



**Njoki t/a Benru Enterprises v Mburu (Civil Appeal 44 of 2020)
[2025] KEHC 12060 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 12060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 44 OF 2020
F WANGARI, J
FEBRUARY 20, 2025**

BETWEEN

RUTH NJOKI T/A BENRU ENTERPRISES APPELLANT

AND

SAMUEL MBUGUA MBURU RESPONDENT

(Being an Appeal arising out of the Judgment and Decree of Hon. G. Kiage, in Mombasa Chief Magistrate's Court Civil Suit No. 1557 of 2018 delivered on 20th February 2020)

JUDGMENT

1. The Appellant herein filed the Memorandum of Appeal against the above mentioned judgment, where the appellant raised the following grounds of appeal;
 - a. That the learned honourable magistrate erred in law in entering judgment for the plaintiff against the defendant as prayed in the suit.
 - b. That the learned honourable magistrate erred in law in failing to find that the respondent did not give notice in accordance with motor vehicle lease agreement.
 - c. That the learned honourable magistrate erred in law and fact that the message screen shots and mpesa statement established on a balance of probability the sum claimed by the respondent.
 - d. That the learned honourable magistrate erred in law and fact in holding the respondent failed to prove her counterclaim.
 - e. That the learned honourable magistrate erred in law and fact in holding that the motor vehicle lease agreement between the appellant and the respondent was voided due to nonpayment.
 - f. That the learned honourable magistrate erred in law and fact in holding that the appellant had shown that the respondent had refused to release her items.



- g. That the learned honourable magistrate erred in law and fact in making finding which were a total misdirection from the provisions of the law.
2. It was thus prayed that the appeal be allowed and the judgment be set aside and substituted with a judgment dismissing the Plaintiff's suit and allow the Defendant's Counter-claim.
 3. Directions were taken that the appeal be disposed off by way of written submissions. Both parties complied with the court's directions and filed their rival submissions in support of their case.

Analysis

4. This court has carefully considered the Record of Appeal, submissions and the authorities relied on. The issue for determination is whether the trial court erred in entering judgment in favour of the Plaintiff/ Respondent and dismissing the Defendant/ Appellant's Counter-claim.
5. As the first appellate court, the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. For this see the case of *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123. This court nevertheless appreciates that an appellate court will not ordinarily interfere with findings of fact by the trial court unless 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. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd* [1982-88] 1 KAR 278 and *Kiruga v Kiruga & Another* [1988] KLR 348.
6. From the record, it is a fact that there existed a motor vehicle lease agreements dated 18th January 2018 and 21st February 2018 existed between the parties herein for the hire of Respondent's motor vehicle registration No. KAS 627D by the Appellant for her garbage collection business. Either party was at liberty to terminate the contract upon giving one (1) months' notice.
7. The Respondent claimed that the Appellant failed to pay the agreed amount of Kshs. 14,500/= per trip and she fell into arrears of Kshs. 126,500/=. The Appellant paid Kshs. 60,000/= leaving a balance of Kshs. 81,000/=. The Respondent gave oral notice on 05/03/2028 and further notice via WhatsApp message stating that if the balance was not to be paid by 14/04/2018, he would withdraw his vehicle.
8. On the other hand, the Appellant claimed that the Respondent demanded the entire amount for the lease period contrary to the agreement. She denied that she was given the one-month notice as alleged. Instead, she filed a counter-claim of Kshs. 181,000/= being Kshs. 174,000/= being the lost payment for the one-month notice and Kshs. 7,000/= being the value of tools of trade which were in the vehicle as at the time of withdrawal of its services.
9. The plaintiff's claims were in the nature of special damages and the law is well settled on special damages, that a party seeking special damages must not only specifically plead the claim but must also strictly prove the same by way of evidence. In the case of *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* (2016) eKLR the court reiterated the principle as follows:

“...not only should a claim for special damages be specifically pleaded, but it is also incumbent upon the claimant to prove it, failure to prove disentitles claimant to the award sought. And that is the case here although the plaintiff pleaded special damages, it did nothing to prove the same and so that claim is dismissed... it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”



10. I have perused though the WhatsApp messages in form of produced by the Respondent. The Appellant did not challenge the authenticity of the said messages. From the screenshots produced as exhibits, the said message from the Respondent to Appellant read as follows:

“I am writing got you about the fact, despite previous reminders, there remains an outstanding balance of Kshs.126,500/- till to date 11th April 2018 and the amount is still accumulating. Our agreement was full payment at the end of each month. If the full amount of the sum outstanding, as set above, is not paid by 14th April, I will withdraw the transport service.”

11. Later, the conversation between the Respondent and Appellant was as follows;

On 12th April 2028

Respondent: I am writing to you about the fact despite previous reminders, there remains an outstanding balance of Kshs. 126,500 till to date 11th of April 2018 and the amount is still accumulating. Our agreement was full payment at the end of each month. If the full amount of the sum outstanding as set above is not paid by 14 April, I will withdraw the transport service”

On 22nd April 2018

Respondent: “I’ve received. Your balance is now 81,000.”

Appellant: “*Sawa*”.

On 1st May 2018;

Respondent: “U had promised I will get all the money by end month, *kwani* what happened?”

Appellant: “When am paid, not end month, when did I pay you last?”

12. From the above conversation, it is clear that the amount due as at 11th April 2018 was Kshs. 126,500/= and was still accumulating. The Appellant cannot claim that the Respondent was claiming money that was not due to him yet she paid part of the amount demanded leaving a balance of Kshs. 81,000/= which she acknowledged by committing herself to pay ‘all the money by end month’.
13. The above WhatsApp messages it is proof that indeed it was the Appellant who breached their agreement barely 3 months into it. On whether sufficient notice was given before the Respondent withdrew the vehicle, from the wordings of the message dated 11/04/2018, there were several demands and reminders for the payment of the amount due to the Respondent. Despite the Respondent stating that he would withdraw his vehicle, the Appellant said nothing and she only paid on 22/04/2018 leaving a balance of Kshs. 81,000/=.
14. I find that the Respondent proved on a balance of probabilities that sufficient notice was given to the Appellant, hence the counter-claim by the Appellant fails. I find no reason to fault the judgment of the trial court in finding that the Respondent had proved his case and dismissing the Appellant’s Counter-claim.

Determination

15. The upshot of the foregoing is that the court renders itself as hereunder;
- a. The appeal is thus devoid of merit and the same is dismissed.



b. Costs awarded to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025

F. WANGARI

JUDGE

In the presence of: -

Mr. Wameyo Advocate for the Appellant

Mr. Odhiambo Advocate for the Respondent

Ms. Salwa, Court Assistant

