



REPUBLIC OF KENYA



**Ndungu v Mwambire (Civil Appeal 12 of 2021)  
[2023] KEHC 1098 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
CIVIL APPEAL 12 OF 2021  
CM KARIUKI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**DAVID KIMOTHO NDUNGU ..... APPELLANT**

**AND**

**EZEKIEL KAZUNGU MWAMBIRE ..... RESPONDENT**

*(Being an appeal against the Judgment of Honourable C Muhoro -  
Senior Resident Magistrate delivered on 19th April 2021 in the  
Chief Magistrate Court at Nyahururu Civil CaseNo. 117 of 2020)*

**JUDGMENT**

1. The appellant lodged Nyahururu Civil Case No 117 of 2020, claiming a refund of Kshs 269,500 plus interest and costs after the suit was heard, it was dismissed, thus attracting instant appeal with ten (10) grounds which can be summarized as whether there was proof of claim on the balance of probabilities and order as to costs.
2. The parties were directed to canvass the appeal via submission.

**Appellant Case and Submission**

3. The appellant filed a plaint dated August 6, 2020 stating that on December 25, 2015, he employed the respondent as an accountant in Daki Enterprises Limited within Olkalou Township. However, on or about February 2016, the plaintiff laid him off for misappropriating funds and assets, mainly crates and cash.



4. Attached was a letter for a recommendation of employment dated December 16, 2015 (page 20) of the respondent by Juliah Warigia Nduati. On page 9 of the judgment (page 39), the Hon Magistrate states, ' ...

“The only document presented by the plaintiff is a referral letter dated December 16, 2015. In the absence of a letter of employment and or a termination letter, it is not clear to the court whether there existed any employer-employee relationship between the plaintiff and the defendant or any relationship between the two parties at all.”

5. Appellant indeed attached a recommendation letter addressed to him by Juliah Warigia, the grandmother of the respondent. The note on page 20, whose reference states “Recommendation for Employment,” proceeds to recommend Ezekiel Kasungu Mwambire for employment by the appellant.
6. It is submitted that the question to ponder is whether a letter of employment and termination letter, a, stated on page 9 of the judgment at page 39 of the record of appeal, is the only proof of employer's existence- employee relationship between the parties?
7. In ELRC, Cause No 181 of 2015 *Joseph Omollo v Board Kisumu Boys High School [2016] eKLR* Hon Lady Justice Maureen Onyango considered a medical examination certificate for 2013, 2014, and 2015 for food handlers which states that he was from Kisumu Boys High School. He also submitted duty rosters for working in Kisumu Boys High School Kitchen prepared by Winnie Ongalo, the caterers be sufficient proof of employment
8. In ELRC Cause No 212 OF 2017 *Leonard Musitsa Endoli v Odds and Ends Limited [2022] eKLR* Hon Justice Dr Jacob Gakeri considered, the copies of the directorate occupational safety and health services notice by employer on an occupation accident /disease of an employee (DOSH 1) form completed on February 6, 2010 provided by claimant ( employee) as evidence of an employer/employee relationship and judgment entered in favour of claimant against the respondent ( employer ) for the sum of Kshs 322,000/= with costs.
9. Based on the above precedents and arguments, it is submitted therefore, that the recommendation letter on page 20 whose reference states ' recommendation for employment, ' and proceeds to recommend Ezekiel Kazungu Mwambire for employment by the appellant is sufficient evidence of existence of employer-employee relationship.
10. The first prayer of the plaint sought for, 'refund of Kshs 269, 500/ being misappropriate funds, Inventory and professional fee deposit paid by the plaintiff including debt collection fees and other handling charges for demand of the same.
11. The appellant engaged the firm of auditors known as Leon Williams & Associates CPA (K) to, carry out data analysis to assess whether there was material misappropriation of business resources, to quantify such misappropriation if any and to advice on the way forward,' as indicated on the report page 16.
12. At paragraph 5 of the plaint, the appellant stated that, 'the total cash that remained unaccounted for or missing was Kshs 141,900/- pegged on the audit was carried out on February 18, 2016 while the respondent was still within the premise as demonstrated at page 23 being the stock movement and sales analysis from November 17, 2015 - February 9, 2016.
13. The firm of auditors charged fees for the work as per the fee note attached at page 21 of the record of appeal. This amount of Kshs 25,000/- was proved to have been incurred and the same ought to have been awarded.



14. The credibility of the audit report was not doubted by the honourable court at any given point which suggests that the sole issue that trial court had with report is that the defendant was not mentioned. The annexures supporting the report at page 23 proceeds remark that Kazungu ought to be dealt with for the said short fall. Therefore, the judgement at page 39 of the record of appeal stating that, 'The defendant is not mentioned in the said report,' is erroneous.
15. It is our humble submission that the appellant proved loss of Kshs 141,900/- and Kshs 25,000/-. We further submit that the respondent was blamed in the annexures supporting the report for the loss incurred by the enterprise.

### **Respondent Submissions**

16. The respondent submitted that the only way to prove that there existed an employer employee relationship is via way of a letter of appointment or contract of service or employment and subsequent dismissal and referred to the provisions of section 9 of the Employment Act cap 226 the laws of Kenya.
  9. General provision of contract of service which provides;
    - (1) A contract of service—
      - (a) (a) for a period of employer-employee working days which amount in the aggregate to the equivalent, of three months or more; or
      - (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.
17. The appellant did not provide any such contract. For a position of an accountant as alleged in his pleadings, nothing could explain the details of whether the respondent was indeed an employee let alone an accountant than a contract or letter of appointment.
18. A letter of recommendation is not proved of employment therefore cannot form the basis to prove that there ever existed any employer/employee relationship between the appellant and the respondent.
19. The learned magistrate was, therefore, right in finding that, he could not ascertain whether the amounts were owed to the appellant and by whom proof.
20. Furthermore, the learned magistrate was right in finding that the respondent herein is not mentioned in the auditor's report therefore making it difficult to ascertain or approve the averments in the Plaintiff.
21. The appellant relies on ELRC Cause No 181 of 2015 Joseph Omollo v Board Management Kisumu Boys High School [2016]eKLR where, the learned judge observed that he was presented with a duty roster; therefore, the duty roster does show or prove an employment relationship. In the current case, a letter of recommendation does not prove this fact (emphasis added).
22. In the second case relied upon by the appellant, the (DOSHS 1) form completed on February 6, 2010 was not produced for scrutiny therefore we are unable to comment on the same.
23. In conclusion, it is as clear as crystal that the appellant failed to prove his case before the learned magistrate and the upshot is that this appeal must fail with costs to the respondent.



## Issues Analysis and determination

24. The discerned in the instant, the matter is whether the appellant proved his case on the balance of probabilities and order as to costs
25. The duty of the appeal court was held in the case of *Makube v Nyamiro [1983] KLR 403*, to the effect that:
- “A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”
26. In the case of *Hahn v Singh, Civil appeal No 42 of 1983 [185] KLR 716*, the Court of Appeal held as follows;
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
27. See also the case of *Capital Fish Kenya limited v Kenya Power & lighting Company Limited [2016] eKLR* the court reiterated the principle as follows:
- “... not only should a claim for special damages be specially pleaded, but it is also incumbent upon the claimant to prove it, failure to prove disentitles claimant to the award sought. And that is the case here although the plaintiff pleaded special damage, it did nothing to prove the same and so that claim is dismissed....it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”
28. The plaintiff's claims are in the nature of special damages. The law is well settled on special damages, that a party seeking special damages must not only specifically plead the claim but must also strictly prove the same by way of evidence.
29. In the instant case, the plaintiff specially pleaded the claim, but he did not produce the most essential document to prove the claim. The plaintiff averred that he employed the defendant as an accountant on December 25, 2015. I have looked at all the documents presented by the plaintiff, and the defendant's letter of employment does not form part of the plaintiff's documents.
30. In fact, the claimant literary threw documents to the court and relied on same without calling their makers nor testifying on same. I agree with the trial court a referral letter dated December 16, 2015 in the absence of a letter of employment and/or a termination letter; it is not clear to the court whether there existed any employer-employee relationship between the plaintiff and the defendant or any relationship between the two parties at all.
34. The audit report dated February 18, 2016 indicates that the auditor (s) had a meeting with the plaintiff prior to conducting the audit. It is also indicated that further information and explanation were provided by Mr Samuel Karanja Muturi, who was the head of accounts for the period. The defendant is not mentioned in the said report. It is, therefore, not clear whether the defendant ever worked as accountant at Daki Entrepreneurs Ltd and/or whether the “shortfall” indicated in the audit report was occasioned by the defendant.



35. Why was the maker and mentioned people not called as witnesses to shed the light on audit content? The court finds that though the special damages were pleaded, the proof did not meet the threshold of being strictly proved with as much particularity as to the circumstances of the case; thus, the court finds no merit in the appeal and therefore makes the orders;

- i) The appeal is dismissed with no orders as to costs as the respondent failed to defend the suit in the trial court.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

