Rono t/a Roselyne Tours and Travel v Koech & 2 others (Civil Appeal E054 of 2021) [2025] KEHC 2101 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2101 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E054 OF 2021

JRA WANANDA, J

FEBRUARY 7, 2025

BETWEEN

HOPE RONO T/A ROSELYNE TOURS AND TRAVEL ..... APPELLANT

AND

VIVIAN CHEROP KOECH ..... 1ST RESPONDENT

MARGARET JEMUTAI KANGONGO ..... 2ND RESPONDENT

EMILY JEROP SILA ..... 3RD RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment entered on 21/05/2021 in Eldoret Chief Magistrate's Court Civil Case No. 1119 of 2016. In that suit, the Appellant was the Plaintiff whereas the Respondents were the Defendants.

2. The background of the matter is that by the Plaint filed on 12/10/2016 through Messrs Chemoiyai & Co. Advocates, the Appellant pleaded that the parties herein entered into an Agreement whereby the Respondents jointly instructed the Appellant to arrange a round-trip from Nairobi to Dubai, and back, scheduled for 2/05/2016, all costs totalling to Kshs. 105,000/-, that pursuant to the instructions by the Respondents, the Appellant made flight bookings and made visa payments for the Respondents from the down payment of Kshs. 20,000/- totalling Kshs 60,000/-. She pleaded further that without notice, the Respondents jointly cancelled the trip even after being advised by the Appellant that they would incur cancellation costs from issuance of air tickets and visa from Emirates Airlines, and also for service fees from the Appellant's office. She then enumerated such costs as follows:

Flight	Kshs 46,350/-	Refundable less Kshs 7,500/-
Visa	Kshs 16,560/-	Non-Refundable
Hotel	Kshs 32,090/-	Bookings on hold
Service fee	Kshs 10,000/-	Non-Refundable
Emirates Airline	Kshs 20,000/- less Kshs 7,500/ = Kshs 12,500/-	
Visa costs	Kshs 16,560/- less Kshs 12,500/ = Kshs 4,060/-	
Service fee payable	Kshs 10,000/- add Kshs 4,060/ = Kshs 14,060/- per head	
Total payment	Kshs 14,060/- x 3 = Kshs 42,180/-	

3. The Appellant further pleaded that the Respondents had failed to pay the said amount despite several requests vide phone calls and personal requests by the Appellant. She therefore prayed for Judgment for the said amount of Kshs 42,180/-, plus costs of the suit and interest thereon.

4. The Respondents, through Messrs Kigen & Co. Advocates, filed their Defence and also Counter Claim on 7/11//2016 wherein they denied cancelling the trip and averred, instead, that they did not travel as planned since the Appellant being an agent, only made temporary bookings and never issued air tickets to the Respondents. They further pleaded that there is no flight cancellation fee for a flight booking unless the ticket is issued on the same booking and that the Plaintiff breached the said Agreement and cancelled the trip for her own interests.

5. In the Counterclaim, it was admitted that the parties entered into the Agreement referred to and whereof the Appellant was to arrange the trip for the Respondents scheduled for 2/05/2016 and return on 7/05/2016, at the said sum of Kshs 105,000/-, that the Respondents were to make a deposit of Kshs 20,000/- each totalling Kshs 60,000/- for flight bookings and payments, and that the Appellant was in return, to book the Respondents with air tickets. It was stated that the Respondents honoured their part of the Agreement but the Appellant breached the same, thus causing the Respondents loss. As particulars of breach, the Appellant was accused of cancelling the trip on grounds that it did not meet the correct number of people required to travel within the validity of the period of visa, failing to issue the Respondents with air tickets, and purporting to demand for Kshs 15,000/- from the Respondents over and above the contractual amount of Kshs 105,000/-. The Respondents pleaded that as a consequence of the breach of the contract by the Appellant, they suffered loss in damages and that the Appellant unjustly enriched herself at the expense of the Respondents who have undergone suffering for breach of legitimate expectation. They then particularized the said amount of Kshs 60,000/- as special damages. The Respondents also claimed that the Appellant, arising from the Agreement, defamed the Respondents and lowered their reputation in the eyes of right-thinking members of the society, since the innuendo was that the Respondents are women of straw. In conclusion, they sought refund of the said amount of Kshs 60,000/- plus interest, general damages for defamation and for breach of contract, and costs of the suit and interest.

6. The Appellant filed a Reply to Defence & Counter Claim on 11/11/2016 in which she denied that the air tickets issued by her were fake or temporary as alleged, and reiterated that she procured visas and hotel bookings but had to cancel the same after the Respondents' unequivocal instructions, which

resulted into the incurring of cancellation costs. She also insisted that the Kshs. 60,000/- paid as down payment was utilized by the Appellant for payment for visas and valid return tickets. She therefore prayed that Judgment be entered as sought in the Plaint and that the Counterclaim be dismissed with costs.

7. The matter then proceeded for hearing wherein the Appellant (as the Plaintiff) called 1 witness while Respondents (as Defendants) called 4 witnesses. Thereafter, as aforesaid, the trial Court delivered its Judgment on 21/05/2021 dismissing the Appellant's suit with costs and instead, entered Judgment on the Counterclaim by awarding each of the Respondents the sum Kshs 20,000/-, together with Kshs 50,000/- each for breach of contract. The Respondents claim for defamation was however dismissed for lack of proof.

8. Aggrieved by the decision, the Appellant preferred this Appeal. By the Memorandum of Appeal filed on 27/05/2021, 7 grounds of Appeal were preferred, though the same are not quite articulately presented, contain considerable grammatical errors and could, by a bit of care, have been better drafted. Quoted verbatim, the same is as follows:

    i. That the Honourable Learned Magistrate erred in law and/or in fact by finding that the Appellant had breached the contract, without addressing conclusively all the issues raised by the Appellant in their pleadings; evidence by adduced in the trial and final written submissions.

    ii. That the Honourable Learned Magistrate erred in law and/or fact by finding that the tickets issued were fake (sic), yet from the evidence adduced they were indeed invalidated by virtue of cancellation of tickets.

    iii. That the Honourable Learned Magistrate erred in law and/or fact by awarding the Respondents Kshs 50,000/- each for breach of contract, despite the fact that the said Respondents has not adduced any iota of evidence of any loss incurred as a result of the alleged breach.

    iv. That the Honourable Learned Magistrate erred in law and/or fact by finding that the Respondent to be refunded the down payment of Kshs 20,000/- each; despite the fact that the Appellant incurred cancellation fee from airline bookings and visas costs.

    v. That the Honourable Learned Magistrate erred in law and/or fact by failing to address herself to practice and procedure of Tours and Travel bookings; alongside cancellation fee incurred by the Appellants due to unfortunate or unlawful actions by the Respondents.

    vi. That the Honourable Learned Magistrate erred in law and/or fact by fully relying on the evidence by DW4, which evidence were indeed inconclusive and indecisive; as to the status of Air tickets to the Respondents.

    vii. That the Honourable Learned Magistrate erred in law and/or fact by failing to act in the interest of justice, despite all surrounding circumstances in this case.

Appellant's evidence before the trial Court

9. PW1 was the Appellant, Hope Chepkemboi Rono. Led by her Counsel, Mr. Chemoyai, she adopted her Witness Statement and basically reiterated the matters set out in her Plaint and Reply to Defence & Defence to Counterclaim and produced her supporting documents. She however added that the scheduled date of travel of 2/05/2016 was pushed to the month of June as it was coinciding with the Ramadhan holiday in Dubai. She denied that it was her who cancelled the trip and insisted that it was the Respondents who did so, and whom she had a meeting with and informed of the consequences

but still insisted on the cancellation. She testified that in the industry, one is required to place a deposit then clear the balance by the date of travel, that the amount is paid towards the tickets which are then generated by the airline, not the agent. She testified that according to the package, they were supposed to be 15 people at the sum of Kshs 105,000/- per head but the clients kept on pushing the dates until it attracted occurrence fee, that they only got 6 people and that it is the clients' fault that they applied to change the package. She denied that they had organized a package of 6 people which allegedly escalated the fee by Kshs 15,000 of Kshs 105,000/-.

10. Under cross-examination by Mr. Kagunza, Counsel for the Respondents, the Appellant stated that there was no written documentation, that she did not issue the Respondents with the tickets as they were cancelled after the Respondents cancelled the trip, that the cancellation of the trip by the Respondents was made verbally and that there were no witnesses. She also conceded that she had no evidence to demonstrate her allegation that the initial amount of Kshs 105,000/- was increased by Kshs 15,000/-.

Respondents' evidence before the trial Court

11. DW1 was the 1st Respondent, Vivian Cherop. She, too, adopted her Witness Statement and confirmed that the parties entered into the Agreement in May 2016. She testified that she knew the Appellant through the 3rd Respondent whom the Appellant had approached and asked to get more people for the trip and that the cost of the trip was Kshs 105,000/-. She added that upon the Appellant's request, they paid her Kshs 20,000/- but as they kept on asking for a meeting, the Appellant told them that she was unable to raise 15 people and thus charged Kshs 120,000/-, that the number of people changed to 6 and that it is at this point that they disagreed. She testified that the Appellant kept on making calls demanding payment from the Respondents as she claimed that she had the visas. According the 1st Respondent, they were never issued with the travel tickets and that when they sought confirmation from the Emirates Airline via email, the Airline denied ever dealing with the Appellant and also denied issuing the air e-tickets alleged by the Appellant. She stated further that when one is booking, no money is involved and that the Appellant never informed them that the trip was cancelled. Regarding the defamation claim, she stated that her name has been tainted. In cross-examination, she admitted that she was issued with a visa.

12. DW2 was the 2nd Respondent, Margaret Jemutai. She stated that the 3rd Respondent is her mother, who informed her that she and a friend were organizing a trip to Dubai, that they had 12 people and were looking for 3 more, and invited the 1st Respondent to join in and look for other people to make up a total of 15. She stated that she joined in and that they each agreed to pay Kshs 105,000/- for the trip, "to and fro", including accommodation, that she paid a deposit of Kshs 20,000/- and agreed on a date for the trip. She testified further that however, they never travelled as the Appellant could not raise the intended 15 travellers and that they were informed that the price had increased to Kshs 120,000/-. She then adopted her Witness Statement and stated that she only heard of the visa procurement but never saw it, that she withdrew from the deal when the amount was increased to Kshs 120,000/-, and that she was never issued with the actual ticket. She prayed for refund of the Kshs 20,000/- from the Appellant. Regarding the claim for defamation, she stated that the Appellant had been tainting her name.

13. In cross-Examination, she stated that it was the Appellant's duty to find the 15 people for the trip as she was the one who went looking for the Respondents. She also denied that any meetings took place between the Appellant and the 3 Respondents and stated that she never even met the Appellant in person throughout the transaction, and that her photographs were taken to the Appellant by her mother, the 1st Respondent. She conceded that the time that they were to travel coincided with the Ramadhan holidays. She testified further that when they made inquiries, they learnt that the Appellant

never made any air ticket bookings. Regarding the defamation, she conceded that her name had not been published anywhere. In re-examination, she stated that the timing of the trip and its coincidence with the Ramadhan holidays was not her fault.

14. DW3 was the 3rd Respondent, Emily Cherop Silah. She also adopted her Witness Statement and testified that the Appellant told her that there was a trip to Dubai being organized in respect to which she had 12 people but needed 15. The 3rd Respondent stated that she agreed to join in the trip as the 13th person and promised to persuade 2 others to also join. She added that the Appellant informed her that the first 2 people had already paid commitment fees and for this reason, the 3rd Respondent convinced the 1st and 2nd Respondents to join in with her, and each of the 3 Respondents paid a deposit of Kshs 20,000/-. She stated further that the total amount to be paid before the travel date was Kshs 105.000/- and that the Appellant later called and told her that the number of people was still only 6. She stated that subsequently, despite requesting for a meeting for all the people involved to meet, the Appellant did not convene such meeting but later told the 3rd Respondent, individually, that the amount payable had changed from Kshs 105,000/- to Kshs 120,000/- and that when she (3rd Respondent) relayed this information to the 1st and 2nd Respondent, they declined. She testified further that later, after receiving payments and after delays, the Appellant sent visas and also started claiming that she had paid for tickets, that however upon inquiring from the Emirates Airline, she learnt that there were no such arrangements with the Emirates.

15. At this point, the 3rd Respondent's attempt to produce the email from the Emirates Airlines was successfully objected to and the Court ruled that the email be produced by a representative from the Airline.

16. DW4, one Sammy Kibor Kingoa, therefore attended Court as the representative from the Emirates Airlines. He confirmed the exchange of the emails in issue and verified their authenticity. When showed the 3 documents described as e-tickets for travel with the Airline, he denied that any tickets were issued and stated that one can book for a flight but not necessarily eventually travel, and that a booking is not a travel document. He added that his inquiries with the Emirates department in Dubai revealed that the documents were not valid. According to him, there can be a booking but no ticket, and that in this case, there was no air ticket issued and that the documents did not even emanate from the Airline. Regarding the visa, he stated that what was paid was for visa optimal, paid only for processing and was be topped up after issuance of the tickets.

Hearing of the Appeal

17. The Appeal was then canvassed by way of written Submissions. The Appellant filed her Submissions on 8/12/2023 while the Respondents filed on 15/02/2024.

Appellant's Submissions

18. Regarding instances when a breach of contract can be said to have occurred, Counsel for the Appellant cited the case of William Muthee Muthomi v Bank of Baroda (2014) eKLR in which the requirement for the existence of offer, acceptance and consideration was restated. According to him, by making the payment of Kshs 60,000/-, a contractual relationship was established, and reiterated that the Appellant initially schedule the travel date for 2/05/2016 but due to that date coinciding with the Ramadhan Muslim holy month, the trip was rescheduled to June, which necessitated a rise in the costs of accommodation, leading to the total cost escalating up to Kshs 120,000/- up from Kshs 105,000/-, circumstances that were beyond the Appellant's control and which the Appellant relayed to the Respondents, but upon which the Respondents chose to cancel the trip. He criticized the trial Magistrate for finding that the Appellant secured reservations for the travel but not bookings, and

that the Appellant failed to inform the Respondents of the changes in travel dates and the associated cancellation costs. To illustrate what constitutes a breach of contract, he cited the case of Dormakaba Ltd v Architectural Supplies Kenya Ltd Civil Suit 136 of 2021 (2021) [2021] KEHC 210 (KLR) (Commercial and Tax) (10 November 2021) (Judgment). He contended that on his part, the Appellant fulfilled her part of the bargain by co-ordinating the trip and by reserving air tickets and covering the cost of visas for the Respondents, and that despite the foregoing, the Respondents cancelled the trip thus triggering their obligation to pay cancellation fees and service charges.

19. Counsel urged that the letter dated 20/08/2026 from the Emirates Group Sales confirmed the cancellation costs amounting to $7 (USD). He insisted that the Appellant issued tickets and also incurred visa cancellation fees, and that the total amount per individual tallied to Kshs 14,060/- thus aggregating a grand total of Kshs 42,180/-. Counsel also submitted that the burden of proof rests on the party making an allegation. He cited Section 107 of the *Evidence Act* and submitted that the learned Magistrate erred by relying heavily on the evidence of DW4 which was inconclusive and indecisive as concerns the status of the air tickets, in contrast to the comprehensive documents presented by the Appellant. He cited the case of Wilson Karuta Gatana v Beth Nyaruiru Karega (2021) eKLR which he relied on as authority for the principle that the established judicial method of establishing a fact is that the Court must weigh, check and balance the rival streams of evidence before arriving at a result. He contended that throughout, the Appellant presented substantial evidence to substantiate her case but which regrettably, the trial Court did not consider in reaching its decision.

20. For his submission that the Appellant had proved that no breach of contract by her occurred, Counsel urged that the award of Kshs 50,000/- to each of the Respondents for contractual breach, in addition to the respective refunds of Kshs 20,000/- each, was unjustified. In conclusion, he prayed that the remedies granted to the Respondents be overturned and that the Appellant be awarded costs. He also prayed that the sum of Kshs 200,000/- paid to the Respondent as security for due performance of the Appeal be refunded to the Appellant.

Respondents' Submissions

21. Counsel for the Respondents begun by what he submitted, is a Preliminary Objection. His contention was that the by the Record of Appeal omitting to include a copy of the Decree of the lower Court, the Appeal contravenes the provisions of Order 42 Rules 13 (4) of the Civil Procedure Rules, 2010 and is thus incompetent and defective as the omission of the decree goes to the root of the appeal. He submitted that the said provisions are in mandatory terms and that the Court shall not dispense with this requirement. He cited the case of Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others (2015) eKLR, the case of Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another (2018) eKLR and also the case of Rachel Wambui Nganga & another v Rahab Wairimu Kamau (2020) eKLR, which he submitted, was cited in the case of Chege v Suleiman [1988] eKLR. He urged the Court to strike out the Record of Appeal.

22. On substantive issues, in respect to the ground of Appeal that the trial Magistrate erred in finding that the Appellant had breached the contract, Counsel submitted that parties are bound by their pleadings, that Section 107 and 108 of the *Evidence Act* provide that "he who alleges must prove" and that it was therefore upon the Appellant to prove that the Respondents had indeed breached the Agreement. He urged that the Respondents filed a Statement of Defence and Counterclaim denying the Appellant's allegations and called for strict proof, stated that it is the Appellant who was in breach, and sought damages and refund which prayers the Court awarded. He submitted that PW1, when she testified, acknowledged that the trip was scheduled for 2/05/2016 at the all-inclusive cost of Kshs 105,000/- and that each of the Respondents paid a deposit. According to Counsel, from this testimony, it is clear that

there was an offer and acceptance, that the Agreement dictated the date of travel, destination and the consideration, and that upon payment of the deposit, the offer was already accepted and the terms set. He submitted that it was the Appellant's own admission that the amount was increased by a sum of Kshs 15,000/- per person which was, by itself, a breach of the terms. He submitted that the additional charge was an offer which a party had the option of accepting or refusing since it was an alteration of the prior arrangement.

23. Counsel also observed that the Appellant confirmed that she made changes on the dates of travel which change was not communicated to the Respondents and neither did they agree to, and that the Appellant thus made the changes all by herself without consulting her own clients, parties to the Agreement. He submitted further that the email cited by the Appellant in respect to the Ramadhan holiday, did not make it mandatory to change the dates but was only advisory, and which the Appellant ought to have passed to the Respondents and had discission about, but the Appellant, without consulting the Respondents, went ahead and made the changes on her own. He also submitted that the additional charges arose because the Appellant misinformed the Respondents that she already had a total of 12 people for the trip and which formed the basis of the Kshs 105,000/-, that at no time did the Appeal reveal to the Respondents that she had only assembled 6 people and that these actions depict the Appellant as a dishonest person, and amounted to non-disclosure of material facts and fraudulent misrepresentation. He cited the Black's Law Dictionary (8th Edition) on the definition of these terms. On the definition of breach of contract, he cited the case of Jackline Njeri Kariuki v Moses Njunge Njau (2021) eKLR. He urged further that although the Appellant alleges to have had meetings with the Respondents in which the said changes were discussed, there is no evidence to that effect, and that the Respondents denied attending any such meetings. He defended the trial Magistrate in her finding that the tickets alleged to have been issued by the Appellant were fake and submitted that from the evidence on record, the same were invalidated. He cited the evidence of DW 4 which, he submitted, was not challenged.

24. Regarding the reliefs awarded to the Respondents, Counsel cited Anson's Law of Contract, 28th Edition on the principle that every breach of contract entitles the injured party to damages for loss and submitted that by breaching the contract, the Appellant had unjustly enriched herself at the expense of the Respondents, that she filed this suit trying to act as the victim, that it had been proved that there was no ticket bookings made by the Appellant and who also failed to demonstrate that she actually incurred cancellation fees from the Airline. He cited the case of Amos Karobia Gichuki v Benard Kamau Wagakoru (2020) eKLR. In conclusion, he prayed for dismissal of the Appeal with costs.

Determination

25. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. For instance, in the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, the following was restated:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

26. The issues that arise for determination herein can be broadly summarized as follows:

    i. Whether the Appeal is incompetent by virtue of omitting to include a copy of the Decree appealed against.

ii. Whether the trial Court erred in finding the Appellant liable for breach of contract and awarding reliefs.

27. I now proceed to analyse and answer the issues.

i. Whether the Appeal is incompetent by virtue of omitting to include a copy of the Decree appealed against

28. The Respondents argue that omission of the decree renders the Record of Appeal incompetent. This argument is founded on the provisions of Order 42 Rule 13 (4) (f) of the Civil Procedure Rules which provide as follows:

> " Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
>
> (a) the memorandum of appeal;
>
> (b) the pleadings;
>
> (c) the notes of the trial magistrate made at the hearing;
>
> (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
>
> (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
>
> (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
>
> Provided that—
>
> (i) a translation into English shall be provided of any document not in that language;
>
> (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f)."

29. The Respondents argue that the above provisions are couched in mandatory terms and the Court should therefore strike out the Record of Appeal. I am aware of various conflicting decisions of the High Court on this issue. On my part however, I associate myself with the view that omission to include a copy of the Record of Appeal does not necessarily render the Record, and by extension, the entire Appeal incompetent. In adopting this view, I am guided by the Court of Appeal decision in the case of of Emmanuel Ngade Nyoka v Kitheka Mutisya Ngata [2017] eKLR in which the following was stated:

> " Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of Order 42 rule 2 of the Civil Procedure Rules which provides inter alia:
>
> "Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as

possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the act until such certified copy is filed."

However, the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

> "The word "Decree" has been defined by the *Civil Procedure Act*, Cap 21 to include judgment. In fact, the *Civil Procedure Act* has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up".

This is the essence of the proviso to the definition of the term "decree."

According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.

We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in sections 1A and 1B of the *Civil Procedure Act*. Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any."

30. In any case, there is no prejudice caused to the Respondents since a copy of the Judgment appealed against is contained in the Record. I also have before me a complete file of the lower Court. In view of the foregoing, I overrule the objection herein raised by the Respondents.

31. I am aware that some Appellants deliberately avoid extracting Decrees of the lower Court for inclusion in the Record of Appeal in a bid to avoid payment of further Court fees which can sometimes be hefty as it is computed on the basis of the final amount awarded in the Judgment. Of course, this "trick" denies the Judiciary its rightful and well-deserved Court fees and should be discouraged. The situation would therefore have definitely been different had this Court, at the time of perusing the Record of Appeal before admitting the same and when giving directions on its hearing, made a specific order directing the Appellant to include a copy of the Decree in the Record of Appeal. In this case, no such order having been issued, there is no justification for punishing the Appellant for the same.

32. In any case, the Record of Appeal was filed way back in May 2023 and I believe, was served upon the Respondents not long thereafter. The Respondents have therefore had possession of the Record for a substantially long time but have not offered any explanation why they are only raising the issue of the omission of the Decree at this late stage. By keeping silent for all this time, the presumption is that they were satisfied with the Record of Appeal as prepared. Challenging the same belatedly at this stage, and in their final Submissions therefore amounts to an ambush against the Appellant, which would be unjustified.

ii. Whether the trial Court erred in finding the Appellant liable for breach of contract and awarding reliefs

33. The basics of a contract are well established and were reiterated by the Court of Appeal in the case of William Muthee Muthami V Bank of Baroda, (2014) eKLR in which the following was stated:

> " ... In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach."

34. In this case, the existence of the Agreement referred to herein is not in dispute. The contract entailed a round trip organized for Nairobi to Dubai and back, scheduled for between 2/05/2016 and 7/05/2016 at the consideration of Kshs 105,000/-, which was inclusive of the costs of obtaining visa, air tickets, accommodation and all other related costs. It is also not in dispute that in connection thereto, each of the 3 Respondents made to the Appellant a down payment of Kshs 20,000/-. The elements of a contract are all therefore in existence.

35. Problems arose when variations were made to the terms agreed upon, which variations the Respondents were not agreeable to, and which then led to collapse of the contract. The question therefore is who is liable for the collapse of the contract?

36. In respect to the variations, the 1st and 2nd Respondents (DW1 and DW2, respectively) testified that they only came to learn of change in the amount payable (from Kshs 105,000/- to Kshs 120,000/-) and the change in the travel dates (from 2/05/2016 to June 2016), from the 3rd Respondent (DW3). They vehemently denied that any meeting was convened by the Appellant to inform all of them of these changes, which changes they termed "material variations", and which they denied being part of and insisted that they never authorized. The Appellant, on her part, insisted that such meeting took place and in which the changes were discussed. She also insisted that it is the Respondents who cancelled the contract thus occasioning her losses. She however concedes that the Respondents never agreed to the changes. As a consequence of the collapse of the contract, the Respondents filed a Counterclaim seeking refund of the down payments, and also for general damages for the breach, as well as damages for defamation.

37. In respect to the collapse of the contract, and in light of the above conflicting accounts, the further question to be answered is: which of the two sides bore the burden of proving its case and thus, will be unsuccessful in the suit if the Court is unable to determine which of the two accounts is the correct one?

38. In answering the above questions, it is important to recall the maxim that "he who alleges must prove" and which is grounded under Section 107 of the Law of *Evidence Act*. For an instance where this principle was reiterated, I refer to the decision of the Court of Appeal in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR in which the following was stated:

> " ..... As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* Cap 80, which provides:
>
> "107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist ....."

39. Further, in the case of Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR, again, the Court of Appeal reiterated the above principle as follows:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

40. In this case, there was no written contract to highlight the terms agreed upon. In applying the above principles, I observe that the Appellant, in her testimony, alluded that it was the norm to conduct her affairs verbally. In the circumstances, being the Plaintiff, in the absence of a written contract, the Appellant had to prove her case through other sufficient documentation, such as correspondence, or by the testimony of witnesses. Failure to do so would have lead to the dismissal of her case.

41. I now move to interrogate whether a valid contract still remained in effect even after the said changes were made thereto. In instances of variation of contract, the Court in the case of Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, held as follows:

> "... Courts are not foras where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

42. In this case, each of the Respondents made a down payment of Kshs 20,000/- to the Appellant in the knowledge that the full consideration was Kshs. 105,000/-. Their understanding was therefore that they would only have to top up the balance arising therefrom. They also contracted for the travel date of 2/05/2016 expressly agreed upon. Once the consideration was varied to Kshs 120,000/- and the travel date moved to June 2016, in the absence of evidence to demonstrate the contrary, the conclusion is that the changes were made unilaterally and thus, there was no meeting of the minds (consensus ad idem). It has also not been demonstrated that the contract permitted any such unilateral variations. The presumption is therefore that as soon as the Respondents rejected the changes, the contract collapsed, was no longer enforceable, and the parties reverted to their pre-contract status.

43. The problems, misunderstandings and fallout that forms the subject of this Appeal arose basically because of the fact that the transaction in issue was entered into verbally. In the absence of a written contract with terms and conditions set out, the stage was easily set for conflicting interpretations of what was agreed upon and of the consequences that would arise in the event of change in circumstances. Considering the fluid nature of the travel and tour industry in which the Appellant operates, I do not know whether it was a mere innocent oversight on the part of the Appellant not to reduce the arrangement into a written contract or whether it was a deliberate way of operating. I do

not know. What I am certain is that the Appellant will take valuable lessons from this case on the need to adopt the written contract way of conducting her future business.

44. Reading the record, I find the Respondents' evidence to have been consistent and corroborative. What I gather from the evidence is that, for purposes of making economic sense to the Appellant, the trip to Dubai required at least 15 travellers and in which case, the consideration was pegged at Kshs. 105,000/- per person. The Appellant met and informed the 3rd Respondent that she had already assembled 12 travellers, some of whom had already made payments, and that she therefore only needed 3 more. The 3rd Respondent therefore convinced and recruited the 1st and 2nd Respondents into the deal. On this understanding, the 3 Respondents each paid a deposit of Kshs 20,000/- to the Appellant as down payment. It is however apparent that all this time, the truth was that the Appellant was still sourcing for clients for the trip and had not yet attained the number of 12 that she had relayed to the Respondents. It appears that she only had 6 people by then, inclusive of the 3 Respondents but suppressed this fact. It is clear that it is this lack of quorum that prompted the changes that were then made by the Respondents, namely, escalation of the consideration from Kshs 105,000/- to Kshs 120,000/-, and postponement of the date of travel from 2nd May 2016 to June 2016, also partly caused by the realization that the date of travel coincided with the Islamic faith holy month of Ramadhan. While these may have been genuine grounds to vary the contract, the Appellant's mistake was that she unilaterally went ahead and implemented the changes without first obtaining the Respondents' authority or consent thereto.

45. Although the Appellant claimed that to have incurred expenses in ticket bookings made with the Emirates Airlines, cancellation fees for the same, and payment for visa, she failed to produce sufficient evidence to support these claims. Further, the independent witness from the Emirates Airlines, DW4, who had to attend Court to testify after the Appellant's Counsel objected to production of the relevant documents by the 3rd Respondent, testified that the alleged documents presented to the Court by the Appellant and alleged to be "e-tickets" procured by the Appellant from the Emirates Airlines, could not be traced in the Airlines system and neither did they emanate from the Airline. He just fell short of declaring the same as fake" and/or forgery". Since this testimony was not controverted by any contrary evidence, I believe it, as did the trial Magistrate. This therefore means that no ticket cancellation costs would have arisen if no bookings were made and no tickets issued in the first place.

46. In the circumstances, I cannot find any justification for criticism of the findings and orders made by the trial Magistrate. Her Judgment was clearly based on the evidence available before her. The Appellant, with the collapse of the contract through no fault of the Respondents, and there being no evidence that the Appellant incurred any expenses permitted, authorized or contemplated under the contract, could not continue retaining the amount paid to her as down payment. She had to refund it. Arguing otherwise would amount to a case of outright unjust enrichment which cannot be countenanced by the Courts.

47. In the circumstances, I find no reason to fault the trial Magistrate for finding that the Respondents proved their case on a balance of probabilities.

48. Regarding the award of general damages to the Respondents as made by the trial Court however, and although this was not specifically raised as a ground of Appeal, the law is that generally, general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered as a result of the breach, but not general damages. This principle was restated by the Court

of Appeal in the case of Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR as follows:

> " 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) vs. 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."

49. Similarly, Majanja J in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR, also stated the following:

> " 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))".

50. In light of the foregoing, it is evident that the respective awards of Kshs. 50,000/- made to each of the Respondents in general damages was clearly wrongly awarded and cannot be allowed to stand.

Final Orders

51. The upshot of my findings above is that this Appeal only partially succeeds, and only to the extent that the respective award of Kshs 50,000/- as general damages to each of the respective Respondents, as prayed in the Respondent's Counterclaim, is hereby set aside. The rest of the awards made by the trial Court therefore remain intact and in effect.

52. For avoidance of doubt therefore, the following orders/awards made by the trial Court remain undisturbed and continue to be in force:

    Dismissal of the Appellant's suit.

    Order of refund by the Appellant of a sum of Kshs 20,000/- to each of the 3 respective Respondents, with interest thereon as prayed in the Counterclaim.

    iii) Dismissal of the claim for damages for defamation, as prayed in the Counterclaim.

    Award of costs of the suit to the Respondents.

53. As this Appeal has partly succeeded, each party shall bear her own costs.

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

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Chemoiyai for Appellant

Osewe Atieno for Respondent

Court Assistant: Brian Kimathi