



**Ondongo v Okango t/a Jemery Energy (Civil Appeal E134 of 2023)
[2025] KEHC 6187 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E134 OF 2023**

AM MUTETI, J

MAY 8, 2025

BETWEEN

STEPHEN ONDONGO APPELLANT

AND

PIUS OWANG OKANGO T/A JEMERY ENERGY RESPONDENT

*(Being an Appeal against the judgment of Honorable G.C SEREM -ADJUDICATOR
delivered on the 14/07/2023 in KISUMU SCC COMMERCIAL CASE NO. 168 OF 2023)*

JUDGMENT

Introduction

1. The appellant in this matter was the respondent in the Small Claims Court Case No. SCCOM E 168 of 2023 which was a claim based on the supply of goods namely petroleum products.
2. The claim was for a sum of Kshs. 520,000 but there was some partial settlement of the debt leaving a balance of Kshs.400,000 which the court ordered the appellant to pay with costs and interests.
3. The appellant aggrieved by the said decision has appealed to this court on the following grounds:-
 - i. The Learned Adjudicator of the Small Claims Court erred in both law and facts in finding against the Appellant
 - ii. That the Learned Adjudicator of the Small Claims Court erred in law and fact in finding that the Respondent had proved his claim for Kshs. 400,000/= and he was never supplied with any fuel.
 - iii. That the Learned Adjudicator of the Small Claims Court erred in law and fact in failing to find that special damages must be strictly proven by a person claiming such relief from court.



- iv. That the Learned Adjudicator of the Small Claims Court erred in law and fact in failing to find that the Respondent had not established his case on a balance of probabilities based on the facts.
 - v. That the Learned Adjudicator of the Small Claims Court erred in law and fact in shifting the onus of proving the existence of a debt to the Appellant instead of the Respondent.
 - vi. That the Learned Adjudicator of the Small Claims Court erred in law and fact in discarding the appellant's evidence of never being supplied with the goods alleged.
 - vii. That the Learned Adjudicator of the Small Claims Court misdirected herself on the applicable law and principles, in the evaluation of evidence adduced and thereby arrived at a wrong decision in her judgment.
4. The issues that arise from the grounds of the appeal filed whether the respondent claimant proved on a balance of probabilities that the appellant owed him the amount in question. Secondly, whether the learned adjudicator shifted the burden of proof to the appellant/ respondent thereby arriving at a wrong decision in law.
 5. The parties to this appeal agreed to have it disposed of by way of written submissions and each of them filed their respective submissions which this court has duly considered.

Appellant's Case

6. The gist of the appellants case is that he did not owe the respondent the amount in issue and that the learned administrator erred in law by holding that his defense amounted to a mere denial.
7. According to the appellant, the duty to prove the existence of the debt lay with the respondent throughout and that the appellant had no corresponding duty to prove that he owed the respondent any money.
8. The appellant submitted that the respondent did not discharge that duty and as a result the claim ought to have been dismissed.
9. In support of his argument the appellant cited the case of Gathaite Farmers Cooperative Society Limited Vs. Nicholas Kigo Ndungu & 17 Others [2019] eKLR in which Justice Kemei stated:-

“The Burden of proof vested on the shoulders of the plaintiff to prove its case even where the case is undefended like in this circumstance. Sadly, the plaintiff failed to discharge the burden of proof. A party wins a case on the strength of the evidence placed before the court and not on the weakness of the evidence or lack of it of the opponent.”
10. The appellant further contended that the learned Adjudicator erred in finding that the appellant had admitted the debt and according to him the Whatsapp message relied on as proof of admission was wrongfully attributed to him.
11. Further, the appellant argued that the court erred in law by relying on hearsay evidence and averments made outside court instead of the evidence which was tendered before the in court.
12. The appellant further accused the learned Adjudicator of descending into the arena of adjudication by taking into account the prolonged business relationship between him and the respondent.



13. The appellant went on to cite the case of *Selle & Another Vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123. On the duty of this court as a first appellate and urged the court to reevaluate the evidence on record and draw its own conclusions.
14. According to the appellant there was no evidence of delivery of the fuel to the appellant. No invoices or delivery notes to show that deliveries were actually made.
15. The appellant maintained that special damages must be specifically proved thus the respondents should have adduced evidence in support of the claim of Kenya shillings 520,000.
16. The appellant further argued that the respondent did not even produce the contract agreement between them.
17. To underscore the importance of the delivery notes, invoices and the contract the appellant cited the case of *E.P Communications Ltd Vs. EA Courier Services Ltd* [2019] eKLR where the learned Justice F. Gikonyo held:-

“The evidence show that a business relationship existed between the parties herein. There is also evidence that goods were supplied to the Respondent during the business relationship on credit. However, two issues abound: Were the goods alleged to have been so supplied actually supplied and received? And, for the goods supplied and delivered, were they paid for by the Respondent? The appellant produced invoices, LPOs and delivery notes. The purpose of an invoice is that it is issued by a seller to request for payment for purchase. An LPO is sent by a purchaser to the seller to confirm, order and authorize the purchase. A delivery note is proof of delivery of goods. See the Black’s Law Dictionary Tenth Edition on of these terms below:

a) Invoice at Page 956 is described as an itemized list of goods or services furnished by a seller to a buyer, us. Specifying the price and terms of sale; a bill of costs

=

b) Receipt at page 1459 1460 as the act of receiving something, esp. by taking physical possession <my receipt of the document was delayed by two days>. A written acknowledgment that something has been received; esp., a piece of paper or an electronic notification that one has paid for something.

(13) Therefore, invoices and LPOs alone do not prove delivery or receipt of the goods. The appellant produced two delivery notes. The one dated 9/12/2009 relate to the invoice dated 9/112/09 for Kshs.135, 695/- PW1 stated that the invoice was settled but for Kshs. 995/- that remained unsettled. The other delivery note is dated 6/11/09 and relate to the invoice dated the same date for Kshs. 114, 055/-. The delivery note bears the stamp of the respondent as well as a signature of approval. The other invoices dated 23/20/08 and 20/08/09 were not supported by any delivery note or notes to show receipt of the goods stated therein. The Appellant may have supplied the goods, but courts of law act on hard evidence not sympathy or speculation. In the absence of a delivery note or evidence of receipt of the goods, it becomes doubtful whether the goods were delivered.” (emphasis by underlining ours)

18. On the basis of those submissions the appellant pleaded with this court to allow his appeal.



Respondent's Case.

19. The respondent in answer to the appellant's submission contended that he presented evidence that was sufficient enough to support his claim.
20. According to him the evidence presented to the court satisfied the standard of proof on a balance of probabilities required in civil cases.
21. The respondent further submitted that his case met the standard set under Section 107 of the Evidence Act that 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.
22. The respondent argued that he was able to prove that he was engaged in the fuel industry business and in the course of it he supplied the appellant 3000 liters of fuel diesel at Kenya shillings 106 per liter and 2000 liters of kerosene at Kenya shillings 101 per liter and the total amount of fuel supplied was for Kenya shillings 520,000.
23. He went further to state that he acknowledged receipt of Kenya shillings 120,000 from the appellant but was never paid the balance of Kenya shillings 400,000 thus his case was sufficiently established as against the appellant.
24. The respondent maintained that the messages exchanged between him and the respondent was sufficient to prove indeed they had business dealings and payment made to him was through Kenya Commercial Bank account number 128488134.
25. The respondent urged this court to review the evidence and find that the same was adequate enough to support the decision arrived at by the adjudicator.
26. In particular the respondent referred this court to the exhibit CEXH .5 in which the appellant acknowledged the debt.
27. From the evidence the respondent submitted that the payment of Kenya shillings 120,000 was made on 22nd February 2022 a day after the text message of "balance 520,000".
28. The respondent went further to urge this court to find that the Kenyan shillings 120,000 paid to him by the appellant was in respect of the debt of Kenya Shillings 520,000.
29. The respondent further submitted that if indeed there were no deliveries made to the appellant, then what was the purpose of paying the Kenyan shillings 120,000?
30. According to the respondent the appellants defense was a mere denial and it was properly rejected by the adjudicator. He cited the case of Margaret Njeri Mbugua Vs. Kirk Mwenya Nyaga [2016] eKLR where The court in dealing with a defense of a mere denial had this to say:-

“ A mere denial is not sufficient defense and a defendant has to show either by affidavit ,oral evidence or otherwise that there is a good defense...”

Analysis And Determination

31. The case by the appellant rests on whether there was sufficient evidence to show that he owed the respondent the sum of Kenya shillings 400,000 that the trial Court ordered him to pay.
32. The duty of this court as a first Appellate court is to re- evaluate the evidence tendered by the parties before the lower court and draw its own conclusions of course remembering that this court unlike



the lower court did not have the opportunity to see or hear the witnesses thus in the drawing of any conclusions, allowance for that must be made. See *Selle & Another Vs. Associated Motor Boat Co. Ltd & Others* (1968) EA 123.

33. The respondent filed a witness statement stamped the 28th March 2023. The statement was adopted in evidence on 25/5/2023 and the claimant respondent specifically told the court that he supplied the appellant with 3000 Litres of Diesel at Kshs. 106 per Litre and 2000 Litres of Kerosene at Kshs. 101 per Litre and that he was only paid Kshs. 120,000 out of a total of Kshs. 520, 000 and despite following up with the appellant payment was not forthcoming.
34. In his witness statement the respondent stated:
- “ the respondent is a customer dealing in Petrol Business . I used to supply him with diesel, kerosene and even petrol and he pays later after.”
35. The evidence of the respondent thus indicated that they had business dealings with the appellant who would be supplied with products and pay later.
36. From that statement of the respondent, the supply was not a gratuitous act and there was certainly expectation on the part of the respondent that upon delivery of the product, payment would be done.
37. In state of *W.B Vs. B.K Mondal & Sons ALR 1962 SC 779 Gajendragakar J (afterwards CJ)* considering the issue of liability to pay for non -gratuitous acts stated:-
- “ the conditions on which liability arises are:
- i. A person should lawfully do something for another person or deliver something to him;
 - ii. In doing the said thing or delivering the said thing he must not intend to act gratuitously; and
 - iii. The other person for whom something is done or to whom something is delivered must the enjoy the benefit thereof. When these conditions are satisfied under Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered”.
38. The respondent having supplied the fuel to the appellant which the appellant received and utilized, the appellant was under duty to pay.
39. On cross examination the respondent was firm that he made the deliveries at points that were chosen by the appellant and as a consequence of the deliveries he was partly paid Kshs. 120,000.
40. The appellant did not deny making such a payment thus the question that arises is why then would he pay the respondent immediately after the alleged supply? The evidence of the claimant at page 78 of the record of appeal is very clear that payment was done on 22 /2/ 2022 at 11:43 AM supply having been done on 21 /2/ 2022. The evidence was in tandem with the statement of the respondent that supplies would be made and payment would follow.
41. Notably, the appellant admitted that he had business dealings with the respondent but maintained that he had paid all that he owed the respondent.
42. The conditions enumerated in the decision cited above were thus satisfied in the sense that product was delivered and part payment done meaning it was not a gratuitous act on the part of the respondent.



43. Interestingly, although the appellant denied deliveries being made he contradicted himself in defense and stated:-

“I was unable to know if any supply was made and at which place the delivery was made that’s why I asked claimant to bring drivers so that I can know whose product was supplied.”

“the Kenya shillings 120,000 I deposited it in his account on 22/2/2023 that was clearance of our previous debt of supplies made on 14/2/ 2022 which I was clearing in bits. We had been in business for a long time and our always did payments through M PESA.”

44. The evidence tendered by the appellant corroborates the respondents evidence to the effect that he would supply him with products and pay later.

45. The appellant is also on record upon cross examination at page 81 of the record of appeal stating as follows:-

“I confirm I have been doing business with Pius Ojwang. Its business of petroleum products it was kerosene and diesel. Orders were done via SMS. Communication on delivery was equally done by SMS or sometimes on phone payment was to claimant KCB bank account on rare occasions I paid in cash.

Bank account 128488134 that’s the one I was using. On this exhibit 5 at page 1, I paid Kenya shillings 120,000 it was indicated that the balance was Kenya shillings 400, 000. I responded yes to Kenya shillings 400,000.”

46. It is clear to this court that although there was no contract produced by the respondent for supply of goods or products between him and the appellants there was a trade practice developed between them over time where the respondent would receive requests for supply either through SMS or a phone call and he would honor the same by delivering the product to their depots for his benefit.

47. The conduct of the two parties was sufficient for the court to deduce that there existed a quiet contractual arrangement between the two for supply and payment of goods.

48. From my independent analysis of the evidence tendered there was clearly an implied contract between the parties which was not formalized and did not have to be formalized by way of written agreement.

49. It is not uncommon in the business world that a man may express his desire to do something or get something done by his conduct. “ Words are not the only medium of expression conduct may often convey clearly as words a promise or an assent to proposed promise.” See Avtar Singh’s Business LAW Principles of Mercantile Law 12th Edn. Pg. 4.

50. The appellant admitted in cross-examination that he owed the respondent Kenya Shillings 400,000 thus his argument that there were no delivery notes produced and or contract between them are business claims without substance since of his own admission their modus operandi was the use of SMS and phone calls in the course of business.

51. In this court’s view, the appellant through this appeal seeks to avoid meeting his financial obligation to the respondent through craft.

52. The maxim eodem modo quo quid constituitur eodem modo destruitur aptly applies to this case. Any obligation is solved or extinguished in the same manner as that by which it was constituted.



53. So that if, as admitted by the appellants, their dealings were by way of sms and phone calls it would make absolutely no legal sense to insist on invoices and delivery notes when the practice of the parties did not envisage that.
54. The decision by the adjudicator in this court's view was correct to the extent that there was indeed proof of the debt and that the appellant had admitted the same.
55. In the end, this court finds that the appeal has no merit and is hereby dismissed with to costs to the respondent.
56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Mwalo for Respondent

Lugano h/b for Achura for the Respondent

