



**Midland Hotel v Kioko (Civil Appeal 183 of 2022)
[2024] KEHC 9709 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9709 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 183 OF 2022
PN GICHOHI, J
JULY 29, 2024**

BETWEEN

MIDLAND HOTEL APPELLANT

AND

THOMAS KIOKO RESPONDENT

(Being an appeal from the judgment of Hon. E. Oboge(Adjudicator) delivered on 25th of November 2022 in Nakuru Small Claims Court Case No. E491 of 2022)

JUDGMENT

1. In this appeal, Thomas Kioko is herein referred to as the Respondent while Midland Hotel is referred to as the Appellant. The background is that before the Small Claims Court and vide a Statement of Claim dated 23/09/2022 Small Claims Court Case No. E491 of 2022, the Respondent herein sought judgment against the Appellant for:-
 - a. Kshs. 66,000/=.
 - b. Costs of the Claim.
 - c. Any other appropriate relief.
2. He pleaded that Appellant herein verbally contracted him to supply it with 1,000 Kg of Irish potatoes at a consideration of Kshs. 66,000/= . The respondent did supply the Respondent with the 1,000 Kg on 27/05/2019 but the Appellant failed, refused and/or neglected to pay him the agreed consideration despite several demands and visits to the to the Appellant’s office seeking the said payment.
3. When served, the Appellant filed his response dated 18/10/2022 stating that it did not owe the Respondent herein any money. The Respondent denied having received the said goods. That the Appellant requested the Respondent to provide it with the Local Purchase Order (LPO) to show there



was such supply of goods to the Appellant but the Respondent failed to do so but only supplied an extract from handwritten notes which were not from the Appellant.

4. The Appellant stated that according to its protocol, goods are only supplied after issuance of an LPO. That without it, one cannot claim to have supplied goods. The Appellant therefore stated that the Respondent herein could have colluded with rogue staff and make a claim that he had supplied the goods yet there was no documentation for the same.
5. After hearing the parties together with their submissions filed by their respective Advocates, the court found that the Respondent herein had his case on a balance of probability and therefore, his claim was allowed and as follows:-
 - a. Judgment is hereby entered in favour of the claimant for the sum of Kshs. 66,000/-.
 - b. The respondent shall pay the costs of the claim from the date of filing until payment in full.
 - c. The respondent shall pay interest on (a) and (b) from the date of judgment until payment in full.
6. Dissatisfied with the judgement and decree and the Appellant filed this appeal on the following grounds:-
 1. That the Adjudicator erred in law and in fact in shifting the burden of proof from the Claimant/Respondent to the Appellant /Respondent.
 2. That the Adjudicator erred in law and in fact in raising the Appellant /Respondent's burden of proof higher than that of the Claimant/Respondent.
 3. That the Adjudicator erred in law and in fact in lowering the Claimant/Respondent's burden of proof.
 4. That the Adjudicator erred in law and in fact in relying on documents that were not on record and neither were they served.
 5. That the Adjudicator erred in law and in fact in failing to take into consideration the oral testimony of the Appellant /Respondent's witness.
 6. That the Adjudicator erred in law and in fact in failing to interrogate the Claimant/ Respondent's evidentiary documents .
 7. That the Adjudicator erred in law and in fact in failing to apply the well -established principles of evidence.
7. The Appellant therefore prayed that the appeal be allowed, the remedies sought in the Claim dated 23/09/2022 be set aside. And the Appellant awarded the costs of the appeal.
8. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 12/01/2023.

Appellant's Submissions

9. In his submissions dated 06/10/2023, the Appellant's Counsel submitted that since it is an appellate court, it should " bear in mind that since it is an appellate court, it did not have the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. Therefore, the jurisdiction to review the evidence should be exercised with caution." On that argument, Counsel cited *Selle vs Associated Motor Boat Company Ltd*[1968] EA 123 .



10. Counsel therefore urged the Court to revisit the evidence tendered during examination in chief for purposes of ascertaining whether the testimony by the claimant warrants a full finding of liability i.e., 100% upon the Appellant.
11. On the issue of shifting the burden of proof from the Claimant/Respondent to the Appellant/Respondent, Counsel submitted that it was up to the Claimant/Respondent to prove his case but failed to do so and therefore, the court erred by shifting the burden on the Respondent/Appellant.
12. On this issue, Counsel relied on Section 107, 108 and 109 of the Evidence Act and further cited the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR where it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the Evidence Act provides the burden lies on that person who would fail if no evidence at all were given as either side.”

13. He submitted that the adjudicator confirmed that the Respondent/Claimant did not produce LPO to show that indeed he had conducted business with the Appellant and therefore, a copy of the Delivery Note produced by the Claimant/Respondent does not guarantee that one has conducted any sought of business with the Appellant.
14. Further, Counsel submitted that the documents relied upon by the Claimant/Respondent were not filed in court and were never served upon the Respondent /Appellant to allow him have a look at.
15. Counsel further submitted that the adjudicator failed to take into account the oral submissions made by the appellant witness with regards to the procedure normally followed in order for someone to be considered a supplier which process include the use of a local purchase order being the first document issued before supply is made but the Claimant/Respondent failed to produce the same to support his claim.
16. Counsel cited the case of Carolyne Indasi Mwononyo v Kenya Bus Service Ltd (2012) eKLR where the Court held:

“The Black Law Dictionary defines the term evidence as:

Any species of proof, or productive matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete object etc for the purpose of inducing belief in the minds of the court or jury as to their contention.

It is clear from the above definition that evidence can be by way of oral, documents or objects. I do find that the trial court erroneously dismissed the Appellant’s suit for no apparent reasons. The trial court’s suspicions on the injuries sustained by the Appellant blinded its objectivity and corrupted its mind

The oral evidence was sufficient to find in favour of the Appellant. There is no written rule that injuries suffered by a victim of a road traffic accident must be formed by documentary evidence by way of treatment notes.”



17. Counsel further submitted that the adjudicator failed in the interrogation of the Respondent's evidentiary documents and in the application of the principle of evidence in that he referred to previous invoices and not the current invoice in regard to the transaction claimed by the Claimant/Respondent. Counsel therefore, submitted that the Adjudicator failed to consider the facts pleaded and proved and further went beyond his duties. Counsel therefore urged this Court to allow this appeal and set aside the award of the trial court and dismiss the Claim with costs.

Respondent's Submissions

18. His submissions are dated 09/10/2023. In regard to burden of proof, Counsel for the Respondent submitted that although the burden of proof in civil cases initially rests with the Claimant, the burden may shift in the course of the trial depending on the evidence adduced by the claimant thus requiring the other party to produce evidence in rebuttal in the absence of which he may lose in his defence.
19. In support of this argument, Counsel placed reliance in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* Civil Appeal No. 297 of 2015 [2017] eKLR on the discharge of the legal and evidential burden.
20. Counsel submitted that having discharged his initial burden of proving the existence of an oral contract between him and the Respondent/Appellant and which was the basis upon which he supplied 1000kgs of potatoes, the Claimant /Respondent he produced an invoice which doubled up as delivery note duly stamped with the Respondent/Appellant's official rubber stamp and signed by the Appellant/Respondent's agent.
21. Counsel therefore submitted that as a consequence, the Claimant/ Respondent demonstrated that indeed, he supplied the 1000kgs of potatoes and therefore, he discharged his burden of proof and the evidentiary burden at that point therefore shifted to the Respondent/Appellant to produce evidence in rebuttal.
22. Counsel further submitted that the burden of proof was on Appellant/Respondent to adduce evidence to prove his allegation that the Claimant/Respondent could have colluded with rogue staff to obtain the stamped invoice cum delivery note which burden he did not discharge.
23. It was submitted that though the Appellant further alleged that in previous transactions between the Claimant/Respondent and the Respondent/Appellant the Claimant was supplied with an LPO to supply the Respondent/Appellant, he did not produce previous LPOs to support that particular allegation bearing in mind that it was not in dispute that there had been previous transactions between the parties for which the Respondent herein produced past invoices stamped and signed in a similar manner as the one produced for the unpaid transaction
24. It was Respondent's position that the Appellant's failure to adduce evidence in rebuttal is what cost him his defence contrary to his assertion that the court shifted the burden of proof from the Respondent/Claimant the Appellant.
25. In regard to Appellant's position that the adjudicator placed higher burden on him , Counsel further submitted that once the Respondent produced a delivery note for the delivery of 1000kgs of potatoes officially stamped by the Appellant and signed by his agent, it was on the balance of probabilities that he had delivered the said potatoes. That in the circumstances, it was not sufficient for the Appellant's witness to simply dismiss the delivery note and allege it to have been stamped through the collusion of the Claimant and rogue staff of the Appellant without adducing evidence to back that allegation.



26. Terming it a lie by the Appellant to avoid liability, Counsel submitted there was no evidence to back the testimony by the Appellant's witness that the delivery of 1000Kgs of potatoes to the Appellant was doubtful as the Appellant did not have a cold room or a store large enough to hold such a quantity.
27. In support of that line of argument, Counsel referred to the Appellant's list of documents attaching Midland Hotel purchase order register containing the Appellant's vendors details, quantities delivered, the store they were delivered to and by whom received. That further, entry No. 3 of the purchase analysis document attached by the Appellant clearly denotes the delivery of 1000 kgs of potatoes by the Respondent to the Appellant on the 27th of May 2019 at a total cost of Kshs 66,000.
28. It was the Respondent's submissions that in light of the above, a mere denial by the Appellant would not suffice without further evidence as to why it is denying the delivery of goods in question.
29. Urging the Court to find the Respondent's evidence not adequately challenged by the Appellant, counsel placed reliance in the Court of Appeal decision in *Mugunga General Stores ~vs -Pepco Distributors Limited (1987)KLR 150*, where Platt, Gachuhi and Apaloo JJA , held that:-
- “...a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without giving some.”
30. Regarding the issue that the trial court relied on documents that were neither on record nor served upon it, Counsel submitted that under Rule 31 of the Small Claims Courts Rules and Section 32 of the *Small Claims Court Act*, the Small Claims Court is not bound by strict rules of procedure or evidence.
31. In that regard, Counsel submitted that the court acted in exercise of its discretion under Section 32 by allowing invoices of previous transactions availed by the Respondent during the hearing and accepted into the record and the Appellant made aware of the same as credible material to prove conduct of parties in previous transactions similar to the issue the subject of the dispute before the said court.
32. While urging this Court not to interfere with that discretion, Counsel cited the decision in *Mboqo & Another v Shah [1968]* cited with approval in *Changa v Satari (Civil Appeal E018 of 2022) [2023] KEHC 19129 (KLR) (27 June 2023) (Judgment)*
- “...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”
33. On the issue that the adjudicator failed to take into consideration the oral testimony of the Appellant's witness, Counsel submitted that it was the Appellant's witness oral testimony that brought about the fact as to the existence of an LPO and a procedure of supply. That in the circumstances, these were matters that were within the special knowledge of the Appellant's witness and therefore, it was incumbent upon him to prove the same under Section 112 of the *Evidence Act* which provides that;
- “Proof of special knowledge in civil proceedings in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”



34. Counsel further submitted that once the Respondent introduced documentary evidence in the form of previous invoices as proof that no LPOs were involved in any of his transactions with the Appellant, that fact could only be disproved by documentary evidence and not by oral evidence as provided for under Section 97 and 98 of the *Evidence Act*, that excludes oral evidence in matters proved by way of a written document.
35. On the issue as to whether the court failed to apply well established principles of evidence, Counsel submitted that in its judgment, the trial court relied on section 107, 108 and 109 of the *Evidence Act* which is a clear indicator that it applied the rules of evidence applicable in such a case in terms of the legal burden and the evidentiary burden of proof.
36. Counsel therefore urged the Court not to allow the Appellant run away from its obligation under an oral agreement by merely denying its existence and particularly where the Respondent has availed documentary evidence to support his claim. Lastly, this Court was urged to dismiss the instant Appeal with costs to the Respondent.

Analysis and Determination

37. Whereas it is a fact that the first appellate court should give a fresh look at the evidence adduced before the trial court bearing in mind that it had no benefit of having seen or hearing the witnesses as they testified as was held in *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123, the parties must also bear in mind the provisions of Section 38 (1) of the Small Claims Court that:-

“A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.”

38. The grounds of appeal herein and the submissions thereto are both on points of law and facts making them outside the provisions of Section 38 of the Act. The question that arises then is what is a point of law and a point of fact? The Blacks’ Law Dictionary, Tenth Edition at page 1345 defines the term point of law as “A discreet legal proposition at issue in a case.” Further, a point of fact is defined as “A discreet factual proposition at issue in a case.”

39. While dealing with provisions of Section 56 (2) of the *Tax Procedures Act* (TPA) which provided that an appeal to the High Court or to the Court of Appeal would be on a question of law only, Majanja J (as he then was) had this to say in the case of *Commissioner of Domestic Taxes v W. E. C. Lines (K) Limited (Tax Appeal E084 of 2020)* [2022] KEHC 57 (KLR) (Commercial and Tax) (31 January 2022) (Judgment);

“An appeal limited to matters of law does not permit the appellate court to substitute the Tribunal’s decision with its own conclusions based on its own analysis and appreciation of the facts.

What amounts to matters of law are the interpretation or construction of *the Constitution*, statute or regulations made or their application to the sets of facts established by the trial court. The court’s engagement with the facts is limited to background and context and to satisfy itself, when the issue was raised, whether the conclusions of the trial court were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them. The court cannot be drawn into considerations of the credibility of witnesses or which witnesses were more believable than others; by law that was the province of the trial court.



When a court that is limited to dealing with matters of law had a concern regarding the issues that dealt on facts, then the court would also be limited to re-evaluation of the lower court's conclusions and if the conclusions were erroneous and were not supported by evidence and the law, then the matter becomes a point of law.”

40. In this case, the basic issue is whether there was an oral agreement between the Appellant and the Respondent for the Respondent to supply the 1,000kgs potatoes and that they were duly supplied but the Appellant failed to pay for the same.

41. In order to deal with that issue, then Court is limited to re- evaluation of the lower court conclusions and see if the said conclusions were erroneous and not supported by evidence. In this Court's view, that a point of law and by that view, this court is guided by the Court of Appeal decision in *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013] eKLR where Court had this to say;

“ 31. We wish to state on the onset that in determining the three or so legal issues that arise in this appeal, some of the issues may cut across the spectrum of the factual evidence especially on the conclusions arrived at after the analysis of the primary evidence by the Election Court. We are nonetheless conscious that our jurisdiction is only limited to determination of points of law and thus, our concern regarding the issues that dealt on facts will be limited to our duty of re- evaluation of the Judge's conclusions; and if the conclusions are erroneous; that is, not supported by evidence and the law; the matter becomes a point of law. As it was held in the case of *Mwangi v Wambugu*, [1984] KLR 453:

A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

42. From the record, the Respondent's prove of the transaction was testimony was that he got a phone call from the Appellant/and or agent requesting him to supply to the Appellant 1000kgs Irish potatoes on credits and he did supply on 27/05/2019 and was issued with a Delivery Note which he relied on as CExh. 1.

43. That document is dully stamped and signed for the Appellant by its agent. It shows the Respondent as the vendor and the goods as the said 1,000kgs potatoes which are duly received by the Appellant's agent and who appended his signature.

44. It was the Respondent's testimony in cross examination that this was the first time that the Appellant had requested him to supply 1000kgs to it otherwise the Appellant used to request him for lesser amounts in kilograms.

45. He explained that he did not know how the Appellant operated but all he knew was that the Appellant used to give him a call requesting for a specific amount of potatoes in Kilograms and he would comply and would be paid in the Appellant's accounts department but was never issued with an LPO. Being



asked whether the Appellant had a store with capacity to hold 1000Kgs, he responded:- I went to that store. I confirm the store is spacious enough to accommodate 1,000 kgs of potatoes.

46. In his testimony, Cheruiyot Kerich (DW1) of the IT Department He termed the delivery note suspicious but confirmed that the Respondent used to supply Irish potatoes to the Appellant and could be paid after following the procedures. He maintained that all suppliers had to be issued with an LPO but he did not have any for previous transactions and said he would avail them given time. He also confirmed that he was not a Procurement Officer.
47. While agreeing with the Claimant on existence of the of an oral contract between the Respondent and the Appellant, the trial court had this to say in its judgement;

“The Respondent’s counsel submitted that it was the duty of the complainant to prove that he received orders through LPOs and that demanding that the Respondent should provide the same is an abuse of procedure. This is a civil matter and the nature of proof is on a balance of probability. The Claimant testified that he was never given any LPO for any orders , but rather the hotel through its various staff would call him to supply potatoes which he did. The respondent brought about the fact of an LPO and the procedure of supply, the burden therefore shifted to it to demonstrate how the LPO looks like if at all which he failed to do...Once the claimant denied the existence of an LPO, then the burden shifted to the Respondent to demonstrate its existence having admitted that Claimant as one of the suppliers. This was not done...”

48. Indeed, regarding who bears the burden of proof, Section 107, 109 and 112 of the Evidence Act differentiate the legal and evidential burden of proof and the Court of Appeal had this to say on two in Mbuthia Macharia (supra):-

“(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”

49. The shifting of the evidential burden of proof was settled by the Supreme Court in Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR that:-

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and



it behoves the Respondent to adduce evidence to prove compliance with the law...”

50. Regarding the procedures used by the trial court of allowing the document to be used in evidence when not served, the Small Court is mandated under Section 3 (3) of the Act to adopt such procedures as it may deem appropriate so as to ensure:-
- (a) the timely disposal of all proceedings before the Court using the least expensive method;
 - (b) equal opportunity to access judicial services under this Act;
 - (c) fairness of process; and
 - (d) simplicity of procedure.
51. Further, Section 17 of the Act mandates the Court to have control of its own procedure in the determination of claims before it but having regard to the principles of natural justice. Further still, section 32 of the Act provides that:-
- (1) The Court shall not be bound wholly by the Rules of evidence. Exclusion of strict Rules of evidence.
 - (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
 - (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
 - (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
 - (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
52. There is nothing to demonstrate contravention of those provisions in the manner the trial court handled the evidence before it and admitted material in evidence.
53. There is no evidence that the Appellant was denied a chance to avail the documents to support that LPOs were always issued to the Respondent and or to call witnesses to that effect or to demonstrate forgery of the Delivery Note.
54. In dismissing the Appellant’s allegation of forgery of the Delivery Note, the trial court held that the Appellant failed to place before the court anything to demonstrate any action for those allegations. The trial court further stated; “Having the advantage of seeing the demeanour of both witnesses and that of the Respondent was riddled with untruths.”
55. It is that court that heard and saw witnesses testify unlike this Court. Having analysed the evidence before the trial court, there is no reason to interfere with the trial court’s exercise of its discretion.
56. In the circumstances, this Court is satisfied that the trial court was well guided by the law and facts before it while arriving at the impugned decision. In conclusion: -
1. The appeal is hereby dismissed.



2. The Appellant to bear the costs of this appeal.

DATED, SIGNED AND DELIVERED NAKURU THIS 29TH DAY OF JULY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. N/A for the Appellant

Mr. Nguto for Respondent

Ruto, Court Assistant

