



**Jeyfine Winess Limited v Powerful Construcrion Limited (Civil Appeal E007 of 2022) [2022] KEHC 17007 (KLR) (Civ) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 17007 (KLR)

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

**CIVIL**

**CIVIL APPEAL E007 OF 2022**

**JN MULWA, J**

**NOVEMBER 28, 2022**

**BETWEEN**

**JEYFINE WINESS LIMITED ..... APPLICANT**

**AND**

**POWERFUL CONSTRUCTRION LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This Appeal arise from the judgment and decree of the Small Claims Court at Nairobi delivered on the 25<sup>th</sup> of November 2021. The Plaintiff in the trial court was dissatisfied hence lodged this appeal on grounds stated at the Memorandum of Appeal dated January 10, 2022 on both facts and the Law, hereunder –but paraphrased; thus:

That the learned Magistrate erred: -

1. In Law and fact by declining to award quantum of damages despite holding that the Respondent was liable.
2. In Law and fact by disallowing the claim for special damages.
3. In Failing to consider the evidence on record.
4. Disallowing the claim on special damages despite unequivocal admission by the Respondent of the damage it assessed at Kshs 200,700/=
5. By failing to appreciate that in the absence of receipts or loss assessment report in a material damage claim, c alternative remedy lies in the testimony of the assessor of the loss at the material time-the warehouse manager in this case.



6. By failure to appreciate that the threshold of proving special damages should be considered on a case to case basis; on a balance of probabilities.
2. Despite being served with the appeal documents, and hearing notices, the Respondent by itself or its advocates –Kinyua and Maingi Advocates –have not participated in these proceedings before this court.
3. Before analysis the appellant’s ground of appeal and submissions, I find it prudent to interrogate whether or not this appeal is competent, and whether this court has the jurisdiction to determine the same.
4. **Section 38 of the *Small Claims Court* Provides:**
  1. 38 (1) A. .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.
  2. An appeal from any decision or order referred to in subsection (1) shall be final.
5. The Small Claim Court was established by parliament to provide for the jurisdiction and procedures of the Court and for connected purposes- Act Number 2 of 2016, and revised in 2021.
6. To that end then, an appeal from the decision of the small claims court is on matters of law only.  
The Memorandum of Appeal dated January 10, 2022  
The appeal is clearly stated to be on matters of law and fact. I have tabulated the grievances by the appellant at paragraph 1 above. All are stated “ .....the learned Magistrate erred in law and fact by .....”
7. The reliefs sought and/or proposed by the appellant are that:
  1. The appeal be allowed with costs
  2. That the part of the Judgment of Hon Justice S.G. Gitonga delivered on 25<sup>th</sup> November 2021, that declines to award quantum for damages be set aside.
8. In my view, ground number 1 of the Memorandum of Appeal summarizes the stated nine (9) grounds. It reads;
  1. The learned Magistrate erred in Law and fact by declining to award the quantum of damages despite holding that the Respondent was liable.

The Rest of the ground state the particulars of the errors in law and fact committed by the trial Magistrate, as alleged.
9. The issue therefore, and for determination. is whether the failure by the trial Magistrate to award damages for the losses incurred by the appellant, upon finding that the Respondent was liable is a matter of both law only; or a matter of both law and fact; by dint of Section 38 of the Act under review.
10. I have perused the trial court’s proceedings and evidence adduced by the parties and documents produced as exhibits; including witness statements that were exchanged. I have also interrogated the trial Courts Judgment delivered on the 25<sup>th</sup> of November, 2021.
11. Upon the issues the trial court framed for determination, the finding are as follows: -  
Issue number (a) – Whether the hole on the roof was caused by negligence of the Respondent.



Finding: That from the evidence presented the damage to the roof was caused by the negligence of the Respondent (Defendant)

Issue number (b)- Whether as a result of the damaged roof the plaintiff suffered loss and damage.

Finding: As a result of the damaged roof the claimant suffered loss in form of damaged stock and therefore liable for the damage caused

to the warehouse roof and the damaged stock.

Issue number (c) – Quantum of loss and damages suffered.

Finding: Claim as special damage for Kshs 915,740/= being value of the damaged stock was not proved due to none production of a loss adjustment report prepared loss assessor; that the claimant did not provide proof of the exact cost incurred for the damaged roof. The evidence as presented was therefore devoid of proving the special damaged claim.

12. The finding at issue number (c) is the subject of this appeal. Indeed, the facts of the claim are not contested and the trial court found in favour of the appellant in terms if material facts.

13. The issue is on the burden of proof for the special damages, by the production of the documents produced by the claimant to the exclusion of an assessment report by a loss assessor, and receipts to prove the value of the damaged stock.

In my considered opinion, these questions are matters of law in line with Section 38 of the [Small Claims Court Act](#).

14. To that extent, I am persuaded that this court is clothed with the necessary jurisdiction to entertain the appeal.

### Issues for Determination

15. The appellant has framed two issues, thus;

1. Whether it was just for the trial court to decline to assess and award special damages to the appellant.
2. Whether the appellant had sufficient proved the special damages as pleaded in the sum of Kshs 915,740/=

16. It is trite that special damages ought not only be strictly pleaded but also proved. However, there are instances when such damages may not be proved by documentary evidence, and the court have pronounced themselves as such. To state a few, is like when a litigant seeks special damages in respect to funeral expenses where it is difficult to require a morning family to keep receipts for every item purchased in preparation of the burial; or where it is plain and even admitted, that indeed, a loss has occurred but no supporting documentary evidence is available.

17. A case in point is the matter of [Kimatu Mbuvi t/a Kimatu Mbuvi & Bros Vs Augustine Munyao Kioko](#) (2006) eKLR and [Samuel Kariuki Nyagoti Vs Jonathan Ditelberger](#) (2017) eKLR wherein the court held that a claimant ought not be denied the cost of repairs in the absence of Motor Vehicle Assessment Report when the damage is obvious. -see also [Nkuene Dairy Farmers Co-operative Society Limited & Another Vs Ngailia Ndeiya](#) (2010) e KLR, where the court pronounced its self as above.

18. In the instant appeal, the appellant produced photographs of the damaged roof of the warehouse and stock. The Respondents had inspected the same damaged items. The reason for failure to produce



receipts for the losses were well explained by the appellant being the nature of the appellant's business –purchase of stock through bulk importation where receipts are only issued for containers imported as opposed to unit products.

19. It is also instructive that evidence was tendered that the list of the damaged stock was furnished to the respondent who accepted the loss and expressed willingness to settle the claim before the suit was instituted at Kshs 200,700. Without any denial of evidence tendered in opposition to the claim, the damages and loss were thus unopposed.
20. I fully agree with the appellant's submission that it was and is not possible to calculate the individual loss for each item, like alcohol bottles hence a global method would have been suitable, basing the same on the inspected and loss adjustment that was not disputed by the respondent.
21. In matter as before this court, imported items/merchandise in our markets like through Jumia, Glovo Oak and other platforms, the appellant would import and sell to the retailers . Using the said platforms, and estimate of the loss can be calculated

In the case *Haln Vs Sigh* (1985) KLR, the trial Judge accepted the respondent 's evidence to arrive at a quantum of special damages in the following words: -

“... The Plaintiffs were unable to give evidence about Each item that they lost in the theft, giving their values, either obtained from a Jeweler who prepared a report giving value to those items or from the websites. It suffices to state that the plaintiffs lost the following items ....”

22. Back home, it is now settled that there are many ways to prove a loss, not only by documentary evidenc . In *Jacob Ayigg Maruja & another Vs Simeon Obayo* (2005) e KLR , and *Julius Kariuki Kimani Vs Evanson Kariuki* (2021) e KLR , the principles enunciated therefrom is that , quoting Justice Joel Ngugi J ( as he then was ) in the *Julius Kariuki Kimani Case* (Supra)

“..... Formalistic rule that special damages must be strictly proved as a reason to deny recovery in this instance seems to me to elevate technicalities beyond substances; to put the formal before the just .... The rule i , therefore , that a party claiming special damages must demonstrate that they actually made the payment or suffering the specific injury before compensation will be permitted or otherwise demonstrate with the permitted degree of certainty what loss of amount he will suffer in the future “.

23. In the case *Jacob Ayiga Maruja* (Supra). the court expressed itself that: ;

“.....if documentary evidence is available, well and good. But we reject any contention that only documentary evidence can prove these things ...”

In this matter. The documents exchanged prior to the filing of the suit were not rejected and were produced before the trial Magistrate and duly admitted as exhibits. The images and photographs confirmed the damages and loss.

24. Upon these, the trial Magistrate made findings that indeed the appellant suffered loss and damage and that the respondents were liable for their negligence.

I therefore hold and find that the trial court erred in law and failing to assess the damages and loss caused to the appellant by the respondent's negligence.



25. The appellant has urged this Court to allow the appeal by setting aside part of the judgment where the trial Magistrate declined to award damages. That I must do as it is just and reasonable. Upon the above, I now proceed to assess the special damages and loss that the trial Magistrate failed to do –in terms of issue number (b)
26. At page 106 of the Record of Appeal, the appellant by looking at the damaged stock based on the photographs produced before the trial court, estimated the loss at Kshs 200,270.
27. On the part of the respondent, they told the court that they were willing to pay Kshs 200,270 – flowing from the shared photographs. The trial court’s failed to appreciate the above evidence is but a clear mis-appreciation of law. The respondents visited the site of the damaged ware house and took photographs and tabulated the loss for themselves, to the extend at Kshs 200,270/=
28. The court will not be doing an injustice to the respondent if it finds that the respondent is under an obligation to compensate the appellant for the loss incurred due to its negligence. It would be beyond absurdity if this court would deny compensation to the appellant for an obvious loss due to negligence clinging to some procedural and technical old age requirement for strict proof by only documentary evidence- Article 159(2)(d) of *the Constitution*.
29. The upshot is therefore that the appeal is allowed. I proceed to set aside the trial court’s finding on the matter quantum of damages; and proceed to assess the same in favour of the appellant at Kshs 200,700/=
30. The above award shall attract interest at 14% per annum from the date of filing of the claim in the Small Claims Court until payment in full.

The Cost of this appeal and the costs below shall be paid by the Respondent to the appellant.

- 31 Orders accordingly.

**DATED, DELIVERED AND SIGNED IN KAJIADO THIS 28<sup>TH</sup> DAY OF NOVEMBER 2022**

**J. N. MULWA**

**JUDGE**

