cash 200,000/= as payment for a month work 15/11/1999 to 31/12/1999.*
3. *A commission at 20/= for kilogram brought and debased.*

4. *A commission of 10/= for kilogram stored, and safely transported to the defendant Company.*
5. *Cost of the case and other costs."*

The Appellant's counsel in his written submissions, argued grounds 1 and 3 together.

The first ground alleges that the trial magistrate erred in holding that the Respondent bought cashewnuts on credit and the third ground, alleges that the magistrate erred to hold that the Respondents delivered to the Appellant 95,418 kg instead of 92911 kg. The learned advocate contended that on the evidence of DW PETER MAKAKALA and DW2 MAHENDRA GANDHI, the respondent was given shs.53,710,5850/= to buy cashenuts, which fact is also admitted by the Respondent. He argued that whether the Respondent bought 95418 kg as he alleged or 92911 kg as alleged by the Respondent, was or question to be decided by the trial court. Referring to the Respondents contention that he bought extra 104001 kg on credit and hence the suit to recover the difference from the Appellant, the learned advocate contended that the Appellant appointed the Respondent as his agent to buy cashewnuts against money given to him. He contended further that the Appellant did not give the Respondent permission to buy on credit. He referred to the Respondents evidence on

cross examination at page 3 of the proceedings and contended that *'the Respondent had admitted twice that he had no instruction to buy cashew nuts from farmers or credit"*. He submitted that under the Law of Contract, an agent is bound to conduct the business of his principal according to the direction given by the principal. He referred to section 163 of the law of contract (presumably, the Law of contract ordinance, which is now cap 345 R.E 2002] the learned advocate further quoted from the evidence of DW2 MAHENDRA GANDHI who stated:

> *"ABDALLAH KIGUMI was our seasonal agent for the season 1999/2000. he was appointed to procure and 6 or 8 people in Kibiti area. To procure cashew nuts, and were all on monthly salary basis and not paid commission. Plaintiff provide korosho. Government stipulated we should buy from recognized posts.... All employees were posted to different parts to buy cashew nuts and pay cash as required by law. It is an offence to buy cashew nuts or agriculture products on credit".*

From the above evidence, the Appellants advocate submitted that "*custom prevailing at the area was not to buy agriculture (sic)crops on credit*". He further submitted that, the law of contract states that where an agent acts otherwise, he has to make good if loss occurs, and he has to account for profit if profit accrues. He argued that the Plaintiff acted without instruction and (if) loss occured, under the law he has to make good for the loss. The learned advocate contended that the Respondent was given shs.83,710,850 to buy cashew nuts and ought to have bought against the cash given. He attacked the Respondents contention that the money given was not enough as surprising, because he was not given a specific target of kilograms of cashew nuts to be purchased. He theorized that the Respondent had committed fraud by purporting to have bought more cashew nuts than the value of the money given and by claiming a refund. He contended that the Respondents own evidence at page 3 of the proceedings, supports this theory. The said evidence as quoted by the learned advocate, states as follows;

> *"I was given shs.53,710,000/- which was not enough to buy cashew nuts otherwise I collected 100,000 kgs at shs.59,810,929/=".*

The learned advocate contended that an the same page of the proceedings, the Respondent stated:

"I admit I transported 95418 kgs, the principal received". The appellants advocate asked, 'Did he collect 100,000kgs or 95,418kgs"?. Attractive as the fraud theory may appear to the Appellants advocate, the theory was lot put up as one of the defences and it was not raised or argued during trial. The argument raised is therefore only relevant in answering the question relating to the amount of cashew nuts actually purchased and delivered to the defendant but not to prove that there was fraud. Coming back to the learned advocates submissions, he referred to the Respondents admission that the Appellant (Principal), received less than 95,418kg and to the Respondents contention that the loss of weight was due to a bad weighing machine and to shrinkage after loss of moisture content. The Appellants advocate contended that the Respondent's contention was refuted by the evidence of DW 1 and DW2 that the weighing scales were serviced before the season and a receipt was produced as evidence of servicing. He referred to the Respondents evidence of delivery notes to the Appellant. He contended that the delivery notes refer to "*bags*" and not "*weight*". He contended that the weight shown on the delivery notes, was recorded by the Appellant after weighing the "*bags*" received. He posed the question as

to why the Respondent preferred to record "*number of bags*" rather than so many kgs of Korosho '*or both....*".

The Appellants advocate further contended that according to the evidence of DW2 MAHENDRA GANDHI the Respondent was given 1122 now empty bags for packing the cashewnuts. He contended that if the Respondent alleged weight, the bags contained a total of 98548kg making an average of 85kg per bag. He contended that the new bags supplied by the Appellant were new and could not stretch so as to take more than 80 kg per bag. He contended that DW2 justified this contention by quoting at page 8 of the proceedings other agents whose bags weight ranged 77.98 kg to 78.9kg and 79.2kg. He contended that on the evidence of DW2, the Respondent could not have packed cashew nuts weighting 85 kg in one bag as the bag could not take such weight. He further contended that the Respondent did not call a single farmer to support his case that much cashew nuts were bought by the Respondent on credit.

As fro the alleged shrinkage of the cashew nuts the Appellants advocate contended that on the evidence of DW1 PETER MAKAKALA, the acceptable moisture content of cashewnuts is 2.5%. If the Respondents alleged loss is 11090kg,

then the moisture content of the cashew nuts was 11% when bought, which is intolerable.

He referred to the loss attributed to other agents which was 2.8%, 5.4%, 3.9%, 3.7% and 2.1%. The learned advocate reiterated that the Respondent did lot give explanation of buying cashew nuts on credit nor did he call any witness to prove the allegation.

Due to the involved issues raised on the question of the amount of cashewnuts bought and delivered by the Respondent and an whether there were any cashewnuts bought on credit, I will proceed to consider the respondents response to the Appellants submissions and dispose of the question, before going on to the remaining grounds of Appeal.

In his submissions in reply, the Respondent advocate conceded that, "Its true that he was given Tshs.53,710,850/= with which to buy the cashewnuts. He contended that the respondent was under the supervision of PATRIC MTOTA [PW2]". He contended further that "the Respondent bought total of 104,001 kg cashew nuts. He managed to between 95,418 kilograms to the Appellant due to shrinkage, a fact which was admitted by PW2 who was an officer of the Appellant company". He contended further that the delivery of the 95418

kg was "supported by delivery notes which signed on delivery by Korosho (T) Ltd at the Godown in Dar es salaam".

On the question of whether the Respondent purchased cashewnuts on credit, the Respondents advocate submitted as follows:

> *"We also say that the Respondent has never said he bought extra 104001 kilograms an credit, but the reason is that the respondent bought a total of 104,001 kilograms out of which 95,418 kilograms were delivered and received by even appellant and that the difference between 104,001/= kilolgrams bought and 95,418 kilograms delivered is due to shrinkage ....."*

On the question of purchasing cashenuts on credit, the Respondents Advocate submitted:

> *"since the Respondent had been buying the cashewnuts from the farmers and paid the on the spat, the farmers trusted the Respondent to advance their cashenuts while the Respondent being assured by an official of*

the Korosho (T) Ltd that the money would be forthcoming, he had no alternative but to collect additional cashewnuts on credit..."

The learned Respondent's advocate contended that the respondent "*conducted the business of his Principal in accordance with directions given by the Principal*". He contended further that the Appellant did not deny that both Peter Makakala and Patrick Mtota were officers of the Appellant and therefore to say the Respondent did not follow directions of the Principal is baseless and that the provisions of section 63 [163] of the Law of Contract are irrelevant. He contended that the Respondent was receiving instructions from the immediate officers and whether or not MAHENDULA GADHI (DW2) gave instructions, was immaterial as the two senior offices were actually seing the buying transactions. He contended that the agreement between the Respondent and the suppliers of cashewnuts is not against the law as the Respondent was sure that the money would be made available by the Principal and that the Respondent got assurance from the representatives of the Principal. He contended that the money given Shs.83,710,850/-, was not enough to meet to additional cashewnuts collected on the instructions of the Principal. He said as the Principal did not specify the ceiling as to how many kilograms should be bought,

he would hove warned the Respondent not to collect anymore cashewnuts. On the allegation of fraud, the Respondents advocate submitted that if there had been fraud, the Appellant would have reported it to the relevant authorities. I have already stated that the issue having not been raised during trial it cannot be raised and argued in this appeal. On the deficiency of the weighing cale, the Respondents advocate contended that, "*the receipt that was produced during that hearing is not itself sufficient to prove the weighing scale were in good condition*". On the issue of delivery of bags of cashewnuts, the Respondents advocate submitted:

> "*In good faith the Respondent delivered the bags of Cashewnuts to the Appellant so that he may as well weight (sic) and satisfy himself. Fortunately, the Appellant did write this kilograms contained in each bag, but he deliberately omitted to write kilograms in other bags so that the Respondent should be different kilograms from the exact true Kilogram. It was the duty of the Appellant to note the Kilograms received for future verification.....*".

On the alleged shrinkage of the cashewnuts purchased and delivered, the Respondents advocate contended that, although DW2 refuted the shrinkage, he did not oppose the explanation given and for that reason, the evidence of DW2 opposing the shrinkage is void. The learned advocate submitted finally that, the purchase of cashewnuts was genuine and that even "*the lower court was aware of the problem that the Respondent has suffered to an extent of being prosecuted*". He further contended that "the people who gave cashewnuts on loan are known and that at the end of the day they must be paid". He reiterated that the buying of cashewnuts was permitted by the Principal through its senior officers as confirmed by DW 2.

The trial Magistrate in his judgment did find that there was a principal/ agent relationship between the Appellant and the Respondent. This issue was not really in dispute and was conceded by both parties. What was really at issue, related to the terms of the agency as to the quantity of cashewnut to be purchased by the agent, whether the agent was authorized to purchase cashewnuts on credit after exhausting the cash given by the Principal and how the agent was to be rewarded for his services, whether on monthly cash payment as alleged by the Appellant or by commission calculated on the basis of shs.20/- per kg purchased, as alleged by the Respondent.

On the quantity of cashewnuts purchased which was issue no. 2, the trial Magistrate stated from the last paragraph of page 3 of the filed judgment, as fallows:

> *"In issue No. 2 whether Plaintiff delivered a total of 95418 kilograms of cashewnuts. This issue is considered in the following way. Plaintiff claimed he bought under supervision of Patrick Alphonce Mtota a total of 95,418 kilograms. This is witnessed by several delivery notes tendered as exhibits, had signatures put on those delivery notes showing the amount transported was correct and that the Registration number of Lorries which transported the consignment of cashenuts were also known. During the transportation of cashenuts from Kibiti to Kipawa Gorden in Dar es salaam no querries were raised that transported or received cashewnuts weighed less that (sic) the actual amount shown on this delivery notes Dispute arose as evidence shows when Plaintiff stated (sic) demanding his payments which the defendant company denied to however in the case it is show*

defence Exhibit" D1 showing a list of shortages of kilograms in the cashenuts transported by the plaintiff the list as accepted in cross – Examination was prepared by DW1 Peter Makakala in the absence of plaintiff or without plaintiff having notified and given an opportunity to given (sic) an explanation, a matter which an be said to have been done injudiciously for the outcome to affect the livelihood of the plaintiff. After all who knows whether those weight were distorted to create the wrong picture in order to deny plaintiff demands for pay. This court in the absence of an explanation do accept 95,418 kilograms of cashewnuts were transported to the defendant company and at 92,911 kilogram as claimed by the defendant".

On this finding the trial magistrate appears to have relied on the delivery notes prepared by the Respondent as evidence of the correct weight of cashewnuts delivered for the Appellant. He also relied on the fact that when the cashewnuts were weighed by the Appellant at Kipawa in Dar es salaam, the Respondent was not given let opportunity to be present and to offer any explanation on any shortcoming discovered.

The trial magistrate went as far as making an adverse finding that the Appellant may have deliberately distorted the weight in order to deny the Respondent his pay.

The Appellant has argued that the Respondent did not deliver the cashewnuts by weight but by number of bags, without specifying the weight of cashewnuts contained in each or all the bags. The Respondent has conceded that the weight shown in the delivery notes was recorded by the Appellant after weighing the bags delivered and shown on the delivery notes. I have scrutinised all the delivery note attached to the Respondent proceedings, assuming that they were produced, and two of which were produced by the Appellant as Exhibit "D".

All these delivery notes refer to "*bags Loaded to a lorry*" specifying the number of bags, without stating the weights of the cashewnuts contained in the bags. As alleged by the Appellant and contended by the Respondent, the weight of the cashewnuts contained in the bags was added later, in a different ink, by the Appellant after weighing the bags after delivery. The question is therefore whether the Respondent did prove by evidence, that he delivered to the Appellant 95,418 kg of cashewnuts, as alleged by the Respondent and as found by the trial Magistrate. Since on the evidence of the delivery

notes the cashewnuts delivered by the Respondent did not show the weight of the cashewnuts contained in the bags, the Respondent did not prove on the balance of probability that he delivered 95,418 kilograms of cashewnuts. Since the delivery notes did not specify the weight of the bags delivered, the trial magistrate had no basis for the finding that the respondent delivered 95,418 Kilograms of cahswenuts. There was only evidence of delivery of bags of cashewnuts whose weight could only be ascertained by weighing the bags after they had been delivered. The Principle of law is that, he who alleges must prove. The Respondent did not prove what he alleged in relation to the weight of the cashewnuts delivered. I therefore find that the third (3rd) ground of appeal which has been argued together with the first grounds, has merit and it is accordingly allowed.

Although the trial Magistrate only dealt with the issue of the amount of cashewnuts delivered to the Appellant, there was the related issue as to how much cashewnuts were infact purchased by the Respondent. This issue is intertwined with the question whether the Respondent, in addition to the cashewnuts purchased and paid for out of the money advanced by the Appellant, did also purchase additional cashewnuts on credit. The trial Magistrate only dealt with the issue of whether the Respondent purchased cashewnuts on

credit, but this issue could not correctly be determined without determining first, how much cashenuts were purchased ond deducting from that amount, the amount of cashewnuts which were infact delivered, as it is alleged there was loss of weight or amount due to what has been farmed as "*shrinkage*" attributed to loss of moisture due to drying process. The Respondent claimed to have purchased a total of 104, 001 Kilograms of cashewnuts. He conceded that he did not deliver to the Appellant all the 104,001 kilograms purchased. He claimed that due to drying, the amount purchased shrunk to the 95,418 kilograms which were delivered. Apart from verbal asertation, from the respondent himself there was no additional evidence even from his "*supervisor*" PW2 Patrick Alphonce Mtota or from any other source, to show the amount of cashwenuts actually purchased by the Respondent. As stated earlier, the principle of law is for the Responded to prove what he alleges. Mere allegation is not proof. There could have been evidence of the list of names of the people from whom he purchased cashewnuts and the amount he purchased from each and the amount of money he paid for the purchase to each sellor. The Respondents advocate has claimed that those who sold cashewnuts to the Respondent an credit are known. If they are known, no evidence of their existence was given. There was absolutely no evidence to prove that the Respondent purchased the total of 104,001 kilograms as

alleged by the Respondent. The fact that the cashewnuts wee transported in bags whose weight was not shown on the delivery notes, goes also to cast doubt on the specific kilograms alleged to have been purchased by the Respondent. This brings us to the issue whether the Respondent purchased any cashewnuts on credit. In his evidence during trial, the Respondent conceded to have received from the Appellant shs.53,710,000/- to purchases cashewnuts. He however claimed that he purchase 100,000 Kilograms valued at Shs.59,810,929/= [see page 3 of typed proceedings]. However, in paragraph 6 of the Plaint, the Plaintiff claimed to have purchased 104,001 Kilograms worth the same amount of money. Be that as it may, and even overlooking the two different amount stated to have been purchased, this court has found that there was no proof offered by the Respondent on the amount he purchased, be it 100,000 kg or 104,001 kg. The Respondent is claiming that the value of the cashewnuts collected or purchased and the value of the cashewnuts delivered to the Appellant after allowing for "shrinkages" ie 95,418kg which amounts to "*shs.6,100,079, is the amount "which the farmers are demanding from the Plaintiff (Agent)*". In other words the amount of cashewnuts allegedly purchased by the Respondent on credit, can only be ascertained mathematically, by deducting the value of the cashewnuts delivered and the value of the cashewnuts purchased. First, I have already found that there was no proof

of the amount of the cashewnuts purchased by the Respondent. Even assuming that the amount which was delivered to the Appellant is 95,418 kg as alleged by the Respondent but disputed by the respondent on the basis of the weight established after weighing the delivered bags, it would not be possible to establish mathematically that the Respondent purchased cashewnuts worth shs.6,100,079/= on credit. Secondly since the Respondent did not produce any record of the cashewnuts purchased from each farmer and according to the weight of cashewnuts so purchased, and the amount paid for each purchase, there was no reliable evidence that the Respondent purchased any cashewnuts on credit. In dealing with this subject, the trial magistrate stated in the 6th paragraph of page 4 of the typed judgement.

> *"It is claimed plaintiff brought (sic) cashewnuts on credit. It was possible and not a crime because that was a transaction continued because the farmers had already been paid at lotal 53,000,000/= and in that way they had no reason to doubt the plaintiff's claim would be paid later. The Plaintiff cannot be blamed for buying or credit because as evidence shows he was supervised and directed by the Company's*

supervised and experienced cashewnuts procure PW2 one Patrick Matota".

The trial Magistrate strayed into the issue whether the Respondent should be blamed for purchasing cashwenuts on credit, before first establishing whether the Respondent had proved that he had purchased any cahsewnuts on credit. The Appellant on the other hand, dealt with the issue on the bais of whether the Respondent was authorized to purchase on credit.

The Appellants advocate submitted that the Respondent had no such authority. He relied on the provisions of section 163 of the Law of Contract Act [Cap 345 RE 2002] which provides that, *"an agent is bound to conduct the business of his principal according to the directions given by the principal or, in the absence of any such directions, according to the custom which prevails in doing business of the some kid at the place where the agent conducts such business....."*. The Appellant relied also on the evidence of DW2 that the agent was not so authorized and also relied on the admission by the respondent when he was cross examined by the Appellants advocate, Mr. 2. MAFTAH. He stated that:

"I had no instructions to get cashewnuts on credit but such instruction were there and were given by the cashier".

The cashier referred to by the Respondent, is none other than PATRIC ALFONCE MTOTA, who gave evidence for the Respondent as PW2. Upon cross examination by the Appellants advocate, PW 2 stated:

"..... and I authorized him to buy Korosho on credit and the Korosho Ltd will pay".

On the evidence of PW2 which was not contradicted, it may be inferred that although the principal may not have directly authorized the Respondent to purchase cashewnuts on credit, as stated by DW 2, for some unexplained reason, the Respondent was authorized by PW 2 who was an officer of the Appellant supervising the Respondents. At any rate there was no direct evidence that the Appellant gave directions to the Respondent not to purchase cashwenuts on credit, and apart from mere ascertations by the Appellant that it was not lawful or allowed by the Government to purchase cashewnuts or credit, there was no evidence adduced by the Appellant on the law or government directive, prohibiting purchase on credit

or evidence of custom in Kibiti area that cashewnuts were nat purchased on credit. To this extent, I would agree with the advocate for Respondent that the provisions of section 163 of Cap 345 RE 2002, cannot be called in aid of the Appellant. However, the crucial issue is whether, even if the Respondent was authorized to purchase cashewnuts on credit, he did in fact purchase any cashewnuts on credit. Throughout the evidence during trial, the Respondent did not offer any evidence to show how much cashewnuts he purchased on credit. In paragraph 11 of the plaint he claims, "..... *the difference between cashewnuts collected (sic) and the cashewnuts consigned owing to shrinkage.... Therefore the Plaintiff claims the deficit of shs.6,100,079/= which the farmers are demanding from the Plaintiff*".

The respondent did not offer any evidence to show how he sum of Shs.6,100,079 was arrived at. In dealing with this subject, the trial magistrate stated in paragraph 6 of page 4 of the typed judgment:

> " *It is claimed plaintiff brought cashewnuts on credit. It was possible and not a crime because that was a transaction continued because the farmers had already been paid a total 53,000,000/= and in that*

way they had no reason to doubt the plaintiffs claim would be paid later. The plaintiff cannot be blamed for buying on credit because as evidence shows he was supervised and directed by the Company's supervisor and experienced cashwenuts procure PW 2 and Patric Moteta...."

With respect, the issue was not whether it was possible that the Respondent purchased cashewnuts on credit but whether there was evidence to show that he purchased cashwenuts on credit. The issue of whether or not the Respondent was to be blamed, would only arise after there has been evidence that he purchased or credit. There was no such evidence except for the mathematical calculation shown in paragraph 11 of the plaint based on the difference between cashewnuts delivered. The volume and price per Kilograms of the cashewnuts purchased on credit, was not offered. Infact, there was no evidence offered by the Respondent accounting for the expenditure of the Shs.53,000,000 provided by the Appellant, for which the trial Magistrate could have found that the Respondent "*had already paid a total 53,000,000/=....*".

Although the Respondent was claiming the sum of Shs.6,100,079/= for the cashewnuts allegedly purchased on

credit, in his judgement at the bottom of page 4, the trial Magistrate stated:

> *"Cash 6,000,000/= for cashewnuts brought on credit which would be paid to the various farmer who have not been paid todate by plaintiff who was the agent of the Principal the Korosho Tanzania Ltd".*

From the above finding, it is not clear if the Respondent was entitled to shs.6,100,079/= as he claimed or to shs.6,000,000/- as found by the trial magistrate. What is clear however is that there is no evidence whatsoever to show the amount and value of the cashwenuts purchased on credit. The trial Magistrate was therefore wrong to find that the Respondent had purchased cashwenuts on credit without there being any evidence to prove it.

There is another issue relating to this claim which was not dealt with during trial or argued by the parties. The issue is the law governing contracts entered into by the agent on behalf of the Principal. The Respondent claims to have purchased cashewnuts on credit and it is claimed that those who sold the cashewnuts to the Respondent have not been paid and are claiming to be paid by the Respondent. Section 182 of the Law

of Contract Act, [Cap 345 RE 2002] which are the same provisions which applied when the transactions leading to this appeal took place, state:

> *"18- (1) In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them".*

(2) A contract referred to in subsection (1) shall be presumed to exist in the following cases –

(a) Where the contract is made by the agent for the sale or purchase of goods for a merchant resident abroad;
(b) Where the agent does not disclose the name of the principal,
(c) Where the principal, though disclose abroad cannot be sued.

The general principle of law of agency is therefore that the *"agent cannot personally enforce contracts entered into by him on behalf of the principal"*, unless third contracts fall within there categories specified in paragraphs (a) (b) and (c)

of subsection (2) of section 182 quoted above. The purchase of cashewnuts on credit by as alleged the respondent who was the agent of the Appellant, was a contract made between the Respondent and the alleged but undisclosed farmers. The Respondents claim in this suit is to be paid the sums of money the Respondent is allegedly indebted to the farmers who sold the cashewnuts to him on credit. The Respondents claim in this suit is to enforce the contract which he entered into with the alleged farmers on behalf of the Appellant, the principal. The respondent is therefore prohibited by law, to enforce the contract he entered into with the alleged farmers to purchase cashenuts on credit which he did on behalf of the Principal, unless the Respondent can show that, the contract falls into any of the three categories. Clearly the contract was not for "*sale or purchase of goods for* a .... *Rendent abroad*" to fall within paragraph (a) and the Principal is not one who " cannot be sued" to fall within paragraph (c), all of subsection (2) of section 182 of Cap 345. There is no evidence that the Respondent did not disclose the principal to the farmers to fall into the category of paragraph (b) of the same subsection. On the contrary, it was in evidence that the Respondent was appointed by a letter which also acted as an introductory letter that he was appointed as the agent of the Appellant. The letter which is attached to the Plaint identifies, KOROSHO T. LTD as the principal who appointed the Respondent "*to procure*

cashewnuts on our behalf from buying post RUFIJI as from 15/11/99 to 31/12/99". PW 2 also testified in cross examination that he authorized the Respondent to buy cashwenuts on credit "*and the Korosho Ltd will pay*".

On the evidence adduced, the Respondent was known as the agent of the Appellant and the Appellant was known as the Respondents Principal in the procurement of cashewnuts in Rufiji during the material time. The provisions of section (2) subsection (b) of section 182 of Cap . 345 RE 2002, do not entitle the Respondent to enforce the contract he entered into with the farmers alleged to have sold cashewnuts to him on credit. Not only that the Respondent did not prove that he purchased cashewnuts on credit but also that in law, he is not entitled to enforce the contract he entered into with farmers on behalf of the Appellant, to purchase cashewnuts on credit. The claim of Tshs.6,100,079 or 6,000,000/= as found and awarded by the trial magistrate as the value of the cashewnuts purchased from farmers a credit was incompetent and should have been either struck out for being incompetent or dismissed for want of proof.

Let us now proceed to ground No. 2, which alleges that, "*the learned Magistrate erred in law and in fact in holding that the plaintiff is entitled to both a salary and commission*". The

Appellants advocate submitted that, the Respondents against the Appellant, is a commission of shs.20/= on every Kg. bought of cashewnuts. He contended that the Respondent never claimed a salary but that, it was the Appellant who claimed that the Respondent was appointed as an agent to procure cashwenuts on monthly salary. He submitted that the trial Magistrate ought to have found whether the Respondent was entitled to either a salary or commission, but it could not be both. The Appellants advocate further contended that in paragraph 2 of the Respondents Reply to the Written Statement of Defence, he "admits the question of shs.20/= commission was not put in writing and that as he could not work free of charge, he was therefore entitled to commission". The Appellants advocate submitted that this reasoning is wrong. He referred to the evidence adduced on behalf of the Appellant that the Respondent was appointed as a tempory agent to buy cashewnuts on monthly wages of shs.200,000/- for a working month. He argued that if all (agents) were employed on monthly basis including PW 2 PATRIC MATOTA, it is unlikely that the respondent could be employed on terms different from the others. He further submitted that the finding that the Respondent was entitled to both, is evidence that the Magistrate failed to pay attention to the evidence adduced by both sides and the finding is bad in law.

In reply to the submissions on the 2nd ground the Respondents advocate contended that, "*the Respondent entitled to shs.200,000/- salary per month for the period he has been in the contract. This is not disputed by the Appellant*". He however went on to argue that, "*The commission is quite different from salary therefore the claim for the commission of 20/= per Kilogram brought stands*". He contended that the Respondent and PW2 were employed on different terms. He concluded that "*Both are applicable salary and commission can be paid to the individual depends on the kind of transaction and contract*".

The issue in the 2nd ground of appeal is whether the Respondent was entitled to both a monthly salary of Tshs.200,000/- and a commission at the rate of shs.20/- per kilogram of cashewnuts purchased. On this point, the trial magistrate relied on the case of THABIT NGARA VS REGIONAL FISHERIES OFFICER [1973] LRT No.24 that "*workers including government employees have a right to their wages and not a mere privilege*". He also strayed into Article 23 (2) of the Constitution of Tanzania to buttress his finding on the entitlement to a just remuneration. However, the issue involved was not whether the Respondent was or was not entitled to wages or pray, but rather, what kind of pay the Respondent was entitled to, a salary or a commission?.

The magistrate decided to grant both the salary of 200,000/- per month from 15/11/99 – 31/12/99 and a commission at shs.20/- per kilogram. He gave no reasons for the decision, apart from the legal argument based on entitlement to just wages, which was not an issue.

In the claims set out in the plaint, specifically paragraphs 10 and 11 of the Plaint, the Respondent did not claim any salary from the Appellant. The sole claim made by the Respondent in relation to remuneration for his work as an agent is for a commission of Shs.2,080,020/=, calculated at the rate of shs.20/= per Kg for the 104,001 kg he alleged to have collected. The trial magistrate was therefore wrong in law, to grant the Respondent both the commission which he claimed and the salary which he did not claim. I agree with the learned advocate for the Appellant that the trial Magistrate had to determine whether the Respondent was entitled to the monthly salary of shs.200,000/- per working month as alleged by appellant, or to a commission or the rate of shs.20/- per too kg for 104,001 kg, as claimed by the respondent, but not both.

Apart from the fact that the Respondent did not claim both a salary and commission, there was no evidence whatsoever that he was entitled to both the salary and

commission. There is no doubt that a "*commission is quite different from salary*", as argued by the Respondent's advocate. However, whether or not the Respondent was entitled to both, depends on the evidence adduced and not on the difference between the two types of remuneration. Also, the respondent cannot be entitled to both payments on the basis that both can be paid to an individual, depending on the kind of transaction, as argued by the Respondents advocate. There must be evidence that in the kind of agency the Respondent and the Appellant entered into, both a salary and a commission was payable. There was no such evidence. The evidence adduced on behalf of the Appellant by DW 2, was to the effect that the Respondent was engaged on a salary of shs.200,000/- for every 30 days of work. On the other hand, the Respondent claimed that he was engaged on a commission at the rate of shs.20/= per kg of cashwenuts purchased. He claimed to have purchased 104,001 kg and therefore claimed a commission of shs.2,080,020/=. We have demonstrated earlier on that the Respondent failed to prove that he purchased 104,001 kg of cashewnuts or any other specific quantity of chaswhenuts. The delivery notes prepared by the Respondent and which accompanied the cashewnuts delivered to the Appellants office at Kipawa in Dar es salaam, state the quantity of cahswnuts delivered in "bags", without specifying the weight. The weight of the bags as found by the Appellant after

weighing his bags, which is disputed by the Respondent was 92,911 kg of cashewnuts. On the other hand, the weight alleged by the Respondent is 95,418 kg. Since the Respondent claims to have purchased 104,001 kg, he has the duty to prove the fact on a balance of probability. A mere ascertain by the Respondent is not sufficient to prove that he purchased 104,001 kg of cashewnuts. In the circumstances, even if it is assumed that he was entitled to a commission and not to a salary, a fact which is disputed by the Appellant, the Respondent failed to prove that he was entitled to a commission of shs.2,080,020, as he did not prove that he purchased 104,001 kg, on which the sum claimed as a commission, is based. What then was the remuneration to which the Respondent was entitled? CHITTY ON CONTRACTS, 23rd Edition paragraphs 103, which deals with the subject of "Right to remuneration", states:

> *"It is the duty of the Principal to pay his agent the commission or other remuneration agreed upon. The agreement may be express or implied. When there is an express agreement the right to remuneration depends on the terms of the contract.....*

There is an implied agreement whenever a person is employed to act as agent under circumstances which raise the presumption that he would, to the knowledge of the principal, have expected to be paid. The conditions on which it is payable will depend on the circumstances. If there is a custom or usage of the particular trade regulating the payment of remuneration, there a presumption, in the absence of any express agreement to the contrary, that the parties contracted for the payment of the remuneration in accordance with the custom or usage. But if there is no proof of such custom and no express agreement, then a reasonable remuneration is payable. In estimating what is reasonable remuneration evidence of the bargaing between the parties is admissible as showing the value put upon the agents services by the parties".

I entirely agree with the guiding principles on the remuneration of agents, as stipulated in the above quoted

passage. In the present case the kind of remuneration whether a salary or a commission is disputed. But there is no dispute from either party that the agent was entitled to pay. It is not possible on the evidence on record, to state that there was an express agreement on the amount to be paid. The Appellant claims the payment was a Salary of Shs.200,000 per 30 days of working while the Respondent claims an commission of over two million shillings. There was evidence from DW2 that all the agents he engaged including PW2, his own officer was paid a salary. It is not however in evidence that this was a custom applicable to pay agents who purchased cashewnuts in Rufiji on behalf of their principals. The Respondent on the other hand, did not offer any evidence to prove that there was a custom of paying agents by commissions. In the circumstances, in the absence of any proof of custom and also in the absence of express agreement, in accordance with the guiding principles quoted above, " *a reasonable remuneration is payable*". There is no evidence that there was any bargaining of remuneration which can be used as a basis for assessing "*a reasonable remuneration*".

Since it was in evidence by DW 1 and DW2 that the Respondent was to be paid a salary of shs.200,000/- and that even the supervisor of the Respondent was paid a salary, I find that the amount of shs.554,000/= which the Appellant admitted

to have been payable to the Respondent for the 53 day he worked the agent of the Appellant as being *"reasonable remuneration"*.

The 5th ground of appeal is that the trial *"Magisrate has erred in law and fact in not resolving all the issues framed in the case"*. In the written submissions, the Appellants advocate complained about the Magistrates failure to resolve the appellants counter - claim. In the written statement of Defence the Appellant had made a counter claim in paragraph 6 as follows:

> *"6. By way of counter claim, the defendant claims from the Plaintiff the sum of Shillings 556,000/= being balance of money ought to be returned to the Defendant by the Plaintiff, and had not been returned by the plaintiff to the Defendant"*

According to the written statement of Defence particularly paragraph 3 and 9 thereof, the amount in the counter claim derived from the value of 92,911kg of cashew nuts which the Appellant admitted to have received from the Respondent valued at shs.52,800,000/-. This sum was deducted from the sum of shs.53,710,000 which was not disputed to have

been given to the Respondent for the purchase of cashewnuts, leaving a balance of shs.910,000/- which the Respondent had not refunded the Appellant. The sum of shs.354,000/- which the Appellant conceded was payable as wages to the Respondent was deducted from the sum of Sh.910,000/-, leaving the balance of shs.556,000/- which is the subject of the Counter - claim. The 4th framed issue, was "*whether the Defendant was entitled to a counter claim*". It is not in disputed that in the whole judgment, the trial magistrate did not refer to or resolve the 4th issue which was framed. The Respondent advocate merely asserted without an substantiation, that;

> "*It is our considered view that the learned magistrate determined the matter in accordance with the issues*".

As I have stated in the whole judgment, the trial magistrate did not touch on the issue relating to the Appellants "*counter-claim*". On the evidence adduced, the amount of the cashwenuts delivered by the Respondent to the Appellant was in dispute. The Respondent claimed to have delivered 95,418 kg worth shs.59,810,929/- while the Appellant after weighing the bags of cashewnuts delivered, claims to have received 92,911 kg. work shs.52,800,000/-. If there was any balance on the sum of shs.53,710,000/-, logic would dictate

that the fact could only be established after the Respondent had submitted an account as to how much cashewnuts he purchased and how much money out of the shs.53,710,000/- he paid out. As I stated earlier on in this judgment, the Respondent did not offer any evidence to show the quantity of the cashwenuts he purchased and paid for in cash, and how much he obtained in credit. The Appellant on the other hand relied on the monetary value of the disputed amount of cashewnuts delivered and not the value of the money given to purchased cashwenut Section 165 of this Law of Contract Act Cap, 345 RE 2002, provides that; "*An agent is bound to render proper accounts to his principal on demand*". Since the amount not spent by the Respondent to purchase cashwenuts can only correctly be established after an account has been rendered, the Appellant should first have demanded from the Respondent an account, in order to establish his counter claim. Although it is true that the trial Magistrate did not deal with the issue of counter claim which was framed as issue no. 4, which was wrong, there is no evidence upon which this court can decide the matter either way.

The 6th ground of appeal is that the "*magistrate has erred in law and in fact in holding that the Plaintiff paid storage charges without any evidence*". In his submissions, the Appellants advocate referred to the respondents claim to be

refunded the storage charges at shs.10/= per kg. he referred to the evidence of DW1 PETER MAKAKALA that as a matter of practice, storage is done in union Godowns and the crops stored are not released until payment has been made to the Union. He contended that the Respondent could not have been allowed to take the cashewnuts unless payment had been made and as the Respondent had not accounted for shs.910,000/- out of the shs.53,710,850/- and had not called any witness who stored the cashewnuts to support his claim, the claim was not proved.

The Respondents advocate contended that the Respondent is entitled to recover the storage charges, because it is obvious that the appellant did nto pay storage charges to the union and if they did, there was no receipt produced to prove it. He contended further that there was dispute that the cashwenuts were bought and stored before being delivered to the Appellants godown in Dar es salaam. He contended further that "*through understanding and cooperation the keeper may allow the crops to be taken out of the godown and this has been the case*". The trial Magistrate in dealing with the storage charges stated at page 4 in the 3rd paragraph, as fallows:

"It is also as clear as crystal that the bought 95,418 kilograms of cashewnuts had to be stored in a store a watchman had to be employed to guide (sic over attempted theft before transportation. As agent lawful appointed (sic) by defendant had all rights to look for a Godown to store the Cashewnuts which lasting (sic) for none cashewnut...."

The issue is not whether the Respondent had any right to look for a godown or to store the cashewnuts. The issue is whether the Respondent did in fact store the cashewnuts and incurred expenses of shs.10/- per kilogram of cashewnuts stored, to the tune of 104,001 kilogrames, making the total cash of shs.1,040,010, as claimed in paragraph 10 (b) of the plaint. First, as this court has found earlier on in this judgment, the Respondent failed to prove that he purchased 1,040,010 kg of cashewnuts. Secondly, the Respondent did not produce any evidence to show that he had paid any storage charges amounting to shs.1,040,010/- or had received any demand note or invoice from the keeper of the cashewnuts. In his testimony at page 3 of the proceeding the Respondent merely stated:

"Also claim 1,040,000/- storage charges in Godwn and each kilogram was 10/= and cashier Patrick saw"

I have carefully scrutinized the evidence of PATRICK MTOTA as it appears at pages 4 to 5 of the typed proceedings, but I have not found anything he said about the storage charges. His only evidence on this subject is to the effect that:

"... Cashewnuts was stored in a cooperative society Godown and it was true Abdallah Kigumi was employed by Korosho Ltd...."

This evidence does not touch on the storage charges or the amount of cashewnuts stored or whether the Respondent made any payments for the storage or even whether the Cooperative society made any claim for storage charges. As stated earlier on, if the Respondent contracted with the Cooperative Society on behalf of the Appellant to store cashewnuts, section 182 of the Law of contract Act, prohibits the Respondent as a agent to sue for the storage charges. If however the Respondent did store the cashewnuts and paid for the storage, he could under sections 174 or section 175 of Cap 345 be entitled to be indentified. However, as stated

earlier an, there was no evidence to prove that the Respondent stored the amount of cashewnuts claimed or any other specific amount or that he incurred any expenses for which he is entitled to be indentified by the Appellant for storing cashewnuts. I therefore agree with the Appellants advocate that the trial Magistrate granted the claim without any evidence to prove it.

The 7th and last ground of appeal which alleges that the *"Magistrate has erred in law and fact in failing to pay attention on evidence adduced by the witnesses"*, was not submitted upon by either advocate. The ground was therefore either abandoned or subsumed in the submissions relating to be ground No.6. in the circumstances, it presumed to have been abandoned.

For the reasons given above in the judgment, I allow the appeal on grounds Nos 1,2,3, 4th and 6th grounds.

The 5th ground is partly allowed to the extent that the trial Magistrate was in error not to have determined the issue of counter claim but there is no evidence upon which this court can determine whether or not the Appellant is thereby entitled to the counter claim. In the final analyisis and to the extent stated above, the appeal is allowed and the judgment order

and decree of trial magistrate are set aside. The Appellant will have the costs in this appeal. It is ordered accordingly.

J. I. Mlay,

JUDGE

Dated and delivered in on presence of the Respondent in person and Mr. Mtanga Advocate for the Appellant who appeared in the course of reading this judgment, this 28th day of May 2009.

The right of Appeal as explained.

J. I. Mlay,

JUDGE

28/5/2009