Nyamweya v Asakania (Civil Appeal E237 of 2022)
[2025] KEHC 1702 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 1702 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E237 OF 2022

JN NJAGI, J

JANUARY 23, 2025

BETWEEN

JOSHUA NYAMWEYA .... APPELLANT

AND

LYDIA ATSULU ASAKANIA .... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. S. Aswani, Resident Magistrate/Adjudicator, in Milimani SCC No. E369 of 2022 delivered on 18/3/2022)

JUDGMENT

1. The Respondent herein sued the Appellant at the Small Claims Court seeking recovery of a sum of Ksh.202,679/= lent out by the respondent to the appellant together with general damages for breach of contract, fraud and deceit in the sum of Ksh.500,000/= and interest and costs.

2. The appellant denied the claim while alleging that he had paid the amount owing and only remained with a balance of Ksh.17, 980/= unpaid. The trial court upon hearing the case, dismissed the appellant`s defence and entered judgment in favour of the respondent in the sum of Ksh.234,688/= and awarded the respondent Ksh.50,000/= in general damages for breach of contract. The appellant was aggrieved by the judgment of the trial magistrate and lodged the instant appeal.

   The grounds of appeal are:

   (a) That the learned magistrate erred in law and in fact by holding that the appellant never paid the sum of Kshs. 232,020/= and the balance due was Kshs. 17, 980/=

   (b) That the learned magistrate erred in law and in fact by failure to consider the annexed statement from Safaricom which the Learned Magistrate referred to as not from Safaricom Centre.

(c) That the learned magistrate erred in law and in fact by not exercising his discretion judicially.

(d) That the learned magistrate erred in law and in fact by failure to consider that the evidence of payments was not controverted.

(e) That the learned magistrate erred in law and in fact by not considering the appellant's submissions and authorities.

(f) That the learned magistrate erred in law and in fact by showing open bias against the appellant.

3. The appellant prays that the judgment and decree of the lower court be set aside or otherwise reviewed and substituted with a suitable award. He also prays for costs of the appeal.

Background facts

4. It was the case for the respondent that the appellant approached her with a proposal for a profitable business which the appellant bought and as a result took a loan of Kshs. 250,000/= from Metropolitan SACCO and gave it to the appellant. The appellant agreed to repay back the amount together with an interest all totaling to Kshs. 302,688/=. The appellant paid a total sum of Ksh.100,009/= thereby leaving a balance of Ksh. 202,679/=. In December 2019, the appellant stopped making deposits, cut all communications and became evasive. The respondent involved the police after which the appellant gave an undertaking dated 9th March 2020 to clear the outstanding balance of Ksg.220,180/= before the end of June 2020. The said amount was not paid prompting the respondent to file suit.

5. The Appellant filed a response to the claim dated 28th January 2022, a witness statement dated the same date, a list of witnesses and a bundle of documents of even date. He admitted paying a sum of Ksh.100,009/= directly to Metropolitan SACCO and alleged that he had paid a total of Ksh.123,420/= directly to the respondent through Mpesa, all totaling to Ksh.232,020/=. He contended that the balance remaining was Ksh.17,980/=.

6. The appeal was disposed of by way of written submissions of the respective counsels representing the parties.

Appellant's Submissions

7. The appellant submitted that though he made an undertaking to pay Ksh.220,180/= at Buruburu police station on 9/3/2020, the trial court ignored his payments vide Mpesa in spite of the fact that the Mpesa print outs were produced in court without objection.

8. The appellant submitted that the respondent had specifically failed to prove loss she encountered arising from the breach of the contract as was held in the cases of Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya [2015] eKLR, David Bagine vs Martin Bundi [1997] eKLR and Ouma vs. Nairobi City Council [1976]KLR 304.

9. It was submitted that general damages are not recoverable in cases of alleged breach of contract. Reliance was placed in the cases of Kenya Tourism Development Corporation vs Sundowner Lodge Ltd (2018) eKLR, Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd (2015) eKLR and China Overseas Engineering Company Limited vs Isaaq Kichwen Kijo (219) eKLR to buttress this position.

10. Counsel submitted that though the general rule is that general damages are not recoverable in cases for breach of contract, the rule has exceptions. He relied in the case of Capital Fish Kenya Limited vs Kenya Power & Lighting Company [2016] eKLR where it was held that:

Whereas the general legal principle is that courts do not normally award damages for breach of contract, there are exceptions such as when the conduct of the respondent is shown to be oppressive, high handed, outrageous, insolent or vindictive.

11. It was submitted that the respondent had not met the exceptions to allow for recovery of general damages for breach of contract. The appellant urged the court to allow the appeal.

Respondent's submissions

12. The respondent submitted on three issues; first, whether the trial court erred in law and in fact by failure to consider annexed statement from Safaricom; secondly, whether the appellant repaid the loan alleged and whether the appellant is entitled to general damages for breach of contract.

13. On the first issue, the respondent submitted that the Mpesa statement produced by the appellant being electronic evidence could only be admissible if accompanied by a certificate of electronic evidence prepared under the provisions of section 106 B (4) of the *Evidence Act*. The respondent made reference to the case of Samuel Kazungu Kambi vs. Nelly Illongo & 2 others [2017] eKLR to buttress this point. Further reliance was made in the case of Charles Matu Mburu v Republic NYRCA, Criminal Apeal No. 34 ofc2014 2014 eKLR where the Court of Appeal held that:

> In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.

14. It was submitted that the requirement of a certificate is mandatory as was stated in the cases of MNN v ENK [2017]eKLR and Jack & Jill Supermarket v Viktar Ngunjiri [2016] eKLR. Therefore, that in the absence of a certificate the Mpesa statements were inadmissible.

15. It was further submitted that the subject statements were not certified and were mere printouts whose authenticity could not be verified and hence could not hold any probable value.

16. The respondent submitted that the appellant's assertion that he had paid a sum of Ksh. 232,020/= with a balance of Kshs. 17, 980/= was a blatant lie coined to mislead the court as the veracity of the Mpesa statement could not be authenticated.

17. It was submitted that the Mpesa statement was not certified as provided under section 81 of the *Evidence Act* which provides that:

    Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.

18. The respondent cited the case of George Kimani Njuki v National Lands Commission & 2 others (2022) eKLR where it was held that:

    In my humble view, the fact that the documents, which were availed to the court, were neither signed nor approved, same therefore do satisfy the provisions of Section 81 of the *Evidence Act*, Chapter 80, Laws of Kenya.

    In my humble view, such documents are not admissible and therefore same cannot be relied upon and/ or otherwise, be therefore subject of admissibility, even if the witness seeking to produce same, is a Public officer.

In a nutshell, I find and hold that the said Documents are not admissible, for purposes of resolving the subject dispute or at all.

19. It was submitted that the statements tendered in court were mere printouts whose authenticity could not be verified and hence could not hold any probative value.

20. On the second issue, the respondent submitted that the appellant admitted owing a sum of Ksh.220,180/= which he undertook to pay vide a document signed at Buruburu police station. That in the undertaking he stated that no coercion was used against him to admit the debt which emanated from a loan of Ksh.250,000/= taken by the respondent and advanced to the appellant.

21. The respondent submitted that the statement from Metropolitan Sacco showed that the appellant only deposited a sum of Ksh.100,009/= from the expected total of Ksh.302,688/=. That this left a deficit of Ksh.202,679/=. It was submitted that the respondent had proved her case against the appellant.

22. On whether the respondent is entitled to general damages for breach of contract, the respondent submitted that there are exceptions to the general principle that general damages are not available for breach of contract such as where the conduct of the party is shown to be oppressive, high handed, outrageous, insolent or vindictive. The respondent submitted that she was harassed and subjected to constant pestering from debt collectors due to the said debt. That in the circumstances of this case, she was entitled to compensation by way of general damages for the mental anguish, distress and inconvenience caused by the appellant. She relied in the case of Hort Limited vs. Attorney General (2016) eKLR where it stated that:

97. To add to this, it is noteworthy that general damages are compensatory in nature in that they should offer some satisfaction to the injured plaintiff. Given the totality of evidence in this case and the fact that the Plaintiff was able to illustrate that there was breach of contract due to the conduct of the Defendant, I am of the opinion that the award of Kshs. 5,000,000/= would be sufficient as an award for general damages to adequately compensate the Plaintiff for the breach of the lease agreement.

23. The respondent submitted that she was harassed and subjected to constant pestering from debt collectors due to the said debt. That in the circumstances of this case, she was entitled to compensation by way of general damages for the mental anguish, distress and inconvenience caused by the appellant.

24. The respondent urged the court to dismiss the appeal.

Analysis and Determination

25. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular

circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. I have considered the record of the trial court, the grounds of appeal and the submissions tendered by both counsels for the parties. The issues that fall for determination are:

    (1) Whether the appellant made payments through Mpesa

    (2) Whether the loan was to attract interest

    (3) Whether the trial court erred in awarding damages for breach of contract

    4) How much the respondent had proved for the amount owing.

Whether the appellant made payments through Mpesa

27. There was no dispute from the evidence adduced before the trial court that the respondent took a loan of Ksh.250,000/= from Metropolitan Sacco and gave the money to the appellant on the understanding that the appellant would pay back the loan to the said Sacco. It is the case for the respondent that the appellant paid a sum of Ksh. 100,009/= directly to the Sacco as captured by the statement from the Sacco and stopped payments with a balance of Ksh.202,679/= unpaid that she claimed in her statement of claim dated 21/1/2022. It is agreed that the parties thereafter entered into an agreement at Buruburu police station that the appellant would pay the outstanding amount of Ksh.220,180/=.

28. It was the contention of the respondent that the appellant was to pay the sum of Ksh.250,000= with interest thereby bringing the total payment to the Sacco to Ksh.302,688/=.

29. The appellant on the other hand pleaded in his statement of defence that there was no provision in his oral agreement with the respondent that the money was to accrue interest. It was his averment that he paid a total of Ksh.108,600/= directly to the Sacco and a total of Ksh.83,430/= to the respondent through Mpesa and another Ksh.40,000/= directly to the respondent, thus making the total payment to Ksh.232,020/=. That left a balance of Ksh.17,980/= unpaid out of the loan of Ksh.250,000/=.

30. The respondent denies that the appellant paid any money to her through Mpesa or any other direct payment to her. It was her contention that the evidence of the appellant to that end was fabricated. She submitted that the Mpesa statements of the appellant were not admissible for lack of a certificate as required by section 106 B of the *Evidence Act*.

31. The trial court held that the appellant`s Mpesa statements were inadmissible for lack of a certificate as required under section 106 B of the *Evidence Act*.

32. Section 106B of the *Evidence Act* provides for the admissibility of electronic records. Section 106 B (4) provides that:

    " In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

    (a) identifying the electronic record containing the statement and describing the manner in which it was produced;

    (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

    (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

33. In the case of Samuel Kazungu Kambi v Nelly Ilongo & 2 others [2017] eKLR that was cited by the respondent, the court held the following on the provisions of the said section:

21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.

23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter.

34. In the said case the court referred to the case of Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR where the court declined to consider documents which were produced without due compliance with section 106B of the *Evidence Act*.

35. The provisions of section 106B of the *Evidence Act* are in my view compulsory. The appellant in this matter did not comply with the said sections before producing the Mpesa statements in court. I am in agreement with the decision of the trial magistrate that the Mpesa statement was not admissible in court without the necessary certificate. The trial court was thus correct in not relying on the document. Consequently, there was no credible evidence that the appellant paid the respondent the money alleged through Mpesa.

36. That notwithstanding, it is to be noted that the arrangement between the appellant and the respondent was for the appellant to pay the money directly to the Metropolitan Sacco. He did not explain why he would unilaterally change that arrangement and pay the money directly to the respondent.

37. The appellant on the 9th March 2020 entered into an agreement with the respondent that the outstanding amount as of that date was Ksh.220,180/=. He in the agreement promised to pay Ksh.30,000/= on or before 13/3/2020 and the balance of Ksh.190,000/ would be cleared by end of June 2020. The appellant never kept to his promise. It is to be noted that even at that time the appellant was committing to pay the money to the Sacco and not to the respondent. There is then no reason why he would turn around and claim that he paid the money directly to the respondent,

38. The appellant in his response as contained on page 25 of the Record of Appeal indicates that he paid a sum of Ksh.40,000/= directly to the claimant. There was no evidence as to how and when that money was paid.

39. The respondent produced a statement from Metropolitan Sacco that shows the amount that the appellant paid. The appellant never showed that he paid any other money other than what was captured in the Metropolitan Sacco statement. In the premises, the respondent had proved that the appellant paid a sum of Ksh.100, 009/= to the Sacco and did not make any other payment. The appellant did not prove that he made any payment to the respondent through Mpesa. The averment of the appellant to that end is therefore dismissed.

Whether the loan was to attract interest

40. The respondent says that the appellant was to pay back the money with interest making the total payment Ksh.302,688/=. The appellant on his part says that the oral agreement did not provide for interest and therefore that he was to pay back Ksh.250,000/=.

41. The appellant in his undertaking dated 9th March 2020 admitted to owing Ksh.220,180=. In his response to the claim dated 28th January 2022 he gave a tabulation of the payments that he had made between the years 2019 and 2021. The tabulation showed that in the year 2019 he had made a total payment of Ksh.128,270/=. This would mean that if he was to refund a total of Ksh,250,000/= as he contended, the balance remaining at the end of 2019 was Ksh. 126,730/=. If that was the case, why then would he have admitted in his undertaking of 9th March 2020 that the balance as at that time was Ksh.220,180/= which would push the total payback to run over Ksh.300,000/= instead of Ksh.250,000/=? In admitting to pay money that was over and above the Ksh.250,000/= can only mean that the appellant was required to pay back the money with interest. His averment that he was not required to refund the money with interest cannot be true. The respondent took the money from her Sacco and handed it over to the appellant with an agreement that he was to pay it back directly to the Sacco. The court takes judicial notice that a Sacco operates like a bank and does not give out free money but charges interest on money loaned out to its customers. I therefore agree with the respondent that the appellant was supposed to pay back the money with interest with the money payable to the Sacco coming to a total of Ksh.302,688/=.

Whether the trial court erred in awarding damages for breach of contract

42. The respondent was in addition to the refund of the money claiming Ksh.500,000/= for breach of contract. The trial court in its judgment held that though the general rule is that general damages are not recoverable in cases of alleged breach of contract, a claimant who has not suffered any loss may nevertheless be entitled to damages though minimal. The court in this respect cited the Anson`s Law of Contract, 28 Edition at Page 589 and 590 where the author states that:

Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.

43. The court also made reference to the Halsbury`s Laws of England, Third Edition Vol. II which defines nominal damages as follows:

Where a plaintiff whose rights have been infringed has not in fact suffered any actual damage therefrom, or fails to prove that he has; or although the plaintiff has sustained actual damage, the damage arises not from the defendant`s wrongful act, but from the conduct of the plaintiff himself; or the plaintiff is not

concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damage which he is entitled to receive are called nominal....Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved.

44. In this case, the trial court held that the respondent was forced to pay the loan after the appellant failed to do so. That the respondent did not prove the loss but she was nevertheless entitled to nominal damages. The court awarded her nominal damages of Ksh.50,000/=.

45. As observed by the trial court, the general rule is that general damages are not available for breach of contract for the reason that such damages are claimed in the form of special damages. The reason for this was expounded by the Court of Appeal in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR, where the court stated that:

> " With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: 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. In Dharamshi Vs. Karsan[1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication. And so it would be. See also Securicor (k) V Benson David Onyango & Anor[2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination."

46. Further explanation as to why damages are not available for breach of contract was given by Majanja J. (as he then was) in the case of Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd [2015] eKLR as follows:

> " The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the

nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR))".

46. The respondent in this matter raised a special claim for payment of Ksh.202,279/= which was the balance of the loan unpaid by the appellant. In my view, it amounted to a duplication of the award of special damages for the respondent to be paid a further sum of Ksh.50,000/= in general damages for breach of contract even though the court termed it as nominal damages. There was no basis for the award of general damages and the same is thereby set aside.

How much had the respondent proved

47. The respondent in her statement of claim claimed Ksh.202,679/=. The trial court awarded her Ksh.234,688/= which was over and above what the respondent was claiming. In my view, a court of law cannot award over and above what a claimant is claiming in the absence of amendment to the claim.

48. The respondent in her statement of claim stated that the appellant paid a sum of Ksh.100,009=/= out of the expected sum of Ksh.302, 688/=, thereby leaving a balance of Ksh. 202,679/= that she claimed in the statement of claim. The payments of Ksh.100,009/= was captured in the statement from the Sacco. The respondent had proved that the appellant was owing a sum of Ksh.202,699/=. That is the amount that the trial court should have awarded. The award of Ksh.234,688/= was not claimed and ought not to have been awarded. The award of Ksh.234,688/= is thereby set aside and substituted with an award of Ksh.202,679/=.

Disposition

49. The upshot is that the respondent had proved her claim in the sum of Ksh.202,679/= against the appellant. The award of Ksh.234,688/= entered by the trial court is thereby set aside and substituted with an award of Ksh.202,679/=. The same is to attract interest at court rates from the date of filing suit.

50. The award of Ksh.50,000/= in general damages for breach of contract is set aside.

51. As the appeal has partially succeeded, I order each party to bear its own costs to the appeal.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT GARSEN THIS 23RD DAY OF JANUARY 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mokaya for Appellant

Mr. Oloo HB Mr. Musiega for Respondent

Court Assistant -