



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 756 OF 2019**  
**GOLD CROWN BEVERAGES (KENYA) LIMITED.....APPELLANT**  
**-VERSUS-**  
**EWD LIMITED.....RESPONDENT**

(Being an appeal against the judgment and decree delivered by G.A. Mmasi (Mrs.) (Senior Principal Magistrate) on 3<sup>rd</sup> December, 2019 in Milimani CMCC no. 3146 of 2017)

**JUDGMENT**

1. The appellant herein filed a suit against the respondent vide the plaint dated 15<sup>th</sup> December, 2016 and sought for a declaratory order that the respondent had breached the contract entered into between the parties and a further order for refund of the sum of Kshs.2,259,000/=.
2. The appellant pleaded in its plaint that by way of the agreement dated 10<sup>th</sup> June, 2015 entered between the parties, the respondent was to offer merchandising services for the appellant at an agency fee of 16% of the total cost being the salary paid to the merchandisers and supervisors.
3. The appellant pleaded in its plaint that the respondent sent it irregular invoices claiming to pay merchandisers and supervisors the respective sums of Kshs.20,000/= and Kshs.30,000/= when in fact it was paying them the respective sums of Kshs.15,000/= and Kshs.20,000/=.
4. It was pleaded in the plaint that as a result of the fraud/irregularity, the respondent received a total sum of Kshs.2,259,000/= from the appellant which it has refused to refund despite demand to do so.
5. It was also pleaded in the plaint that the respondent breached the term of the agreement requiring it to pay the statutory deductions for the merchandisers and supervisors.
6. Upon service of summons, the respondent entered appearance and filed its statement of defence dated 10<sup>th</sup> March, 2017 to deny the allegations made in the plaint.
7. The respondent also filed a counterclaim of like date separately in which it essentially claimed *inter alia*, the sum of Kshs.891,460/= from the appellant, being the sum owed by the appellant by way of the invoice dated 30<sup>th</sup> September, 2016 and general damages for breach of contract plus costs of the counterclaim and interest thereon.
8. The respondent further pleaded in its counterclaim that the appellant had paid previous invoices without complaint of any irregularities.
9. The appellant rejoined with a reply to defence and defence to counterclaim dated 19<sup>th</sup> February, 2018.
10. At the formal hearing of the suit, the appellant and the respondent each summoned one (1) witness.
11. Upon close of submissions, the trial court in its judgment delivered on 3<sup>rd</sup> December, 2019 dismissed the appellant's suit with costs and allowed the counterclaim by awarding the respondent the sum of Kshs.891,460/= being the unpaid fees and by also awarding general damages for breach of contract in the sum of Kshs.200,000/= plus costs of the counterclaim and interest on the sum of Kshs.891,460/=.

12. Being dissatisfied with the aforementioned judgment, the appellant has sought to challenge the same on appeal and has put forward the following grounds of appeal in its memorandum of appeal dated 19<sup>th</sup> December, 2019:

i. **THAT the learned trial magistrate erred and misdirected herself in law by rendering a judgment that did not conform to the provisions of Order 21, Rule 4 of the Civil Procedure Rules in so far as she among others failed to set out the parties' respective cases as disclosed in the filed pleadings, identify the issues for determination and set out her decision thereon and the reasons thereof.**

ii. **THAT the learned trial magistrate erred and misdirected herself in law and fact by failing to appreciate sufficiently or at all, consider and correctly analyze the evidence tendered by the parties in considering the merits of the appellant's claim against the respondent and the respondent's counterclaim against the appellant.**

iii. **THAT the learned trial magistrate erred and misdirected herself in law and fact by failing to consider or sufficiently consider the appellant's position as set out in its written submissions and the judicial authorities cited therein thus reaching a manifestly erroneous finding that its claim against the respondent had not been proved.**

iv. **THAT the learned trial magistrate erred and misdirected herself in law and fact in failing to appreciate or properly appreciate that on the evidence before her, the respondent had breached its fiduciary obligation to the appellant as its agent by secretly receiving and retaining non-contractual remuneration and was therefore liable to refund such remuneration as sought by the appellant in the suit before her.**

v. **THAT the learned trial magistrate erred and misdirected herself in law and fact in finding that the appellant's claim against the respondent had not been proved during trial and dismissing the same with costs which was against the weight of evidence and therefore manifestly erroneous.**

vi. **THAT the learned trial magistrate erred and misdirected herself in law and fact in failing to consider or sufficiently consider the appellant's pleadings, evidence and submissions in respect of the respondent's counterclaim and thereby reaching a manifestly erroneous finding that it was liable therefore.**

vii. **THAT the learned trial magistrate erred and misdirected herself in law and fact in failing to appreciate or sufficiently appreciate the appellant's pleaded position, evidence and submissions in respect of the respondent's counterclaim and thereby reaching a manifestly erroneous finding that it was liable therefore.**

viii. **THAT the learned trial magistrate erred and misdirected herself in law and fact in reaching a finding that the appellant had breached the contract between it and the respondent when no such case of breach of contract had been proved and thereby proceeding to determine the dispute between the parties on the basis of an unpleaded issue.**

ix. **THAT the learned trial magistrate erred and misdirected herself in law and fact in finding that the appellant was liable to the respondent in the sum of Kshs.891,460/= which was against the weight of evidence and the position at law as it applies to breach of an agent's fiduciary duty to the principal and hence manifestly erroneous.**

x. **THAT the learned trial magistrate erred and misdirected herself in law and fact in assessing damages for alleged breach of contract in the sum of Kshs.200,000/= without any basis and/or justification in law whatsoever which is manifestly wrong.**

13. This court directed the parties to file written submissions on the appeal. At the time of writing this judgment, this court only had the submissions of the appellant. Those of the respondent had not been availed.

14. The appellant by way of its submissions dated 28<sup>th</sup> July, 2021 contends *inter alia*, that in the impugned judgment, the trial court did not set out the case before it or frame the issues for determination or give reasons for the decision arrived at.

15. The appellant also contends that the trial court did not address its mind to the issues raised at the trial and did not consider the appellant's evidence and submissions supporting its case against the respondent, thereby arriving at an erroneous decision on the claim.

16. The appellant equally faulted the trial court for allowing the respondent's counterclaim in the sum of Kshs.891,460/= whereas the respondent had not shown that it was entitled to recover the said amount from the appellant.

17. Finally, it is the contention of the appellant that the trial court erred in awarding general damages for breach of contract and cites the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** in which the Court of Appeal held that general damages are as a general rule not recoverable in cases of breach of contract.

18. I have considered the appellant's written submissions on appeal and the authorities relied upon. Moreover, I have re-evaluated the evidence which the trial court had the opportunity to look at.

19. It is clear that the appeal essentially lies against the decision by the learned trial magistrate dismissing the claim and allowing the counterclaim respectively. I will therefore address the 10 grounds of appeal raised contemporaneously under the three (3) limbs hereinbelow.

20. The *first* limb of the appeal has to do with whether the learned trial magistrate's judgment conformed to the provisions of Order 21, Rule 4 of the Civil Procedure Rules.

21. The abovementioned provision stipulates that:

**“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”**

22. Upon my perusal of the impugned judgment, I see no indication of non-conformity with the Order so as to render it incompetent.\

Consequently, ground (i) of the appeal automatically fails.

23. The *second* limb of the appeal concerns itself with the issue on whether the learned trial magistrate arrived at a correct decision in respect to the appellant's claim and the respondent's counterclaim respectively.

24. Daniel Karanja who was PW1 began by adopting his witness statement as evidence and also produced the appellant's list and supplementary list of documents as exhibits.

25. The witness stated that he worked for the appellant as Finance Manager at all material times and that the appellant overpaid the respondent.

26. The witness further stated that the parties herein had entered into an agency agreement whereby the respondent was to pay to merchandisers allowances and salaries, while the appellant was to reimburse the respondent the sums paid in that respect.

27. It was the testimony of the witness that in the months of June, July and August 2017 anomalies were noted in the pay slips forwarded to the appellant since the same showed that the respondent had paid the sums of Kshs.15,000/= instead of the respective sums of Kshs.20,000/ indicated on the invoices earlier forwarded to the appellant, thereby resulting in overpayments.

28. The witness therefore stated that the respondent is indebted to the appellant in the sum of Kshs.2,259,000/= and further stated that the appellant owed the respondent a sum of Kshs.891,460/= but that this amount was based on wrong tabulations.

29. In cross-examination, PW1 testified *inter alia*, that the merchandisers were not directly employed by the appellant and that the production of invoices provided the basis for payments made.

30. PW1 further testified that the contract between the parties terminated as a result of a breach which was discovered 13 months after the overpayment had been made, and that the matter was subsequently reported to the police and was pending under investigations as at the time of giving his testimony.

31. In re-examination, it was the evidence of the witness that the appellant made payments to the respondent upon presentation of pay slips and invoices to confirm the sums incurred.

32. The witness concluded his testimony by stating that the appellant's claim was for the overstated sums of Kshs.30,000/= and Kshs.20,000/= whereas the actual sums paid were Kshs.20,000/= and Kshs.15,000/= for supervisors and merchandisers respectively.

33. Angela Wambui Wacheke who was DW1 similarly adopted her signed witness statement as evidence and produced the respondent's bundle of documents as D. Exhibits 1-8.

34. The witness gave evidence that the agreement between the appellant and the respondent was initially for 3 months but that the same was extended for one (1) year and that the merchandisers were employees of the respondent.

35. The witness further gave evidence that the appellant terminated the contract, by which period the last payment for September, 2016 had not been made to the respondent.

36. In cross-examination, the witness stated that the invoices were submitted following an agreement on costs between the parties and that upon the appellant requesting for the pay slips, it did not raise any issues on the overpayments at the earliest time.

37. The witness further stated that the respondent did not charge the appellant the exact sums being paid to the merchandisers but charged a higher amount so as to make a secret profit.

38. In her judgment, the learned trial magistrate reasoned that the appellant had not demonstrated that the respondent was indebted to it in the sums claimed but that the former admitted to owing the latter the sum of Kshs.891,460/= sought in the counterclaim.

39. Consequently, the learned trial magistrate arrived at the finding that while the appellant had not proved its claim, the respondent had succeeded on the counterclaim.

40. Upon my re-examination of the pleadings and evidence, it is not in dispute that the parties herein had at all material times entered into an agency agreement for the purpose laid out hereinabove. It is also not in dispute that one of the terms of the agreement was for the respondent to pay statutory deductions in respect to the salaries made to the merchandisers and that the respondent would present invoices for purposes of receiving payment from the appellant.

41. Concerning the claim lodged by the appellant, the evidence shows that the sums indicated in the pay slips vary from the sums indicated on the invoice. However, going by the contents of the agreement, it is apparent that there was no specific term to the effect that the pay slips and invoices ought to have borne similar sums since the invoices formed the basis for determining the payments to be made by the appellant to the respondent.

42. Furthermore, I find the explanation of DW1 that the higher sums charged in the invoices constituted profits being made by the respondent to be reasonable in the circumstances.

43. In that respect, I concur with the finding of the learned trial magistrate that the appellant had not brought credible evidence to prove its claim on a balance of probabilities.

44. When it comes to the counterclaim, I agree with the reasoning of the learned trial magistrate that the evidence tendered; more particularly the oral testimony of PW1; shows that the appellant owed the respondent the outstanding sum of Kshs.891,460/= pursuant to the invoice dated 30<sup>th</sup> September, 2016 adduced as an exhibit. This evidence was not controverted by way of credible evidence from the appellant.

45. Consequently, I am satisfied that the learned trial magistrate was correct in awarding the abovementioned sum sought in the counterclaim.

46. Moreover, I am of the view that there is nothing to indicate that the learned trial magistrate overlooked the evidence and submissions availed by the appellant, as is the claim being made on appeal. Therefore, grounds (ii) to (ix) of the appeal must collapse.

47. This leaves me with the third limb of the appeal concerning whether the learned trial magistrate acted correctly in awarding the respondent a sum of Kshs.200,000/= on general damages for breach of contract.

48. I find the potion taken by the appellant on appeal that general damages are ordinarily not granted in cases of breach of contract to be plausible. I am guided by the decision of the court of appeal in the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** quoted by the appellant, thus:

**“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason.”**

49. I am therefore satisfied that the learned trial magistrate fell into error in granting the same and I will interfere with this aspect of the impugned judgment.

50. The appeal succeeds solely in respect to the award on general damages for breach of contract. The trial court's award made under this head is hereby set aside.

51. Judgment on appeal is as follows:

**a. The appellant's suit stands dismissed with costs to the respondent.**

**b. The respondent's counterclaim against the appellant is hereby allowed giving rise to issuance of the following reliefs:**

**i. Kshs. 891,460/ being the outstanding sums payable.**

**ii. Costs of the suit.**

**iii. Interest on (i) at court rates from the date of filing the suit until payment in full.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2021**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent