



REPUBLIC OF KENYA



**Sudhe t/a Mongasud General Enterprises v Ochieng t/a Glassmart & General Hardware
(Civil Appeal 135 of 2024) [2024] KEHC 16547 (KLR) (24 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL 135 OF 2024
MS SHARIFF, J
DECEMBER 24, 2024**

BETWEEN

**MOSES ONGONGA SUDHE T/A MONGASUD GENERAL
ENTERPRISES APPELLANT**

AND

**JARED OCHIENG OCHIENG T/A GLASSMART & GENERAL
HARDWARE RESPONDENT**

*(Being an appeal from the judgment of Hon. J.P Mkala
delivered on 14th June 2024 in Kisumu SCCCOM E286 of 2024)*

JUDGMENT

1. Jared Ochieng Ochieng (the Respondent) sued the Appellant before the Small Claims court at Kisumu for the amount of Kshs 573,870/=, tabulated as follows:
 - i. Kshs 473,870/= for glassware supplied,
 - ii. Kshs 80,000/= for procuring County Government building approval.
 - iii. Kshs 20,000/ for a demand letter.
2. In response, the Appellant filed a reply and counterclaim dated 30th April 2024. The Appellant averred that he had entered into an oral agreement with the Respondent for the supply of glassware in exchange for the construction of a house. He further claimed to have incurred a total cost of Kshs 725,945 in building the house, and after deducting the Kshs 473,870 for the glassware, was left with an amount of Kshs 256,075, which he sought to counterclaim from the Respondent.
3. In a judgment delivered on 14th June 2024 the Adjudicator allowed the respondent's claim and awarded him kshs 573,870 plus costs of the suit, after finding that the Appellant had not proven his counterclaim on a balance of probabilities.



4. Aggrieved by the judgment the Appellant lodged a memorandum of appeal with this court dated 8th July 2024 alleging that: -
 1. The trial magistrate erred in law and fact in pronouncing a verdict dismissing the counter-claim despite the weight of evidence in his favour.
 2. The magistrate erred in law and fact in misrepresenting the contract between the appellant and the respondent.
 3. The learned magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thus reaching an erroneous decision.
 4. The trial magistrate erred in law and fact when he based his decision on irrelevant matters and failing to base his decision on facts and evidence on record.
 5. The magistrate erred in law and in fact by failing to appreciate that he has proven his case on a balance of probabilities.
 6. The magistrate erred in law and in fact in not finding that the evidence and exhibits produced by the respondent were inconsistent, contradictory and did not support the respondent's case.
 7. The trial magistrate erred in law and fact pronouncing a verdict dismissing the counter-claim despite the fact the respondent never gave enough evidence in court.
5. The appeal was canvassed by way of written submissions. However, as of the time of drafting this judgment, only the Appellant's submissions were on record.

Appellant's Submissions

6. The Appellant urges the court to fulfill its duty as a first appellate court by reconsidering and re-evaluating the evidence, drawing its own conclusions, while recognizing that it did not have the opportunity to see the witnesses testify firsthand. He references the cases of *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000) and *Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another* Civil Appeal no 345 of 2000, among others, to support his argument.
7. The Appellant further submits that the Magistrate erred in finding that there was no oral contract. He contends that he successfully discharged his burden of proof, as required by Sections 107, 108, and 109 of the *Evidence Act*, and cites the Court of Appeal decision in *Mumbi M'Nabea v David M Wachira* [2016]eKLR.
8. To substantiate his claim, the Appellant points to the labour schedule produced as RW1, the receipt from Daotok, and the site book, which indicates that he supplied building materials to the Respondent.
9. In contrast, the Appellant argues that the Mpesa statement produced by the Claimant as CW 6 shows payments made before the commencement of construction, implying that these funds were meant for the building materials.
10. Regarding approval by the County Government the Appellant draws attention to the receipt of Kshs 150,000/= paid to Daotok for the structural drawing. He asserts that the Respondent only paid Kshs 70,000/= leaving a balance of Kshs 80,000/= which he topped up due to their good business relationship.
11. Moreover, the Appellant submits that the Respondent failed to produce any document or receipt confirming payment for the services provided.



12. The appellant maintains that he had proven his case on a balance of probabilities before the trial court wherefore he prays that the judgment of the lower court be set aside and be substituted with an order allowing the counterclaim.

Analysis And Determination

13. After carefully considering the record of appeal and the submissions filed, the sole issue for determination is whether the appeal is merited.
14. The Appellant contends that he is owed Kshs 725,945 by the Respondent, which, if offset by the Kshs 473,870 the Appellant owes the Respondent, would leave a balance of Kshs 256,075. The Appellant also asserts that there was an oral agreement in which glassware would be provided in exchange for the construction of a house.
15. On his part the Respondent asserts that he is owed Kshs 573,870/= by the Appellant and that the Appellant even gave him a parcel of land to sell to recover his monies. He also denies owing the Appellant any money.
16. The Magistrate, in his judgment, found that the Appellant had not proven his case on a balance of probabilities. The Magistrate noted that the labor schedule provided by the Appellant did not show the work done or the rate at which it was done. Furthermore, that the Appellant failed to produce the architectural design presented for approval by the County Government and could not satisfactorily explain why he gave the Respondent title deeds.
17. I have reviewed the evidence taking cognizance of this court's role which is to re-evaluate, re-assess and re-analyse the extracts on record and determine whether the conclusions reached by the learned trial Magistrate are to stand or not and give reasons either way. (see *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR)
18. Additionally, the only instance this court can interfere with the decision of the Magistrate is if: it is based on no evidence, based on misapprehension of evidence or the Magistrate obviously acted on the wrong principles in reaching the decision. On this regard this court places reliance on the Court of Appeal case of *Ramji Ratna and Company Limited V Wood Products (Kenya Limited)*, Civil Appeal No. 117 of 2001.
19. Regarding the alleged oral agreement, the Respondent vehemently denied its existence. He asserted that the engagement for building was a completely separate transaction which was fully paid for as evinced by the Mpesa and cash records.
20. It is trite law as rightly highlighted by the Appellant that whoever alleges must prove as provided by Sections 107, 108 and 109 of the *Evidence Act*. The Appellant alleged the existence of an oral agreement thus the onus was on him to prove its existence.
21. In support of his position, he drew attention to labour schedule, the receipt to Daotok Ltd, the site book, the Mpesa statement showing that the Respondent paid monies prior to commencement of construction and the conduct of the parties.
22. Additionally, the Appellant contended that the money sent prior to commencement of construction were meant for building materials, leaving the labour charges unsettled.
23. I have taken a look at the documents cited by the Appellant. In and of themselves it is not easy to decipher the existence of an oral agreement for supply of glassware in exchange for construction; for instance, the labour schedule merely itemizes the materials, quantity and labour prices.



24. The existence of an agreement can, however, be inferred from the conduct of the parties and their testimony. In this case, the Respondent consistently maintained that he had fully paid for the work, and his evidence was largely unshaken during cross-examination. He also stated that the construction was unfinished, a point that the Appellant did not dispute.
25. During cross-examination, the Appellant acknowledged receiving glassware worth Kshs 473,870. He also agreed that there was no indication that the construction was to be in exchange for the glassware.
26. There is nothing in the appellant's testimony or evidence that suggests the existence of an oral agreement.
27. Having carefully evaluated the evidence and testimony, I see no reason to depart from the Magistrate's reasoning. As was held in *Ramji Ratna and Company Limited v Wood Products (Kenya) Limited (supra)*, this court should only interfere with the Magistrate's decision if it is based on no evidence, a misapprehension of evidence, or if the Magistrate acted on wrong principles. I cannot fault the trial court on any of the three reasons available for interference with his judgment.
28. The upshot of the foregoing is that the Appellant's Appeal is dismissed with costs to the Respondent assessed at ksh 45000 and payable within 45 days from the date hereof. In the event of default in payment of the same, execution to issue
29. This file is marked as closed

DELIVERED, SIGNED AND DATED AT KISUMU THIS 24TH DAY OF DECEMBER 2024.

MWANAISHA S SHARIFF

JUDGE

