

**IN THE COURT OF APPEAL
AT KISUMU**

(CORAM: OMONDI, KIMARU & JOEL NGUGI,

JJ.A) CIVIL APPEAL NO. 215 OF 2019

BETWEEN

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

PERES ANYANGO OPIYO.....RESPONDENT

*(Being an appeal from the judgment and decree of
the High Court at Migori (Mrima, J.) dated 9th April,
2019*

in

HCCA No. 21 of 2017)

JUDGMENT OF THE COURT

1. The respondent herein filed a suit at the Kehancha Principal Magistrate's Court vide a plaint dated 21st September, 2004, seeking for a declaration that the appellant herein was in breach of the cane contract between themselves; for the value of the unharvested sugar cane at the rate of Kshs. 1,730 per tonne; costs of the suit and interests.
2. In summary, the respondent's averments in her pleadings were that she had entered into an agreement with the appellant in 1996 whereby she was to cultivate sugar cane on Plot No. 241 A Field No. 5 vide Account No. 142982; and that by the terms

of the

contract, the appellant was to harvest, purchase, and transport the sugar cane to the factory on its maturity and pay the respondent for its value.

3. The respondent averred that pursuant to the agreement, she grew the sugar cane on a parcel of land measuring 0.8 Ha and on its maturity asked the appellant to harvest and purchase it as per the agreement but that the appellant only harvested eight (8) stalks of the plant crop and failed to harvest the rest of the plant crop, the 1st and 2nd ratoon, in breach of the contract thereby causing the sugar cane to get abandoned, damaged and dried up on the farm. Consequently, the respondent sought compensation for the total value of the sugar cane and the 1st and 2nd ratoon crops as per the contract.
4. In its statement of defence dated 2nd November, 2004, the appellant admitted the existence of a contract between itself and the respondent but denied breaching it. Instead, the appellant claimed that no sugar cane was cultivated by the respondent in a manner that could achieve satisfactory yield in total breach and complete disregard to the provisions of their contract; and that, therefore, no liability accrued to the respondent against the appellant.
5. The appellant also claimed that it was not bound to purchase the sugarcane from the respondent as alleged. Rather, it was only bound to harvest sugarcane from plots that had been well maintained and from which satisfactory sugarcane yield could

be

reasonably expected to be achieved; and that the respondent's plot was poorly maintained, neglected and abandoned. It further claimed that if the sugarcane got abandoned, damaged or dried up as alleged, the same was solely occasioned by the respondent as it was her responsibility to take care of her plot and protect it against waste and damage. In any event, the appellant alleged that the respondent never availed to it any sugarcane which could be economically harvested and milled, therefore, no loss or damage was suffered by the respondent.

6. When the matter was listed for hearing on 27th August, 2014, the two advocates for the parties agreed to prepare and file witness statements, supporting documents and written submissions and the court adopted the same as its directions. Later on 19th March, 2015, the two advocates for the parties entered into a consent to have the matter heard by way of written submissions upon filing statements and exchanging documents.
7. Subsequently, the respondent complied with the directions while the appellant did not. Judgment was eventually delivered on 20th August, 2015, wherein the learned magistrate dismissed the respondent's claim and held thus:

***“The plaintiff says that she entered into a contract with the defendant. Indeed, she produced in evidence a contract dated 10th January 1996. The plaintiff says that she planted three crops of sugarcane and was paid for one.*”**

However, she does not provide any documents to support this assertion. If there was

cane on her land, she would have documents to show that it was developed or that she was paid. She failed to provide such documents.

The question for determination therefore is whether the plaintiff proved that she developed the crop. No documentary proof that the crop cycles were developed was adduced by the plaintiff. It is unlikely and improbable that there would fail to be a single document, such as a job completion certificate, showing that the plaintiff developed or cultivated a cane crop. Therefore, the failure to avail such evidence is suspect and it tarnished the plaintiff's claim.

It is trite law that he who alleges must prove. The plaintiff in this case failed to prove that as a contracted farmer, she cultivated or developed any cane crop. I therefore dismiss the suit with costs."

8. The respondent was aggrieved by the decision of the lower court and filed an appeal in Migori High Court Civil Appeal No. 21 of 2017. Her grounds of appeal were that:

- 1) The learned magistrate erred in law and fact when he failed to consider, evaluate and balance the pleadings, evidence and submissions thereby reaching to a wrong conclusion that the appellant had failed to prove that she developed any crop.**
- 2) The learned magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to a level higher than that required by the law.**

3) *The learned magistrate was biased against the appellant.*

9. Directions were taken and the appeal was canvassed by way of written submissions.
10. In his judgment dated 9th April, 2019, the learned judge found that it was indisputable that a contract existed between the parties and that the plant crop was developed up to maturity. However, the appellant failed to harvest the 1st ratoon crop, which compromised the development of the 2nd ratoon crop; thus, breached the contract. The learned Judge coined one issue for determination, which was: whether the respondent was entitled to any compensation in such circumstances; and held as follows:

“12. I have previously dealt with this issue. Since I have not changed my position on the same I will reiterate what I stated in Migori High Court Civil Appeal No. 10 of 2016 South Nyanza Sugar Co. Ltd vs. Joseph O. Onyango (2017) eKLR as under: -

‘21. I will now look at whether the Respondent was in a position to mitigate loss in this type of a contract. As stated elsewhere above the contract was for a period of a period of five years or until one plant and two ratoon crops of sugar cane are harvested on the farm whichever period shall be less. Therefore, the success of the main plant crop determines the success of the first ratoon and likewise the success of the first ratoon determines the success of the second ratoon. In other words, if the

main plant crop is compromised then the ratoons will definitely be equally compromised. Hence unless the miller is in a position to foresee its failure

to harvest the cane in advance and put the farmer on appropriate notice and in accordance with the Agreement, there is very little a farmer can do to salvage the situation once the miller fails to harvest the cane under the Agreement.

22. Looking at the Agreement, there are several restrictive clauses such that it would not be possible for the Respondent to take any reasonable steps to mitigate the loss unless the Appellant takes the first step in informing the Respondent of its intended breach of the Agreement. The Appellant's argument that the Respondent failed to mitigate its loss cannot stand and is hereby rejected.

23. I therefore find that the Respondent was entitled to the proceeds from the ratoons.

.....'

11. The learned judge then assessed damages payable to the respondent as follows:

"13. According to the Plaintiff and the evidence, the Appellant rightly prayed for the proceeds from the ratoon crops in accordance with the contract. There is no dispute on the size of the land as 0.5 Hectares. The Appellant further relied on the Yields Report from the now defunct Kenya Sugar Research Foundation, which was succeeded by the now Kenya Agricultural and Livestock Research Authority

(KALRO) and the Respondent's Cane Prices Schedule.

14. According to the Yields Report the average expected cane yields over the whole area forming the Respondent's zones are clearly stated. In this case, since the Contract was entered in January 1996, the plant crop was expected to be harvested sometimes in December 1997 when the cane prices were Kshs. 1,730/= per tonne and the average yields were 121 tonnes per hectare. The first ratoon crop was expected to be harvested around October 1999 when the cane prices were still at Kshs. 1,730/= per tonne and the average yields were 85 tonnes per hectare. The second ratoon crop was expected in July 2001 where the average yields were 53 tonnes per hectare and the cane prices were Kshs. 2,015/= per tonne.

15. The total expected earnings for the three cycles would have been Kshs. 231,590/=. That amount would however have been subjected to the would-be harvesting and transport expenses, but no indication was tendered on the then existing rates.

16. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -

- a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the suit with costs be and is hereby set aside accordingly;**
- b) Judgment is hereby entered for the Appellant as against the Respondent for Kshs. 231,590/=;**

c) The sum of Kshs. 231,590/= shall attract interest at court rates from the date of filing of the Plaint;

d) The Appellant shall have costs of the suit as well as costs of the appeal.

12. The appellant is aggrieved by the judgment of the High Court and had listed sixteen (16) grounds of appeal in her Memorandum of Appeal which are that:

- 1) *The learned judge erred in law when in the circumstances of the appeal as was before him, he awarded damages in respect of the appellant's alleged failure to harvest ratoon 1 and ratoon 2 sugarcane which were never developed and which never existed at all.*
- 2) *The learned judge erred in law when he held that the respondent had proved the claim against the appellant when no evidence at all was led, when no such contract was availed and produced in evidence and on the face of the clear denial of the alleged breach of such a contract by the appellant.*
- 3) *The learned judge erred in law when having held that the respondent did not lead any evidence, he nevertheless used figures which were never led in evidence by the respondent to award compensation to him, thereby violating the appellant's rights to a fair hearing.*

- 4) *The learned judge erred in law when he made an erroneous conclusion that since the existence of the contract was admitted in the defence, such an admission in the pleading amounted to proof of the respondent's claim as had been pleaded.*
- 5) *The learned judge erred in law when he made an erroneous conclusion that the respondent's testimony was never controverted, when the respondent in fact never led any such testimony before the trial court, and in relying on documents which were never formally produced as exhibits before the trial court to award compensation and in the absence of proof.*
- 6) *The learned judge erred in law when he held that the alleged ratoon 1 crop mature and was ready for harvest by December, 1999, and that the average yield were 85 tons per hectare and that the ratoon 2 crop was expected to mature by July 2001, when no such was led before the trial court and thus such finding were not supported by the record.*
- 7) *The learned judge erred in law when he ordered the appellant to pay damages of Kshs. 231,590/= on the basis of an alleged expected earnings for three crop circles to the respondent, contrary to the claim in the pleadings where only ratoon 1 and 2 were claimed, and in the face of lack of evidence led*

before the trial court

that the respondent had developed the three crops and thus the appellant's alleged failure to harvest them did not arise, as they never existed and against the background that only special damages, specifically pleaded and strictly proved by way of evidence can be awarded for breach of contract.

8) The learned judge erred in law and wrongly exercised his discretion when he held that interest on the speculative amounts he awarded as compensation were to be calculated from the date of filing suit, when such compensation was only assessed by the court and awarded, and not proved as damages, on the date of judgment and thus obligation to pay them only arose on the date of the appellate judgment and decree.

9) The learned judge erred in law when he awarded speculative damages to the respondent as against the appellant based on an alleged estimate of expected yields and using information from documents which were not formally produced as exhibits before the trial court by a party who was not called as a witness, and disregarding the appellant's direct evidence on yields.

10) The learned judge erred in law when he truly misapprehended the appeal before him and claim which was before the trial court and decided the

case in favour of the respondent based on no evidence at all but purely conjecture and speculation and ignored

empirical documentary evidence of the actual yields led by the appellant and the value thereof.

- 11) The learned judge erred in law when he held that without evidence that there was loss of yield for the plant crop, and that such loss compromised the development of the ratoon crops whose alleged value he subsequently awarded to the respondent on the basis of gross loss which the respondent allegedly suffered.*
- 12) The learned judge erred in law when he held that the respondent was entitled to compensation arising from three crop circles, contrary to the known principles of law that only special damages lay for breach of contract, and for such damages to be awarded, they must be specifically pleaded and claimed in the plaint and thereafter strictly proved by way of evidence during trial which was not done in the appeal which was before him.*
- 13) The learned judge erred in law when he multiplies the plot size, average yield and cane price and held that the sum of Kshs. 231,590/= which he arrived at from his own calculations, and not from evidence led by the respondent, was the damage which the respondent had suffered and in proceeding to allow the same against the appellant.*
- 14) The learned judge erred in law when he failed to hold that the respondent had a duty to but failed to mitigate his losses, if at all any, in respect of the contract despite finding and holding that termination of the contract and contracting cane to another miller was an open option to the respondent.*
- 15) The learned judge, in having awarded to the*

respondent compensation in respect of three crop circles, in respect of a contract, and which amount had

neither been pleaded nor proved by evidence and was not supported by the record of the trial court which was availed before him.

16) The judge decided the case against the weight of evidence purely on speculation and without proof and in failing to dismiss the respondent's appeal as was before him with costs.

13. The appeal before us was argued by way of written submissions. Only the appellant filed its written submissions while the respondent failed to do so despite being served with the notice of the hearing. Mr. Odero, learned counsel, appeared for the appellant, while there was no appearance for the respondent.
14. This is a second appeal. As such, we are limited to considering matters of law only unless it can be demonstrated that the courts below considered matters they should not have considered or failed to consider matters they should have considered or the decision of the superior court is, on the whole, perverse. See **Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR.**
15. We must state that this is the fifth in a series of cases involving the appellant and several respondents. In the series, the trial and the first appellate court proceedings took similar trajectory with similar judgments; and the series of appeals raise the same five issues. They are as follows:

a) Whether the learned judge decided the appeal based on

issues not properly raised on appeal.

- b) Whether the learned judge relied on material which was not properly on record.*
- c) Whether the respondent proved his case on a balance of probabilities.*
- d) Whether the award of damages was justified in the circumstances.*
- e) Whether the award of interest was lawful.*

16. In the present appeal, the appellant raise a sixth issue which is particular only to this appeal: whether it was a manifest error of law for the learned Judge to award compensation for all three cycles of the sugarcane crop (the crop plant as well as the 1st and 2nd ratoons) yet the respondent had only pleaded for compensation for two cycles. The appellant also argues that it was a manifest error for the learned Judge to reach the conclusion that the size of the land was 0.5 Ha yet the plaint identified the size as 0.8 Ha and the contract produced by the respondent also provided for the size of 0.8 Ha. We will deal with the other five issues whose determinations follow the other precedents in the series and then return to this issue.

17. On the first issue, the appellant submitted that the learned judge failed to confine himself to the three grounds of appeal that had been placed before him, despite the settled principle that parties are bound by pleadings; and that on appeal, the grounds of appeal are akin to the pleadings of the parties. In particular, the appellant contended that grounds 1 and 2 as

framed did not raise the

question of breach of contract, which nonetheless became an issue in the appeal.

18. The respondent's grounds of appeal before the learned judge were as follows:

a. The learned magistrate erred in law and fact when he dismissed the appellant's case on a mere ground that the appellant did not have any job completion certificate yet it was the duty of the respondent to issue the appellant with the said job completion certificate if any.

b. The learned trial magistrate erred in law and in fact by purporting to raise the threshold of standard of proof to as level higher than that required by the law.

c. The learned trial magistrate was biased against the Appellant.

19. The appellant further maintained that, on the basis of the respondent's pleadings, the judge's task was limited to determining whether the respondent proved cultivation of the plant crop, the 1st ratoon, and the 2nd ratoon, and whether the appellant failed to harvest the plant crop in breach of contract. Reliance was placed on ***Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR***, which underscores that courts must remain within the confines of the parties' pleadings.

20. On that footing, the appellant argued that the judge made pronouncements on unpleaded issues.

21. Citing ***David Sironga Ole Tukai v. Francis Arap Muge & 2 Others [2014] eKLR***, the appellant argued that the finding

of

breach of contract and award of damages was based on assumptions unsupported by evidence, and that in doing so the learned judge exceeded the appellate powers set out under section 78 of the Civil Procedure Act

22. On the question whether the learned judge determined the appeal on impermissible or un-appealed issues, we find that he did not. As the first appellate court, his duty was to re-evaluate the evidence *de novo*.
23. The trial magistrate had dismissed the claim on the basis that the respondent failed to provide documentary proof of cultivation of the plant crop, holding that as a contracted farmer, the respondent had not established that he developed the cane. In contrast, upon re- evaluating the record, the learned judge found that the respondent's case turned on the appellant's failure to harvest the plant crop, which in turn undermined the development of the ratoons.
24. This Court has already addressed this very issue in ***South Nyanza Sugar Company Limited v. Mboga [2025] KECA 546 (KLR)***, where we stated:

“Looking at the two issues raised on first appeal, it seems eminently obvious that the learned Judge determined the appeal on issues that were raised, and in exercise of his obligation to re-evaluate the evidence de novo. The question whether the learned magistrate had wrongly analyzed the evidence; and

whether the learned magistrate had deployed a

standard of proof unknown in law were both before the learned Judge as they are before us. The learned Judge ruled that the learned magistrate's analysis was wrong; and the adopted standard of proof that required documentary proof to succeed in a claim for breach of contract was similarly wrong. We do so as well.

25. Our conclusion in this appeal is the same.

26. The appellant next contends that the learned Judge improperly relied on documents not formally produced in evidence. To support this, the appellant invoked ***James A. Niala v South Nyanza Sugar Co. Ltd [2019] eKLR*** for the principle that mere production of a document does not prove its contents. The appellant also cited other authorities affirming the settled rule that a document can only be relied upon if formally tendered in evidence. This was well expressed in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR*** where the Court stated:

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in

evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the

judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents - this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.”

27. This argument, however, is misconceived. As outlined earlier, the parties expressly agreed by consent to rely on all witness statements and documents filed in the trial court. By that agreement, the documents were deemed produced in evidence. For the respondent, this included his written statement, the contract, and the Yield Assessment Report by the defunct Kenya Sugar Research Foundation. Moreover, as the learned Judge correctly noted, the respondent’s testimony stood unchallenged, as the appellant called no witness and filed no documents. There is, therefore, no basis for alleging that the Judge relied on unproduced documents.

28. The appellant further asserts that *“there was no justification, in the law or in the record for the judge to find and hold that the appellant did not harvest 2 ratoon crops, in breach of the pact between the appellant and the respondent. Sugarcane never develops itself.”*
29. The appellant’s curious argument is that because the respondent pleaded that he had “developed” the ratoon crops, his claim must fail, since failure to harvest the plant crop automatically compromised the ratoons. To bolster this, the appellant relied heavily on ***South Nyanza Sugar Company Ltd v Francis Aderi Degeri (Migori HCCA No. 47 of 2019)***, where Chitembwe, J. (as he then was) reasoned:

“This is a civil claim and the standard of proof is one of balance of probabilities. It was expected that the Respondent was to prove that indeed the 1st ratoon was developed. The second ratoon is subject to the harvesting of the first one. The first ratoon comes out after the main crop is harvested. It is not automatic that the moment the main crop is harvested then the 1st ratoon will grow on its own upto maturity. The farmer has to tend to the 1st ratoon. The agreement indicates that the 1st ratoon was to be harvested not later than 27 months after the harvest of the plant crop. It therefore follows that the farmer has about 22 months to take care of the 1st ratoon. The cane cannot

grow on its own (or that period of almost two years without the weeds being removed and all other relevant cane farming

requirements alone. The Respondent's position is that since there is no evidence of harvesting of the first ratoon then automatically it has cultivated but not harvested. It could be possible that upon harvest of the first crop, the farmer cultivated the land and planted other crops. There is no evidence that the Respondent notified the Appellant that the 1st ratoon was ready for harvesting and the Appellant failed to do so. There is no photograph showing the growing ratoon. It can be argued that the Respondent did not expect the Appellant to fail to harvest the cane and therefore could not have taken photos. Be that as it may the respondent could have realized that the Appellant had failed to harvest the 1st ratoon and prepared himself for the loss and build up his claim. He could have notified the assistant chief who witnessed the contract that the Appellant had failed to harvest the cane. He could have sent a demand letter to the Appellants to go and harvest the cane otherwise he would have sold the cane to other millers so as to mitigate his losses despite his contractual obligations to sell the cane to the Appellant. There was a contract between the parties. It is normal for a party alleging breach of the contract to notify the party in breach about the impending breach and the consequences thereof."

30. The appellant now urges us to adopt Chitembwe J.'s reasoning, contending that the respondent should have mitigated his loss

by either removing the unharvested crop and replanting, or selling the cane to other millers.

31. We rejected this reasoning in ***South Nyanza Sugar Company Ltd v Mary Anyango (Suing as Administratrix of the Estate of Jared Onyango Onguka) (Civil Appeal No. 171 of 2019) [2024] KECA 694 KLR*** (21 June 2024). Our analysis in that case applies squarely here, particularly our clarification on the conflation between the duty to mitigate damages and the standard of proof in breach of contract claims. We stated in that case:

“The view that the respondent, on record, satisfied her burden of proof is fortified by looking at Clause 11 of the Agreement between the parties. While the appellant has heavily relied on the decision of Chitembwe, J. (as he then was) in South Nyanza Sugar Company Ltd vs. Francis Aderi Dedege (supra), wherein he held that it was the outgrower’s responsibility to inform the sugar company when the ratoon crop was ready and that the failure of a farmer to prove that they did so is fatal to a claim of this nature, Clause 11 of the Agreement between the parties provides as follows:

.....

The wording of the said clause clearly indicates that there are scheduled visits by the Company to the farmer’s shamba and notification thereof of the farmer by the Company of any works or operations that may be required to be done. Therefore, it

goes without saying that it was the duty of the appellant to inform the respondent or his representative of the appointed date of each harvesting or any other works or operations.

This is to say, according to the wording of the contract, it was not the duty of the respondent to notify the appellant that the plant crop or the first ratoon was ready for harvesting. The contract reveals that there is a system developed by the appellant to ensure scheduled and/or follow up visits to the farmer's shamba to ensure that the farmer has maintained, cultivated and tended his shamba for purposes of obtaining satisfactory yield. It is telling that despite that elaborate system, the appellant did not have any evidence whatsoever to demonstrate that the respondent had failed to maintain the shamba satisfactorily; or that it had valid reasons to rescind its contract with the farmer on account of breach of contract on her part."

32. The penultimate issue is whether the learned Judge erred in awarding interest from the date of filing. The appellant objects on three grounds: first, that interest should only run from judgment since the sum was indeterminate until quantified by the High Court; second, that awarding interest from 2011 (the date of filing) is unfair given the delays, which were not attributable to the appellant; and third, that interest from filing would unduly inflate liability against a public company.
33. In essence, the appellant argues that awarding interest from the date of filing was unjust and disproportionate, as the claim was not for a fixed sum but one made certain only at judgment.

Accordingly, it contends that interest should have been awarded

from judgment. For this proposition, it relies on ***New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] eKLR***, where Kwach, JA observed:

“In the present case, the liability of the respondent to pay for the appellant's loss was not determined until the date of the judgment, and that is the date from which interest should be payable. I am satisfied that the judge is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion.”

34. We have considered both the cited authority and the governing provision — section 26 of the Civil Procedure Act — which provides:

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on

such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be

deemed to have ordered interest at 6 per cent per annum.

35. The statute is clear: the court has discretion both to award interest on the principal sum and to determine the rate. None of the appellant's proposed limitations appear in the text. This was a liquidated claim based on breach of contract, and the award of interest from filing was justified. We do not read Kwach, JA's words in ***New Tyres Enterprises Ltd*** as establishing a rigid rule; rather, they explain why, in that case, the Court upheld the trial judge's discretion. Similarly, neither delay in litigation nor the appellant's public status excuses it from its obligations. The termination clause in the contract, too, has no bearing on the calculation of interest.

36. Indeed, in ***New Tyres Enterprises Ltd***, this Court also emphasized:

“It is evident from the reading of this provision that the Court enjoys a wide measure of discretion on the question of interest. And being an appeal against a trial judge’s exercise of his discretion this Court is enjoined to treat the original decision with the utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong.”

37. That, in our view, is the correct position in law. We, therefore, find no fault in the Judge's exercise of discretion in awarding

interest. This ground of appeal accordingly fails.

38. We now turn to the final issue. The appellant complains that the learned Judge committed a manifest error of law by awarding damages for all the three cycles of sugarcane while the respondent, in her own pleadings and evidence had claimed compensation for only two cycles. The appellant further complains that the judgment ought to be set aside because it contains an obvious error: the judge uses 0.5 Ha as the size of the land while the evidence on record and the pleadings clearly show that the respondent's land was, in fact, 0.8 Ha.

39. We have carefully scrutinized the pleadings, the record, and the evidence. The Contract at Clauses 11 (a), (c) and (e) identifies the area of cultivation as 0.8 Ha. Contrary to the appellant's arguments, the plaint, at paragraph 4 identifies Plot No. 241 as measuring 0.8 Ha. The judgment dated 9th April, 2019 in paragraph 2 also identifies the parcel as "Plot No. 241 Field No. 5 measuring 0.8 Hectares in Kogelo sub-location within Migori County." However, at paragraph 13 of the same judgment, the learned Judge uses 0.5 Ha as the size of the land. It would appear that this is merely typographical error and would be a harmless one but for the next issue.

40. At paragraph 4 of the plaint, the respondent avers that:

pursuant to the contract/agreement the plaintiff grew sugarcane on a plot measuring 0.8Ha and on its maturity asked the defendant to harvest/purchase the said sugarcane as per the

agreement but the defendant only harvested 8 stalks of the plant crop but unreasonably, negligently and or recklessly and in total breach of the contract refused to harvest plant crop, first and second ratoon which got abandoned, damaged and dried up on the farm thereby causing loss to the plaintiff.

41. In the particulars of negligence listed in paragraph 5(a) of the plaint, the respondent states that:

“...for no apparent reason and contrary to the terms and spirit of the contract refused to harvest and or purchase the plaintiff’s first and second ratoon when it was due for harvest on the 0.8 Ha and estimated to weigh 68 tonnes.

42. In paragraph 5(b), the respondent complains that the:

“defendant negligently and recklessly and contrary to public policy and common practice refused and or failed to harvest and or purchase the said first and second ratoon even it was evident and obvious that the refusal would cause great loss to the plaintiff at Kshs. 1,730 per tonne.”

43. In the respondent’s witness statement, which was tendered as evidence as aforesaid, the respondent pithily states as follows:

....As per the contract the defendant was to harvest sugarcane 3 times, that is the plant crop, 1st and 2nd ratoons. The defendant harvested the plant crop but failed to harvest the 1st and 2nd ratoons.

I expected a yield of 40 tonnes per cycle. My total tonnage loss was therefore 80 tons. The price per

ton at the time of the contract was Kshs. 1,730 per ton.

I am therefore claiming compensation for 2 cycles as well as costs and interest since the date of filing.

44. It is readily obvious from the respondent's own pleadings as well as her tendered evidence that she was only claiming compensation for the 1st and 2nd ratoon crops - but not for the main plant crop. It is also clear from her evidence, which was uncontroverted at trial that she placed her total loss at 80 tonnes for both cycles. It is, finally, clear that she sought compensation at Kshs. 1,730 per ton - a figure which the learned Judge concluded found support in the appellant's cane prices' schedule.
45. In the circumstances, it was a manifest error for the learned Judge to award the total figure of Kshs. 231,590 based on the expected earnings of the three cycles when it was clear that the respondent only claimed compensation for two cycles. We, therefore, set aside that award. Instead, we award the respondent Kshs. 138,400 based on her uncontroverted and credible evidence that she expected the 2nd and 3rd ratoon crops to garner a yield of 80 tonnes in total at the expected, published can price of Kshs. 1,730 per tonne.
46. The result is that the appeal partially succeeds. The awarded sum of Kshs. 231,590 is hereby set aside and in its place an

award of Kshs. 138,400 is entered in favour of the respondent
as against the

appellant. That sum shall attract interest at court rates from the date of the filing of the plaint. Since the appeal has partially succeeded, each party shall bear their own costs.

47. Orders accordingly.

Dated and delivered at Kisumu this 3rd day of October, 2025.

H. A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

I certify that this is
a true copy of the
original.

Signed
DEPUTY REGISTRAR