REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E269 OF 2024

ARNOLD OPERE MATIBE……..
……APPELLANT

VERSUS

MICHAEL OGALO OSOO……1ST RESPONDENT

GABRIEL OMONDI AMOKE……2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. G.C. Serem Resident Magistrate/Adjudicator delivered on 4th December, 2024 in Kisumu SCCCOMM No. E1117 of 2024 Michael Ogalo Osoo & another v Arnold Opere Matibe T/A Lakeside Automobile Works).

JUDGEMENT

1. This appeal emanates from the judgement and decree of **Hon. G.C. Serem** Resident Magistrate/Adjudicator delivered on 4th December, 2024 in the Small Claims Court in *Kisumu SCCCOMM No. E1117 of 2024 Michael Ogalo Osoo & another v Arnold Opere Matibe T/A Lakeside Automobile Works*.

2. The grounds of appeal presented by the Appellant vide the memorandum of appeal dated 19th December, 2024 upon which he seeks to upset the judgement and decree of the lower court are as follows:

    i. **The learned trial Magistrate erred in law and in fact in finding that the Claimant did not provide full details about**

the job that had not been paid for any list (sic) **of the entire amount that they complained about.**

ii. **The learned trial Magistrate erred in law and in fact in failing to recognize that the vehicles have number plates and no list of full vehicle numbers given to match the amount they wanted to be paid.**

iii. **The learned trial Magistrate erred in law and in fact in finding that there was no contract between the Appellant and the Respondent.**

iv. **The learned trial Magistrate erred in law and in fact in failing to recognize that the Appellant had a different name from that of the company the Respondent was claiming against.**

v. **The learned trial Magistrate erred in law and in fact in failing to recognize that the Respondent indicated that they worked for Ol-Lessos Secondary School who is not even a client of the Appellant.**

vi. **The learned trial Magistrate erred in law and in fact in failing to recognize the evidence book produced by the Respondent was in their custody hence could have been tampered to meet their narrative.**

vii. **The learned trial Magistrate was completely biased against the Appellant.**

3. The Appellant proposes that the appeal be allowed and that this court sets aside the trial court's judgement and decree.

4. This being the first appellate court, I am required under *Section 78* of the *Civil Procedure Act* and as was espoused in the case of ***Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123*** to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In ***Selle***, **Sir Clement De Lestang** observed that:

> ***"This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.***
>
> ***However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of ***Peters v Sunday Post Limited [1958] EA 424*** in which it was held that the

appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> ***"i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."***

7. The matter before the trial court, based on a monetary claim for services rendered, was commenced by the Respondents (the Claimants before the trial court) against the Appellant (the Respondent before the trial court) by way of an amended statement of claim dated 18th October, 2024.

8. The Respondents pleaded that at the time material to the suit, the Appellant would from time to time contract the Respondents for the supply of mechanical services on work availability basis at his garage Lakeside Automobile Works.

9. The Respondents further pleaded that between January and August, 2024, the Respondents completed several tasks for the Appellant and that the total value of the works done amounted to Ksh.144,900/-, out of which the Appellant only paid Ksh.10,000/- and failed to pay the balance of Ksh.134,900/- despite several demands, necessitating the suit before the lower court.

10. The Respondents stated that as a result of the Appellant's refusal to make good payment of the money demanded, they instructed an Advocate to send to the Appellant a formal demand letter, for which the Respondents paid Ksh.15,000/-.

11. The Respondents sought judgement for the liquidated amount of Ksh.134,900/-, special damages of Ksh.15,000/-, costs and interest.

12. The Appellant resisted the Respondents' claim by filing a response to the statement of claim dated 28th October, 2024. In his response, the Appellant denied the allegations that the Respondents completed tasks between January and April, 2024 for which they were not paid Ksh.134,000/-. The Appellant stated that whenever the Respondents performed any works for the Appellant, they were fully paid for the same.

13. The Appellant denied owing the Respondents the claimed amount. He denied that he was liable to the Respondents for

the special damages claimed. He denied ever receiving any demand from the Respondents. The Appellant prayed that the Respondents' claim be dismissed with costs.

14. The 2nd Respondent testified as CW1 and adopted the contents of his undated witness statement as his evidence in chief. In his statement, the witness stated that that he was a mechanic and was contracted alongside the 2nd Respondent by the Appellant to provide mechanical services at the Appellants garage – Lakeside Automobile Works and that it was agreed by the parties that the Appellant would compensate the Respondents for their work. The witness further stated that based on the agreement, the Respondents performed their part of the bargains by carrying out several mechanical works for the Respondent between January and August, 2024, whose total value was agreed at Ksh.144,900/-.

15. CW1 further stated in his statement that the Appellant paid only Ksh.10,000/-, leaving a balance of Ksh.134,900/-, which amount he failed to pay, necessitating the suit before the trial court. The Respondents sought for a further Ksh.15,000/- being services paid to their Advocate to send a demand letter to the Appellant. Thus then, the witness sought for judgement in favour of the Respondents for Ksh.149,900/-.

16. The witness produced the following documents in support of his case:

- A copy of record book for accounting - CExh1.
- M-pesa messages transcript showing receipt of Ksh.10,000/- from the Appellant and communication with the Appellant – CExh2.
- Demand letter – CExh3.
- Receipt for Ksh.15,000/- being payment for the demand letter – CExh4.

17. On being cross examined, CW1 told the trial court that the garage where the Respondents provided services – Lakeside Automobile Works – belonged to the Appellant.

18. With regard to the copy of record book for accounting (CExh1), CW1 stated that the entries were made by the Respondents and the Appellant would countersign against the indicated debts.

19. On reexamination, CW1 told the trial court that the Appellant would cross out in CExh1 all the entries that were paid to the Respondents.

20. CW2 **Benedict Odhiambo Rauda** told the trial court that he was a mechanic who worked alongside the Respondents until sometime in January, 2024. He stated that the Appellant would engage his and the Respondents' services and would pay them by mpesa mobile money service. He explained that

they would make entries of the value of the work done in a book. He stated that the book in which the entries were made was CExh1.

21. On being cross examined, CW2 stated that he worked for the Appellant at his garage for about 10 years but was not his employee and that by the time he stopped providing services at the Appellant's garage, the latter owed him money which he refused to pay, pursuant to which the former gave up on making follow-ups.

22. CW3 was **Mathius Okoth Okumu.** The witness adopted the contents of his undated statement as his testimony. He stated in his statement that both the Appellant and the Respondents were well known to him as he would supply motor vehicle parts to the Appellant's garage. The witness stated that he was aware that the Appellant had contracted the Respondents on various occasions to provide mechanical services at his garage and that CW3 would at times join the Respondents at the garage and for out-of-town assignments.

23. CW3 further stated that he was aware that the Appellant owed the Respondents Ksh.144,900/- as he had attempted mediating on the debt for which the Appellant gave unfulfilled promises to pay.

24. On being cross examined, CW3 stated that he was at the time material to the suit the Appellant's personal assistant and would supervise works and make payments when the Appellant was away.

25. The Respondents closed their case.

26. The first Respondent **Michael Ogalo Osoo** testified as CW4 and adopted the contents of his undated statement as his testimony, which was a replica of that of CW1.

27. CW4 was cross examined and told the trial court that the Appellant would engage the services of the two Respondents when there was work to be done. He stated that the unpaid dues were recorded in CExh1, which was kept in the Appellant's office.

28. The Appellant testified as RW1 and told the trial court that he was a director of Lakeside Automobile Works. He adopted his undated statement as his evidence in chief.

29. The Appellant stated in his statement that he would give the Respondents work whenever the same was available and needed to be done. He further stated that he would pay his casual workers after every piece of work or assignment was completed and did not owe the Respondents any dues.

30. The Appellant further stated in his statement that he kept the book that the Respondents relied on (CExh1) at Salama Motors, where both himself and the Respondents worked as employees prior to registering his business. He added that he moved with the book to Lakeside Automobile Works for purposes of getting customer details when Salama Motors was closed down and that it subsequently disappeared. He stated that his handwriting was not in the book.

31. The Appellant admitted in his statement that he knew CW2 and CW3 and stated that he would give them work to do and did not owe them any money. He stated that he indeed paid Ksh.10,000/- through mpesa to the 2nd Respondent as per the testimonies of the two Respondents.

32. The Appellant produced the following documents in support of his case:

- Certificate of business registration for Lakeside Automobile works – RExh1.
- Mpesa statement showing that the Appellant paid the 2nd Respondent Ksh.3,000/- on 25th May, 2024 and Ksh.6,000/- on 8th July, 2024 – RExh2.

33. Upon being cross examined, the Appellant was emphatic that he did not owe the Respondents any money. He admitted that his signature appeared in CExh1 but stated that he did

not understand why it was there. He then turned around and stated that the signature was a forgery. He stated that he would pay the Respondents immediately they were through with the allocated works.

34. **Willis Otieno Ogwe** testified as the Respondent's witness (RW2). The witness adopted the undated contents of his statement in which he stated that he worked as a mechanic at Lakeside Automobile Works. He stated that the terms of engagement at the garage were that casual workers would be paid on daily basis depending on the work done at the end of each day.

35. RW2 stated that he worked with the Respondents at the Appellant's garage but added that the Appellant would pay all the casual workers.

36. On being cross examined, RW2 told the trial court that he did not know the terms of the engagement agreement between the Appellant and the Respondents. He further stated that he found the Respondents already working for the Appellant when he joined Lakeside Automobile Works and could not tell the amount of work that they had done for the Appellant. He further stated that he did not know how much the Appellant had paid the Respondents.

37. The Appellant closed his case at that stage.

38. In the judgement delivered on 4th December, 2024, the learned Adjudicator rendered herself as follows:

> ***"9. On whether the Claimants herein (are) entitled to the prayers in the plaint, the court states that the Claimants stated that they had not been paid for the service they offered. They did produce the book they would do the recording of the unpaid bills on. This was corroborated by all the witnesses. The Respondent on the other hand stated that he would pay for all the services on hand and there was no balance and the same was corroborated by the witnesses.***
>
> ***10. He who alleges must prove. Section 107 of the Evidence Act provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while Section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person.***
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> ***11. Justice Majanja in <u>Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR</u> when he stated that (sic):***

"...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides:

> ***"107(1). Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...."."***

12. The court has looked at the evidence adduced by the parties herein and the record of unpaid bills by the Claimants herein. The court states that from the book and the message asking the Respondent to pay and he promised to pay (sic). There was a receipt for payment for the demand letter. The court states that the record on the book was consistent with the payment that were done on mpesa. The Respondent herein did not attach any evidence to show that he had paid the bills that were in question, hence he did not discharge his burden.

13. The Claimants did prove their case on a balance of probability."

39. With the above, the learned Adjudicator proceeded to enter judgement for the Respondents and against the Appellant as follows:

"a. The Claimants is awarded judgement in the sum of Ksh.134,900/-

b. The Claimant is also awarded interest at court rates from the date of filing till full payment.

c. The Claimant is also granted costs of the suit.

d. The Respondent has 30 days stay."

40. The instant appeal proceeded by way of written submissions.

41. I have carefully considered the record of appeal, the memorandum of appeal, the rival written submissions, the applicable law governing appeals from the Small Claims Court and I proceed to frame the issues for determination as follows:

    a. Whether this appeal raises matters of law only, as required under *Section 38* of the *Small Claims Court Act.*

    b. Whether the learned Adjudicator erred in law in finding that a valid and enforceable contract existed between the Appellant and the Respondents.

c. Whether the learned Adjudicator misapplied the burden and standard of proof under *Sections 107–109* of the *Evidence Act.*

d. Whether the learned Adjudicator erred in law in admitting, relying on or attaching probative value to the record book (CExh1) in light of the Appellant's challenge to its authenticity and custody.

e. Whether the learned Adjudicator erred in law in finding that the Respondents proved their claim for Ksh.134,900/- on a balance of probabilities.

f. Whether the learned Adjudicator erred in law in awarding the Respondents the reliefs granted, including interest and costs.

g. Whether the Appellant proved the allegation of bias on the part of the learned Adjudicator.

42. I will proceed to determine the above issues.

43. *Section 38(1)* of the *Small Claims Court Act* provides that an appeal shall lie to the High Court on matters of law and *subsection (2)* thereof declares such appeal as final. The legislative intention is clear: factual determinations made by the Small Claims Court are insulated from appellate

interference unless it is demonstrated that they were arrived at through a misapprehension or misapplication of the law.

44. A careful reading of the grounds of appeal reveals that the Appellant's complaints largely challenge the credibility of witnesses, the authenticity and custody of documentary evidence, the sufficiency of particulars relating to work allegedly done and the weight accorded to competing testimonies. These are, in substance, matters of fact, and this court lacks jurisdiction to re-open them merely because the Appellant is dissatisfied with the outcome.

45. The court shall therefore confine itself strictly to the question whether the learned Adjudicator committed any error of law in arriving at the impugned decision.

46. On whether the learned Adjudicator erred in law in finding that a contractual relationship existed between the parties, the record discloses that the Appellant admitted engaging the Respondents to undertake mechanical work at his garage from time to time and further admitted making partial payment through Mpesa. It is settled law that a contract may be oral, written or implied from conduct. The finding that an implied contract existed was a lawful inference drawn from the parties' conduct and admissions and does not disclose any misdirection in law.

47. The Appellant faulted the trial court for its application of the burden and standard of proof. The learned Adjudicator expressly cited *Sections 107, 108,* and *109* of the *Evidence Act*, thereby correctly identifying the governing legal principles. The question that remains is whether those principles were properly applied.

48. Proof on a balance of probabilities does not mean proof beyond doubt. It requires that the court be satisfied that the existence of a fact is more probable than not, when the totality of the evidence on both sides is weighed. Proof on a balance of probabilities is achieved if the evidence renders the occurrence of the event more likely than its non-occurrence.

49. In the present case, the Respondents tendered oral evidence, contemporaneous records of work allegedly done, Mpesa messages evidencing partial payment and corroborative testimony from multiple witnesses. This body of evidence, taken as a whole, was capable in law of tilting the scale in favour of the Respondents' version of events.

50. Once the Respondents established a *prima facie* case, the evidential burden shifted to the Appellant to demonstrate that the alleged debt had been fully settled or that no such liability arose. The Appellant did not produce evidence of full payment and, further, gave contradictory explanations regarding the disputed record book. The learned Adjudicator's conclusion

that the Respondents had proved their case on a balance of probabilities was therefore grounded in law and principle.

51. The Appellant also challenged the trial court's reliance on the record book produced as CExh1, alleging possible tampering and disputing its authenticity. This argument must be considered in light of *Section 32* of the *Small Claims Court Act*, which expressly provides that the Small Claims Court shall not be bound wholly by the strict rules of evidence.

52. *Section 32* accords the Small Claims Court latitude to admit and rely on evidence that it considers credible and relevant, even where such evidence might attract stricter scrutiny in ordinary civil proceedings. The learned Adjudicator was therefore entitled in law to admit and rely on CExh1, particularly where its contents were corroborated by oral testimony and by Mpesa payment records, and where the Appellant conceded that his signature appeared therein.

53. The Appellant's complaint that the document was in the custody of the Respondents and could have been manipulated raised a factual dispute, the resolution of which lay squarely within the province of the trial court. The weight attached to that document was a matter of judicial discretion and does not amount to an error of law.

54. Similarly, the Appellant's grievances relating to alleged discrepancies in names, clients, vehicle particulars and identities of parties are factual matters that were canvassed before the trial court. This court is precluded by *Section 38* from re-evaluating those factual findings or substituting its own conclusions thereon.

55. On the reliefs granted, once the learned Adjudicator found that liability had been established, the award of the principal sum proved, together with interest and costs, followed as a matter of course. No illegality, excess of jurisdiction or misapplication of legal principle has been demonstrated.

56. The allegation of bias on the part of the learned Adjudicator was not supported by any material evidence. An adverse decision, without more, cannot found a claim of bias. The record demonstrates that both parties were heard and that the decision was reasoned and grounded on the evidence presented.

57. In the final analysis, the appeal before this court is predominantly an invitation to re-open factual findings and re-assess evidence, an invitation that this court must decline in obedience to *Section 38* of the *Small Claims Court Act.*

58. I am satisfied that the learned Adjudicator properly directed herself on the law, correctly appreciated the standard of proof

on a balance of probabilities and lawfully exercised the discretion afforded to the Small Claims Court under *Section 32* of the *Act.* There is therefore no legal basis upon which this court may interfere with the judgement and decree of the Small Claims Court delivered on 4th December, 2024.

59. This appeal is accordingly dismissed in its entirety, with costs to the Respondents, and the judgement and decree of the Small Claims Court are hereby upheld. I assess costs at Ksh.10,000/-.

60. This file is hereby closed.

DELIVERED (virtually), DATED & SIGNED this 19th February, 2026.

JOE M. OMIDO.

JUDGE

FOR APPELLANT: **Ms. Odhiambo** for **Mr. Mwamu, SC.**

FOR RESPONDENT: **Ms. Nyagol.**

COURT ASSISTANTS: **Mr. Juma** & **Mr. Ngoge.**

Ms. Odhiambo: I seek 30 days stay of execution.

Ms. Nyagol: No objection.

Court: There shall be stay of execution for 30 days.

JOE M. OMIDO.

JUDGE