



**Kamau v Safari Cleaners Limited (Civil Appeal E618 of 2021)
[2024] KEHC 15000 (KLR) (Civ) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15000 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E618 OF 2021**

TW OUYA, J

NOVEMBER 28, 2024

BETWEEN

DAN KANYA KAMAU APPELLANT

AND

SAFARI CLEANERS LIMITED RESPONDENT

*(Being an appeal from the judgment of Ogonda, A.N., SRM.
delivered on 27.08.2021 in Nairobi CMCOMMSU No. 97 of 2020)*

JUDGMENT

Background

1. The subject of this appeal is the judgment delivered on 27.08.2021 in Nairobi CMCOMMSU No. 97 of 2020. The events leading up to the said judgment are that Dan Kanya Kamau (hereafter the Appellant) filed the suit in the lower court against Safari Cleaners Limited (hereafter the Respondent) by way of the plaint dated 20.02.2020 seeking the sum of Kshs. 452,096/- plus costs of the suit and interest thereon, arising from a claim for alleged breach of contract.
2. The Appellant averred that there existed between the parties herein a drycleaner-customer contractual relationship at all material times. That on the basis of the said relationship, the Appellant delivered his clothing items to the Respondent; namely four (4) suits and one (1) coat (the subject clothes) of designer quality, for purposes of dry cleaning.
3. The Appellant averred that upon his return to the Respondent's premises to collect the subject clothes, the same were not delivered to him, thereby giving rise to a gross breach of contract (allegedly) on the part of the Respondent, through the following particulars:

Particulars Of Breach



- a. Failing to deliver services as required
 - b. Failure to deliver the Plaintiffs clothes back to him on demand
4. It was pleaded in the plaint that as a result, the Appellant suffered substantial loss, hence the suit.
 5. The Respondent upon entering appearance, filed a statement of defence dated 15.07.2020 denying the key averments in the plaint and liability. More particularly, the Respondent whilst admitting to the existence of a contractual relationship between the parties at all material times and the delivery of the subject clothes by the Appellant to its premises on the material date, denied that the said clothes were of designer quality and put the Appellant to strict proof thereof.
 6. The Respondent further pleaded in its statement of defence that upon the Appellant delivering the subject clothes on 15.07.2019, a fire broke out later on the same day at Utumishi Co-op House located on Mamlaka Road in Nairobi, and in so doing, burned down the Respondent's laundry shop which was situated on the ground floor of the said building, consequently destroying all goods and items therein including the subject clothes. That soon thereafter, the Appellant was informed of the unfortunate incident and offered compensation to the tune of Kshs. 27,000/- being 10 times the cost of the laundry services, which offer the Appellant declined.
 7. The Respondent therefore denied the particulars of breach of contract, averring that the loss of the subject clothes was the result of events beyond its control.
 8. The suit proceeded to full hearing with the Appellant's testimony, with the Respondent also calling one (1) witness. Upon close of submissions, the trial court allowed the Appellant's suit but only awarded the abovementioned sum of Kshs. 27,000/- upon finding that the claim sought for the sum of Kshs. 452,096/- had not been proved. The Appellant was similarly awarded costs of the suit.

The Substratum Of The Appeal

9. Being dissatisfied with the aforementioned award, the Appellant preferred the present appeal through the memorandum of appeal dated 27.09.2021 which is based on the following grounds:
 - I. That the Learned Magistrate erred in fact and in law in discounting and disbelieving the oral and documentary evidence given on behalf of the Plaintiff on the value of the lost/destroyed items.
 - II. That the Learned Magistrate erred in law and fact in the analysis of the evidence given and in doing so reached the wrong conclusion. (sic)
10. The Appellant consequently seeks the following orders:
 - I. The appeal be allowed with costs.
 - II. Judgement be entered for the Appellant against the Respondent for Kshs. 452,096/- plus interest at court rates.
 - III. Costs of the Appeal and of C.M.C.C No. 97 of 2020. (sic)



Parties' Submissions On The Appeal

11. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on *Ephantus Mwangi v Duncan Mwangi Wambugu* [1984] KECA 13 (KLR) where the Court of Appeal rendered itself thus:

“A member of an appellate court, is not bound to accept the learned judge’s findings of fact, if it appears either that, (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or, (b) if the impression based on the demeanor of a witness, is inconsistent with the evidence in the case generally.”

12. Counsel then proceeded to argue that the trial court erred in finding that the Appellant was to be awarded the sum of Kshs. 27,000/- and yet sufficient evidence had been tendered to support the pleaded sum of Kshs. 452,096/-. Counsel equally faulted the trial court for finding that the quotation tendered by the Appellant to support the above pleaded sum did not constitute sufficient evidence on the basis that it was not a receipt and that it was obtained following the fire incident. It is counsel’s submission that the said quotation constituted the only relevant evidence which could be obtained at the time and therefore urged the court to disturb the trial court’s finding, upon considering the Black’s Law Dictionary, 9th Edition definition of what amounts to ‘standard of proof’ thus:

“the degree or level of proof demanded in a specific case in order for a party to succeed.”

13. It is ultimately the submission by counsel that the trial court placed a higher burden of proof upon the Appellant and hence the trial court award ought to be disturbed accordingly.
14. The Respondent naturally supported the trial court’s findings. Counsel for the Respondent anchored his submissions on the decisions in *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] KEHC 3782 (KLR) and *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) on the duty of a first appellate court. Counsel submitted that pursuant to the Respondent’s terms and conditions, it would compensate the affected party for the loss of any clothing items which were in its custody in the event of damage and loss, and that such compensation would be assessed on the basis of standard depreciating factors but would not exceed 10 times the amount chargeable for the cleaning services rendered. Counsel further submitted that in the present instance, following the unfortunate fire incident, the Respondent informed the Appellant of the same and offered compensation in the sum of Kshs. 27,000/- which constitutes 10 times the cost of the laundry services to be offered to the Appellant.
15. Counsel contended that the Appellant’s claim for the sum of Kshs. 452,096/- was solely based on the quotation dated 29.07.2019 and tendered at the trial, and hence the trial court acted correctly in finding that the said quotation did not constitute proof of payment for the subject clothes prior to the incident. On this note, counsel contended that the claim being in the nature of special damages, the onus fell on the Appellant to provide a receipt as proof of payment for the subject clothes, in order to support any claims sought in that regard. That in the absence of any such receipts, the trial court acted correctly in declining to grant the pleaded sum. In submitting so, counsel placed reliance on the decisions in *Herbert Hahn v Amrik Singh* [1985] KECA 68 (KLR) and *Douglas Odhiambo Apel & Emmanuel Omolo Khasino v Telkom Kenya Limited* [2014] KECA 868 (KLR) on the principles for consideration in awarding special damages; namely, that the said damages ought to be both specifically pleaded and strictly proved.



16. Counsel for the Respondent added that the quotation in any event constituted a proforma invoice which not only fails to correspond with a receipt but in no way supports the allegations that the Appellant purchased the subject clothes at the price indicated therein, in order to justify the sum sought in the pleadings. On those grounds, the court was urged to dismiss the appeal with costs, and to uphold the award made by the trial court.

Analysis And Determination

17. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and Anor v Associated Motor Boat Co Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.
18. The Court of Appeal in *Abok James Odera t/a J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR stated that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
19. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is noteworthy that the Appellant raised two (2) grounds of appeal primarily challenging the reasoning taken by the trial court in arriving at the award made. Consequently, the court will tackle the grounds of appeal contemporaneously.
20. Having earlier summed up the contents of the pleadings which were relied on by the parties in the suit, the court will proceed to restate the evidence tendered at the trial.
21. The Appellant who was PW1 adopted his signed witness statement filed on 24.02.2020 as part of his evidence-in-chief and produced his list and bundle of documents dated 20.02.2020 as P. Exhibits 1-4. He then proceeded to state that he delivered the subject clothes to the Respondent on 15.07.2019 but that later the following week, he received communication from a representative of the Respondent named Jeanette Muthoni, informing him that the said clothes had been completely burned in the fire incident. He stated that he subsequently forwarded receipts to the Respondent’s agents on 29.07.2019 only for them to revert with a discharge voucher for the sum of Kshs. 27,000/- which he rejected.
22. In cross-examination, the Appellant testified that he had severally delivered his clothing items to the Respondent for dry cleaning in the past. That when he delivered the subject clothes to the Respondent on the material date, he was issued with a receipt, indicating that the cost of cleaning was Kshs. 2,700/-. He further testified that upon being informed of the loss of the subject clothes, he accepted the explanation. It was his testimony that he acquired the subject clothes on 29.07.2020 at a cost of USD 3,850, but that he delivered the same to the Respondent on 15.07.2020. That the quotation dated 29.07.2020 (P. Exhibit 3) in respect of the said clothes constitutes evidence of payment by way of a receipt. He restated that following the fire incident, the Respondent offered him compensation to the tune of Kshs. 27,000/- which he declined. It was equally his testimony that according to the Respondent’s terms and conditions, in the event of damage, it was to pay the customer a sum equivalent to 10 times the cost of the respective dry clean. That the terms and conditions further state



that the Respondent will not be liable for any claims resulting from damage to goods unless negligence is proved against it.

23. During re-examination, the Appellant compensation sum of Kshs. 27,000/- is not comparable to the costs incurred in purchasing the subject clothes. This marked the close of his case.
24. Saida Chepchumba testified for the Respondent as DW1. Her evidence-in-chief consisted of the adoption of her signed witness statement dated 22.02.2021 and the production of the Respondent's list and bundle of documents of like date as D. Exhibit 1-3.
25. In cross-examination, the witness confirmed the delivery of the subject clothes by the Appellant to the Respondent's premises on the material date, before stating that the terms and conditions for the dry cleaning services offered by the Respondent are system generated. She stated that while Condition No. 4 of the Terms and Conditions (D. Exhibit 2) states that the Respondent will not be held liable for any damage or loss of buttons, buckles, ornaments, zips, belts, padding or trimmage, the entire subject clothes were destroyed by the fire and not just the above-listed items. She stated that since the subject clothes were destroyed by a fire, the Respondent would be liable to pay compensation to the Appellant, which it did by way of the discharge voucher produced by the Appellant (P. Exhibit 4) for the sum of Kshs. 27,000/- in accordance with the Respondent's company policy.
26. During re-examination, it was her evidence that going by its policy, the Respondent was only required to pay 10 times the value of the dry cleaning service and that in the present instance, the Appellant did not tender any evidence to prove that the subject clothes were valued at the sum sought in the plaint. That the quotation (P. Exhibit 3) bears a date later than that of the fire incident. This marked the close of the Respondent's case.
27. The learned trial magistrate after restating and analyzing the evidence, reasoned as follows under paragraph 5 of her judgment:

“ ...

The defendant does not deny that the plaintiff's clothes were destroyed when the clothes were in its custody after the plaintiff deposited them for dry cleaning.

The only issue for determination is how much is payable for the damage to the plaintiff's clothes. The defendant ought to pay the plaintiff the exact costs of the suit that were destroyed.

However, I do not have the receipts or other evidence produced in court to prove the claim of Kshs. 452,096/-. The plaintiff has produced quotations which were issued after the clothes were damaged. I do not have sufficient evidence to allow the claim of Kshs. 452,096/-. I allow Kshs. 27,000/- offered by the defendant only because I have no other evidence to prove the costs of the damages clothes.” (sic)

28. The learned trial magistrate equally awarded the Appellant herein costs of the suit and interest on the sum of Kshs. 27,000/- from the date of filing suit until payment in full.
29. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence



advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

30. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR* held that:

“Denning J, in *Miller –vs- Minister of Pensions [1947] 2 All ER 372* discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

31. From the foregoing guiding authorities therefore, it is clear that the duty of proving the averments contained in the plaint lay squarely with the Respondent. In *Karugi & Another v Kabiya & 3 Others (1987) KLR 347* the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of



rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added)

32. Upon re-examination of the pleadings and material on the lower court record, it is not in dispute that the Appellant engaged the dry cleaning services of the Respondent, as seen in the payment receipt dated 15.07.2019 tendered both as P. Exhibit 2 and D. Exhibit 1. The said receipt indicates that the Appellant was charged a sum of Kshs. 2,700/- for the relevant service.
33. Upon further re-examination of the pleadings and material on the lower court record, it is not disputed that a fire incident later occurred on the said 15.07.2019 in Utumishi Co-op House which housed the Respondent’s dry cleaning business, thereby resulting in the unfortunate destruction of the premises and inevitably, the destruction of the subject clothes belonging to the Appellant. The Respondent on its part tendered as D. Exhibit 3 a copy of an invoice dated 21.08.2019 issued by G4S Fire Services (K) Ltd to that effect.
34. From a perusal of the material on record, and in particular the Respondent’s terms and conditions tendered as part of both P. Exhibit 2 and D. Exhibit 2, Condition 7 thereof reads that the Respondent will not be held liable for any claims arising from any loss or damage to goods unless it is proved that such loss or damage was the result of negligence on the part of the Respondent, upon which any resulting compensation will be assessed and based on standard depreciating factors but shall not exceed an amount 10 times the cost charged on the particular service. Condition 8 further provides that: “The Company will not be liable for any loss of any article or damage of any article arising from arson, theft, burglary or forceful entry into the Company’s premises by any persons, or arising from looting at such premise, riot or civil commotion.”
35. Whether or not the fire incident which resulted in destruction to the Respondent’s premises was the result of an act of arson is neither here nor there. Be that as it may, it is apparent from the record that the Respondent communicated the occurrence of the fire incident to the Appellant and further agreed to compensate him for the resulting loss, by issuing him with a discharge voucher for the sum of Kshs. 27,000/- (P. Exhibit 4). Going by the record, it is apparent that the Appellant declined to accept the same, maintaining that he was entitled to full compensation on the value of the subject clothes, to the tune of the pleaded sum of Kshs. 452,096/-. As earlier mentioned, the learned trial magistrate in the end declined to award the abovementioned pleaded sum, for want of proof.
36. Upon re-examination of the Appellant’s pleadings, it is apparent that the aforementioned sum was sought within the ambit of special damages. The standing legal position has been that special damages must be specifically pleaded and strictly proved in order to be awarded. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated thus:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the



head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

37. Upon perusal of the totality of the material tendered on record, it is apparent that the Appellant’s claim was primarily founded on the quote dated 29.07.2019 tendered as P. Exhibit 3. The same was issued by Poon Keung Workshop based in Hong Kong and lists various suits, totaling the sum of USD 3,850. It is however noteworthy that the above quote firstly bears a date which follows 15.07.2019 being the date on which the subject clothes were delivered to the Respondent and subsequently destroyed in the fire, thus profoundly contradicting the position taken by the Appellant in his oral testimony that he acquired the said clothes on the abovementioned 29.07.2019. Secondly, the above quote does not constitute a receipt but merely offers a quotation on the price of the listed suits and in no way indicates a purchase thereof. In addition, there is no way of ascertaining that the suits listed therein are one and the same as those delivered to the Respondent on the material date. Thirdly and more importantly, the Appellant did not tender any credible material by way of receipts, detailing the purchase of the subject clothes, in order to ascertain the value thereof at the time of purchase and to support his claim for the pleaded amount.
38. Be that as it may, it is trite law that proforma invoices and related documents do not constitute receipts and cannot therefore be relied upon in claiming special damages. This position was reaffirmed by the Court of Appeal in the case of Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR) in the following manner:
- “In the case of Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority (2009) eKLR 720, on the production of proforma invoices, this Court stated thus’
- “What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word” paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”
- From the judgment, the respondent produced proforma invoices in support of the claims for the retained petrol station equipment. A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”
39. In view of all the foregoing circumstances, the court is of the view that the Appellant failed to tender any credible material or evidence to support the sum sought in his pleadings. The court further finds that the learned trial magistrate upon appropriately considering the totality of the pleadings and evidence placed before her, arrived at a reasonable finding. Consequently, the court is not inclined to disturb the trial court’s finding.



Disposition

40. The upshot therefore is that the appeal is hereby dismissed for lack of merit, with costs to the Respondent. The trial court's judgment delivered on 27.08.2021 in Nairobi CMCOMMSU No. 97 of 2020 is hereby upheld.

- i. This Appeal is hereby dismissed.
- ii. Cost of the appeal to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....Ms Dida

For Respondent.....Kiprono

Court Assistant.....Martin

