

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E1252 OF 2024

-between-

JOSEPH WAMBUA MUSYOKI
t/a BRIMS LOUNGE.....APPELLANT

-versus-

GEORGE NJOROGE KAMAU
t/a TRUMAX GENERAL.....
RESPONDENT

(Being an appeal from the Judgment of Hon. N. Ng'ang'a (Adjudicator) in Milimani Small Claims Court Case No. E2133 of 2023 delivered on 23rd November 2023)

JUDGMENT

Introduction:

1. Before this Court is an appeal from the decision of the Adjudicator in *Milimani [Nairobi] Small Claims Court Case No. E2133 of 2023* (hereinafter referred to as '**the suit**') where *Joseph Wambua Musyoki t/a Brims Lounge*, the Appellant herein, was found indebted to *George Njoroge Kamau t/a Trumax General*, the Respondent herein, to the tune of Kshs. 824,880/-, for goods supplied.
2. Among other things, the learned trial Adjudicator found that the Respondent produced invoices indicating when the goods (alcoholic and non-alcoholic beverages) were delivered to the establishment, *Brims Lounge*, owned by the Appellant. Conversely, it observed that the Appellant failed to adduce evidence that it made payment to the Respondent for goods received.
3. It was that decision that prompted the instant appeal which was heard by way of written submissions, hence, this judgment.

The Appeal:

4. Dissatisfied with the Adjudicator's findings, the Appellant, through the Memorandum of Appeal dated 30th October 2024, asserted grounds of appeal as hereunder: -
 1. *THAT the Learned Trial Magistrate erred in law and in fact by dismissing the Appellants' response to the memorandum of claim merely on technicalities.*
 2. *THAT the Learned Trial Magistrate erred in law and in fact by failing to note that the claimant failed to adduce any evidence showing that the Appellant Joseph Musyoki was the owner and was actually trading in the name of Brims Lounge.*
 3. *THAT the Learned Trial Magistrate erred in law and in fact by failing to read and consider the substance of appellants submissions.*
 4. *THAT the Learned Trial Magistrate failed to consider the evidence that the business changed ownership in 2017, yet the claimant brought the suit in 2023 for transactions dating from 2018. This is an afterthought to punish the appellant herein*
 5. *THAT the Learned Trial Magistrate erred ruling was arrived at in a cursory and perfunctory manner without any legal justification and the entire judgement is against th provisions of article 159 (2) (d) of the Constitution of Kenya.*
 6. *THAT the Learned Trial Magistrate erred in law and fact by considering irrelevant factors and leaving out relevant ones in arriving at her judgement.*

The Submissions

5. In its written submissions dated 25th March 2025, the Appellant argued that the Respondent's claim of Kshs. 824,880/- for goods allegedly supplied was unfounded. It was his case that the Respondent failed to conduct due diligence or produce a current official company search to prove the Appellant's actual

ownership of the business that established a connection between the Appellant and the alleged transaction or the business in question.

6. Regarding the specific legal requirements for damages, the Appellant submitted that special damages must be specifically pleaded and proved. He referred the Court to various authorities among them the one in *Zacharia Waweru Thumbi -vs- Samuel Njoroge*, Civil Appeal No 445 of 2003, where the Court held that special damages must be both pleaded and proved before they can be awarded. Finally, the Appellant argued that the Respondent failed to strictly prove the special damages sought. He contended that the invoices presented were self-generated and marked 'paid' without accompanying receipts or proof of money transfer, rendering them inadmissible and insufficient as proof of payment. To reinforce the necessity of consistent evidence, the Appellant relied on *Lilian Njeri Mugucha -vs- Petronila Muyathi Mwinzi* [2022] eKLR, noting that the Court in that instance dismissed an appeal due to glaring inconsistencies and the Appellant's failure to prove how the pleaded sums were arrived at.

The Respondent's case:

7. The Respondent challenged the appeal through written submissions dated 9th April 2025. From the outset, it was his case that he successfully proved that it supplied alcoholic and non-alcoholic drinks to the Appellant between 2017 and 2018, leaving an unpaid balance of Kshs. 824,880/-. He contended that under Section 5 of the Sale of Goods Act, Cap 31 Laws of Kenya, a contract could be established in writing, orally, or implied by conduct.
8. To define the burden of proof, the Respondent relied on *Isaac Mugweru Kiraba t/a Isamu Refri- Electricals -vs- Net Plan East Africa Limited* [2018] eKLR, where the High Court held that a Plaintiff must establish on a balance of probabilities that they supplied goods and transferred property to the defendant for agreed consideration. The Respondent highlighted that the Appellant explicitly admitted in their pleadings and witness statement that they owned the business, *Brim's Lounge*, during

the material times and that the drinks were supplied. Regarding the Appellant's defence that the business was sold in November 2018, the Respondent submitted that the Appellant failed to adduce any evidence to prove this sale or that they no longer traded in that name.

9. Finally, the Respondent challenged the Appellant's mere denial of indebtedness and the claim that all goods were paid for upon delivery. They relied on the Court of Appeal decision in *Magunga General Stores -vs- Pepco Distributors Limited [1988-92] 2 KAR 89*, as cited in *Mashlyn Sky Limited -vs- City Council of Nairobi [2008] eKLR*, which established that a simple denial is insufficient.
10. In the end, the Respondent argued that the trial Magistrate correctly awarded the outstanding sum and costs.

Analysis:

11. Having appreciated the grounds of appeal, the arguments in the submissions and the authorities cited, the issues that crystallize for determination are as follows: -
 - i. *Whether the Adjudicator applied the correct standard of proof in establishing ownership of Brims Lounge.*
 - ii. *The propriety of treating the claim as a commercial debt provable by invoices.*
 - iii. *Whether the Adjudicator correctly applied the law regarding the shift of the evidentiary burden on sale of the business and indebtedness of the Appellant.*
12. The jurisdiction of the High Court on appeal is donated by Section 38 of the Small Claims Court Act. Such mandate is on matters of law and the decision of the High Court is final.
13. Whereas there has been no universally accepted definition of the term '*matters of law*', there has been some working definitions thereto. The term '**point of law**' may also be referred to as '**matter of law**'. The **Black's Law Dictionary** defines '*a matter of fact*' and '*a matter of law*' as follows: -

Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and **Matter of law:** A matter involving a judicial inquiry into the applicable law.

14. Lord Denning, J in **Bracegirdle vs. Oxley** (2) [1947] 1 ALL E.R. 126 at p 130 in espousing the two terms had the following to say: -

.... The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.

15. Drawing from the above, the Court of Appeal in **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others** [2014] eKLR sated as under: -

*.... That reasoning has been adopted in this jurisdiction. In **A.G. vs. DAVID MURAKARU** [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. **This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law.** See also **PATEL vs. UGANDA** [1966] EA 311 and **SHAH vs. AGUTO** [1970] EA 263.*

16. Earlier, the Court of Appeal in **M’riungu and Others -vs- R** [1982-88] 1 KAR 360 observed thus: -

*.... We would agree with the views expressed in the English case of Martin v Glyneed Distributors Ltd (t/a MBS Fastenings) [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, **an appellate Court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that;_on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.***

17. Later, the Court of Appeal in **Charles Kipkoech Leting -vs- Express (K) Ltd & another** [2018] eKLR discussed what entails matters of law as the Court considered its role as a second appellate Court. It observed thus: -

*.... Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina -vs- Mugiria [1983] KLR 78, Kenya Breweries Ltd v Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & another v Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, **the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters, they should not have considered or failed to consider matters they should have considered or, looking at the entire decision, it is perverse.....***

18. And, in **Peter Gichuki King'ara vs. IEBC & 2 others**, Nyeri Civil Appeal No. 31 of 2013, Court of Appeal held that a decision challenged on the basis of wrongful exercise of discretion raises a point of law. [See also **Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others**, (2014) eKLR].

19. From the foregoing, an appeal on matters of law calls upon the appellate Court to steer clear of findings of fact derived from primary evidence and to also restrain itself from treating findings of fact as holdings of law or mixed findings of fact and law unless the findings are so perverse as to defeat the object of justice.

20. In discharging its appellate role in matters from the Small Claims Court, the High Court should remain alive to the rationale behind the establishment of the Small Claims Court as a special and unique Court which is different from the mainstream civil Courts. It must always be remembered that the focal point of the Small Claims Courts is expeditious disposal of cases and that is why the Court is not bound by the strict rules of evidence [**Section 32** of the Small Claims Court Act] and further the Court has power to control of its own procedure in determining any claim before it subject to regard to the principles of natural justice [**Section 17** of the Act]. The High Court, therefore, is duty-bound to assist the Small Claims Court realize it's said objective and it ought to consider appeals from the said Court through those special lenses.
21. On the basis of the foregoing, this Court will now consider the issues identified earlier.

[a] Whether the Adjudicator applied the correct standard of proof in establishing ownership of Brims Lounge:

22. Despite the fact that the Evidence Act does not explicitly define the term '*standard of proof*', there is a consensus that it is a legal phenomenon. Recently, the Supreme Court in **Kombe - vs- Karisa & 3 Others** (Petition E020 of 2023) [2024] KESC 25 (KLR) while acknowledging the above lacuna attempted to define it. The learned Judges observed thus: -

...no similar definition of the meaning of the phrase 'standard of proof' is provided for in the Evidence Act. However, the standard of proof simply refers to the level of cogency that the evidence should attain before the court can act in favour of the person who bears the burden of proof. It is the quantum of evidence demanded in a specific case for a party to succeed.

Generally, there are two broad standards: proof beyond reasonable doubt in criminal cases and on preponderance of the evidence or balance of probabilities in civil cases. The expression "burden of proof" may refer to either the 'legal burden' or the 'evidential burden.' In between these

standards, the courts have developed different levels of proof, depending on the specific type of case and the allegations...

...Depending on the evidence presented by the party who has brought a claim and who bears the legal burden, the evidentiary burden may in certain instances shift to the opposing party.

23. The Appellant's complaints regarding the Adjudicator's acceptance of invoices are largely factual. However, the Appellant framed the said errors of legal principle, specifically regarding the *standard* of proof for special damages. To that extent, this Court is allowed to interrogate the legal principles applied. The Appellant argued that the Respondent failed to conduct a search to prove the Appellant owned *Brims Lounge*. However, it is a settled principle of law that facts admitted in pleadings or evidence need not be proved. The Appellant explicitly admitted in their pleadings and witness statement that they owned Brims Lounge during the material times, 2017-2018.
24. Therefore, the Appellant cannot allege a failure of proof regarding a fact they conceded. The Adjudicator thus correctly applied the law by relying on the Appellant's admission rather than requiring extraneous proof (like a CR12) for a fact that was not effectively in dispute.
25. The contention, therefore, fails.

[b] The propriety of treating the claim as a commercial debt provable by invoices:

26. The Appellant relied heavily on the authority of *Zacharia Waweru Thumbi -vs- Samuel Njoroge* and *Mathew Mutua Mutio -vs- Car & General* to advance the argument that the Respondent's claim was for special damages and thus required strict proof by producing receipts. The Appellant drew parallels in special damages in tort and referred to medical costs in an accident, where every cent must be receipted. He also made reference to liquidated demand in Contract where a specific sum owed for goods sold.

27. However, in a claim for goods sold and delivered, a Plaintiff must prove the existence of the contract and the delivery of goods. The Respondent relied on Section 5 of the Sale of Goods Act, which allows contracts to be implied by conduct. He also referred to the case of *Isaac Mugweru Kiraba t/a Isamu Refri-Electricals -vs- Net Plan East Africa Limited (supra)* to show that the burden is to prove supply and transfer of property. The Appellant argued that invoices are self-generated and inadmissible without receipts.
28. In this Court's view, the approach by the Appellant is a legal misconception. In ordinary commercial transactions, an invoice is the primary document issued upon a party requesting to be supplied with goods or services. Once the goods or services are supplied, payment is then made and a receipt is issued as proof of payment. Therefore, by requiring a creditor to produce a receipt to prove a debt is logically incoherent since if the creditor had a receipt, then the debt would be paid.
29. In the premises, the Adjudicator did not err. The production of invoices and statements of account was the correct legal method to prove a liquidated debt.

[c] Whether the Adjudicator correctly applied the law regarding the shift of the evidentiary burden on sale of the business and indebtedness of the Appellant:

30. In ground 4 of the memorandum of appeal, the Appellant stated that the business was sold in 2017 and the Respondent pursued debts owing from November 2018 and as such, denied indebtedness. The Respondent pointed out the dictates of Section 107 of the Evidence Act to the effect that the evidentiary burden is for one who desires any Court to give judgment as to any legal right to must prove that those facts exist.
31. Whereas the Appellant alleged the business was sold, he adduced no evidence to substantiate the sale. The Adjudicator was right in law to disregard the unproven assertion. As regards the Appellant's indebtedness, it is readily discernible

that he engaged in mere denial of the debt. As was correctly stated in **Magunga General Stores -vs- Pepco Distributors**, a decision relied upon by the Respondent, a mere denial is insufficient defence. The Appellant had the obligation to prove payment.

32. In **Odinga & another -vs- Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)** (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) the Supreme Court discussed the dynamics of the evidentiary shift of the burden of proof in the following manner;

...a Petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court." That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.

33. Cumulatively, therefore, once the Respondent proved supply, the evidential burden shifted to the Appellant to prove the debt was discharged. The Appellant failed to produce a single receipt or proof of transfer. The upshot is that the Adjudicator correctly applied the law on the evidentiary shift of the burden of proof in this matter.

Disposition:

34. As I come to the end of this decision, I wish to sincerely apologize for the late delivery of this decision. The delay was largely caused by my engagement at the Judicial Service Commission where I sit as a Commissioner.
35. Having said so and in consideration of all the issues raised in this appeal, this Court finds that appeal does not demonstrate any error of law by the Trial Court. As such, the following final orders hereby issue: -

[a] The appeal is dismissed in its entirety.

[b] The Judgment and Decree of the Small Claims Court in Case No. E2133 of 2023 delivered on 23rd November 2023 is hereby upheld.

[c] Costs of this appeal are awarded to the Respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 29th day of January, 2026.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Mr. Juma, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.