

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMA NO. E117 OF 2023

KODIMO GENERAL ENGINEERING WORKS.....APPELLANT

-VERSUS-

BURTON MBOGO MAINA.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J. W. Munene, Resident Magistrate, delivered on 26th May 2023 in Milimani SCCCOMM No. E3296 of 2022).

JUDGMENT

1. The plaintiff (respondent) filed a suit against the defendant (appellant) at the Small Claims Court vide a statement of claim dated 31st October 2022 which was subsequently amended, seeking for judgment against the appellant in the sum of Kshs.265,000/= and costs of the claim. The respondent's case was that on or about 20th August 2018, he delivered a water boozier lorry registration number KAU 755D, which he had received from a client, to the appellant's workshop for repairs. He stated that upon inspection, the appellant agreed to undertake the repairs at an agreed cost of Kshs.100,000/=, with the parties settling on a deposit of Kshs.50,000/= and the balance being payable upon completion, and the respondent was assured that the repairs would be completed within a week.
2. The respondent averred that despite paying the agreed deposit and making numerous follow-ups through visits and calls between September and December 2018, the appellant failed to complete the repairs and repeatedly offered excuses. He further averred that when he visited the appellant's yard sometime in March 2020, he made a further payment of

Kshs.40,000/= and the appellant promised to start works on the lorry immediately. The respondent asserted that the appellant persistently failed to carry out the repairs, the lorry remains unrepaired and was damaged while in the appellant's custody, causing him to suffer loss of Kshs.175,000/= as at the time of filing the claim.

3. In opposition to the respondent's claim, the appellant filed a response to the statement of claim and counter-claim dated 21st November 2022, wherein it denied the averments contained in the respondent's amended statement of claim. The appellant averred that on or about 20th August 2018, the respondent approached it to fabricate a 6,000-litre tank at an agreed cost of Kshs.100,000/=: of which the respondent has only paid Kshs.90,000/=: leaving an outstanding balance of Kshs.10,000/=: The appellant contended that despite the lapse of approximately four (4) years, the respondent neither settled the outstanding balance nor collected the motor vehicle, which continued to attract storage charges.
4. In its counter-claim, the appellant reiterated the contents of its response to the statement of claim and averred that the respondent was in breach of contract for failure to pay the balance of Kshs.10,000/= which it claimed against the respondent. The appellant sought for the Trial Court to enter judgment for it against the respondent in the sum of Kshs.10,000/=: payment of storage charges and costs of the suit.
5. In a Judgment delivered by the Trial Court on 26th May 2023, the said Court found that the respondent's claim was merited and entered Judgment for the respondent against the appellant in the sum of Kshs.265,000/= and costs of the suit, plus interest at Court rates.
6. Dissatisfied with the said Judgment, the appellant filed a Memorandum of Appeal dated 9th June 2023 raising the following grounds –

- i) That the learned Trial Magistrate erred and misdirected herself in finding for the claimant despite no evidence supporting the claim;
- ii) That the learned Trial Magistrate erred and misdirected herself in finding that the claimant's motor vehicle was brought for repairs and not fitting of a tank;
- iii) That the learned Trial Magistrate erred and misdirected herself in finding that the claimant's motor vehicle was brought to the respondent's garage on the 20th August 2018 while it was not the case;
- iv) That the learned Trial Magistrate erred and misdirected herself in allowing an alleged Motor Vehicle Assessment Report from a non-qualified Motor Vehicle Inspector to be of persuasive value to her finding;
- v) That the learned Trial Magistrate erred and misdirected herself by allowing an alleged Motor Vehicle Report for a different motor vehicle to be of persuasive value to her finding;
- vi) That the learned Trial Magistrate erred and misdirected herself in shifting the burden of proof to the respondent;
- vii) That the learned Trial Magistrate erred and misdirected herself in disregarding the respondent's response, testimony, counterclaim and submissions; and
- viii) That the learned Trial Magistrate erred and misdirected herself in apportioning blame on the respondent for the failure of the claimant for finishing payment of services rendered and collecting of his motor vehicle.

7. The appellant's prayer is for the Appeal herein to be allowed with costs. It also prays for the whole Judgment delivered on 26th May 2023 by Hon.

J.W. Munene, Resident Magistrate, to be set aside, and for the appellant to be awarded costs for the claim in the Small Claims Court.

8. The Appeal herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Olando, Okello & Luseneka Advocates on 16th May 2024, whereas the respondent's submissions were filed on 17th March 2025 by the law firm of Wilfred K. Babu & Company Advocates.
9. Mr. Okello, learned Counsel for the appellant submitted that the respondent's case cannot be sustained since the initial engagement between the parties herein, which commenced on 20th August 2018 was solely for the fabrication and fitting of a 6,000-litre water tank at an agreed cost of Kshs.100,000/=, of which Kshs.50,000/= was paid, and not for repairs of a motor vehicle, as erroneously found by the Trial Court. He argued that no motor vehicle was presented at the initial meeting, a fact consistently denied by the appellant and never proved by the respondent, rendering the finding that the work was to be completed within a week untenable. Counsel asserted that the motor vehicle was only delivered on 13th March 2020, at which time a further Kshs.40,000/= was paid, leaving an undisputed balance of Kshs.10,000/=, and that the tank installation was duly completed, but the respondent failed to clear the balance and collect the vehicle.
10. Counsel challenged the Trial Court's reliance on a Valuation Report produced by a witness who was neither a registered nor licensed Valuer, and which related to a different motor vehicle registration number altogether. He contended that the Trial Court misdirected itself by shifting the burden of proof to the appellant, including faulting him for failing to produce an assessment report for alleged repairs that were never part of his case. He maintained that the burden of proof lay entirely with

the respondent, who failed to discharge it, and urged this Court upon a fresh evaluation of the evidence, to allow the Appeal as prayed.

11. Ms Amunga, learned Counsel for the respondent submitted that it is not in dispute that the parties herein entered into a valid contract for the installation of a water boozer on the respondent's motor vehicle registration number KAU 775D at an agreed cost of Kshs.100,000/=, of which Kshs.90,000/= was paid, and duly acknowledged by receipts that were neither disputed nor challenged by the appellant. She further submitted that the motor vehicle in issue throughout the trial was registration number KAU 775D, as pleaded and as per the evidence of the respondent, and that allegations of discrepancy in the registration number, in the Valuation Report are unfounded, as the correct registration number, being KAU 775D is reflected therein.
12. Counsel disputed the appellant's assertion that the work was completed and that the respondent failed to collect the vehicle, noting that no evidence was adduced to prove completion of the works and that the appellant failed to respond to a demand and notice of intention to sue. Ms Amunga maintained that the claim before the Trial Court was for a refund of Kshs.90,000/= paid for the uncompleted installation and special damages of Kshs.175,000/= for loss occasioned to the lorry while in the appellant's custody due to negligence and breach of the duty of care owed. She submitted that the principle that he who alleges must prove was satisfied, including proof of the competence of the Valuer or Mechanic, and on that basis, she urged this Court to dismiss the Appeal with costs.

ANALYSIS AND DETERMINATION.

13. Appeals from the Small Claims Courts to the High Court are limited to matters of law only, as provided by the provisions of Section 38(1) of the Small Claims Court Act, which states that –

A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

14. The Court of Appeal in the case of **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others** [2018] eKLR, summarized what amounts to “*matters of law*” as hereunder –

The interpretation or construction of the Constitution, statute or regulations made thereunder or their application to the sets of facts established by the Trial Court. As far as facts are concerned, our engagement with them is limited to background and context and to satisfy ourselves, when the issue is raised, whether the conclusions of the Trial judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them. We cannot be drawn into considerations of the credibility of witnesses or which witnesses are more believable than others; by law that is the province of the Trial court.

15. From the above decision, this Court is not permitted to substitute the Trial Court’s findings of fact with its own conclusions based on its own analysis and appreciation of the facts, unless the Trial Court’s decision cannot be supported by any evidence.
16. Upon consideration of the appellant’s Memorandum of Appeal, the Record of Appeal and the written submissions filed by Counsel for the

parties, the issue that arises for determination is whether the Judgment of the Trial Court should be set aside.

17. From the Court record, it is apparent that the parties herein entered into a contractual relationship whereby the appellant was to build and install a 6,000 litre water tank for the respondent's water boozier lorry registration No. KAU 755D, at a cost of Kshs.100,000/=. It is further not disputed that as at the date of the hearing before the Trial Court, the respondent had paid the appellant a total of Kshs.90,000/=. leaving a balance of Kshs.10,000/=.
18. On perusal of the evidence adduced before the Trial Court, the respondent testified that he took the lorry to the appellant on 24th August 2018 and it was to be repaired within four (4) days, but it took longer. He explained that the photos produced as appellant exhibit No. 3 depict that the water boozier was installed on the back of the lorry, but the photos were taken after the suit before the Small Claims Court was filed. He further stated that the appellant placed the water boozier at the back of the lorry after he sued him.
19. The appellant's witness on the other hand stated that the appellant completed the works it was engaged to do on the motor vehicle, but the respondent failed to collect it four (4) years down the line or to pay the Kshs.10,000/= balance. The record shows that no evidence was adduced by the appellant to corroborate and/or substantiate these claims.
20. On examination of the Judgment delivered by the Trial Court on 26th May 2023, it is manifest that the Trial Magistrate evaluated the pleadings, the testimony adduced, and documentary evidence and made a finding that the appellant did not demonstrate that it had concluded the works it was engaged to do on the suit motor vehicle, and that what remained was its collection. I am therefore persuaded that the said finding was a

conclusion of fact, drawn from the evidence before the said Court. The appellant has however not demonstrated that the aforesaid finding was based on no evidence at all or that it was so perverse that no reasonable Tribunal, properly directing itself on the law, could have arrived at it. As such, this Court cannot interfere with the said finding of fact.

21. In regard to the Motor Vehicle Assessment Report, the appellant contended that the said Report was authored by an unqualified person, and that it related to a different motor vehicle. This Court is however of the considered view that the admissibility and probative value of that Report were matters that fell squarely within the discretion of the Trial Court. The Record indicates that the said Report was produced, challenged, and considered within the context of the entire body of evidence adduced before the Trial Court. As to whether the maker of the Report was sufficiently qualified, and whether the discrepancy of the motor vehicle registration number was material, were factual matters weighed by the Trial Court. It is my finding that no error of law has been demonstrated in the Trial Court's decision to admit and rely on the Report, and it has not been shown that the Court applied the wrong legal standard in assessing its evidential value.
22. On the alleged shifting of the burden of proof, this Court finds no merit in the appellant's complaint. The Judgment of the Trial Court shows that the learned Magistrate was alive to the principle that he who alleges must prove. The respondent bore the burden of proving payment, non-performance, and loss, which the Trial Court found had been discharged on a balance of probabilities. The fact that the appellant was called upon to rebut the respondent's evidence does not amount to shifting of the legal burden of proof, it reflects the ordinary evidential burden that shifts in the course of a trial once a *prima facie* case is established.

23. In light of the foregoing, this Court finds that the appellant is inviting this Court to re-analyze evidence, re-assess factual dispute, and substitute the Trial Court's findings with its own conclusion. That invitation of factual issues runs contrary to Section 38(1) of the Small Claims Court Act and settled appellate principles governing Appeals on matters of law only.
24. It is therefore my finding that the appellant has failed to demonstrate any error of law, misapplication of legal principles, or a decision unsupported by evidence. As such, the impugned Judgment of the Small Claims Court was grounded on sound evidence and on proper application of the law.
25. The upshot is that the instant Appeal is not merited. It is hereby dismissed. Costs of the lower Court case and this Appeal are awarded to the respondent.

It is so ordered.

DELIVERED, DATED and SIGNED at NAIROBI on this 6th day of March 2026. Judgment delivered through Microsoft Teams Online platform

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Okello for the appellant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.