



**Shem v Nyangao (Civil Appeal E513 of 2022)
[2025] KEHC 2265 (KLR) (Civ) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2265 (KLR)

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

**CIVIL
CIVIL APPEAL E513 OF 2022**

**AM MUTETI, J
FEBRUARY 6, 2025**

BETWEEN

GRANT SHEM APPELLANT

AND

FLORENCE NYANGAO RESPONDENT

(Being an appeal against the Judgment and Decree of the Small Claims Court at Nairobi given by Hon. V. M. Mochache on 28th April, 2022 in E782 of 2022)

JUDGMENT

Introduction

1. The appellant in this matter contracted the respondent to perform some works at his premises. The respondent was contracted on or about 29th March 2021 to build Gypsum Ceiling lightings, paintings and upgrading the bathroom in the appellants office.
2. The parties agreed on a sum of Kshs. 588, 700 as payment for the works.
3. Further the agreement was that interest on all outstanding payments would accrue at 20% per month within 3 months of completion and 50% thereafter.
4. The respondent in this appeal filed a claim in the Small Claims Court following failure by the appellant to pay the agreed sum leading to an award of Kshs. 471,024.68 plus costs for the suit.
5. The appellants counterclaim was dismissed prompting this appeal.
6. In his appeal the appellant preferred 12 grounds of appeal as set out hereunder :-



- I. That the Learned Adjudicator erred in law by allowing the Respondent's claim dated 14/2/2022..
 - II. That the Learned Adjudicator erred in law by failing to allocate reasonable and proportional time for the Appellant to be heard during the trial thereby violating his right to a fair trial.
 - III. That the Learned Adjudicator erred in law by imputing the existence of an agreement between the Appellant and Respondent where none existed.
 - IV. That the Learned Adjudicator erred in law by failing to appreciate that the Claimant neither specifically pleaded nor strictly proved special damages for the same to be awarded.
 - V. That the Learned Adjudicator erred in law by awarding the Respondent damages at Kshs. 471,024.68/= which was not supported by the evidence on record thus not strictly proved as required by law.
 - VI. That the Learned Adjudicator erred in law by failing to apply the law to the facts of the case as required under Rule 5(5) of the Small Claims Code of Conduct -30 for Adjudicators, 2019.
 - VII. That the Learned Adjudicator erred in law by awarding damages that was too excessive in the circumstances and not commensurate with the alleged loss suffered.
 - VIII. That the Learned Adjudicator erred in law by entering Judgment for the Respondent notwithstanding the inconsistent and contradictory pleadings, affidavits, and testimony of the Respondent.
 - IX. That the Learned Adjudicator erred in law by failing to consider the totality of the evidence tendered by the Appellant thus occasioning miscarriage of justice.
 - X. That the Learned Adjudicator erred in law by ignoring the Appellant's submissions.
 - XI. That the Learned Adjudicator erred in law by dismissing the Counterclaim in spite of the abundance of evidence produced by the Appellant and the Counterclaim being unopposed.
 - XII. That the Learned Adjudicator erred in law by failing to objectively determine the claim as opposed to deciding the matter on prejudicial basis contrary to Rule 6(2) of the Small Claims Code of Conduct for Adjudicators, 2019.
 - XIII. That the Learned Adjudicator erred in law by failing to appreciate that the main objective of the Small Claims Court is to guarantee the right to access justice through a fair hearing.
7. The issues that arise in the appeal are whether the respondent was able to prove his case on a balance of probabilities and if so, were the damages awarded by the magistrate excessive or commensurate to the loss suffered.

Appellant's Case

8. By way of a Statement of Claim dated 14/2/2022, the Respondent initiated the instant dispute before the Court, of which the Appellant being dissatisfied with the Small Claims Court judgment hereby appeals against the same.
9. The Appellant denied in toto the allegations contained in the Statement of Claim and opposed the same through his Response to Statement of Claim and Counterclaim dated 14/3/2022, Witness Statement dated 14/3/2022, and Further Witness Statement dated 11/4/2022, and all supporting documents adduced in connection thereof, which he relies on in support of his case.



10. On or about March, 2021, the Appellant sought from the Respondent the following services to be completed in his offices:
 - a) Installation of a gypsum ceiling and lightings;
 - b) Upgrading bathroom fittings;
 - c) Painting;
 - d) Installing office cabinets; and
 - e) Installing kitchen cabinets and tiles.
11. From the outset, it was discussed and agreed between the parties that the Appellant would pay the Respondent Kenya Shillings Five Hundred and Seventy -Eight Thousand Seven Hundred and Eighty (Ksh. 578,780/-) upon the Respondent completing performance of the services.
12. The Respondent was to draft, and send to the Respondent for review and --approval, an agreement encompassing inter alia the services sought and the amount of payment, but she neglected to do so.
13. It was alleged by the appellant that after installing a gypsum ceiling in a few rooms of the Appellant's offices, the Respondent abandoned the work and later began demanding for full payment from the Appellant.
14. In the course of installing the gypsum ceiling, the appellant alleged that the Respondent interfered with electric lines powering the electric fence wire, security lights, and general office lighting causing significant damage thereof.
15. The Appellant continued to pay rent for his offices in the hope that installation of the gypsum ceiling and lightings, painting, bathroom fittings, office cabinets, and kitchen tiles and cabinets would be completed allowing for utilization of the office space, however, the Respondent continued in her intentional and deliberate neglect to complete installation. As a result of the Respondent's intentional neglect, the Appellant suffered enormous losses for rent payments for unutilized office space.
16. The claim was erected upon the edifice of falsehoods, half-truths and unsubstantiated allegations calculated to exploit and extort money from the Appellant.
17. The adjudicator erred in awarding special damages to the Respondent for she had failed to strictly prove the costs alleged to have been incurred and/or suffered, for this reason and others detailed herein below, the Appellant prays that the judgment be set aside and the claim be referred back to the small claims court before a different adjudicator.

B. Issues For Determination

i. Whether the learned adjudicator erred in finding that the Respondent completed 80% of the services sought

18. The Appellant vide submissions filed at the trial court invited the Court to visit and inspect his offices in order to establish with finality the veracity of the claim.
19. Despite there being no expert finding/report being filed in the trial court indicating the percentage of work completed by the Respondent, the trial court went on to arbitrarily and erroneously determine the percentage at 80% thus prejudicing the Appellant.



20. The appellant further submitted that the learned adjudicator ignored the video evidence produced by the Respondent and the photographic evidence produced by the Appellant which evidenced that the Respondent had not completed a large portion of the services sought.
21. The learned adjudicator erred in determining the percentage of work done in the absence of an expert report.

ii. Whether the learned adjudicator erred in awarding the Respondent special damages in the absence of proof.

22. It is a longstanding principle of law that special damages must be specifically pleaded. The Court in *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, underscored that, "In regard to special damages the law is quite clear...Special Damages must be both pleaded and proved, before they can be awarded by the Court."
23. In *Mathew Mutua Mutio V Car & General (K) Ltd* [2000] eKLR, the Court stated obiter dictum that:

To specifically plead the plaintiff must quantify the special damages claimed or tabulate. In *Charles Sande vs. Kenya Cooperative Creameries Civil Appeal No. 154 of 1993* (unreported), Shah JA of the Court of Appeal went to the extent of saying that in the absence of specific pleading of special damages such a claim cannot be allowed even if not objected to by the other side.
24. In similar vein, the Respondent herein failed to specifically plead special damages. Special Damages Must Be Strictly Proved
25. The Respondent failed to discharge this crucial burden of proving the special damages she seeks.
26. On the record, there is neither a receipt in support of what the Respondent alleged to have spent nor did she avail invoices issued to the Appellant to settle payment. There is absolutely no evidence to support the sums claimed.
27. The appellant placed reliance on the case of *Lilian Njeri Mugucha v Petronila Muyathi Mwinzi* [2022] eKLR where the Court dismissed the appeal on observation of the glaring inconsistencies of the appellant's case and her failure to "...connect the dots or shade light on how the amount of Kshs. 317,200 pleaded was arrived at.
28. In *Moses Njane Ngendo v Josiah Anyangu Omutoko & another* [2022] eKLR, the Court cited several authorities and in particular relied on the acclaimed decision in *Capital Fish Kenya Limited Vs Kenya Power & Lighting Company Limited* (2016) eKLR and rejected the Plaintiff's claim for specific damages for the reason that, "The plaintiff claim which was by and large a claim in damages remained unproved."
29. The appellant further submitted that in the instant case, the sums awarded by the trial court are unjust for the Respondent failed to discharge her obligation of specifically pleading and strictly proving, and for this reason the trial court judgment ought to be set aside in its entirety.
30. The appellant further submitted that the Respondent was not entitled to the awards granted by the trial court.
31. The appellant urged this Honourable Court to set aside the trial court judgment and remand the matter for retrial before a different adjudicator as the Appellant stands to suffer from the unfair and unjust determination and awards of the trial court.



iii. Whether the Appellant was entitled to the damages sought in the counterclaim.

32. Despite the Counterclaim being unopposed the trial court failed to consider and award the same.
33. The Respondent has demonstrated through the rent receipts tendered that he had dutifully paid his office rent of Ksh. 210,000/- monthly throughout the one year that the Appellant abandoned her work. Servicing the office rent was in vain since the office remained in unusable state causing enormous losses.
34. Over and above the financial losses suffered, the trial court ignored the photographic evidence produced by the Appellant which depicted the hazardous reality posed by the hanging naked electric wires. The Appellant proved that the Respondent's inaction deterred him from peaceful enjoyment of the office property. The Appellant sought for an award of general damages at Ksh. 1,000,000/= due to the inconveniences, losses, and damage suffered as a result of the Respondent's admitted non-completion.
35. The appellant in advancing his claim sought to rely on the case of Jaswinder Singh Jabbal v Mark John Tilbury & another [2019] eKLR, where the Court found that a claim for inconvenience, loss and nuisance was established and awarded general damages for inconvenience and discomfort suffered at Kshs. 1,000,000/=. In Tim Mwai & 2 others v Extra Mile Limited [2018] eKLR, the Court allowed the prayer for general damages at Ksh. 1,500,000/= for nuisance, loss and damage suffered.
36. Accordingly, the appellant urged the Court to find that an award of Kshs1,000,000/= as general damages was/is appropriate and reasonable for the inconvenience, losses, and damage suffered by the Appellant at the behest of the Respondent.

Analysis And Determination

37. The respondent did not file submissions in this matter.
38. The appellants filed their submissions which I have reproduced above.
39. As a first appellate court this court is bound to re-evaluate the evidence on record to determine whether the respondent proved his case on a balance of probabilities and that the decision arrived at by the Lower court was premised on evidence and the Law. See *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123.
40. The two parties testified in support of their respective cases.
41. From the evidence of the respondent, it is clear that there was an agreement between her and the appellant for the services.
42. The appellant in his defense acknowledged there was an agreement for payment of Kshs. 588,000.
43. He stated:-

“I knew her through a friend who she had assisted with the work. She proposed to be paid the claimant was Kshs. 588,000 but we didn't agree. But I do not have an issue with that charge. I accept it. She was supposed to do Gypsum, highlighter, painting, office cabinet and Kitchen file. Gypsum in the full building. The claimant has not touched the ceiling at all. She has tampered all the lighting system in the whole compound. She was supposed to have completed the work within 2 weeks she has not completed upto now.”
44. What emerges clearly from the evidence of the claimant (Respondent) and the appellant is that they had an agreement for works to be performed.



45. The amount in issue is not disputed by the appellant.
46. The respondent was under duty to prove her case on a balance of probabilities that she had indeed performed her part so that she could be awarded the damages she sought.
47. The learned Honorable magistrate had this to say in her judgment at paragraph 15:-
“it is not disputed that the works were no fully completed, however the 2 parties failed to assist the court to determine the percentage of work done, by failing to file reports of experts. Had the parties done so, the court would have also been able to easily determine what works was done and which was pending and values placed thereof. In addition, the court would have also been able to find the extent of the damage pleaded by the respondent if any and the value thereof. In absence, the court has to apportion the percentage of completion based on the evidence available.”
48. If indeed the issue was completion of the works, it follows that the appellant was under duty also to prove that the respondent had not performed the contract as per their understanding.
49. Section 107 of the *Evidence Act* provides:-
“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.”
50. It is clear from the statement of the magistrate above that the two parties did not tender evidence that could enable the court to determine the matter with certainty.
51. The statement leaves this court with one question, if the parties did not adduce evidence sufficient enough to lead the court to a definitive finding on the rights of the parties, on what basis did the court apportion the percentage of completion.
52. The court erred in what appears to have been a clear case of failure to establish the primary case or the counterclaim. It was not the business of the court to engage in guesswork and reach a finding somehow.
53. The appellant having admitted that they had entered into a contract and that works were done, it was incumbent upon him to prove that the works were incomplete if he so desired the court to hold. The respondent on the other hand had the evidential burden to prove the extent of works and what it is that she was entitled to.
54. Having failed to do so the appellant’s counterclaim was dismissed and judgment entered in favor of the respondent who had similarly not tendered evidence that would have enabled the court to arrive at a just decision in the circumstances. The decision of the learned honorable magistrate cannot survive this appeal in the circumstances.
55. In the cases of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR and Kenya Power and Lighting Company Limited vs Nathan Karanja Gachoka & Another [2016] eKLR where the common thread was that a plaintiff must prove its case too upon a balance of probabilities whether the evidence was unchallenged or not.
56. The court here expressly stated that the parties did not assist the court and specifically failed to file expert reports. The claimants case therefore ought to have failed just like the counterclaim.



57. Notably, Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya) states that:- “Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.”
58. Each of these parties desired the court to find in their favor but they both failed to discharge their respective duty to prove each of their claim. Courts must resist the temptation to engage in a gratuitous interpretation of evidence to find meaning of a particular portion of evidence. The burden is on the parties to present cogent and succinct evidence in order to succeed.
59. The degree of proof in civil cases was well enunciated in the case of *Miller vs Minister of Pensions [1947]* which was cited with approval in *D.T. Dobie Company (K) Limited Vs Wanyonyi Wafula Chabukati [2014] eKLR* where the court held:-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, thus proof on a balance of probabilities means a win however narrow.”
60. In the instant case none of the parties had an edge over the other and the magistrate determined so only to turn around and fault the appellant.
61. This court is therefore inclined to allow the appeal and order that the entire judgment of the adjudicator be and is hereby set aside.
62. The appellant under paragraph 10 of his submissions has urged this court to send the matter back to the small claims court for rehearing before another adjudicator other than V.M Mochache who rendered the judgment set aside by this court.
63. The prayer by the appellant is granted. The lower court file shall be immediately transmitted to the small claims court for hearing and determination within 60days of receipt in that court.
64. Parties shall bear their own costs in this appeal.
65. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF FEBRUARY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Njagi for the Appellant

Amadi & Co. Adv. absent for the Respondent

