



Cool Limited v Patrick Chege Nganga t/a Chenga Auto Hardware (Civil Appeal E064 of 2023) [2025] KEHC 8792 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8792 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E064 OF 2023
AN ONGERI & AN ONGERI, JJ
JUNE 20, 2025**

BETWEEN

COOL LIMITED APPELLANT

AND

**PATRICK CHEGE NGANGA T/A CHENGA AUTO
HARDWARE RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. C. K. Kitbinji
(PM) in Voi CMCC No. E019 of 2020 delivered on 8th March 2023)*

JUDGMENT

1. The Appellant, COOL LTD, was sued by the Respondent Patrick Chege T/a Chenga Auto Hardware in Voi CMCC No. E019 of 2020 for the loss incurred by the Respondent on account of goods which were transported by the Respondent's consignee Maxxis Kenya Ltd which got lost while on transit.
2. The Respondent's claim of Kshs. 1,066,000/= was as follows:-
 - i. The value of the goods Kshs. 152,000/=
 - ii. Loss of business (for 2 years) Kshs. 912,000/=
 - iii. Courier services paid Kshs. 2,000/=Total Kshs. 1,066,000/=
3. The Respondent's evidence was that the goods were delivered to the Appellant at Voi and the Consignee was Maxxis Kenya Ltd.
4. The goods were never delivered to the Consignee.



5. The Appellant's employees were charged with stealing the consignment which consisted of 20 pieces of Maxxis Batteries they received from Tire World but they were acquitted for reasons that the batteries were lost at the company's Nairobi office.
6. The Appellant's evidence was that it was not clear whether the Consignee of the goods was Maxxis Kenya Ltd or Tire World and the goods could not be delivered to an entity that is not known.
7. Further that the luggage could not be delivered to a Consignee not delivered on the consignment note.
8. The trial court found that the goods were delivered to the Respondent at Voi to be transported to Nairobi but they were not available for collection at the Nairobi office.
9. Further, that the contract was for delivery of the goods to Maxxis Kenya Ltd and not Tire World. The court found that Tire World was added at DCI Office at Voi on 23rd January 2018.
10. The trial court entered judgment in favour of the Respondent against the Appellant in the sum of Kshs. 1,066,000/= plus costs and interest from the date of filing suit.
11. The Appellant has appealed against the judgment on the following grounds:-
 - i. The learned Magistrate erred in law and fact in finding that the Appellant was liable for loss of the Respondent's goods thereby being required to compensate the latter.
 - ii. The learned Magistrate erred in law and fact when determining the question of the value of the goods as disclosed by the Respondent when sending them.
 - iii. The learned Magistrate erred in law in shifting the evidential burden of proof to the Appellant yet the Respondent was by law required to prove its case on a balance of probabilities.
 - iv. The learned Magistrate erred in law and fact in basing his findings in the judgment on projected earnings yet no evidence was led of similar income during a similar period.
 - v. The learned Magistrate misdirected herself when making a finding that the Respondent was entitled to profit arising from loss of the goods.
 - vi. The learned Magistrate erred in relying on a multiplicand that was not justified translating that the Respondent would have been earning a profit on a monthly basis for goods it had purchased in 2017. The reasoning and rationale is not commercially viable.
 - vii. The learned Magistrate failed to consider the response by PW2 that the Respondent would have sold the goods and bought others thereby relying on an irrational, unreasonable and factually impractical multiplier not based on any reasonable hypothesis and justification.
 - viii. The learned Magistrate disregarded the inconsistency in the evidence led by the Respondent on the sending and or collection of the goods in issue thereby arriving at a wrong decision.
 - ix. The learned Magistrate erred in law in making inference arising from non-production of documents by the Appellant to the effect that they would have been adverse to its case. This is a finding not supported by law and or evidence.
 - x. The learned Magistrate erred in finding that the evidence on the profit was unchallenged yet there was no reasonable justification to keep earnings from sale of goods 2 years after they were and or are sold.



- xi. The learned Magistrate erred in law and fact in holding that there was an oral contract on the other hand rely on written documents presented by the Respondent or evidence hence being diabolical in its decision.
 - xii. The learned Magistrate erred in law in evaluating the evidence adduced and drawing inference and make findings not based on evidence in this case that was questionable to with the Respondent suffered a loss of Kshs. 38,000/= per month whereas no evidence was adduced to support this.
 - xiii. The learned Magistrate erred in law and fact in failing to properly evaluate the evidence adduced by the parties thereby arriving at a wrong decision.
 - xiv. The learned Magistrate erred in law by failing to consider that it would be inequitable for the Respondent to be enriched out of the loss of goods worth Kshs. 152,000/= only to be compensated Kshs. 1,066,000/= which was unreasonable, harsh, excessive, punitive and capricious.
 - xv. The learned Magistrate erred in law in finding that the Respondent had proved its entire case on a balance of probabilities.
 - xvi. The learned Magistrate erred in law and fact in making a finding that the projected earnings that the Respondent had lost was for 2 years whereas there was no legal, factual or justifiable evidence adduced in support of this position.
 - xvii. The learned Magistrate erred in law and fact in holding that there was breach of contract yet there had been a finding in a related criminal case that acquitted the Appellant's employees thereby not being culpable for any loss of the Respondent's goods. This decision had not been appealed against and or reversed by any court of competent jurisdiction.
12. The parties filed written submissions as follows:-
 13. The appellant's submissions challenged the trial court's judgment on multiple grounds, arguing that the magistrate erred in law and fact in several key aspects.
 14. Firstly, the appellant contended that the trial court incorrectly shifted the legal burden of proof to the appellant, asserting that the respondent failed to sufficiently prove liability for the lost goods.
 15. That the magistrate's reliance on a related criminal case (Voi Criminal Case No. 107 of 2018) to establish civil liability is criticized as improper, given that civil and criminal matters require distinct standards of proof.
 16. The appellant argued that the court should have independently evaluated the evidence rather than relying on the criminal judgment, which may have contained errors.
 17. Secondly, the appellant disputed the finding that the mere loss of goods at the appellant's office established liability, emphasizing that the respondent did not prove how the goods were lost, who was responsible, or whether the respondent contributed to the loss. The trial court's failure to scrutinize these details is presented as a critical oversight.
 18. Thirdly, the appellant submitted that the award of lost profits is not justified and that the same is speculative.
 19. The appellant argued that the respondent provided no credible evidence to support the claimed monthly profits over two years, rendering the magistrate's calculations commercially unrealistic.



20. Further, that the court allegedly ignored contradictory testimonies from the appellant's witnesses (DW1 and DW2) and relied on unchallenged but unsubstantiated projections.
21. The appellant cited legal precedents (e.g., *Hydro Water Well (K) Ltd v Sechere & Others*) to underscore that lost profits must be proven with reasonable certainty, including proximate cause, foreseeability, and evidentiary support—none of which were satisfied here.
22. Additionally, the appellant highlighted inconsistencies in the respondent's case, such as discrepancies in the consignee's name (*Maxxis Kenya Limited vs. Tire World Limited*), which the trial court overlooked.
23. That the magistrate's inference that missing documents would have harmed the appellant's case is also dismissed as speculative and legally unsound.
24. The appellant further argued that the judgment created an inequitable windfall for the respondent, awarding Kshs 1,066,000 for goods worth Kshs 152,000 without evidentiary basis.
25. Further, that the magistrate's hybrid approach—combining oral contract findings with reliance on written documents—is labeled contradictory and legally untenable.
26. Finally, the appellant asserted that the trial court misapplied contract law principles by failing to require proof of breach and damages, as outlined in *Attorney General v Kabuito Contractors Ltd*.
27. That the judgment is characterized as fundamentally flawed, warranting its overturning and replacement with a dismissal of the respondent's claim.
28. The appellant urged the appellate court to correct these errors and vacate the trial court's decision in its entirety.
29. The Respondent opposed the appeal and submitted that the appropriate standard of review for a first appellate court was as established in the case of *Watt v Thomas* [1947] A.C. 484 and other authorities.
30. The key principles are that the appellate court must re-evaluate the evidence on record while giving due weight to the trial court's advantage of observing witnesses, and it should not interfere with findings simply because it might have reached a different conclusion.
31. The appellant alleged that the trial magistrate failed to properly analyze the evidence, but a scrutiny of the record demonstrates otherwise.
32. The respondent (plaintiff) adduced credible evidence, including testimony from the plaintiff, an accountant who quantified the losses, a salesperson from the supplier, and a court administrator who produced a related criminal judgment.
33. The criminal judgment, admissible under Section 34 of the Evidence Act, corroborated the plaintiff's claim that the appellant (defendant) breached their agreement by failing to safely transport goods, resulting in their loss.
34. The defence witnesses, however, lacked credibility—they could not prove their employment with the appellant or substantiate their claims about the consignment note's alteration.
35. The Respondent said that the trial court rightly relied on the uncontroverted expert testimony of the accountant to award damages for the lost goods and lost profits.
36. Further, that the appellant's challenge to the damages calculation lacks merit, as the defence did not call any expert to rebut the plaintiff's evidence.



37. The Respondent urged the court to dismiss the appeal and uphold the trial court's judgment with costs.
38. The first appellate court, while hearing a first appeal, bears a crucial duty to conduct a thorough and independent reappraisal of the entire evidence on record, both oral and documentary, rather than merely endorsing the findings of the trial court.
39. It must examine not only questions of law but also questions of fact, unless restricted by statute, and arrive at its own conclusions based on a proper assessment of the evidence.
40. The first appellate court is obligated to apply its mind independently, scrutinizing the trial court's reasoning and correcting any errors—whether factual, legal, or procedural—that may have crept into the lower court's judgment.
41. The issues for determination in this appeal are as follows:-
 - i. Whether the Respondent proved his case to the required standard.
 - ii. Whether Respondent proved loss of business.
 - iii. Whether the appeal should be allowed.
42. On the issue as to whether the Respondent proved his case, there was evidence that the goods were handed over to the Appellant's Voi office to be delivered to Maxxis Kenya Ltd.
43. There is evidence that the goods were received at Nairobi on 30th December 2017 and that the consignee was Maxxis Kenya Ltd.
44. Further that the name Tire World was added at DCI Office on 23rd January 2018.
45. There is evidence that the employees of the Appellant were charged with stealing by servant but they were acquitted for reasons that the goods got lost at the Nairobi office.
46. On the issue as to whether the Respondent proved loss of business. I find that the same was not proved.
47. On the issue of liability for the lost goods, the court finds that the respondent sufficiently proved delivery of the goods to the appellant for transportation to Maxxis Kenya Ltd, as evidenced by the documentation and the related criminal case.
48. The acquittal of the appellant's employees in the criminal case would not absolve the appellant of civil liability, as the standards of proof differ between criminal and civil cases and civil liability can exist independently of criminal culpability.
49. However, this court agrees with the appellant that the award of Kshs 912,000 for loss of business was improper.
50. The respondent's projection of two years' lost profits without concrete evidence of past earnings or firm contracts is speculative.
51. I find that there is no evidence that the Respondent would have earned profits of Kshs. 912,000/= for a period of 2 years.
52. The award of Kshs 1,066,000 for goods worth Kshs 152,000 creates an unjust enrichment, which courts must avoid.
53. Ultimately, this court partially allows the appeal, setting aside the award for loss of business but upholding the award of Kshs 152,000 for the value of the goods and Kshs 2,000 for courier services, with costs and interest from the date of filing suit.



54. The Respondent is therefore entitled to Kshs. 154,000/= plus cost and interest from the date of filing the initial suit until payment in full.

55. Each party to bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

