REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL No. 202 OF 2011

JOYCE MUKULU KILONZO....................................APPELLANT

-VERSUS-

PURITY KANYAA MWANGANGI.........................RESPONDENT

(An appeal from the Judgement of Machakos Principal

Magistrate, S. Mungai, dated 18/11/2011 in Civil Suit Number 1270 of 2000)

BETWEEN

JOYCE MUKULU KILONZO.......................................PLAINTIFF

-VERSUS-

PURITY KANYAA MWANGANGI..........................DEFENDANT

JUDGEMENT

1. The Appellant's claim against the Respondent, according to the plaint filed in the lower court, was for Kshs 113,750/= which was an amount due and owing by the Respondent to the Appellant being the value of sixty five bags of maize delivered by the Appellant to the Respondent's posho mill in Machakos for milling during the years 1998 and 1999 which the Respondent wrongfully and unlawfully retained and failed to account for.

2. In the written statement of defence, the Respondent denied the said allegations and contended on without prejudice that if the Appellant delivered any maize to the Respondent's posho mill, the same was milled and the flour collected by the Appellant through the Appellant's agents and/or servants.

3. The Appellant, was the sole witness in support of her case and she testified that she was involved in the business of selling clothes and was contracted by the government to supply food-stuffs to the prison. According to her, she was given an order to supply maize flour and since the Respondent was milling flour at Machakos Market under the trade name of Sokoni Posho Mill. The Appellant averred that it was agreed that the Respondent would mill the same flour at the cost of Kshs 70/- per bag of 90 kilograms. The Appellant was showed by the Respondent a store behind the posho mill where the Appellant could keep the ordered bags.

4. The Appellant consequently took 331 bags of maize to the Defendant on various dates and she exhibited a copy the delivery book which according to her the Respondent used to sign in the presence of the Appellant and the Respondent's staff, one **Paul Munene Muruma**. According to the Appellant, there was another lady, one **Gladys Kavara Mwangangi**, who also used to receive the said deliveries which used to be delivered via the Appellant's pick up KUG 509. After milling the Appellant would collect her maize flour and the Respondent would verify the same by making the Appellant sign for the same in an exercise book which the Respondent would keep. The Appellant then produce the delivery book for 270 bags which according to her she collected leaving a difference of 61 bags. When she went for the said balance, she did not find the same and she was assured by the Respondent that the Respondent would give her the flour. It was her evidence that each bag was worth Kshs 1,750/- when milled totalling Kshs 106,750/- which the Respondent failed to pay. It was her evidence that she paid the Respondent for the milling and had receipts for the same and that 195 bags were recorded in the invoice and as per the documents she paid Kshs 24,650/- for the 270 bags worth Kshs 18,900/- hence overpaid by Kshs 5,750/-. It was her evidence that she was claiming Kshs 106,750/- being the value of 61 bags as well as the overpayment of Kshs 5,750/- totalling Kshs 112,500/-.

5. The Appellant also produced the LPs showing that she was contracted by the Government to supply the said items as well as the receipts and the invoice issued by the Respondent.

6. In cross-examination, she explained that she supplied 331 bags from 2nd June, to 4th November, 1998 and therefore agreed that the claim in her plaint was incorrect since she never delivered any maize to the Respondent in 1999. Referred to the demand letter, the Appellant admitted that it referred to 65 bags instead of 61 and that she was claiming Kshs 113,750/- the same figure in the plaint. She explained that she did not notice the discrepancy in the number of bags.

7. At the close of the Appellant's case the Respondent testified as DW1. She admitted that she had a Posho Mill at the market and that in 1999, the Appellant contracted her to mill her maize though they had no contract. However, the Appellant used to take the maize in bits and she would mill the same after which the Appellant would carry the same personally. It was her evidence that the Appellant had a delivery book and that throughout she would receive the maize. While she admitted that she received the deliveries for 1st July, 1998, she denied receiving the rest of the deliveries and denied knowledge of one **Gladys Kavata**. She denied that the Appellant used to make deliveries to her employees though she admitted that **Paul Mule Muluma** was her only employee who used to mill the maize.

8. According to the Respondent, no maize remained uncollected by the Appellant since the Appellant could bring 20 bags and collect them the same day milled. It was her evidence that if there were 50 bags, it could take 5 days to mill the same and their business continued till 1999. The Respondent stated that for a period of one year the Appellant did not raise any complaint regarding the maize and had any maize been lost, she could have stopped delivering the same. According to the Respondent she got the demand letter in 1998 and denied both the claim for the 65 bags as well as the overpayment.

9. In cross-examination the Respondent stated that the Appellant used to take 20, 50 and 70 bags and she would accommodate about 50 bags after milling others on the same day. In her evidence the Appellant used to take the maize using a delivery book which the Appellant would take wither after the Respondent signed the duplicate and on 1st July, 1998, 10 bags were delivered. Since she was working from Monday to Friday, Paul was milling alone in her absence while **Gladys Mwangangi** was unknown to her. She therefore denied the deliveries purportedly made to the said **Gladys** and also denied that the stamp bearing Sokoni Posho Mill was hers though she admitted that it was the same stamp through which she received. She was however unable to explain how the said Gladys who was unknown to her received the bags and affixed her stamp.

10. She reiterated that the maize used to be milled and the Appellant would collect the flour from Paul and that she was charging Kshs 70/= per bag and that she used to invoice the Appellant showing the details of the charges. She however denied that the receipts came from her but admitted that some of the entries such as the dates and details of the payments. In her evidence, she was unable to tell the number of bags the Appellant delivered and the amount of flour bags she collected since Paul never used to give the particulars of what was collected.

11. In re-examination, the Respondent stated that the original invoices got lost and reiterated that there were no complaints on the deliveries and what was collected and that she did not keep records of the maize she was grinding. While admitting that the entries at the bottom of the invoices were hers, she disputed the ones at the top.

12. DW2, **Paul Munene Muluma**, who was grinding flour at the Respondent's posho mill, admitted that the Appellant used to be their customer who used to take the maize for grinding and she used to receive the same as she was operating alone at the Posho Mill as the Respondent was working as a civil servant. According to him, the Appellant did not raise any complaint and that they used to confirm everything was okay before the flour was collected. It was his evidence that the Appellant used to take the maize in bits of for example 10 bags for grinding after which they would be collected.

13. In cross-examination, DW2 stated that at the posho mill he was grinding the maize and receiving the payments and since they did not have much work, he was managing the work alone. It was his evidence that he used to do the reconciliation when the Respondent was away. She denied that **Gladys Kavata Mwangangi** was known to him and that she used to work at the posho mill.

14. In his judgement, the Learned Trial Magistrate found that whereas the Appellant claimed Kshs 113,750/= for the value of the 65 bags delivered to the Respondent during the years 1998 and 1999, the Appellant admitted that there were discrepancies between her plaint in which she claimed 65 bags worth Kshs 113, 750/- and her evidence in court where she claimed Kshs 106,750/= for 61 bags. The court therefore found that the Appellant departed from her plaint by claiming less bags of maize than the ones pleaded and attempted to explain the discrepancy by claiming the excess on top of the claim for 61 bags as overpayment. The court also found that by admitting that she did not deliver any bags for milling in the year 1999, she also departed from her pleadings and her demand notice dated 6th August, 1999 since she averred that she delivered 331 bags between 2nd June, 1998 and 4th November, 1998.

15. The Court noted that whereas the Appellant produced the LPOs for delivery of 250 bags between June and 24th August 1998, the delivery book detailing what she supplied to the prison showed the maize delivered up to 24th October, 1998 as totalling 270 bags. The invoice dated 18th June, 1998 on the other hand tabulated details of maize grinded by 23rd February, 1998 as amounting to 195 bags while the receipts payments for the grinding dated between 6th July, 1998 up to 5th November, 1998 totalled Kshs 11,000/=. According to the Court, the documents produced by the Appellant neither tallied nor did they individually or collectively disclose what was delivered and paid for at any given or specific period to enable one decipher with reasonable degree of certainty what transpired.

16. According to the Court, the Respondent and her employee acknowledged receipt of maize indicated in the delivery book but denied receiving the rest especially the ones purportedly received by one **Gladys Kavata**. According to the Court's there was no reason to acknowledge receipt of one batch and deny the others which at times were fewer. It also took issue with the delay by the Appellant in lodging her claim.

17. In the result the court found that the Appellant had failed to prove her claim against the Respondent on a balance of probabilities and

dismissed the same with costs.

18. In this appeal, the Appellant relies on the following grounds:

> **1) The Learned Senior Principal Magistrate erred in Law and Fact in failing to note and to appreciate the fact that the Appellant had proved her case on a balance of probability, and in proceeding to decide the case against the case against the weight of evidence adduced.**
>
> **2) The Learned Senior Principal Magistrate erred in both law and in fact in failing allow the Plaintiff's claim, either as prayed or to the extent to which the same been proved.**
>
> **3) The learned Senior Principal Magistrate erred in law and in fact in failing to note and to appreciate that the Appellant's evidence had not been rebutted and that the Respondent had not offered any logical or valid defence to the claim.**
>
> **4) The learned Senior Principal Magistrate erred in both Law and in Fact in dismissing the Appellant's claim when the same had been proved of probability.**

19. On behalf of the Appellant, the evidence on record was set out and it was submitted that based on the evidence adduced the Appellant proved her case on a balance of probabilities. According to the Appellant, her evidence was not controverted by any documentary evidence from the Respondent who confirmed that indeed she owned a posho mill and an arrangement and/or agreement existed as between both herself and the appellant in regard to maize milling. The Respondent, it was submitted, confirmed that there indeed did exist a delivery book that showed how and when deliveries were made by the appellant but contended that no maize remained in the store uncollected by the appellant. She went ahead to also state that it usually took her more than a day to mill and gave an example of 50bags of maize which would take her 5 days to mill. In cross- examination, it came out from the respondent that she had employees who would carry out the operations of the mill in her absence as she was a civil servant at the material time.

20. It was noted that while the Respondent denied knowing one, **Gladys Kavata Mwangangi** who appeared to have received bags of maize from the appellant on the respondent's behalf, she however admitted that the same stamp which had been used by herself on the delivery notes she acknowledged to have signed herself, was the same, same stamp that had been used on the delivery notes which the said Gladys had signed but admitted that she was charging Kshs. 70 to mill one bag of maize. She however did not dispute having received Kshs. 24,650 from the appellant.

21. It was submitted that since the primary suit herein was filed within time, the respondent's allegation that the appellant took long to raise her claim against the respondent was of no evidential or legal value.

22. It was therefore submitted that the appellant's claim was proved on a balance of probability.

23. On her part the Respondent submitted that the Appellant in her evidence departed from her Pleadings/ averments in the Plaint and the Contents of the Demand Letter by claiming less bags and less amount from the bags and amount that is pleaded in the Plaint. It was submitted that in Paragraph 3 of the Plaint, the Appellant has pleaded and claimed Kshs. 113, 750/= being the value of Sixty Five (65) bags which the Appellant alleges to have supplied the Respondent between the year 1998 and 1999 and which the Appellant alleges that the Respondent wrongfully and unlawfully retained. The Appellant in her evidence however departed from her pleadings and the contents of the Demand Letter dated 06.08.1998 and stated that the Respondent wrongfully and unlawfully retained sixty one (61) bags valued at Kshs. 106, 750/=. Secondly, in her Plaint, the Appellant has not claimed Kshs. 5, 750/= being an overpayment made to the Respondent and in her Demand Letter dated 06.08.1998, the Appellant has not demanded anywhere Kshs. 5, 750/= being any overpayment made to the Respondent for milling her maize. The Appellant in her evidence in court however departed from her Pleadings and the contents of her Demand Letter and stated that the Respondent that she is also claiming Kshs. 5, 750/=.

24. It was further submitted that the Appellant in her evidence did not offer concrete evidence both in oral evidence and the Exhibits produced by the Appellant during the trial to show that she actually supplied a total of 331 bags to the Respondent and only collected a total of 270 milled bags from the Respondent who in her evidence offered concrete evidence which was corroborated by that of DW 2 *(her employee)* to demonstrate that she did not receive at her Posho Mill the bags the Appellant alleges were supplied on 14.07.1998, 24.08.1998 and 22.09.1998 and alleged to have been received by **Gladys Kavata Mwangangi**, who was never an employee of the Respondent at any given particular time.

25. According to the Respondent, the trial court and was right, in dismissing the Appellant's Claim before the lower court with costs on the ground that the Appellant had not proved her claim against the Respondent on a balance of probabilities after evaluating the evidence on record and reliance was placed on the case of **Cecilia Achieng Awino vs. Guardian Coach [2017] eKLR**, and the case of **Toyota East Africa Ltd vs. Express Kenya Limited [2013] eKLR.**

26. It was submitted that the Appellant's Claim before the Trial Court was a claim for a Quantified amount in the nature of Special Damages which ought to have been specifically pleaded and proved in law and that the law is now settled that a claim for a quantified amount is a claim in the nature of Special Damages and as such, the said claim must be specifically pleaded and proved as required by the law. In this regard, the Respondent relied on the case of **Mary Wanjiku Gakuru vs. John Kabiti Mwangi [2002] eKLR**, and reiterated that the Appellant failed to specifically plead her claim in her Pleadings and specifically prove the same before the trial court. It was submitted that the Appellant did not specifically plead the value of one (1) milled bag in her Plaint so that the Court can ascertain how the Appellant arrived at the total value of Kshs. 113, 750/= being the value of the bags alleged to have been wrongfully and unlawfully retained. The Appellant did not also Plead in her Plaint the Specific Number of bags of Maize which were specifically supplied to the Respondent on a particular date and the number of milled bags which the Appellant collected from the Respondent after milling from the supplied bags of maize so that the trial court could ascertain how and when the alleged 65 bags were allegedly wrongfully and unlawfully retained by the Respondent.

27. It was submitted that the Appellant did not specifically produce any document before the trial court to show that the value of One (1) milled bag of maize was actually Kshs. 1, 750/= so that she can prove that the value of the 65 bags she alleges were wrongfully retained by the Respondent is Kshs. 113, 750/=? How did the Appellant expect the trial court ascertain the value of One (1) milled bag to be Kshs 1, 750/= without production of any document?

28. According to the Respondent, the documents produced by the Appellant did not at all tally nor do they individually or collectively disclose what was delivered and paid for at a given or specific period to enable one ascertain with a reasonable degree of certainty what transpired. It was contended that the total receipts produced by the Appellant to demonstrate payment to the Respondent only show payment of Kshs. 11, 000/= was made to the Respondent for the milling of the maize delivered to her Posho Mill. In her submissions, the Respondent stated that the Appellant's alleged claim that she paid that she paid the Respondent Kshs. 24, 650/= to mill 331 bags of maize at a cost of Kshs. 70 per bag does not add up and/ or tally at all since simple mathematical calculations demonstrate that the Cost of Milling 331 bags at Kshs. 70 per bag is Kshs. 23, 170/= and Kshs. 24, 650/= is the cost that one would incur for milling approximately 353 bags of maize.

29. Going by the evidence of both the parties that the Appellant would collect the milled bags of maize and pay the Respondent the charges for milling, it was submitted that if the Appellant paid Kshs. 24, 650/= to the Respondent as she alleges, which she claims to be even excessive, then that is a clear demonstration that she collected all the maize that she had delivered to the Respondent after same was milled.

30. It was therefore submitted that the Appellant did not specifically plead and prove her claim which was in the nature of special damages as required by the law and that the trial court was right in making a finding that the Appellant's Claim was not proved on a balance of probabilities and was right in dismissing the Appellant's Claim with Costs to the Respondent.

Determination

31. I have considered the submissions of the parties in this appeal.

32. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."**

33. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

34. However, in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

35. However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

36. The main issue for determination in this appeal is whether the Appellant proved her case to the standard prescribed by the law.

37. According to the Learned Trial Magistrate, the appellant evidence did not tally with the pleadings. In his judgement, the Learned Trial Magistrate found that whereas the Appellant claimed Kshs 113,750/= for the value of the 65 bags delivered to the Respondent during the years 1998 and 1999, the Appellant admitted that there were discrepancies between her plaint in which she claimed 65 bags worth Kshs 113, 750/- and her evidence in court where she claimed Kshs 106,750/= for 61 bags. The court therefore found that the Appellant departed from her plaint by claiming less bags of maize than the ones pleaded and attempted to explain the discrepancy by claiming the excess on top of the claim for 61 bags as overpayment.

38. The importance of pleadings in civil litigation cannot be downplayed hence the Court of Appeal in **Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] eKLR** rendered itself as follows:-

“A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5)* where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

39. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (See ***Bullen & Leake and Jacob: Precedents of Pleadings,*** 2th edn. page 3). The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.).**

40. In **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** the Court of Appeal quoted with approval an excerpt from an article by **Sir Jack Jacob** entitled ***“The Present Importance of Pleadings”*** where it was stated:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

41. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where **Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

“…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

42. **The death knell for parties who wander away from their pleadings was sounded by the Supreme Court in Raila Amolo Odinga & Another vs. IEBC & 2 Others 92017) eKLR where it expressed itself as follows:**:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a

material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings…"

43. It is true that it is trite that in a claim for special damages, the claimant is obliged to not only expressly plead that claim but also to strictly prove the same. Where a party fails to expressly plead a claim, he cannot be awarded the same even if the evidence discloses such loss. That however is not the same as saying that a party who claims a larger sum but proves only part of it is thereby disentitled from being awarded that part which he has proved. There is nothing objectionable about an award of lesser amount than pleaded and particularised. What is not permissible is to award a sum in excess of the sum pleaded unless the pleadings are amended. Accordingly, even if the Appellant claimed 65 bags worth Kshs 113, 750/- and her evidence in court revealed that she in fact lost 61 bags worth Kshs 106,750/= the Court would still have awarded the said sum if the same had been proved since 61 bags and Kshs 106,750/- falls within the 65 bags and Kshs 113,750/- pleaded. I however agree that the claim for overpayment ought to have been expressly pleaded and in failing to do so, that claim could not be upheld notwithstanding the evidence. I however do not agree that the failure to plead the cost of each bag and the specific number of bags was necessarily fatal to the claim. Having pleaded the total amount claimed and the cause of action, it is my view that that was sufficient and those other matters were matters for evidence. This is my understanding of the holding by the Court of Appeal in **Douglas Odhiambo Ape & Anor –vs- Telkom Kenya Ltd, CA No. 115 of 2006**, that:

> **"…a plaintiff is under a duty to present evidence to prove his claim. Such proof cannot be supplied in the pleadings or the submissions. Cases are decided on actual evidence that is tendered before the court…unless a consent is entered into for a specific sum, then it behoves the claiming party to produce evidence to prove the special damages claimed…"**

44. As regards the contents of the demand letter, I agree that nothing turns on that document apart from proving the *bona fides* of the claimant. The discrepancy in the contents of the letter of demand and the evidence adduced in court, while may go towards showing the claimant's *bona fides*, cannot *ipso facto* be the sole ground for finding that an otherwise proved claim cannot succeed.

45. The trial court also alluded to the delay by the Appellant in lodging her claim. In my view, a delay can only be a ground for dismissing a claim where as a result of the same, the claim is caught up by the statute of limitation. A party is perfectly entitled to lodge his claim in court at any time within the period of limitation and ought not to be penalised for not doing so earlier.

46. The question that arises however, is whether the Appellant proved her claim that she lost 61 bags of maize and that the said bags were worth Kshs 106,750/=. The burden was clearly on the Appellant to prove that not only did she deliver the said bags to the Respondent for milling but also that each of the said bags was valued at Kshs 1,750/-. Before the trial court however, the Appellant did not produce any document proving that each bag of maize cost Kshs 1,750/-. The cost of each bag was clearly a matter within the knowledge of the Appellant and the law required that it be specifically proved. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

47. In this case the Appellant ought to have specifically proved not only the number of the bags lost but their value as well. She was obliged to prove the cost of each bag of maize before testifying as to the total value of the 61 bags lost. This she failed to do.

48. Apart from that as rightly found by the Learned Trial Magistrate, the documents produced by the Appellant neither tallied nor did they individually or collectively disclose what was delivered and paid for at any given or specific period to enable one decipher with reasonable degree of certainty what transpired. I associate myself with the position adopted in the case of **Cecilia Achieng Awino vs. Guardian Coach [2017] eKLR**, that:

> **"Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. It was the duty of the appellant to prove on a balance of probabilities that the lost package contained goods valued at Kshs. 96,139/-. The evidence adduced by the appellant fell short of that. It left serious doubt concerning the value, quality and quantity of the contents of the lost package.''**

49. In the result I find that the Appellant failed to prove her case on a balance of probability and her case was properly dismissed.

50. In the result this appeal fails and is dismissed with costs.

51. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos 1st day of December, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Wanjiku for Mrs Nzei for the Appellant

Mr Kilonzo for the Respondent

CAGeoffrey