

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. E066 OF 2024

TAHER KASSAMALI.....

APPELLANT

=VERSUS=

ROSE KATUNGE MUTETI.....

.....RESPONDENT

**(Being an appeal from the Judgment of Hon. S. M. Musili
(Adjudicator/RM) in Voi SCCCOMM E001 of 2024 delivered on
15th November 2024)**

JUDGMENT

1. The Appellant **TAHER KASSAMALI** was sued by the Respondent **ROSE KATUNGE MUTETI** in Voi SCCCOMM E001 of 2024.

2. The Respondent was seeking compensation in the sum of Kshs. 323,584/= in respect of construction building materials supplied to the Appellant by the Respondent.
3. The Appellant denied the Respondent's claim.
4. The Respondent said in her evidence that she supplied the Appellant with materials worth Kshs. 523,584/= and the Appellant paid a deposit of Kshs. 200,000/= leaving a balance of Kshs. 323,584/=.
5. She produced a list of documents dated 16th September 2024 in support of her claim.
6. The Appellant in his evidence said that the Respondent supplied him with substandard materials.
7. The trial court found that there was a valid oral contract between the parties for the supply of materials worth Kshs. 523,584/= and that a deposit of Kshs. 200,000/= was paid leaving a balance of Kshs. 323,584/=.
8. The trial court also found that the Appellant ought to have returned the materials if they were substandard.
9. The trial court entered judgment in favour of the Respondent against the Appellant in the sum of Kshs. 323,584/= together with costs and interest at court rates.

10.The Appellant has appealed against the judgment on the following grounds:-

- (i) The learned trial Magistrate erred in law by misapprehending the standard of proof in special damage claims.**
- (ii) The learned trial Magistrate erred in law by applying wrong principles and thereby arriving at a totally erroneous conclusion.**
- (iii) The learned trial Magistrate erred in law by failing to consider the evidence given by the Appellant herein.**
- (iv) The learned trial Magistrate erred in law by failing to give a basis for his findings and or conclusions.**
- (v) The learned trial Magistrate erred in law by misapprehending the evidence on record and thereby arriving at totally wrong conclusions.**

11.The parties filed written submissions as follows:- That these written submissions on behalf of the Appellant, Taher Kassamali, arise from a civil appeal challenging a trial court's decision in a dispute over an oral agreement for the supply of construction materials.

12. It is undisputed that in May 2024, the parties entered into an agreement for the Respondent to supply materials for a social hall project in Taita Taveta County, with the Appellant paying a deposit of Kshs. 200,000 and the balance to be settled after delivery.
13. A key term of this oral agreement was that the materials supplied would meet required standards, supported by a certificate of compliance from the Respondent.
14. Although the Respondent did supply the materials, the Appellant contended they failed to meet the requisite quality and were not accompanied by the promised certificate, despite repeated demands.
15. Consequently, the Appellant refused to pay the outstanding balance and requested a refund of the deposit, asking the Respondent to collect the materials, which she declined to do, instead filing a claim in the Small Claims Court.
16. The trial court ruled in favour of the Respondent, holding that because the deposit had been paid, the Appellant must settle the full amount, and suggesting the Appellant should have secured the certificate before payment or returned the goods.
17. Aggrieved by this judgment, the Appellant now invites the High Court to vary it.

18. The Appellant argues that the Respondent was fully aware of the condition to supply a certificate of compliance, as evidenced by her belated attempt to produce a laboratory report dated after the suit was filed, and the trial court erred by not estopping her from denying this condition.
19. The Appellant further emphasizes that due to the Respondent's failure to provide the certificate, the county government cancelled the entire construction contract, frustrating the purpose of the agreement and rendering the materials useless to him.
20. He maintains that the Respondent's breach led to this frustration and that the trial court failed to consider his testimony on this crucial point. The Appellant asserts that the materials remain available for collection and that it would be unjust for the Respondent to retain the deposit and also claim the balance, particularly as the project's cancellation stemmed from her own omission.
21. He contends that the contract was frustrated by a supervening event—the government cancellation—directly caused by the Respondent's non-compliance, making further performance impossible and any insistence on payment a form of unjust enrichment.

22. In conclusion, the Appellant submits that fairness dictates the parties be restored to their original positions, urging the court to order the Respondent to collect the materials and refund the Kshs. 200,000 deposit, thereby allowing the appeal.
23. The respondent in this appeal urges the High Court to uphold the judgment of the Small Claims Court at Voi, which awarded her KES 323,584 as the unpaid balance for construction materials supplied to the appellant.
24. The background to the matter is that the respondent supplied ballast, sand, and other building materials to the appellant pursuant to an oral contract for a total purchase price of KES 523,584, out of which the appellant paid a deposit of KES 200,000.
25. The respondent delivered all the materials as ordered, and the appellant acknowledged receipt but failed to settle the outstanding balance despite several demands.
26. The respondent thus filed a claim before the Small Claims Court. During the hearing, the appellant admitted to entering into the oral contract, making the deposit, and receiving the goods, but alleged that the materials were of poor quality.
27. However, the appellant could not produce any document showing that he had communicated any quality concerns to the

respondent, nor did he provide evidence to support his claim that he lost KES 2,900,000 as a result of the alleged poor quality.

28. In contrast, the respondent produced a laboratory test report from a government facility confirming that the materials supplied were of good and merchantable quality.

29. The adjudicator therefore entered judgment in favour of the respondent.

30. In these submissions, the respondent contends that the appeal lacks merit and should be dismissed.

31. She argues that by accepting delivery of the goods in May 2024 and failing to raise any objection at the time, title to the goods passed to the appellant under Section 20(d) of the Sale of Goods Act.

32. Further, the appellant's allegation that the goods were sub-standard is not supported by any contemporaneous communication or independent evidence, and is directly contradicted by the laboratory test results obtained by the respondent.

33. The respondent also points out that the appellant has disobeyed a court order issued on 8 April 2025, which required him to deposit security in court within 30 days as a condition

for stay of execution, and he has not done so to date, demonstrating contempt.

34. On the substantive law, the respondent invokes Sections 28 and 30 of the Sale of Goods Act, which impose a duty on the buyer to accept and pay for goods delivered in accordance with the contract, and make delivery and payment concurrent conditions.

35. Since the appellant received the goods and has not returned them or proved any defect, he is obliged to pay the balance of the purchase price. The respondent concludes by urging the court to affirm the trial court's judgment, dismiss the appeal with costs, and take note of the appellant's non-compliance with the stay order.

36. This is an appeal to the High Court from a decision of the Small Claims Court. Under Section 38(1) of the Small Claims Court Act, No. 2 of 2016, an appeal from the Small Claims Court lies to the High Court only on matters of law.

37. This court's jurisdiction is therefore circumscribed strictly to points of law, and it cannot interfere with findings of fact unless it is demonstrated that the trial court applied wrong legal principles, misapprehended the law, or arrived at a decision that no reasonable court could reach based on the evidence .

38. The Appellant has raised five grounds of appeal. Grounds (iii), (iv), and (v) complain that the learned trial magistrate failed to consider the Appellant's evidence, failed to give a basis for his findings, and misapprehended the evidence on record.
39. These grounds are essentially invitations to this court to re-evaluate the factual merits of the case. A re-evaluation of facts is precisely what this court is statutorily barred from doing on an appeal from the Small Claims Court.
40. Consequently, grounds (iii), (iv), and (v) are struck out for falling outside the appellate jurisdiction of this court.
41. This leaves grounds (i) and (ii) for consideration. Ground (i) alleges that the learned trial magistrate erred in law by misapprehending the standard of proof in special damage claims.
42. Ground (ii) is a general ground that the trial court applied wrong principles and arrived at an erroneous conclusion. These grounds, if substantiated, could properly be considered as points of law.
43. The Appellant's argument, as discerned from his submissions, is that the Respondent's claim for the outstanding balance of Kshs. 323,584/= was a claim for special damages which, he

contends, was not strictly proved. He also appears to raise the legal doctrine of frustration as a defence.

44. The claim before the trial court was for a specific sum of money for goods sold and delivered.

45. This is a liquidated demand arising from an alleged breach of an oral contract for the sale of goods.

46. The applicable law is the Sale of Goods Act (Cap 31). The Respondent pleaded and adduced evidence that she supplied materials worth Kshs. 523,584/= and that the Appellant paid a deposit of Kshs. 200,000/=.

47. The Appellant admitted to the existence of the contract and the payment of the deposit, but denied liability on the basis that the materials were substandard.

48. The trial court, after evaluating this evidence, found that a valid oral contract existed and that the Appellant had not returned the goods or proved they were substandard.

49. On the question of the standard of proof for a liquidated claim, the law is settled. A claim for the price of goods sold and delivered is a debt, not a claim for special damages in the strict sense as understood in tort.

50. The Respondent proved her claim by adducing evidence of the agreement and the part payment, which the Appellant himself acknowledged.
51. The Appellant bore the evidential burden, under Sections 107 and 108 of the Evidence Act (Cap 80), to prove his defence that the goods were substandard.
52. The trial court found that he failed to discharge this burden. This finding was a conclusion of fact based on the evidence.
53. The Appellant has not pointed to any misdirection by the trial court on a principle of law regarding the burden or standard of proof.
54. The trial court correctly placed the burden of proving the defence on the Appellant, and his dissatisfaction with the outcome does not transmute a factual finding into an error of law.
55. Regarding the doctrine of frustration, this was a new argument raised on appeal. The Appellant submitted that the contract was frustrated because the county government cancelled his main contract due to the Respondent's failure to provide a compliance certificate, rendering the materials useless.

56. This argument fails on two legal fronts. First, as a point of law, a party cannot rely on a self-induced frustration to avoid contractual liability.
57. The alleged frustrating event, the cancellation, is said to have stemmed from the Appellant's own complaint about the goods.
58. Secondly, and more fundamentally, this argument was not part of the Appellant's pleadings or evidence before the trial court.
59. It is trite law that a party is bound by its pleadings, and new issues cannot be raised on appeal for the first time. A court will not determine issues which the parties have not pleaded.
60. Upon a re-examination of the trial court's judgment, it is evident that the learned adjudicator properly directed himself on the law.
61. He correctly identified the existence of the contract, the payment of the deposit, and the delivery of goods.
62. He applied the correct legal principle that a party alleging non-conformity with a contract bears the burden of proving it. He found, as a fact, that the Appellant did not return the goods or provide evidence to support his claim of substandard quality.
63. There is no error in law apparent on the record. Consequently, the appeal fails. The Appellant has not demonstrated that the

trial court misapprehended any principle of law or applied wrong legal principles.

64. The challenge mounted is, in essence, against the factual findings of the court, which this court has no jurisdiction to entertain. The upshot is that this appeal is dismissed in its entirety.

65. The judgment delivered on 15th November 2024 in Voi SCCCOMM E001 of 2024 is hereby upheld.

66. Each party to bear its own costs of this appeal.

Dated, signed and delivered this 5th day of March 2026 in open court at Voi.

**ASENATH ONGERI
JUDGE**

In the presence of:-

Court Assistants: Millicent/Mabishi

.....**for the Appellant**

.....**for the Respondent**