



**Otieno v Waithera (Civil Appeal E324 of 2023)
[2024] KEHC 12530 (KLR) (Civ) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E324 OF 2023

MA OTIENO, J

OCTOBER 17, 2024

BETWEEN

ALFRED OTIENO APPELLANT

AND

ELIZABETH WAITHERA RESPONDENT

*(Being an Appeal from the Judgment and Order of the Small Claims Court at Milimani
SCCC E7159 OF 2022 delivered by Hon. V. M. Mochache on the 5th of April 2023)*

JUDGMENT

Background

1. This is an Appeal from the lower court's judgment of 5th April 2023 in the Milimani SCCC No. E7159 of 2022 in which the trial magistrate entered judgment in favour of the Respondent as against the Appellant herein.
2. The genesis of the matter is that by a Statement of Claim dated 17th November 2022, the Respondent sued the Appellant seeking for the payment of Kshs. 70,386.00 being monies owing from a supply of goods by the Claimant to the Respondent.
3. It was the Respondent's claim at the trial court that she supplied the Appellant with chicken worth Kshs. 130,086/- but the Respondent only paid a sum of Kshs. 59,700/-, leaving a balance of Kshs. 70,386/-.
4. On his part, the Appellant's case was that his role in the transaction was that of a middle man between the Respondent herein and a third party. While admitting that that the Respondent indeed supplied the chicken of the quantity and value claimed in the Statement, it was the Appellant's case that the portion that was not paid, being Kshs. 70,386/-, related to those that had gone stale.



5. On 5th April 2023, the trial court rendered its judgment in the dispute in favour of Respondents finding the Appellant liable for breach of contract. The Appellant was therefore ordered to pay a sum of Kshs. 70,386/- being the unpaid balance of the purchase price as claimed in the Respondent's Statement of Claim.

The Appeal

6. Aggrieved by the decision of the trial court, the Appellant lodged the instant appeal on grounds that; -
 - i. The learned trial magistrate erred in law and in fact in finding that the Claimant was entitled to damages of Kshs. 70,386.00/- which in view of the agreement between the parties presented a miscarriage of justice.
 - ii. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions thereby arriving at an erroneous decision.
 - iii. The learned trial magistrate erred in law and in fact in finding that the Claimant was not party to the dispute whereas it was the Claimant who contacted the Respondent to assist her sell off her chicken since she did not have a ready market for the same.
 - iv. The learned trial magistrate erred in law and in fact in finding that the goods delivered went bad after delivery whereas the whole consignment was rejected upon delivery and the Respondent only sympathized with the Claimant and urged Company to choose the best chicken only to avoid a total loss.
 - v. The learned trial magistrate erred in law and in fact in finding that the Respondent sent his people to slaughter the chicken whereas the slaughterers are always on hire and the Respondent only acted as a facilitator to bring them and that is why the Claimant paid them for their service.
 - vi. The learned trial magistrate erred in law and in fact in failing to find that the sole responsibility of the Claimant was to slaughter, transport and deliver her chicken to the buyer in good condition and not for the Respondent who was assisting her to do it on her behalf.
 - vii. The learned magistrate wholly erred in law and in fact by arriving at the said Judgement.

Submissions

7. The appeal was canvassed by way of written submissions. The Appellant's submissions are dated 9th June 2024 whilst the Respondent's submissions are dated 17th July 2024.
8. In his submissions, the Appellant submitted that the trial court erred in finding that the agreement between him and the Respondent constituted a contract. According to the Appellant, there cannot be a breach when there is no contract in the first place.
9. The Appellant asserted that the agreement between him and the Respondent did not meet the requirements of a valid contract capable of being enforced since the agreement fell short of the strict dictates of section 3 (3) of the Law of contract as to the presence of an offer, acceptance of the offer, consideration for the offer and the parties' intention to create a legal relationship between them.
10. According to the Appellant, theirs was a friendly engagement where he merely offered to assist the Respondent get market for her poultry and therefore, the mere fact that the Respondent suffered some loss in the process should not ipso facto call for compensation from the Appellant. That in any event, the said agreement was neither written nor witnessed.



11. The Appellant cited among other, the case of Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR in support of his arguments.
12. On the question whether the Appellant was liable for breach of contract, the Appellant submitted that based on the facts of the case, he could not be held liable for any breach on the basis that he acted in the best interest of the Respondent in the course of the entire transaction. That he helped the Respondent secure market for her poultry from a third-party buyer and event solely, and without any payment from the Respondent, met all the disposal costs for the portion of the poultry that were rejected by the third-party buyer for being stale.
13. In what appears to be an alternative argument, the Appellant sought to rely on the doctrine of force majeure and cited the case of Kenya Union of Commercial, Food and Allied Workers v Tusker Mattresses Limited [2020] eKLR in support of his arguments in that regard.
14. The Appellant therefore prayed that; -
 - i. The appeal be allowed
 - ii. The trial court's judgment of 5th April, 2023 be set aside with costs in his favour
 - iii. Such other further relief as the court may determine to be just.
15. On her part, the Respondent supported the trial court's finding that there existed a valid contract between the Appellant and the Respondent and that the Appellant was liable in breach.
16. According to the Respondent, the contract for the supply of the poultry was between her and the Appellant and that she was not a party to the agreement between the Appellant and the eventual third-party purchaser. That if the poultry went stale, then it was after the Respondent had sold and passed ownership to the Appellant. The Respondent therefore asserted that in circumstances, if there was any subsequent loss, the same could not be passed over to her.
17. The Respondent therefore prayed that the appeal be dismissed with costs in her favour.

Analysis and determination

18. This is an appeal emanating from the Small Claims Court pursuant to section 38 of the [*Small Claims Court Act*](#) which provides as follows; -
 - “(1)A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.”
19. It therefore follows that in appeals originating from the Small Claims Court, this court can only entertain appeals limited only to points of law in terms of Section 38(1) of the Small Claims Act. Consequently, the trial court's findings on factual issues are therefore to be accepted by this court unless it is demonstrated to this court that the trial court's conclusions on those facts are so perverse as to warrant the attention of this court, exercising its appellate jurisdiction as donated under the Act.
20. The duty of this court when dealing with appeals from the Small Claims Court under Section 38 of the Act is equivalent to that of the Court of Appeal when dealing with a matter on a second appeal.



In Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows: -

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

21. Again, in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That the court should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

22. In the circumstances, this court will first establish whether the appeal is one on law, to which this court has jurisdiction, or one involving factual issues and therefore outside the jurisdiction of this court pursuant to section 38 (1) of the *Small Claims Court Act*.
23. I have considered memorandum of appeal, the evidence on record and the Appellants submissions in this appeal and note that the major issues for this court’s determination whether in the circumstances of the case there was a valid contract between the Appellant and the Respondent, whether there was breach, and whether the Appellant was liable for the breach as was held by the trial court.
24. A determination as to whether valid contract exist between parties to a transaction is undoubtedly an issue of law and in my view therefore falls within the ambit of matters to be entertained in an appeal made pursuant to the provisions of Section 38 of the *Small Claims Court Act*.
25. On the issue of the whether the Plaintiff and the Defendant entered into a valid oral contract, the court of Appeal in *Ali Abid Mohammed versus Kenya Shell & Company Limited* (2017) eKLR, stated that



a contract between parties can exist even where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. The court said that; -

“It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed, it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per liter and for a certain period of time.”

26. Consequently, contrary to the Appellant’s submissions, it is not always the case that for a contract to be valid, the agreement must be in writing and be witnessed. A contract can exist even by inference, particularly taking into account the conduct and actions of the parties.

27. In *Moses Njane Ngendo v Josiah Anyangu Omutoko & another* [2022] eKLR Kasango J (as she then was) stated as follows

“There is uncontroverted evidence that the two defendants agreed to hire the plaintiff stage equipment, took possession the same but failed to pay the total hire price and failed to return the equipment to the plaintiff to date. Verbal/oral contracts are valid just like written contracts. This is as long as such contracts are for a lawful purpose, there is mutual agreement, consideration and genuine assent for the contract to be enforceable.” [emphasis added)

28. Section 5 of the *Sale of Goods Act*, Cap. 31 is clear in its provision that a contract of sale may be made either in writing, orally or even be inferred by conduct of the parties. The section provides that; -

“5.

Subject to the provisions of this Act and of any Act in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties...”

29. The Court of Appeal in *William Muthee Muthami versus Bank of Baroda* (2014) eKLR, stated that for a contract to be valid under the law of contract, it must be proved that there was offer, acceptance and consideration.

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

30. In view of the above, I will now delve into the facts and evidence of this case as submitted before the trial court with a view of establishing whether in the circumstances there was a valid contract between the parties, whether there was breach by the Appellant and if yes, then whether the Respondent is entitled to the damages, and in the amount awarded by the trial court.

31. From the proceedings, I note that the Respondent testified as CW1 and stated that on 25th October 2022, she received a call from the Appellant seeking to know whether she had chicken for sale. That following their conversation, the Appellant sent his workers to the Respondent’s premises to prepare the chicken and have them transported and delivered to a third-party buyer with whom the Appellant had established a contact. The value of the chicken supplied by the Respondent was Kshs. 130,086/-.



32. The Respondent further testified that after delivery of the chicken to the third-party buyer, the Appellant only remitted to her a sum of Kshs. 59,7000/-, leaving a balance of Kshs. 70,386/- unpaid. That upon enquiry, the Appellant told the Respondent that the unpaid amount represented the portion of the chicken, 183 pieces, that had been rejected by the third-party buyer for being of poor quality.
33. The Appellant on the other hand testified as RW1 and told the trial court that it is the Respondent who had asked her to assist her get market for her poultry. That due to the fact that he had obtained some order for the supply of poultry from a third-party buyer, he decided to assist the Respondent sell her chicken to the third-party buyer. In the circumstances, it was the Appellant's case that there was no valid contract between him and the Respondent capable of being enforced.
34. Having reviewed the evidence submitted by both parties at trial, I am inclined to agree with the finding of the trial court that there was indeed a valid contract between the Appellant and the Respondent.
35. I note that the Appellant admitted in cross-examination that he is the one who obtained the initial contract for supply of the chicken to the third-party purchaser. That after obtaining the contract from the third-party purchaser, he sourced for chicken from among others, the Respondent herein.
36. It is also critical to note that it is the Appellant who sent his staff to the to the Respondent's premises to prepare the chicken and have them delivered to the third-party purchaser. That upon delivery, the third-party purchaser took possession and had them stored in his cold room.
37. From the above evidence, it is apparent that the Respondent delivered the subject goods to the Appellant right at her premises. The contract between the Appellant and the Respondent was complete by the time the Appellant's workers took possession of the chicken at the Respondent's premises. By taking possession, the sale to him was complete and there all the risks and benefits in relation to the chicken had vested on him.
38. Section 2 (1) of the Sales of Goods Act defines the term 'sale' and the term 'delivery' in the following words; -
 - "delivery" means voluntary transfer of possession from one person to another;
 - "sale" includes a bargain and sale as well as a sale and delivery;
39. From the evidence, the Appellant is the who agreed with the Respondent on the price for the chicken, he sent his staff to take possession and he is the one who delivered the goods to the third-party purchaser. It is immaterial that the Respondent was also present at the time and place delivery to the third-party purchaser.
40. Accordingly, I find that the holding by the trial was supported by evidence on record and therefore not erroneous as alleged by the Appellant.
41. Consequently, the trial court's Judgment of 5th April 2023 is hereby upheld. The appeal is hereby dismissed with costs to the Respondent.
42. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS

17TH DAY OF OCTOBER 2024

ADO MOSES



JUDGE

In the presence of:

Moses – Court Assistant

.....N/A.....For the Appellant

.....N/A.....For the Respondent

