



**Raburu v Odianga t/a Timber Yard and General Hardware (Civil Appeal
E019 of 2024) [2025] KEHC 6887 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E019 OF 2024**

**DK KEMEL, J
MAY 22, 2025**

BETWEEN

DENNIS RABURU APPELLANT

AND

**MILLICENT AKINYI ODIANGA T/A TIMBER YARD AND GENERAL
HARDWARE RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. C. Maiyo
delivered on 08/05/2024 in Siaya Small Claims Court No. E025 of 2024)*

JUDGMENT

1. The Appellant, Dennis Raburu, was sued by the Respondent in Siaya small claims case No. E025 of 2024, in which the Claimant/Respondent prayed for ksh 1,035,300/=.
2. The trial court in the said case entered a judgment in favour of the Claimant for: Principal amount Ksh 550,000/=, interest Kshs 50,630/= and costs of Kshs 83,400/=.
3. Aggrieved by the court's decision, the Appellant has lodged a Memorandum Of Appeal dated 28/5/2024 wherein he raised the following grounds of appeal:
 - i. That the trial magistrate erred in law and in fact by holding that an agency relationship existed between PW2 and the Appellant thus arriving at a wrong decision.
 - ii. That the trial magistrate erred in law and fact by failing to uphold that the alleged goods never reached the Appellant's site.
 - iii. That the trial magistrate erred in law and in fact by failing to appreciate the Appellant's evidence, testimonies offered and the submissions filed.
 - iv. The conviction arrived at was against the weight of the evidence tendered by the Appellant.



4. This being a first appeal, the court's duty is well spelt out namely, to evaluate the entire evidence and subject it to a fresh exhaustive analysis and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to hear or see the witnesses and thus i must give an allowance for that. (See *Selle & Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123; *Peters v. Sunday Post Ltd* (1958) EA 424; *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).
5. The Claimant had three witnesses while the Respondent had two witnesses. The matter proceeded by way of viva voce evidence.
6. Claimant's witness first was Millicent Akinyi Odiang'a. She testified that she is a business lady owning a hardware business by the name Nyananga Hardware. Her witness statement, recorded by her counsel and found at page 10 of the record of appeal was adopted as her evidence in chief. She further produced documents as exhibits. Exhibit 6 a,b,c, d are invoices; Exhibit 7 a, b, and c are copies of cheques; exhibit 8 is copy of whatsapp excerpt, exhibit 9 is an OB.
7. The Claimant stated that she gave the Appellant a loan of Kshs 450,000/= and also supplied materials to him that he has never paid. That upon such supply of materials, the foreman Carolus Oyilo signed for the items. That the invoices produced were signed for by the foreman while the others were signed the Appellant himself.

She averred that the materials she supplied were used at the Appellant's site at Siaya Institute. That apart from the Ksh 450,000/= which was given to him in cash, the balance due from the supply of material is Ksh 560,000/=. She averred that she was ready to forego the amount that was beyond the court's jurisdiction.

On cross examination, she stated that the Respondent would authorize the foreman (Carolus Ayilo) to sign for the goods through a phone call. That both the Appellant and the foreman could sign the delivery invoices. That the Appellant agreed to go to the advocate vide a whatsapp extract. That she had not known the Appellant (Raburu) for long. That it was because she had known the foreman that she loaned Ksh 450,000/= to the Appellant.

On re-examination, she stated that she received calls from Raburu the Appellant to release goods. That Raburu never accepted to sign the documents.

8. The Respondent's witness number two was Carolus Owuor Oyilo, who stated that he knows both the Respondent and the Appellant. That he recorded his statement on 8/4/2024 and which he adopted as his evidence in chief. He testified that he used to work for the Appellant as a foreman at Siaya Institute of Technology. That he was not involved in theft as alleged. That his duties were to receive goods and attend meetings and not store keeping. That the Appellant received goods worth Ksh 560,000/= delivered via lorry KCU 680S and a pick up KCB 593E. That he received goods on behalf of the Appellant when he wasn't around and signed invoices and handed the goods over to the store keeper. That the goods delivered were used in the construction of a dining hall, a shed and ablution block at Siaya Institute of Technology.

On cross examination, he stated that he knew the Appellant towards end of April 2020. That the Appellant appointed him as his foreman and assigned him duties. That there is no letter of appointment. That part of the duty was to hire workers and pay them. That Raburu the Appellant would give him money to pay the workers. That the Appellant instructed him verbally as there was no authority in writing. That Raburu the Appellant purchased materials worth about Ksh 50,000/=



only. That most of the materials were on loan from the Respondent. That he was present at the site three quarter of the time. That he only received goods from Nyananga hardware.

9. Respondent's witness number three was Judith Achieng Okello, a business lady in Siaya town. Her witness statement dated 8/04/2024 was adopted as her evidence in chief. That she worked at Siaya Institute as a store keeper. That she used to keep materials received by the foreman and also control how they were used. That knew the hardwares where the materials came from as she is the one who kept the receipts and invoices and later hand them over to Raburu the Appellant. That she only knew of that one project in Siaya Institute and not any other. That she never let Carolus be in charge of the store and that she has never been summoned on the issue of depletion of materials. That she did not have all the invoices of supply of goods/materials. That she worked for Raburu and that he was the one who used to pay her. That the foreman recruited her to work for the Appellant to take care of the stores.
10. That marked the close of the Respondent's case.
11. The Appellant's case began with the testimony of Dennis Odhiambo Raburu, the Appellant himself. He testified that he is a contractor and supplier of lab chemicals and equipment. His statement recorded on 17/04/2024 was adopted as his evidence in chief. He produced a list of documents dated 18/04/2024 and marked exhibit 1-18 as well as a further list of documents dated 25/04/2024 which was marked as exhibit 19. That he knew the Respondent through his foreman Carolus and that he could go to her shop in person to purchase goods/materials. That at no point did he call the Respondent to deliver materials at the site. That he could send money to the foreman to pay the workers. That he never authorized the foreman to sign invoices or receive goods. That he was always at the site. That Judith was his storekeeper and that whenever she would be late, then Carolus would man the store.

On cross examination, he stated that he demoted Carolus on theft allegations. That he commenced work in early June 2020 and that the theft occurred after June-Mid July and that he replaced him with Benard Ombiri. That he transferred duties to Ombiri immediately, I realized theft. That Millicent, the Respondent lent him Ksh 450,000/= and that judgment should be entered for that amount. That he could buy goods from the Respondent's shop and that he paid cash twice. That Carolus vouched for the Respondent to be given money by the Appellant. That he was commuting daily from Kisumu. That the invoices that he had filed were similar to those filed by the Respondent and that Carolus worked for him as his foreman and signed the documents. That he knows that he owed the Respondent Kshs 450, 000/ which was long overdue.

12. The Appellant's witness number two was Benard Ochieng Ombiri who hailed from Kisumu and who stated that he was involved in construction business. He adopted his witness statement dated 17/04/2024 as his evidence in chief. He stated that he knew Millicent through Denis Raburu. That when Dennis Raburu had financial challenges his friend Carolus had organized for some money from a lady who had been giving him materials. That he came to know Carolus at Siaya Institute as he was contracted there. At Raburu's construction site, Denis introduced him as the foreman and that Denis requested him to help him supervise his work. That his job was to supervise the work and not to sign any documentation. That as his job description, he was boss to both Carolus and the storekeeper.
13. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
14. I have considered the record of appeal together with the submissions filed. I find the issue for determination is whether the Respondent's case was been proved on a balance of probability.



15. The Appellant vide his statement dated 17/04 /2024 admitted that the Respondent loaned him Ksh 450,000/= which he was to repay but is yet to do so. This then confirms that indeed the Appellant owed the Respondent Ksh 450,000/= being a loan given to him. The Appellant admitted that he was indebted to the Respondent for the said sum and that the court could proceed to enter judgement for the said sum.
16. Further this court must ascertain whether the Respondent indeed supplied building materials to the Appellant. It was the Respondent's testimony that she supplied construction materials worth Ksh 560,000/= to the Respondent at Siaya Institute and that the invoices were signed by the Appellant's foreman Carolus Oyilo. The Respondent went further and called the foreman Carolus Oyilo as a witness who confirmed being the Appellant's foreman whose duties included receiving construction materials, recruiting workers and paying workers. The foreman stated that he would sign invoices on behalf of the Appellant while he was away.
17. The Appellant confirmed that Carolus was his foreman but denied having instructed him to receive construction materials and sign invoices on his behalf. The question which arises is whether there existed an agency relationship between the Appellant and the foreman. Halsbury's Law of English dictionary 4th edition volume1 (2) paragraph 19 and 29 describes that a principal agency relationship is created when by the express or implied agreement of the principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal expressly appoints the agent, whether by deed, writing under hand or orally. On the other hand, implied agency arises from the conduct or situation of the parties.
18. The Appellant has not denied that Carolus was his foreman at the time of the construction. In this regard, by his words or conduct, the Appellant brought about an agency relationship by implication from his conduct or words. Further, on no occasion would the Respondent know the construction site of the Appellant and proceed to deliver construction materials without a request from the Appellant. This court is therefore convinced that the foreman as the agent, was receiving the materials at the Appellant's site on his behalf since the Appellant was the principal while the foreman was the agent. The said foreman testified for the Respondent and vouched for the Respondent's claim against the Appellant. Further, the store keeper also testified in favour of the Respondent and confirmed that indeed the Respondent delivered materials at the site. The Appellant's witness Benard Ochieng Ombiri confirmed that he was the one in charge at the site and supervised the foreman and the store keeper and thus the Appellant's claim that the store keeper and foreman stole materials is not convincing in view of the fact that Benard Ombiri was present as the supervisor. The Appellant admitted having been loaned Kshs 450, 000/ by the Respondent and that he had not refunded the same as at the time of giving his evidence. It transpired that the relationship between the Appellant and Respondent was one of trust and thus the Respondent's claim that she acted on the basis of the Appellant's telephone instructions to deliver the materials to the Appellant's site must be believed. In any case, the Appellant confirmed that the invoices the Appellant presented had been duly signed by the foreman and tallied with his documents as well. It is clear beyond any per adventure that the Appellant's foreman was his agent and that he transacted the work on his behalf and that he had given his express and implied permission. I am unable to believe the Appellant's assertions that the foreman and store keeper were not his agents. His assertions that the duo had committed acts of thefts at the construction site must be rejected out rightly because he did not avail any evidence that he ever lodged a report with the police over the same. In fact, it is the Respondent who lodged a report with the police over her claim against the Appellant herein. I am satisfied that the Respondent presented credible evidence against the Appellant. The conduct of the Appellant in failing to refund the sum of Kshs 450, 000/ lent to him by the Respondent for a long period leaves no doubt that even the delivery of materials by the Respondent was actually made and



that the Appellant had no intention of paying for the same and thus went on stringing the Respondent along while he knew that he would not honour his pledges. The Appellant came out as a person who is not candid and truthful as he could not even explain as to why he had not refunded the Respondent's monies that had been lent to him in good faith. His conduct is one of a person who has projected a condescending and a cavalier attitude of 'can't pay won't pay!' Having established that the foreman was acting under the instructions of the Appellant as his agent, I find the Respondent's claim was proved on a balance of probabilities. I am convinced that the learned trial magistrate addressed herself well on the issues at hand. The finding by the learned trial magistrate was therefore quite sound and must be upheld.

19. In view of the foregoing observations, it is my finding that the Appellant's appeal is devoid of any merit. The same is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 22ND DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Anyangofor Appellant

M/s Ooro E.....for Respondent

Okumu.....Court Assistant

