



**Hamisi v Orodi (Civil Appeal E1089 of 2023)
[2025] KEHC 1802 (KLR) (Civ) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1802 (KLR)

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

CIVIL

CIVIL APPEAL E1089 OF 2023

JM NANG'EA, J

FEBRUARY 12, 2025

BETWEEN

HADIJAH LINDA CHERUTO HAMISI APPELLANT

AND

SARAH ISORIT ORODI RESPONDENT

(Being an appeal from the Judgement and decree of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts (Hon. Wendy K. Micheni-CM) delivered on 13th September 2023 in CMCC NO. E6706 of 2020)

JUDGMENT

The pleadings in the lower court

1. The Appellant herein is challenging the learned trial court's decision in which judgement was entered against the Respondent in the sum of Kshs. 1,460,000 together with the costs of the suit and interest thereon at court rates. The Appellant had sued the Respondent, who was her workmate, and 10 others jointly and severally in the lower court for judgement in the sum of Kshs. 17,914, 646 which she had allegedly remitted to the respondent, and on her instructions, to her co-defendants in the suit by instalments on diverse dates between 10th November 2017 and December 2019 for use in their business venture. According to the Appellant, it was agreed among them that the money would be refunded to her on demand. The Respondent and her co-defendants are alleged to have failed to make refund of funds advanced to them contrary to the agreement, hence the claim lodged in the lower court.
2. The Respondent and her co-defendants filed a joint defence to the claim traversing the allegation that they owe any money to the Appellant. They aver that they are strangers to the alleged agreement and put the Appellant to strict proof of all the material claims in the suit. The court was accordingly urged to dismiss the suit with costs.



The evidence before the lower court.

3. The Appellant reiterated the averments in her Statement of Claim vide her oral evidence. In support of her evidence she tendered copies of bank receipts, bank statements and Mpesa statements among other documentary exhibits showing that she paid out the money in question to the Respondent. She further maintained that she also made direct payments to the Respondent's co-defendants at her request.
4. The Respondent and her co-defendants in the suit didn't offer evidence.

Analysis and determination

5. The Appellant's Grounds of Appeal as per Memorandum of Appeal dated 12th October 2023 may be condensed into two as hereunder:
 - (a) That the learned trial magistrate erred in law and fact by finding that the sum of Kshs. 17,914, 646 paid to the respondent in cash and Mpesa were generalized, unspecific, despite pleadings, evidence and submissions in the contrary (sic).
And
 - (b) That the learned trial magistrate erred in law and fact in failing to order refund of the entire sum of Kshs. 17, 914, 646 advanced against the weight of evidence and submissions.
6. The Appellant therefore prays that the lower court's judgement be quashed, set aside, and/or varied, and that the Respondent does refund the whole of the claimed amount of Kshs. 17, 914, 646 together with interest at court rates, and further bear the costs of the suit and in this appeal.
7. It is trite law that the appellate court can only interfere with the findings and/or award of the trial court if the court misdirects itself on matters of fact and/or law by failing to take relevant factors into account or by considering irrelevant factors and thus arrive at a plainly wrong decision (see the case of *Ocean Freight Shipping Co. Ltd V. Oakdale Commodities Ltd (1997) eKLR Civil Appeal No. 198 of 1995*). The appellate court also has the duty of analysing and re-assessing the evidence on record and reach an independent decision as observed in the case of *Selle V. Associated Motor Boat Co. (1968) EA 123*.
8. In her judgement, the learned trial magistrate rightly found all the defendants in the suit including the Respondent herein liable for the claim having failed to offer evidence in rebuttal of the Appellant's evidence. The court held that in the circumstances the Appellant had proven fraud on the part of the Respondent and her co-defendants in the suit to the required legal standard. Notwithstanding, the learned trial magistrate found that the only claim the Appellant specifically pleaded and strictly proved as against the respondent herein as legally required of special damages was the sum of Kshs. 1,460,000 she awarded. Her other claims were rejected for want of specificity or particularization. The trial court also reasoned that a sum of Kshs. 13,669,000 which is part of the Appellant's claim could not be granted for reason of failure to ascertain the recipients.
9. The learned trial magistrate was fortified in her decision by various judicial determinations she cited which include the case of *Gichinga Kibutha V. Caroline Nduku (2018) eKLR*. In that matter it was held that;

it is not automatic that in instances where the evidence is not controverted the Claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."



10. As correctly submitted by Counsel for the Appellant and reiterated by the trial court, it is trite law that special damages must not only be specifically pleaded but should also be strictly proven for the court to find in favour of the claimant. Counsel cited various decisions in support of their submissions including Kenya Akiba Micro Finance Limited V. Ezekiel Chebii & 14 Others (2012) eKLR. It was held in that case that;-

“a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter”.

The Appellant therefore argues that having failed to offer evidence in rebuttal of her case in the lower court, the Respondent has not debunked her claim that is backed by documentary exhibits and underscored by oral evidence. The trial court is faulted for declining to award the entire claim to the Appellant.

11. Like in the lower court, the Respondent has not challenged this appeal.

12. In its decision in the case of Mitchell Cotts (K) LTD V. Musa Freighters (2011) eKLR, the Court of Appeal observed that a claim for special damages is not necessarily always proven by documentary exhibits. It would suffice according to the circumstances of every case before the court if there is otherwise credible evidence in support of loss occasioned.

13. The situation obtaining in this matter is that the Appellant’s evidence that she advanced a total of Kshs. 17, 914, 646 by various instalments at the request of the respondent has not been rebutted. Nevertheless, the Appellant went ahead to prove the disbursements vide unchallenged bank deposits and Mpesa transfers and oral evidence. In the special circumstances of this case, therefore, the special damages claim has been proven to the required legal standard and I fully agree with the Appellant’s submissions. The case is akin to a scenario where the defendant in a pecuniary claim such as the suit instituted by the Appellant herein fails to enter appearance and/or file defence. Judgement would automatically in law be entered being a liquidated claim. Even though the respondent and her co-defendants filed a defence, the same is of no probative value without evidence to back it up. I find the case of Gichinga Kibutha supra distinguishable given the particular circumstances of this case.

Determination

14. In the result, the appeal succeeds. Consequently, the trial court’s judgement entered on 13/9/2023 and the resulting decree as against the Respondent herein is set aside and substituted with judgement in favour of the Appellant against the Respondent in the sum of Kshs. 17,914, 646. The Appellant is further granted the costs of this appeal as well as interest at court rates to be computed from the date of filing suit in the lower court.

15. Judgement accordingly.

J.M. NANG’EA, JUDGE

JUDGEMENT DELIVERED VIRTUALLY THIS 12TH DAY OF FEBRUARY, 2025 IN THE PRESENCE OF:

The Appellant’s Advocate, Mr Sang

The Respondents, Absent

J.M. NANG’EA, JUDGE

