



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Total Kenya Ltd v Dakawou Transport Ltd (Civil Appeal E019 of 2020)
[2026] KEHC 663 (KLR) (Commercial and Tax) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E019 OF 2020
H NAMISI, J
JANUARY 30, 2026**

BETWEEN

TOTAL KENYA LTD APPELLANT

AND

DAKAWOU TRANSPORT LTD RESPONDENT

(Being an Appeal against the judgement of Hon. P. N. Gesora (Mr) Chief Magistrate delivered on 28 May 2020 in CMCC NO. 7867 of 2005 – Milimani)

JUDGMENT

1. In this appeal the Appellant seeks to set aside the judgment and decree of the Subordinate Court delivered on 28th May 2020 in Milimani CMCC No. 7867 of 2005. The dispute underlying this appeal pertains to a contract of carriage of goods, specifically petroleum products, and the subsequent debiting of the transporter's account by the principal for alleged non-delivery. The central contestation revolves around whether two consignments of fuel, dispatched on 8 December 2000 and 11 December 2000 respectively, were in fact delivered to the Appellant's customer, the Department of Defence (DoD) at Kahawa Garrison, Nairobi.
2. This Court is seized of jurisdiction pursuant to Section 165(3) of The *Constitution* which confers upon the High Court unlimited original jurisdiction in civil and criminal matters and appellate jurisdiction over decisions of subordinate courts. Further, Section 79 of the *Civil Procedure Act* provides for the right of appeal from decrees of subordinate courts. In determining this appeal, this Court is cognizant of its primary duty as a first appellate court to re-evaluate the evidence tendered before the trial court and arrive at its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses as they testified.



Brief Background

3. The Appellant, a leading oil marketing company in Kenya, and the Respondent, a transport logistics company, entered into a commercial arrangement in the year 2000. The terms of this engagement, though not embodied in a single formal instrument produced at trial, were admitted by the parties in their pleadings and witness statements. The Respondent was contracted to transport petroleum products from the Appellant's depots to various customers within Nairobi and its environs.
4. The standard operating procedure (SOP) involved the Appellant issuing instructions to the Respondent to load fuel at the depot. Upon loading, Delivery Invoices/Notes would be generated. The Respondent's driver was then required to transport the product to the customer, offload it, and obtain proof of delivery in the form of a stamp and signature on the Delivery Invoice from the customer's receiving officer. This proof would then be returned to the Appellant for processing of payments.
5. The dispute crystallizes around two specific deliveries allegedly made in December 2000. In the first transaction on 8 December 2000, the Respondent's tanker, registration number TZ 5669Z (also cited as TZ 5667 or TZ 56697 in various documents), was loaded with 16,000 litres of Regular Motor Spirit (RMS). The corresponding invoice was No. MAIN526683. In the second transaction on 11 December 2000, the same tanker was loaded with 8,000 litres of Regular Motor Spirit and 8,000 litres of Automotive Diesel Oil (ADO), totalling 16,000 litres. The corresponding invoice was No. MAIN526838.
6. The driver assigned to these deliveries was Mr. Osman Omar (PW1). The consignee for both deliveries was the Department of Defence (DoD), specifically the Kahawa Garrison along Thika Road.
7. The Respondent contends that on both dates, Mr. Omar successfully delivered the products to Kahawa Garrison. He presented the invoices to the receiving officers, who stamped and signed them as acknowledgment of receipt. The Respondent relied on these stamped invoices as primary evidence of performance.
8. Sometime in January 2001, a dispute arose. The Appellant received information from the DoD suggesting that the fuel had not been delivered. Specifically, a letter dated 1 January 2001 from the Army Logistic Command, authored by Major C.G. Simotwo, stated that the LPO No. C409234 did not belong to them and that vehicle TZ 56697 was not booked at the security gate on the material dates.
9. Acting on this information, the Appellant issued a letter dated 23 January 2001 to the Respondent, titled "Re: Disputed Petroleum Delivery To Dod-afod Kahawa - Truck TZ 56697". In this letter, the Appellant stated:

"The products were not delivered at D o D Kahawa and we hold you responsible. Accordingly, we have debited your account with the involved sum of ksh. 1,732,816.00."
10. On the same day, 23 January 2001, the Respondent's Managing Director, Mr. Ahmed A. Noor, wrote back to the Appellant. This letter is the fulcrum of the Appellant's case. It read, inter alia:

"We refer to the above and humbly submit that the loss of the products amounting to KShs. 1,732,816 was unexpected and will put our company in a big financial constrains and we therefore kindly request you to be deducting a maximum of KShs 200,000... per month to offset the loss."
11. The Appellant characterizes this as an unequivocal admission of liability. The Respondent characterizes it as a product of coercion and economic duress, written in panic to prevent the Appellant



from withholding the entirety of the Respondent's transport earnings, which would have collapsed their business.

12. The Appellant reported the matter to the police, leading to the arrest of the driver, Osman Omar, and others. They were charged with theft in Criminal Case No. 291 of 2001 at the Chief Magistrate's Court at Nairobi. 2.5.2. Crucially, during the criminal trial, the Appellant's own employee, Elijah Kipng'eno Koech (Invoicing Clerk), testified. According to the record of proceedings produced by the Respondent, Mr. Koech confirmed preparing the invoices and stated that the driver returned them duly stamped and signed. The criminal court eventually acquitted Osman Omar and his co-accused under Section 210 of the Criminal Procedure Code, finding insufficient evidence to link them to any theft.
13. Following the acquittal and the continued debiting of their funds, the Respondent filed suit on 21 July 2005 seeking a refund of the Kshs. 1,732,816.00 plus interest. The trial proceeded with the Respondent calling two witnesses. PW1, Osman Omar, the driver, maintained that he delivered the fuel. PW2, Patrick Njenga Kinyanjui, the Transport Manager, testified on the system of work and the duress regarding the admission letter.
14. The Appellant called one witness. DW1, Rosemary Wakaba, a Legal Officer who was not employed by the Appellant at the time of the incident (2000), relied on the company records, specifically the DoD letter and the admission letter. She admitted on cross-examination that she had no personal knowledge of the delivery events.
15. The trial court delivered judgment on 28 May 2020. The learned Magistrate found for the Plaintiff (Respondent herein), holding that the stamped invoices were proof of delivery. The Appellant failed to call a witness from DoD to rebut the invoices. The trial court observed that the buck stops with the officers at Kahawa Garrison who stamped the documents. The Appellant was not entitled to debit the Respondent's account.

The Appeal

16. Aggrieved by the Judgement, the Appellant lodged an appeal on the following grounds:
 - i. The learned Magistrate erred in law and in fact in entering judgement in favour of the Respondent, contrary to the weight of the evidence before Court;
 - ii. The learned Magistrate erred in law and in fact in failing to take into account the letter of admission dated 23 January 2001 from the Respondent which was not disputed by the Respondent;
 - iii. The learned Magistrate erred in law and in fact in failing to take into account the fact that the Respondent had admitted to the loss of the petroleum products;
 - iv. The learned Magistrate erred in law and in fact in failing to take account the fact that the Respondent had pleaded with the Appellant to make monthly deductions to offset the loss;
 - v. The learned Magistrate erred in law and in fact in failing to take into account the inconsistencies and anomalies in the two delivery invoices produced by the Respondent;
 - vi. The learned Magistrate erred in law and in fact in shifting the burden of proof of the delivery of the petroleum products to the Appellant contrary to section 107 and 109 of the *Evidence Act*.
17. The appeal was canvassed by way of written submissions.



18. The Appellant contends that the trial court erred by ignoring the letter of 23 January 2001. They argue this letter was a clear and unequivocal admission of liability that estopped the Respondent from later denying the loss. They rely on the principle that facts admitted need not be proved.
19. The Appellant further argues that the weight of evidence favoured them. They point to anomalies in the invoices and the DoD letter confirming non-delivery. They argue the trial court ignored the discrepancies in the Respondent's documents.
20. The Appellant submits that the Magistrate erred in law by shifting the burden of proof. They argue that under Sections 107 and 109 of the *Evidence Act*, the burden lay with the Respondent to prove delivery, and the Magistrate was wrong to require the Appellant to call a DoD witness to disprove it.

Analysis and Determination

21. This Court has carefully considered the Record of Appeal, submissions, and the applicable law. The determination of this appeal rests on the resolution of the following legal and factual issues:
 - a. Whether the admission letter dated 23 January 2001 constituted a binding estoppel;
 - b. Whether the Respondent discharged its legal and evidentiary burden of proof regarding the delivery of goods;
 - c. Whether the trial court erred in its treatment of the documentary evidence and the admissibility of hearsay evidence;
 - d. The relevance of the acquittal in the criminal proceedings to the civil liability?

The Legal Effect of the 'Admission Letter'

22. The Appellant places heavy reliance on the letter dated 23 January 2001 (Exhibit D3), authored by the Respondent's Managing Director. The text is unambiguous:

“We refer to the above and humbly submit that the loss of the products amounting to Kshs. 1,732,816 was unexpected... we therefore kindly request you to be deducting a maximum of Kshs 200,000... to offset the loss.”
23. Under Section 17 of the *Evidence Act*, an admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. Section 18 provides that statements made by a party to the proceeding are admissions.
24. However, Section 23 of the *Evidence Act* is critical. It states that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.
25. The law recognizes that an admission is not a final judgment. It is a piece of evidence that can be explained, clarified, or retracted if it was made under a mistake of fact, misapprehension, or duress. In *Kenya Commercial Bank Limited & Another v Samuel Kamau Macharia & 2 Others* [2008] eKLR, the Court of Appeal extensively discussed the binding nature of admissions and settlements. While the Court ultimately enforced the deed of settlement, it acknowledged that the presence of economic duress or coercion could vitiate such an agreement.
26. The Respondent argues that this letter was written under economic duress. The elements of economic duress, as elucidated in *Pao On v Lau Yiu Long* [1980] AC 614 and *CTN Cash and Carry Ltd v Gallaher Ltd* 4 All ER 714, require: 1. Pressure which is illegitimate; 2. Which is a significant cause



- inducing the victim to enter into the contract (or make the admission); 3. Which leaves the victim with no reasonable alternative.
27. I have examined the timeline of events, which is crucial in determining the state of mind of the Respondent's Managing Director. On 1 January 2001, the DoD wrote a letter alleging non delivery. On 23 January 2001, the Appellant informs the Respondent of the loss and immediately debits the account. On the same day, the Respondent replies, requesting instalments instead of lump sum debit.
 28. The proximity of the Appellant's demand and the Respondent's reply, both dated 23 January 2001, is telling. The Respondent was confronted with an immediate debit of over Kshs. 1.7 million, a significant sum in 2001. The Appellant held the power of the purse strings. The Respondent's Transport Manager (PW2) testified that the letter was a desperate measure to prevent the total paralysis of their operations due to cash flow constriction.
 29. Furthermore, the admission was based on a mistake of fact. At the time the letter was written, the Respondent had not yet conducted its own full investigation, nor had the criminal case been heard. The Managing Director was relying on the Appellant's assertion that the goods were not delivered. An admission made on the faith of a representation by the other party, which later turns out to be false, cannot bind the maker.
 30. Once the Respondent's driver was acquitted and the invoices were verified by the Appellant's own clerk in the criminal trial, the factual basis for the admission collapsed. The Respondent was entitled to resile from the admission.
 31. I find that the letter of 23 January 2001 does not constitute an irrefutable estoppel. It was a conditional admission made under the threat of severe financial sanction and based on unverified information provided by the Appellant. The trial court was correct to look past this letter and evaluate the substantive evidence of delivery.

Burden of Proof

32. The Appellant alleges a misapplication of the burden of proof. They rely on Sections 107 and 109 of the *Evidence Act*, arguing that the Respondent bore the burden of proving their case.
33. It is imperative to distinguish between the legal burden (persuasive burden) and the evidential burden. Legal burden is the obligation to prove the case to the required standard (balance of probabilities). It generally remains with the plaintiff throughout the trial. Evidential burden is the burden of adducing evidence to support a specific assertion. This burden shifts like a pendulum during the trial. This distinction was eloquently clarified by the Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others eKLR* :

“Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

34. In this case, the Respondent asserted that delivery occurred. To discharge the initial burden, they called PW1, the Driver, who testified to the physical delivery and produced stamped invoices. Upon production of the stamped invoices, the Respondent established a prima facie case. If the trial stopped there, the Respondent would win. Thus, the evidential burden shifted to the Appellant to prove that the invoices were forged, the stamps were fake, or that despite the stamps, no goods were received.



35. The Appellant argues that the trial court erred by asking them to call a DoD witness. This argument is flawed. The learned Magistrate was essentially stating that the Appellant failed to discharge the shifted evidential burden. The Appellant attempted to rebut the direct evidence of the driver with a letter from a third party (DoD). The learned Magistrate's finding was that this letter was insufficient to displace the invoices without the testimony of its author.
36. Therefore, the learned Magistrate did not err in law. He correctly identified that the Respondent had proffered sufficient evidence to shift the onus of rebuttal to the Appellant.

Documentary Evidence and Hearsay

37. This issue goes to the heart of the evidentiary weight attached to the Delivery Invoices versus the DoD Letter.
38. The Respondent produced two invoices: MAIN526683 and MAIN526838. The Appellant challenges them because they lack the printed name of the recipient, bearing only a stamp and signature. However, PW1, Osman Omar, testified directly that he presented these documents to the officers at Kahawa Garrison, who stamped and signed them. Crucially, in the Criminal Case No. 291 of 2001 (whose proceedings were admitted as Exhibit Pex 2), the Appellant's own employee, Elijah Kipngeno Koech, testified:

“The invoices were signed by the drivers and the depot manager... The fifth accused [Osman] was the driver. He has to get the invoice stamped and signed. He did so. The invoice was then taken to the customer service manager for filing.”
39. This testimony establishes the presumption of regularity. The invoices followed the standard chain of custody. The Appellant accepted them for filing. The anomaly of a missing name is a minor irregularity common in bureaucratic institutions and does not, on its own, vitiate the document's authenticity, especially when the official stamp is present.
40. The Appellant relies on the letter from Army Logistic Command denying receipt. The fundamental evidentiary defect here is hearsay. Section 63 of the *Evidence Act* requires oral evidence to be direct.
41. The Appellant produced this letter through DW1, Rosemary Wakaba, a Legal Officer. DW1 did not write the letter. DW1 was not at Kahawa Garrison. DW1 did not witness the alleged non-delivery, nor could she answer questions regarding the authenticity of the DoD stamp on the invoices or the identity of the signatory.
42. As established in *Mwanzani Mwakitu v Chandaria Industries Co. Ltd* [2015] eKLR, where a party has evidence or witnesses in their possession (or power to call) and fails to call them, the court is entitled to presume that the evidence would have been adverse to them. The Appellant made a serious allegation of fraud/non-delivery. To prove this, they were legally obligated to call the maker of the DoD letter (Major Simotwo) or the Quartermaster at Kahawa Garrison. By failing to do so, they offered the court a document that could not be tested by cross-examination.
43. In *Selle & Another vs. Associated Motor Boat Co. Ltd* E.A. 123, the Court emphasized the value of witness demeanor. The trial court saw PW1 withstand cross-examination. The Appellant offered no witness with first-hand knowledge. Consequently, the DoD letter remains an untested allegation, whereas the Invoices are supported by sworn direct testimony. The trial court rightly preferred the latter.



Relevance of the Criminal Acquittal

44. The Appellant correctly cites *Mbagga Wetangula v Co-operative Bank of Kenya* eKLR for the proposition that an acquittal in a criminal case does not automatically bar civil liability due to the higher standard of proof in criminal cases.
45. However, the acquittal is not irrelevant. Under Section 34 of the *Evidence Act*, evidence given in previous judicial proceedings is relevant. The Respondent relied on the testimony given in the criminal case, specifically by the Appellant's staff, to impeach the Appellant's credibility in the civil suit. The fact that the State failed to prove theft by the driver, combined with the Appellant's clerk confirming the invoices were stamped, significantly weakens the Appellant's theory of non-delivery. While not *res judicata*, the criminal proceedings form part of the evidentiary mosaic that supports the Respondent's case.
46. The upshot of the foregoing is that the Appeal lacks merit. The same is dismissed, with costs to the Respondent assessed at Kshs 60,000/=.

DATED AND DELIVERED AT NAIROBI THIS 30 DAY OF JANUARY 2026.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For the Appellant: Ms Gecaga h/b Kimani

For the Respondent: Mr. Jibril

Court Assistant: Lucy Mwangi

