



**Mati & another v Gicheru (Civil Appeal E002 of 2024)
[2025] KEHC 2062 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E002 OF 2024
LW GITARI, J
FEBRUARY 7, 2025**

BETWEEN

GERVASISU MATI 1ST APPELLANT

GODFREY MICHENI MATI 2ND APPELLANT

AND

JACKSON GICHERU RESPONDENT

(Being an Appeal against the Judgment of Hon. Oscar Wakina delivered on 20th March 2024)

JUDGMENT

1. The appeal arises from the decision in the Small Claims Court Case Number SCCOMM. No. E003 of 2024 which was filed by the respondent Jackson Gicheru who was claiming the existence and execution of an alleged contract between him and the deceased the late Moses Karimi Mati aka Majani Musa aka Kirimi Mati whom the Appellant represents as his legal representative. The appellant's claim was that the deceased owed him Ksh.998,834.00. It was the respondent's claim that the amount claimed arose from services rendered to the deceased for the maintenance of motor vehicle KCF 394 D and KBM 071U in the year 2020.
2. The claim was instituted by the respondent who was claiming that the deceased had engaged in a contractual agreement for the provision of services and maintenance of the two motor vehicles amounting to Ksh.998,834/-
3. In support of his claim the respondent relied on several pieces of evidence which included undated and unsigned invoices, mpesa transaction messages and whatsapp chat records to substantiate the claim
4. The appellant denied the existence of any such contract and that the evidence relied on by the respondent lacked authenticity were not enforceable against the deceased. The learned adjudicator heard the dispute and entered Judgement in favour of the respondent. Her finding was that the



evidence presented by the respondent was sufficient to prove the claim. The appellant was dissatisfied by the decision of the learned magistrate and filed this appeal based on the following grounds:-

1. The Appellant contends that the lower court erred in concluding that a contract existed based on the evidence provided. They argue that the evidence did not meet the required legal stands to establish a binding contractual relationship.
 2. The respondent failed to prove the special damages with the necessary degree of certainty and particularity. The Appellant asserts that the lower court overlooked this fundamental requirement of law.
 3. The Appellant challenges the reliance on undated and unsigned invoices as proof of the alleged debt, arguing that these documents do not constitute valid evidence of a contract.
 4. The Appellant disputes the sufficiency of the Mpesa messages and WhatsApp chats emphasizing that these pieces of evidence were unverified and lacked proper authentication.
 5. The Appellant argues that the trial magistrate misapprehended the law by failing to consider relevant legal precedents and by not exercising judicial discretion judiciously. The decision disregarded established legal principles and was unduly influenced by the absence of a rebuttal witness from the Appellant.
 6. The Appellant criticizes the lower court's reliance on Section 32 of the Small Claims Act, arguing that it does not relieve the Respondent from the burden of proving their case with reliable and concrete evidence.
 7. The Appellant seeks to overturn the lower court's Judgment, arguing that the findings were against the weight of the evidence presented and the applicable legal standards. They request that the High Court of Chuka reviews the case, sets aside the lower court's Judgment, dismisses the Respondent's suit with costs, and awards the costs of the appeal to the Appellant.
5. The appellants pray that the appeal be allowed, the Judgment be set aside and substituted with an order dismissing the respondent's suit with costs. That he be awarded costs of this appeal.
6. The appeal was canvassed by way of written submission. The appellant submits that the trial court decisions was fundamentally flawed due to legal errors and a misrepresentation of the evidence, warranting a complete re-evaluation of the evidence by the High Court and reversal. The appellant has raised five issues for determination which are as follows:-
1. Whether the trial magistrate erred in holding that the Respondent proved the existence of a contract between the deceased and the Respondent.
 2. Whether the trial magistrate erred in finding that the Respondent had specifically proved special damages of Ksh.998, 834/- with the required degree of certainty and particularity.
 3. Whether the trial magistrate erred in considering the Mpesa messages and WhatsApp chats from an unverified number as reliable and sufficient proof of the existence of a contract and further disregarding the Appellant's submissions on account of absence of a witness by the Appellants at the hearing.
 4. Whether the trial magistrate misapplied the law by solely relying on Section 32 of the Small Claims Act and disregarding the Respondent's burden to produce reliable.
 5. Whether the trial magistrate's verdict is against the weight of the law and evidence presented, including the failure to consider relevant legal precedents and judicial discretion.



7. I have considered the submission by the Appellant.

Respondent's Submissions:-

8. The counsel for the respondent submitted that this is the first appellate court and it is mandated to re-evaluate the evidence before the trial court as well as the Judgment and arrive at its own independent Judgment on whether to allow the appeal. That the first appellate court is mandated to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. He cited the case of Bashir Ahamed Butt-v- Uais Ahamed Khan (1982-1988) 1 KLR as referenced in Kenya Oil Company Limited & Another –v- Kenya Pipeline Company (2014) eKLR.

9. It is submitted that on the contention that whatsapp and Mpesa messages cannot be verified he submits that in deciding disputes of this nature it is the courts duty to give effect to the intention of the parties. That the parties' intention is discernible from the documents and conduct of the parties. That, however, onerous document or contract may, the courts duty is to give effect to it. He relies on Smith-v- Cook (1891) AC 297 at Page 303 as referred to in Eldoret City Limited –v- Corn Products Kenya Ltd & Another (2013) eKLR where it was held that-

The duty of the court is to give the natural meaning of the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing on the face of the deed.”

10. On how the court determines the intention of the parties, he relies on Storer-v- Manchester City Council (1974) 1WLR where Lord Denning stated that-

In contracts, you do not look into the actual intent in a man's mind, you look at what he said and did. A contract is formed when there is, to all outward appearance, a contract. A man cannot get out of a contract by saying, “I did not intend to contract.” If by his words he has done so. His intention is to be found only in the outward expression w which his letters conveys. If they show a concluded contract that is enough.”

11. It is further submitted that the appellants did not adduce evidence in their defence although they were given an opportunity to do so and the court would be acting contrary to its own nature and character by if it were to pronounce any claim or defence not made by the party. He relies on Kimani (suing as the Administratrix of the Estate of Amos Kanina Kimani (Deceased) –v- Mwangi (Civil Appeal 120/2021) (2024) KEHC 2434 KLR where the court stated inter-alia that-

In all adversarial legal system like ours, a party undermines his case drastically by not calling or failing to call witnesses.....”

12. It is submitted that the evidential burden shifted to the appellants, they failed horribly to discharge their duty by not calling witnesses. The plaintiff has also relied on Drappery Empire –v- The Attorney General Nairobi H.CCC No.2666 of 1996 where the Judge stated that failure by the defendant to adduce evidence will lead the court holding that the case is proved as the burden of proof is on a balance of probabilities. The counsel submits that the appellants have failed to proof any of the grounds of appeal and the appeal should be dismissed.

13. This is the first appellate court and the court's duty has been laid down in various decisions of the Court of Appeal and the High Court. The duty entails re-evaluating. The evidence tendered in the



lower court, analyzing it and itself to come up with its own finding. The court is however supposed to bear in mind that it did not have an opportunity to see and hear the witnesses when they testified and leave room for that, See *Selle & Another –v- Associated Motor Boat Co. Ltd*, (1968) E.A 123.

14. The court will however not interfere the findings of fact by the trial court unless they were based on no evidence at all or on misapprehension of it. In *Mwanasokoni –v- Kenya Bus Service Ltd* (1982-88) 1KLR 278. The Court of Appeal held that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless it shows that they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. See also the holding in *Kiruga –v- Kiruga & Another* (1988) KLR 348. The claim by the respondent was pleaded in the statement of claim where he states that on about the year 2020 the claimant entered into an agreement of service with Moses Kirimi for his motor vehicles registration number KCF 994 D and KBM 071 U. It was agreed that the respondent would repair the various motor vehicles and the claimant was to be paid after raising an invoice and forwarding the same to the deceased as a request of payment. That between the year 2021 and 2022 the appellant requested the claimant to repair and service vehicles an offer which the claimant accepted and undertook. The respondent raised invoices amounting to Ksh.998,834/- which the appellants failed to pay. The respondent claims that the appellant breached the contract by failing to pay the invoices when they were raised, incurred arrears amounting to Ksh.998,834/- and failing to honour his contractual obligations.
15. The claimant’s claim was for special damages together with costs and interests as well as general damages for breach of contract The appellant denied the claim in its entirety and put the claimant to strict proof.
16. The respondent adopted his witness statement and adopted the documents as exhibits. On being cross-examined, the respondent admitted that he had no agreement but the appellant used to request him orally. He used to communicate with the appellant through mobile phone numbers 0764-218525. He did not have copies of receipts which he issued to the deceased. The appellants closed their case without calling any evidence. The learned trial magistrate in his Judgment held that under Section 32(2) of the *Small Claims Court Act* the court is not bound wholly by the rules of evidence and that the court may admit as evidence and oral evidence or written evidence record or other material which may not be admitted in evidence in any other court under the law of evidence. The learned magistrate allowed the claim on the ground that no evidence was tendered in rebuttal to the claimant’s claim. I have considered the appeal, the proceedings in the lower court and the submissions. The issue for determination is whether the respondent proved there was a service contract between him and the appellant on a balance of probabilities. It is trite law that he who alleges must prove. The legal burden of proof is provided under Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provides that:

Whoever desires any court to give Judgment as to any legal right or liability dependent on the existent of facts which he asserts must prove that those facts exists.”

 - 2) when a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.”
17. The onus of proof was on the respondent who wanted the court to allow his claim for breach of contract. This is the legal burden of proof. The legal and evidential burden of establishing the facts and contentions which supports a party’s case is static and never shifts from the claimant out depending on the effectiveness with which he discharges the legal burden of proof the evidential burden may shift and leaves the court with the question as to who would lose if no other evidence were introduced. This is to say that the legal burden never shifts and rests on the claimant throughout. The evidential burden on the other hand may shift to the defendant depending on the nature and effect of the evidence adduced by claimant. In this case, the burden of proof is on a balance of probability.



18. The question is whether the respondent discharged the legal burden of proof. The claimant through his advocate has submitted that the respondent proved his case on a balance of probabilities and that the decision of the learned magistrate should be upheld. The contention is that the respondent proved that there was a contract and that the court should consider the intention of the parties.
19. The appellant has raised the issue that the learned magistrate erred in holding that the respondent proved the existence of a contract as the evidence relied on does not satisfy the requirements outlined under Section 3(3) of the Law of Contract Act. The appellant relies on the case of Kenya Pipeline Company Limited-v- Glencore Energy (UK) Limited where the Court of Appeal held that a valid contract requires an unequivocal offer, an acceptance of that offer and consideration passing between parties. The court stated:-
- An offer is an expression of willingness to contract on specified terms made with the intention that if accepted, there will arise a binding contract. An acceptance is a final unqualified expression of assent to the terms of an offer. Consideration is the price paid for the promise of the other party and must be something of value in the eyes of the law.”
20. A contract may be oral or written. However some contracts for recovery of debts or claiming default of payment must be in writing and signed by the debtor or defaulter. Section 3(1) &(2) Law of Contract Act provides:
- (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.
 - (2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.”
21. The ingredients of a binding contract are offer, acceptance of that offer and consideration. The respondent had the burden to prove that a valid contract existed between him and the appellant. The burden of proof was not dependent on the evidence in rebuttal by the appellant. It is the respondent who had the burden of proof his claim before the respondent could give evidence to rebut it. My view is that uncontroverted evidence must itself be sufficient to discharge the legal burden of proof of the existence of a valid contract, the court should not treat the evidence as truthful without interrogating it merely because it was uncontroverted. The claimant must first of all prove its case too on a balance of probabilities. As pointed out above the claimant bears both legal as well as evidential burden. Evidential burden shifts to the respondent in a case based on the effectiveness of the evidence. There is therefore a duty on the court to determine whether the plaintiff has discharged the burden of proof placed on him by the statute. The respondent despite the absence of evidence from the appellants, was under an obligation to prove its case on a balance of probabilities. It is my view that the respondent did not demonstrate with concrete evidence that there existed a contract of a service between him and the appellant. He did not adduce evidence of an offer, acceptance and consideration passing. In cross-examination he admitted that he had no agreement with the respondent but used to request orally. See page 122 of the record. The invoices relied on in court which were given to the court without any explanation as to what they did not meet the legal threshold required to establish a binding contract. No documents were signed by the appellant to acknowledge the debt. The respondent claim was in the



nature of special damages. It is well settled that special damages must not only be specifically pleaded but must also be strictly proved. In the case of *Hahn-v- Singh* it was held that the claimant must provide precise particulars of the special damages claimed, ensuring clarity and accuracy in their presentation. The evidence tendered did not specific provide the claim by the respondent. The respondent stated that he was owed Ksh.1,055,834/- but the court could award 1,000,000/- see page 133 of the record. This contracts his statement where he states that the invoices amount to Ksh.1,198,834/- the deceased paid Ksh.200,000/- leaving a balance of Ksh.998,834/-. These contradictions fail to discharge the burden of proof as to what he was owed, if at all. The respondent further admitted that the whatsapp screen shots purported to be conversation between him and the deceased were unverified. This was a clear indication that the evidence was wanting. The learned magistrate ignored the evidence which came up in cross-examination and went on to hold that the case was provided. This was erroneous as the respondent admitted that he had no contract with the deceased. The courts have held that electronic records like Mpesa and whatsapp chats must undergo authentication to establish their credibility, see *Kenneth Nyaga Mwige –v- Austin Kifuta & 2 Others* (2015) eKLR Section 32 (1) & (2) of the Small Claim’s Court provides that:-

- (1) The court shall not be bound wholly by the Rules of evidence.
- (2) Without prejudice to the generality of sub-section (1) the court may admit as evidence in any proceedings before it any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other of evidence.”

22. As submitted by the appellant the section does not absolve the parties in a claim before the court from adducing credible evidence to support their claim. The section talks of the court not being bound wholly by the rules of evidence. A party goes to court with the hope that its claim will succeed. The party must produce the best evidence which the nature of the case will permit. Evidence law is concerned with the proof or disapproval of facts in courts of law. The parties in the Small Claims Court are not absolved from the burden to produce credible evidence to support their claim. The rule on burden of proof under Section 107 of the *Evidence Act* reinforces this as it places a burden on a party asserting the existence of facts. Failure by the appellant to adduce evidence after the respondent admitted he had no contract with the deceased and that he had no copies of receipt the learned magistrate erred by relying on Section 32 without testing the weight of the evidence in the invoices which were unsigned and undated which made them un-reliable. The section is not designed to allow adjudicators to pass Judgment for claimants who have not proved their claims. It would be a sad day for courts to interpret Section 32 of the Small Claims Act to the effect that parties are not to proof their cases and rubbish Section 107 of the *Evidence Act* . A party goes to court to prove its case first and foremost.
23. Finally on whether the verdict by the learned magistrate was against the weight of the evidence, I believe I have addressed the issue on the ground of burden of proof. The authority cited by the appellant that is *Mbogo & Another-v- Shah*, (1968) E.A 93 underscores the importance of exercising judicial discretion judiciously to prevent injustice arising from erroneous decisions. This was a matter where the respondent was claiming a hefty amount of money from the estate of the deceased who was not available to confirm the respondent’s claim.
24. Though the appellant chose to rely on the documents and not adduce evidence, the court erred by failing to interrogate the respondent’s evidence on purely on the basis that the evidence was not controverted. The court had a duty to determine whether the respondent had proved its case on a balance of probabilities. He denied the existence of the contract and therefore his goose was cooked as his claim was based on contract.



Conclusion:

25. For the reasons stated in this Judgment, I find that the decision of the learned magistrate cannot be supported. It is clear from the evidence by the respondent and the documents relied on did not proof the respondent's case on a balance of probabilities. I therefore come to the conclusion that the appeal has merits. I allow the appeal and order that the Judgment by the learned magistrate is set aside. It is substituted with an order dismissing the claimant's claim with costs.
26. I award the appellant the costs of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE

