



REPUBLIC OF KENYA



**KENYA LAW**  
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**Digithu Hotel Limited v Mwangi t/a Jaycmi Enterprises (Civil Appeal  
E170 of 2021) [2025] KEHC 6373 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6373 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E170 OF 2021  
DO CHEPKWONY, J  
MAY 6, 2025**

**BETWEEN**

**DIGITHU HOTEL LIMITED ..... APPELLANT**

**AND**

**GEOFFREY MAINA MWANGI T/A JAYCMI ENTERPRISES ..... RESPONDENT**

**JUDGMENT**

1. The Appellant launched this appeal vide a Memorandum of Appeal dated 17<sup>th</sup> September, 2021 which raised the following grounds:-
  - a. That the Learned Magistrate erred both in fact and law in entering Judgment against the Defendant.
  - b. That the Learned Magistrate failed to appreciate that the burden of proof lay on the Plaintiff which burden was not discharged as the Plaintiff did not prove his case.
  - c. That the Learned Magistrate erred in law and in fact in entering Judgment against the Defendant whereas the Plaintiff failed to produce very crucial documents with regards to the suit.
  - d. That the Learned Magistrate erred in fact and in law in relying on unauthenticated documents.
  - e. That the Learned Magistrate erred in law and in fact in relying on an accounts document that did not have any supporting documents to show where it extracted its information.
2. The Appeal seeks the following orders:-
  - i. That the Appeal be admitted.
  - ii. Upon hearing of this Appeal, the judgment of the court in Civil suit no. E2 of 2020 be set aside.



- iii. This Honourable court be pleased to hear this matter afresh by another magistrate.
  - iv. Costs to abide the outcome of this appeal.
  - v. This Honourable court be pleased to make such further or other orders as it may deem just in the circumstances of the case.
3. This being a first appeal it is this duty of the court to reassess and reanalyse the evidence tendered before the trial court and draw its own conclusion bearing in mind that it did not have the advantage to observe the demeanour of the witnesses at the trial court. The duty is well spelt out in the decision in the case of *Selle & another –vs- Associated Motor Boat Co. Ltd. & others* [1968] EA 123 in the following terms:-
- “I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif – vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”
4. Nonetheless, brief facts leading to the present case is that the Respondent sued the Appellant vide a Plaint dated 18<sup>th</sup> November, 2016 claiming that through his registered firm Jaycni Enterprises entered into an agreement with the Appellant to supply fruits and vegetables on credit on a weekly basis. That the Appellant would pay thereafter and the relationship lasted for a period of three years. According to the Respondent, out of the fruits he supplied the Appellant only paid Kshs. 302,959/= leaving a balance of Kshs. 778,457/= and when the Appellant failed to pay the amount when demanded, the Respondent filed the suit before the trial court to recover the debt. The Respondent also sought costs and interests for the suit.
  5. In response, the Appellant filed a statement of defence dated 29<sup>th</sup> November, 2020 denying the contents of the Plaint but the trial court delivered Judgment dated 9<sup>th</sup> September, 2021 in favour of the Respondent for the sum of Kshs. 778,457/=, costs and interest to be paid until payment in full.
  6. It is the said Judgment which informed the present appeal and as per the court’s directions the Appeal was disposed by way of written submissions with the Appellant filing its submissions dated 19<sup>th</sup> October, 2023 while those of the Respondent are dated 4<sup>th</sup> November, 2024. The court has read and considered the said submissions which in summary are as follows.
  7. The Appellant submits that the trial court failed to acknowledge that the Respondent did not discharge his burden of proof on the case, particularly the fact that the trial court failed to appreciate that the standard procedure for receiving goods including embossing the Defendant’s stamp which the Respondent failed to prove. According to the Appellant, the claim by the Respondent had to be proven in the same threshold for special damages and therefore offering unstamped invoices never met the required standard of proof and was not enough to indicate conclusively that the Respondent had indeed supplied the alleged goods. According to the Appellant, the unstamped invoices were internally generated and they were insufficient to link any purchases made by the Appellant or its agents. The Appellant in essence faulted the trial court for failing to make adequate comparison between the



invoices made by the Appellant and those internally procured by the Respondent as they were not legitimate or authentic to substantiate the claim made. As such based on those discrepancies, the Appellant urged the court to allow his appeal.

8. The Respondent's case on the other hand is that he adduced evidence before the trial court to show that he had indeed made the deliveries hence the appeal is not merited. In his list of documents among them invoices for the goods delivered, delivery notes and cheques for the invoices that were paid which showed that he discharged his burden of proof. He stated those delivery notes showed he had supplied goods worth Kshs. 1,081,416/= but only Kshs. 302,959/= was paid leaving a balance of Kshs. 778,457/= which he claimed.
9. The Respondent further submitted that although the Appellant issued requisitions for the supplies, he never shared copies of the same which was the reason why they were not part of his documents. The Respondent also argued that the invoices which had been produced had not been stamped by the Defendant but his employees who affixed their signatures to acknowledge receipt of the goods and therefore the evidentiary burden of proof shifted to the Appellant to rebut the Respondent's assertion that the goods had been delivered.
10. The Respondent further submitted that the Appellant in his testimony before the trial court did not dispute the facts that the goods were supplied and delivered but only merely alleged that the goods had been paid for. That indeed the Appellant produced some invoices signed by his employee known as Lydia although he could not account on whether she was currently an employee. The invoices produced by the Appellant were numbers 3260 and 3289 although he could not recall whom among his employees had signed the invoices.
11. It was the Respondent's submissions that it was the Appellant's procedure to stamp invoices when payments were being made and that explains why the unpaid invoices were not stamped. Indeed the invoices paid and which the Respondent produced had been stamped and the corresponding cheque numbers for the cheque issued was indicated in those invoices. That it would be absurd to expect the Respondent to produce cheques stamped invoices when those invoices had not been made. Based on the mode of practice adopted by the parties, the Respondent urged the court to find that he had discharged his burden of proof.
12. According to the Respondent, it would not be true to state that the trial court relied on unauthenticated documents on the judgment since the Appellant did not clarify on what kind of authentication needed to be done on the documents. Even the Statement of Account produced by the Appellant showed invoices which did not bear the Appellant's stamp and he emphasises that the said invoices bore the name of the employee of the Appellant who received the goods and date when the delivery was done which is in line with the procedure No. 5 in the invoices and reads as follows:- "The store attendant stamp the invoices and remit the same with payment to the supplier."
13. The Respondent's claim is that the invoices could only be stamped when a cheque number is written on it to show payment has been done. He argues that the Appellant cannot claim that the documents are not authentic yet they have been received by its employees and further that the Appellant did not object to the production as evidence in the trial court. He maintained that he produced all the crucial documents at the trial court but the Appellant did not produce any evidence to rebut the same and thus argues that the appeal lacks merits and should be dismissed.

### **Analysis and Determination**

14. Having considered the Memorandum of Appeal, the Record of Appeal, the Appellant's submissions as well as the submissions filed by parties in support of their respective cases, the main issue for



determination is whether the trial court's judgment was faulty in law and fact to warrant its interference by this court.

15. The claim upon which the appeal lies is the dispute for non-payment of goods which were delivered. It is crucial to note that the Plaintiff, the Respondent had a duty to discharge his burden of proof under Section 107-109 of the *Evidence act*. The Appellant argues that the Respondent did not discharge this burden while the Respondent on the other hand claims to have submitted the unpaid invoices and delivery notes signed by the Appellant's employee who received the goods then the burden shifted to the Appellant to prove payment. Or rebut the Plaintiff's.
16. The Supreme Court in the case Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another –vs- IEBC & 2 Others, (2017) eKLR on the distinction of legal and evidentiary burden of proof held as follows:-

“Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced. It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”

17. The court in the case of Ahmed Mohammed Noor –vs- Abdi Aziz Osman, [2019] eKLR, similarly held as follows:-

“For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.”

18. From the record and proceedings before the court, it is clear that the Respondent produced the delivery notes and invoices which were signed by the Appellant upon receipt of the goods. The Respondent added that the invoices would only be stamped after payment but would be issued upon delivery of the goods. The evidentiary burden of proof at this point shifted to the Appellant who though he claimed that procedure was not followed on the authenticated documents he did not prove the same. The court further finds that the Respondent's explanation that unpaid invoices were unstamped because they could only be stamped upon payment more convincing than the Appellant's mere denial that they were not authenticated. The Appellant did not challenge the Respondent's explanation hence this court cannot fault the trial court's decision although the invoices unstamped.
19. This court finds no error in the trial court's judgment to warrant this court to set it aside. Consequently, the court finds that the Appeal herein lacks merit and proceeds to dismiss the same with costs to the Respondent.

It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 6<sup>TH</sup> DAY OF FEBRUARY 2025.**



**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

No appearance by either party

Court Assistant - Martin

