

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. E140 OF 2022

WILSON MUEMA

.....**APPELLANT**

VERSUS

SIMEON KIOKO KITHEKA

RESPONDENT

(Being an appeal from the Judgment and Decree of Honourable B.A Luova in Machakos SCCC No. E130 of 2022, delivered on 8th September 2022)

JUDGMENT

1. This appeal arises from the judgment delivered in Machakos SCCC No. E130 of 2022. In the trial court, the Respondent sued the Appellant for breach of an oral agreement for the rental of 399 trappers for use in a construction project. The agreed rental charge, according to the Respondent, was Kshs.100,000/= for every sixty (60) days, payable in advance.
2. In his Statement of Claim, the Respondent averred that the Appellant made payments to the Universal Traders bank account up to May 2022, when he allegedly defaulted. He further stated that the Appellant claimed the agreed rental price was Kshs.40,000/= per floor, an assertion the Respondent denied. The Respondent

maintained that, despite warnings against further use of the trappers without payment, the Appellant proceeded to use them in the construction of the fourth floor of his building without making any payment.

3. The Respondent also averred that on 24th June 2022, he was invited by the Appellant's advocate to collect the trappers. Upon inspection, he discovered that forty seven (47) trappers were missing. He stated that the value of the missing trappers was Kshs.235,000/=. Consequently, the Respondent prayed for judgment in the sum of Kshs.355,000/= together with costs of the suit and interest at court rates.
4. In his Defence, the Appellant denied any indebtedness to the Respondent. He contended that the oral agreement between the parties was for the leasing of the trappers at a hiring charge of Kshs.40,000/= per floor of the building under construction, as reflected in a letter dated 27th May 2022 from his advocates. He further averred that payment was to be made in advance for each floor and that, in respect of the four floors, he paid Kshs.40,000/= via Mpesa on 1st September 2021, Kshs.40,000/= via Mpesa on 22nd October 2021, Kshs.40,000/= by cheque on 17th December 2021, and Kshs 40,000/= by cheque on 28th February 2022.
5. The Appellant further contended that at no time did he agree to pay monthly rental charges and that the Respondent's claim amounted to a unilateral variation of the agreement. He also averred that the trappers were

delivered to the construction site by his employees in his absence and were similarly collected by the same employees in his absence, with the result that no record was kept of the number of trappers delivered or collected. He maintained, therefore, that whatever was delivered to the site was duly collected.

6. The matter proceeded to full hearing, after which the trial court entered judgment in favour of the Respondent herein in the following terms:

- a) Kshs.235, 000/= being costs of 48 missing trappers.
- b) Costs of the suit.
- c) Interest from the date of judgment until payment in full.

7. Being aggrieved by the Judgment, the Appellant filed this appeal, on the grounds that the Honourable court erred in law and in facts by; finding and holding against the weight of evidence adduced, that the Respondent had proved 47 trappers were lost by the Appellant; Disregarding the Appellant's defence regarding the number of trappers he had received; relying on the record of the trappers returned without first establishing how many were delivered to the Appellant; holding that the Respondent should pay the Appellant Kshs 235, 000/= without appreciating that the claim was in nature of special damages which were to not proved.

8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. The Appellant began his submissions with a brief introduction of the matter, the judgment and the appeal. He identified two issues for determination that is, whether the findings of the Learned trial Magistrate were well founded or whether the Learned trial Magistrate misapprehended the law and thereby reached wrong conclusions and who should bear the costs.
10. On the first issue, the Appellant submitted that, with respect to the number of trappers delivered and those collected, the Respondent relied on an alleged dispatch note which was neither signed by the Appellant nor by any authorised recipient on his behalf. He further argued that the evidence on record demonstrated that, on the date of delivery of the trappers, the Appellant was not present to receive them and was therefore unable to verify the number delivered. He contended that the dispatch note was prepared solely by the Respondent and was never authenticated by him, and that, the only undisputed fact was that 352 trappers were collected from the site.
11. The Appellant further submitted that the Respondent produced a note allegedly signed by a driver, indicating that forty seven (47) trappers out of the alleged 399 were not received from the Appellant. He argued that this document constituted the entirety of the Respondent's evidence on the alleged loss which was insufficient to prove the claim for forty seven missing trappers. He maintained that the learned trial Magistrate

erred in finding that the Respondent had pleaded and proved special damages in the sum of Kshs.235,000/= for the allegedly lost trappers, as this finding was not grounded on the fundamental principles governing proof of special damages, including within the Small Claims Court. In particular, he submitted that no assessment by a competent assessor was produced to establish either the number of trappers allegedly lost, their individual value, or aggregate worth.

12. With respect to the quantum of damages, the Appellant relied on the decision in **Delta Haulage Services Limited v Complast Industrial Limited & Another [2015] eKLR and Rule 5(2)(a) and (c) of the Small Claims Court Rules, 2019**. He submitted that the Respondent merely produced a note which did not prove either the value of the property sought to be recovered or the property allegedly lost while in the Appellant's custody. He further contended that the alleged material loss was not of a nature capable of repair, but was instead claimed as a total loss recoverable in monetary terms. It was therefore incumbent upon the Respondent, in accordance with the applicable rules of practice, to strictly prove the extent of the alleged loss.
13. On the issue of costs, the Appellant, relying on Section 27 of the Civil Procedure Act, urged this Court to award him the costs of the appeal.

Respondent's Submissions

14. The Respondent submitted on the grounds of appeal.
15. Regarding the first ground of appeal, the Respondent submitted that the claimant's witness (CW1) testified that the Respondent requested him to supply 399 trappers at a rental cost of Kshs 100,000/= for every sixty (60) days. CW1 testified that he later sent his driver to collect the trappers but was unable to recover forty seven (47) of them. The driver returned with a note dated 24th June 2022, signed by the Respondent's agent, indicating that the forty seven trappers were missing. The Respondent submitted that this note was produced in evidence. He also pointed out that evidence of the missing trappers was contained in the demand letters dated 26th May 2022 and 27th May 2022, the note dated 24th June 2022, and the delivery receipts from Simecor Merchants dated 19th August 2022, all of which demonstrated that 399 trappers had been delivered to the Appellant. The Respondent emphasized that CW2, his driver, Daniel Nzioki, confirmed that he delivered 399 trappers to the site and further testified that he was informed that the forty seven missing trappers were inside debris that was to be removed later. He further submitted that Exhibit 3 was signed by Christopher, an employee who was stationed at the site on behalf of the Appellant. The Respondent's argued that the Appellant failed to call the site agents to rebut this evidence and that, consequently, the trial court, having considered the totality of the evidence, arrived at a correct finding which should not be interfered with.

16. With respect to the second ground of appeal, the Respondent submitted that RW1 stated in his testimony in chief that he was present when approximately 400 trappers were delivered, although he did not count them. He later contradicted himself by stating that he counted the trappers and that they were fewer than 400. The Respondent further submitted that RW1 confirmed that Christopher was present when the trappers were collected and that the assertion regarding forty seven missing trappers remained uncontroverted, as it was confirmed by the Appellant's agent.
17. Regarding the third ground of appeal, the Respondent submitted that the Appellant was engaged in a fishing expedition, as RW1's testimony initially confirmed that the trappers delivered were sufficient to cover the agreed construction space, pursuant to a gentleman's agreement between the parties. Additionally, the Respondent submitted that the dispatch note from Simecor Merchants, which was produced in evidence, clearly indicated that 399 trappers were dispatched. The Respondent further argued that the note dated 24th June 2022 confirmed that forty seven trappers were missing and that those who counted and recorded the missing trappers must necessarily have relied on the number initially dispatched.
18. Regarding the fourth ground of appeal, the Respondent submitted that the claim was clear and within the Appellant's knowledge, as the Appellant had entered into

a contract to hire the Respondent's trappers pursuant to an arm's length agreement between two businessmen. He submitted that, upon assessment, the Respondent informed the Appellant that 399 trappers would be sufficient to cover the floor under construction, a fact that the Appellant confirmed in his testimony in chief when he stated that the trappers covered the entire floor. The Respondent further submitted that the prevailing market price of a single trapper was well known and was not contested at the trial, and that the value of the forty seven (47) missing trappers was Kshs.5,000/= each, amounting to a total of Kshs.235,000/=.

19. In conclusion, the Respondent submitted that the grounds of appeal raised no issues of law and that, even without delving into the merits thereof, the appeal ought to be dismissed with costs.

Analysis and Determination

20. This Court is mindful of its mandate as an appellate court. In exercising its jurisdiction, the Court must re-examine the matter within the confines of the law, bearing in mind that appeals from the Small Claims Court are restricted to points of law only.

21. Section 38 of the Small Claims Court Act expressly provides:

38. (1) A person aggrieved by the decision or an order Appeals 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.”

The scope of what constitutes, points of law, has been settled see the case of ***Otieno, Ragot & Company Advocates v. National Bank of Kenya Limited [2020] eKLR; Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2B of 2014 [2014] eKLR.***

22. Guided by the above statutory provision and judicial precedent, this court is obligated to consider the grounds of appeal as set out in the Memorandum of Appeal dated 7th October 2022, the Record of Appeal and the parties' submissions in order to discern whether any question of law arises for determination.

23. Upon review, the Court notes that the Memorandum of Appeal sets out four grounds. However, all of them are framed around issues of fact and law. It is trite that in appeals of this nature, good practice demands that the grounds be concise and clearly anchored on clear points of law.

24. Litigants are expected to draft their pleadings with precision and avoid vague grounds that compel the court to speculate on the actual issues for determination. The Appellant ought to have distinctly identified the specific issues of law arising from the impugned decision.

25. The Appellant's principal grievance against the impugned decision is that the learned trial Magistrate entered judgment for unproven loss by accepting insufficient and unverified evidence, thereby awarding special damages that were not strictly proved to the required standard. This contention, however, invites the court to re-evaluate the evidence and arrive at a different factual conclusion. Such an exercise would amount to a reassessment of facts, which lies outside the jurisdiction of this Court under Section 38 of the Act. The appellate jurisdiction is strictly confined to issues of law, and the Appellant has failed to frame any legal issue beyond challenging the trial court's factual assessment of the evidence.

26. Consequently, based on the above this court makes the following orders: -

- i. The appeal is dismissed. The judgment delivered on 8th September 2022 in Machakos SCCC No. E130 of 2022 is upheld.
- ii. Respondent is awarded costs of this appeal assessed at kshs.30,000/-.

Orders accordingly.

Dated, signed and delivered at Machakos this 29th of January, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

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