



REPUBLIC OF KENYA



**KENYA LAW**  
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**DB Schenker (K) Limited v Akado (Civil Appeal E238 of 2024)  
[2025] KEHC 4972 (KLR) (Commercial and Tax) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4972 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E238 OF 2024**

**PM MULWA, J**

**APRIL 24, 2025**

**BETWEEN**

**DB SCHENKER (K) LIMITED ..... APPELLANT**

**AND**

**BONN AKADO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. G.G. Lui Okwengu - SRM  
delivered on 14th August 2024 in Milimani CMCC No. 1157 of 2022)*

**JUDGMENT**

1. This is a first appeal arising from the judgment and decree delivered in Milimani CMCC No. 1157 of 2022 on 14<sup>th</sup> August 2014, wherein the trial court entered judgment in favour of the Respondent, Bonn Akado.
2. The background to this appeal is that the Respondent had entered into an agency agreement with the Appellant dated 1<sup>st</sup> March 2015, pursuant to which the Respondent was entitled to earn commissions for business introductions made to the Appellant's company. The dispute arose following termination of the contract on 4<sup>th</sup> August 2021, with the Respondent alleging that certain commissions remained unpaid.
3. The Respondent filed suit seeking a commission of USD 61,695 for services rendered. The Appellant denied liability and counterclaimed Kshs. 207,187.25 for overpaid commissions. The trial court allowed the Respondent's claim and dismissed the Appellant's counterclaim.
4. Aggrieved by the decision, the Appellant lodged this appeal vide the Memorandum of Appeal dated 23<sup>rd</sup> August 2024 on the following grounds:



- a. The learned magistrate erred in law and in fact by misinterpreting the contract between the parties.
  - b. The learned magistrate erred in law by admitting and relying on electronic evidence that was not correctly certified as required under Sections 78A and 106B of the Evidence Act, contrary to established legal precedents.
  - c. The learned magistrate erred in law and fact by failing to apply the correct standard of proof for special damages.
  - d. That learned magistrate erred in law and in fact by dismissing the Appellant’s counterclaim for overpaid commissions without proper consideration of the evidence presented.
  - e. The learned magistrate erred in law and fact by ordering the appellant to provide a statement of account for business with GSK and FEBC up to 4<sup>th</sup> August 2021, despite the lack of contractual or legal basis for such an order.
5. The parties argued the appeal by way of written submissions.
  6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See *Abok James Oders T/A A.J Odera & associates v John Patrick Macharia T/A Macharia & Co. Advocates* (2013) eKLR).
  7. An appellate court will only interfere with the judgment of the lower court if the said decision is founded on wrong legal principles.
  8. Having considered the Appellant’s grounds of appeal, pleadings, proceedings and the parties’ written submissions, I frame the following issues for determination:
    - a. Whether the trial court erred in holding that the Respondent was entitled to a 30% commission under Clause 3(II) of the Agreement.
    - b. Whether the trial court erred in admitting uncertified electronic evidence contrary to Sections 78A and 106B of the Evidence Act.
    - c. Whether the trial court failed to apply the correct standard of proof for special damages.
    - d. Whether the trial court erred in dismissing the Appellant’s counterclaim.
    - e. Whether the order directing the Appellant to issue statements of account was legally sound.
 

Whether the trial court erred in holding that the Respondent was entitled to a 30% commission under Clause 3(II) of the Agreement
  9. The Appellant contends that the Respondent did not bring in GSK as a client for customs clearing and forwarding services, thereby disqualifying the claim for commission. However, the record shows the Respondent participated in identifying, following up, bidding and ensuring compliance in the engagement with GSK. While GSK was previously engaged with the Appellant in warehousing, the evidence before the trial court supported a finding that the Respondent’s efforts directly contributed to the Appellant securing additional business specifically for clearing and forwarding services.
  10. Clause 2(I) of the contract required the Respondent to market logistics, freight and clearing services and to introduce new customers to the Appellant. While Clause 3(II) provided for a 30% commission



for business generated by the Respondent. The Appellant's primary contention is that the Respondent did not "secure" business with GSK, particularly for customs clearing and forwarding.

11. The appellant argues that the trial magistrate erroneously interpreted the word "AND" to create two separate and independent grounds for commission eligibility.
12. The trial court properly found that the Respondent facilitated GSK's engagement, and there is no material misinterpretation of the contract.
13. The strict construction of commercial contracts must be guided by the parties' intentions, which must be deduced from the agreement and the factual matrix. (See *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR).
14. I am persuaded that the trial court correctly held that the Respondent's involvement went beyond a mere introduction and extended to facilitating a successful bid. I find no basis to interfere with the finding that he was entitled to commission.

Whether the trial court erred in admitting uncertified electronic evidence contrary to Sections 78A and 106B of the [Evidence Act](#)

15. The Appellant challenges the trial court's admission of statements of accounts that were not certified under Section 106B of the [Evidence Act](#).
16. The admissibility of electronic evidence is primarily governed by Sections 78A and 106B of the [Evidence Act](#), Cap 80. Section 78A (1) provides that:

"Electronic messages and digital material shall be admissible as evidence in legal proceedings."

17. However, the admission of such evidence is subject to compliance with Section 106B, which stipulates that:

"Any document produced by a computer shall only be admissible in evidence if accompanied by a certificate identifying the electronic record, describing how it was produced, and verifying its authenticity."

18. While Section 106B mandates a certificate for admissibility of computer-generated records, courts have adopted a pragmatic approach where such documents are not in dispute and are produced by both parties. (See *Republic v Mark Lloyd Stevenson* [2006] eKLR and *Benson Ndwiga Njeru v Republic* [2019] eKLR).
19. In this instance, the Appellant, as the maker, relied on the same documents to support its case regarding overpaid commissions. No challenge was raised on authenticity or integrity. I am thus persuaded that the trial court was justified in admitting the documents. My view is that a formalistic approach in such circumstances would elevate technicality over substance.
20. The rationale is that the purpose of Section 106B (4) is to ensure authenticity, and if both parties rely on the electronic records without dispute, the risk of fraud or manipulation is minimal. As there was no allegation of fraud on the documents, I therefore find no merit in this ground of appeal

Whether the trial court failed to apply the correct standard of proof for special damages

21. It is trite that special damages must be pleaded and strictly proved. The Respondent pleaded USD 61,695 and supported this with a computation based on a 30% commission on the amount of USD 186,750. The Appellant did not dispute this figure in substance but challenged the entitlement. Once



the entitlement was established, the amount was sufficiently proved. I thus find that the Respondent met the threshold for granting special damages.

Whether the trial court erred in dismissing the Appellant's counterclaim

22. In the present case, the Appellant alleged an overpayment of Kshs 207,187.25 but failed to disclose the basis of computation or any corroborating documentation.
23. The law is settled that a party seeking relief bears the burden of proving their claim. A mere assertion, without more, is insufficient to support a monetary claim.
24. In *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, the Court held:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

25. The Appellant's counterclaim for overpaid commissions lacked supporting documentation or a credible explanation of how the figure of Kshs. 207,187.25 was arrived at. As rightly found by the trial magistrate, a bald assertion devoid of documentary or testimonial support could not sustain a counterclaim for recovery. I thus find that there was no error in dismissing the same.

Whether the order directing the Appellant to issue statements of account was legally sound

26. The order requiring the Appellant to render a statement of account for commissions up to the effective date of contract termination was well grounded in Clause 3(II) and Clause 2(I) of the agreement. The Respondent was seeking an equitable remedy to ascertain the true extent of commissions payable, and the documentation was solely in the Appellant's possession.
27. Given that the Respondent was entitled to commission for business brought in before 4<sup>th</sup> August 2021, and in the absence of full disclosure on all such engagements (e.g., with FEBC International), the trial court was justified in issuing the order. It was a necessary and equitable step to safeguard the Respondent's contractual entitlement and ensure an accurate accounting of commissions due.
28. Clause 3(II) of the agreement expressly obligated the Appellant to maintain transparent commission records. It follows that the order for a statement of account was not only fair but also contractual.
29. In conclusion, I find that the appeal is devoid of merit. I am satisfied that the learned trial magistrate properly construed the terms of the contract, correctly admitted the electronic records in the context presented, and applied the appropriate legal principles in his evaluation of the evidence. There is no demonstrable error in law or fact on the part of the learned trial magistrate that would justify interference by this court.
30. Accordingly, the appeal lacks merit and is dismissed with costs to be borne by the Appellant. The judgment of the trial court delivered in CMCC No. 1157 of 2022 is hereby upheld in its entirety.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Onsare for Appellant



Mr. Odhiambo for Respondent

Court Assistant: Carlos

