

2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 11th July, 2023;

1. The Learned Magistrate erred in law and fact in finding that it was the willful duty of the Respondent to collect the proceeds of sale.
2. The Learned Magistrate erred in law and fact in finding that the discrepancies in the statements was the Responsibility of the Appellant and no one else.
3. The Learned Magistrate erred in law and fact in awarding the claim in its entirety, ignoring the evidence by the Appellant.
4. The Learned Magistrate erred in law and fact in her application and interpretation of the law regarding the suit.
5. The Learned Magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's evidence, submissions and case law cited.
6. The Learned Magistrate's Ruling was biased in favour of the Respondent against the Appellant, is full of

errors, against the weight of evidence and a travesty of justice.

Oral evidence

3. **CW1 David Gitonga**, the Respondent's Operation Manager, adopted his statement dated 9/5/2023 as his evidence in chief and produced the documents filed therewith as exhibits 1 to 5. He told the court that they delivered milk to the Appellant on several occasions, and his claim was for various dates when milk was dispatched to the Appellant.
4. **RW1 Miriti Ngolua**, the Appellant herein, adopted his statement dated 8/6/2023 as his evidence in chief and produced the documents filed therewith as exhibits 1 to 2. He told the court that he was employed by the Respondent as a sales representative. Once he received the milk, he was expected to sell and pay back the money, and the details of the customers were shared with the company. He denied receiving a consignment of 643,200, but he signed the invoice.

Submissions

5. The Appellant, through the firm of Kiautha Arithi & Co. Advocates, filed submissions dated 24/9/2025. Counsel submitted that the Appellant's role, if any, was limited to delivery and handling of cash sales, and it was never demonstrated that he was entrusted with recovering debts from customers who bought on credit, and cited **Samuel Kamau Macharia v KCB & 2 Others (2012) eKLR**. Counsel faulted the trial court for misapplying the law by extending the concept of agency beyond what was proven, and cited **Kenya Ports Authority v Modern Holdings (E.A) (2017) eKLR**. Counsel maintained that the Respondent's claim was not proved on a balance of probabilities, and cited **Charan Singh v Commercial Bank of Africa Ltd [1982] KLR 2 and CFC Stanbic Bank Ltd v John Maina Githaiga & another (2013) eKLR**.
6. The Respondent, through the firm of M.D Maranya & Co. Advocates, filed submissions dated 3/10/2025. Counsel asserted that the relationship between the Appellant and the Respondent created an agency relationship as the Appellant acted on behalf of the Respondent in relation to

3rd parties, and cited **Lucy Nungari Ngigi & 4 Others v National Bank of Kenya Limited & another (2015) eKLR**. Counsel contended that it was the Appellant's duty to collect proceeds from all the sales he made, as failure to do so would amount to breach of contractual duties, and cited **SYT v TA (2019) eKLR, Dormakaba Limited v Arcitectural Supplies Kenya Limited [2021] KEHC 210 (KLR) and Kenya Commercial Bank v Suntra Investment Bank Ltd (2015) eKLR**. Counsel further contended that the Appellant's counterclaim was a nullity in law, having been founded on employment and labour relations, and cited **Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) eKLR**.

Analysis and Determination

7. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
8. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA**, the court held as follows: ***"This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by***

way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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.”

9. I have considered the appeal herein, the trial court’s judgment, which is the subject of this appeal, as well as the submissions by counsel.
10. From the grounds of appeal, the issue for determination is whether the trial court’s decision was erroneous.
11. The undisputed facts are that the Respondent engaged the Appellant, its salesman, to supply milk to its vast clientele on diverse dates. While some customers would pay upfront, the Appellant contended that delivery would occasionally be done to others on credit, because the company retained their details. Whilst he denied receiving the consignment of Ksh. 643,200, he admitted to signing the invoice.

12. I am minded that the invoice dated 13/11/2020 is expressly addressed to the Appellant as the customer, for the sum of Ksh. 643,200.
13. The Respondent's Operation Manager was categorical in his testimony that once an order was raised, the milk was delivered, invoiced and paid.
14. I find that the Appellant was duty bound to ensure the milk supplied to him duly reconciled with the corresponding remittances made to the Respondent, as any shortfall would, in the circumstances, be recoverable from him personally.
15. Needless to state, it would be manifestly unreasonable to expect the Respondent to demand payment from 3rd parties who were not privy to its dealings.
16. The trial court is faulted for failing to consider the Appellant's submissions and authorities. That fault is misconceived because submissions cannot take the place of pleadings, and their non-consideration cannot in itself be a basis to overturn a trial court's decision. Moreover, the mere fact that the trial court was ultimately dissuaded by the submissions of the Appellant together with the

authorities he cited does not imply that they were disregarded altogether.

17. For the foregoing reasons, I find that the appeal is in want of merit and it is hereby dismissed with costs to the Respondent.

**DATED AND DELIVERED AT MERU THIS 16TH DAY OF
DECEMBER, 2025**

S.M. GITHINJI

JUDGE

APPEARANCES:-

Mr. Mwirigi holding brief for Mr. Maranya for the Respondent.