



REPUBLIC OF KENYA



**Board of Management of St Marys Lwak Girls High School v Odeny t/a Simon Odeny Enterprise  
(Civil Appeal E024 of 2023) [2025] KEHC 1470 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL APPEAL E024 OF 2023  
DK KEMEL, J  
FEBRUARY 14, 2025**

**BETWEEN**

**THE BOARD OF MANAGEMENT OF ST MARYS LWAK GIRLS HIGH  
SCHOOL ..... APPELLANT**

**AND**

**SAIMON ODUNDO ODENY T/A SIMON ODENY  
ENTERPRISE ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Malesi (P.M.) issued  
on 8th November 2023 in Madiany PMCC No. E001 of 2023)*

**JUDGMENT**

1. The Respondent herein filed suit in the lower court being Madiany PMCC No. E001 of 2023 wherein he claimed for a sum of Kshs 921,400/= together with interest as well as general damages plus cost of the suit which arose from supply of materials (beds) to the Appellant in the month of August 2021.
2. After a full trial, the learned trial magistrate entered judgment in favour of the Respondent against the Appellant as prayed in the Plaint.
3. The Appellant being aggrieved by the aforesaid Judgment, he has appealed to this Honorable Court against the entire judgment together with the orders therein on the following grounds:
  - i. That the trial magistrate erred in law and in fact when he held that a delivery note was evidence of a contract.
  - ii. That the trial magistrate erred in law and in fact when he held that a valid contract could exist where public procurement laws have been violated.
  - iii. That the trial magistrate erred in both law and fact in failing to appreciate that there was no evidence presented by the Respondent to demonstrate that he was given a tender to supply



beds to the school as against the Appellants evidence including the tender committee minutes, audit report from the ministry of education showing that no tender was issued.

- iv. That the trial magistrate misdirected himself when he ignored the fact that the Respondent issued a delivery note without being issued with a local purchase order as by law required.
  - v. The trial magistrate erred in law and in fact by concluding that there was a contractual relationship based on no evidence and against the admission by the Respondent that there was no local purchase order issued to him.
  - vi. That the trial magistrate misdirected and contradicted himself when he observed that the Respondent had not pleaded breach of contract while still holding that the Respondent was entitled to the contractual sum.
  - vii. That the trial magistrate erred in law and fact when he applied the wrong principles to arrive at a finding that there were triple beds that were delivered at the school as against the evidence tendered including school ledger, gate keeper entry report and audit report.
  - viii. That the trial magistrate misdirected himself when he relied on a delivery note as proof of delivery which was signed by an unauthorized person contrary to the law on public procurement.
  - ix. That the trial magistrate erred in fact in arriving at a conclusion based on no evidence that the Appellant produced documents for requisition of beds and the beds would be distributed within the school based on no evidence.
  - x. That the trial magistrate erred in law and in fact in totally disregarding the Appellant's pleadings, evidence and submissions.
4. The Appellant prayed that the lower court judgment be set aside and that the suit be dismissed with costs and that the cost of the appeal be awarded to the Appellant.
  5. Being a first appeal, the court relies on a number of principles as set out in *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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 into account of particular circumstances or probabilities materially to estimate the evidence.”

6. It therefore behooves upon this court to relook, re-evaluate, reanalyze the evidence at the trial court and arrive at its independent conclusion while bearing in mind that it did not see the witnesses first hand.
7. PW1 Simon Odundo Odeny testified that he recorded a statement and filed in court which was adopted as his evidence in chief. That he also filed a list of documents together with annexures which were admitted in evidence as exhibits - Invoice No. 181 – (PExhibit 1), Delivery note P (exhibit 2), Copy of letter dated 23/11/2021 – (Pexhibit 3), Demand letter-(P exhibit 4).

On cross examination, he stated that he had taken a loan of Kshs 540,000/= in 2021 from KCB Bank Bondo Branch. That it was not the first time he was taking a loan with KCB. That the loan was to finance a tender with the Appellant. That the loan was secured with a title deed of a property belonging to his son. That he did not show the bank the tender documents. That he was not issued with an LPO.



That he had copies of the cheques he was issued from the school. That the invoice does not bear the school's stamp. That he gave the tender document to his advocate. That the person who received the items was Irene Otieno, matron of the school. That the said Irene was receiving on behalf of the school. That he signed at the gate when he delivered the items and that he was present during the delivery.

On re-examination, he stated that the bank did not take security and that he has been doing business with the school since the year 2016. That he used to deal with someone else before Irene Otieno who was the matron of the school, took over.

That marked the close of the Respondent's case.

8. DW1 Teresia Njiru testified that she was in charge of stores at Lwak Girls High School. That she recorded a statement dated 03/03/2023 filed in court on 05/04/2023 which was adopted as her evidence in chief. That she also filed a copy of the ledger which was produced as D-Exhibit 1. That the same had no information about bed deliveries.

On cross examination, she stated that the dates on the ledger are 06/05/2022, 13/05/2022 and 02/06/2022. That she was aware that the subject of the suit is said to have transpired in 2021. That the ledger did not indicate the deliveries done in 2021. That she did not know whether the Respondent was given a delivery note. That Irene is the school matron and an agent of the school. That she was employed in 2016. That she did not show any document regarding deliveries on 09/08/2021. That deliveries would be accompanied with a delivery note.

9. DW2 Roseland Shiramba testified that she has been a Principal Lwak Girls High School since 04/08/2021. That she received a hand over report produced as D exhibit 2. She also produced an audit report as D exhibit 3. That she recorded a statement and filed in court which was adopted as her evidence in chief.

On cross examination, she stated that she reported at the school on 04/08/2021. That she was not aware of the transaction subject of the suit. That she was not sure whether the transaction happened during her predecessors' term. That she saw a requisition raised by the school matron at the time she was an employee of the school. That the same was presented to the school's Bursar. A delivery ought to be presented by a supplier. That the auditor is an employee of the Ministry of Education. That it was not easy for her to ascertain whether the delivery was made or not. That the supplier has no responsibility as to who keeps the deliveries. That verification of goods is a process.

On re-examination, she stated that Irene was the in-charge of the user department. The goods ought to have been received by the storekeeper. That other documents ought to accompany the delivery note like requisition and Local Purchase Order (LPO) That a local purchase order was raised.

The defense case closed.

10. The appeal was canvassed by way of written submissions. Both parties complied.
11. The Appellant's counsel submitted that the trial magistrate misapplied the facts and the law in concluding that a delivery note is evidence of a contract. He submitted that the Respondent produced an invoice and a delivery note both of which originated from him. That the delivery note was undated and did not have any stamp or any other evidence to show that the Appellant ratified the actions of the Respondent. He placed reliance on the case of *Pramukh Cash and Carry vs Charles Ojwang Milimba t/a Milimba Stores (Civil Appeal No. E053 of 2022)* [2024] KEHC 1340 (KLR) where it was inter alia held that showing the invoice alone, which only are proof of demand for payment, cannot in anyway fill the void left by failure to exhibit the LPO and Delivery notes.



12. The Appellant likewise submitted that the trial magistrate erred in law and in fact in holding that a valid contract could still exist where public procurement laws had been violated. That the entirety of the dealings alleged by the Respondent to have occurred did not even remotely follow the provisions of the *Public Procurement and Asset Disposal Act* 2015, thus any claim arising from it is an illegality. They prayed that the appeal be allowed with costs.
13. On the other hand, the Respondent submitted that it is not mandatory that all contracts be in writing. He submitted further that the items were indeed delivered and received by the matron who was an agent of the school. In conclusion, he submitted that the instant appeal was a waste of judicial time and that the same should be dismissed with costs to the Respondent.
14. I have considered the record of appeal plus submissions by the parties. I find that the issue for determination is whether there was a valid contract between the Appellant and the Respondent.
15. The Appellant herein being a public institution, then the supply of goods and services ought to be in line with the provisions of the Public Procurement and Asset Disposal Regulations, 2020.

Regulation 166(1) stipulates that:

“an accounting officer of a procuring entity shall only receive works, goods or services pursuant to section 159 of the Act based on a purchase order, service order or signed contract and ensure that annual consolidated inventory of assets is maintained in the format specified in the Twelfth schedule”

16. It is not in doubt that the above provision is couched in mandatory terms thus any transactions in violation of the above terms is deemed void and or illegal. In the instant case, the Respondent did not produce any Purchase order, service order or signed contract which would evidence a valid contract. In the absence of the said documents, it is therefore difficult to establish the existence of a valid contract.
17. In *Pakatewa Investments Company Limited vs. Municipal Council of Malindi* (2016) eKLR the court stated that:

“...I do agree with the findings of the trial court that the proper procedure to procure the goods was not followed. Although it is not the work of the supplier to find out the internal workings of a public organization or a company as established in the *Turquand’s* case, at least the ordinary processes have to be followed. A supplier cannot expect to receive a phone call from an assistant supply officer to supply goods and jump into the process of supplying. One has to be pre-qualified.”
18. The Respondent has claimed that he supplied 66 beds to the Appellant which is a public institution. He further claimed that the goods were received by the school matron, however, he ought to have known that the Appellant was a Public Institution which called for proper procedure regarding contractual obligations. Indeed, the Respondent has claimed that there was a contract of supply of beds to the school. However, he did not avail any LPO or a Supply Contract to back his claims. The Law of Contract vide Section 2 thereof requires that any transaction exceeding Kshs200/= must be in writing. It was therefore incumbent upon the Respondent to ensure that he obtained the requisite documents to enable him pursue the Appellant. The Respondent on cross examination, testified that the supply contract was with his advocate but he failed to produce it in court to back his claim. The definition of a contract from the *Halsbury’s Laws of England* 4<sup>th</sup> Edition Page 340, is as follows: -

“to constitute a valid contract,



- i. there must be two or more separate and definite parties to the contract;
- ii. those parties must be in agreement, that is there must be consensus on specific matters (often referred to in the older authorities as ‘consensus ad idem’)
- iii. those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises;
- iv. the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise.

From the foregoing description, it is clear that the Respondent has not surmounted the burden of proof. He failed to present the valid contract documents and sought to rely on oral transaction but again failed to call the official who he alleges had received the goods on behalf of the school. The Respondent knew that the Appellant was a public institution that requires that its transactions with 3<sup>rd</sup> parties must be above board and in line with the Public Procurement and Disposal of Assets Act. As this was not done, I find that the Respondent’s claim must fail. The attempt by the Respondent to present invoices without the relevant LPOs and Delivery notes came a cropper.

It was therefore erroneous for the trial magistrate to find that a contract existed between the Respondent and Appellant when in actual facts there was none in view of the absence of the valid documents. I find there was no contract between the Respondent and the Appellant. The workers of the Appellant were bound to comply with the clear guidelines of the Public Procurement and Asset Disposal Act which required that they receive works, goods or services pursuant to Section 159 of the Act based on a purchase order, service order or signed contract and ensure that Annual Consolidated Inventory of Assets is maintained in the format specified in the 12<sup>th</sup> schedule. Since this provision is couched in mandatory terms, there was no way the Respondent could supply the alleged beds without any valid documentation such as purchase order, service order or a signed contract. There was also doubt as to whether any such goods entered the school. Further, the Respondent cannot be allowed to benefit from transaction which was flawed and therefore his claim of a breach of contract must be rejected.

19. In view of the foregoing observations, it is my finding that the Appellant’s appeal has merit. The same is allowed. The judgment of the trial court dated 8<sup>th</sup> November, 2023 is hereby set aside and substituted with an order dismissing the Respondent’s suit with costs to the Appellant. The Appellant is also awarded costs of the appeal.

Orders accordingly.

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Gajo.....for Appellant

Oreda.....for Respondent

Ogenda.....Court Assistant

