

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MIGORI
CIVIL APPEAL NO. E118 OF 2021
HILARY M.

MARWA.....APPELLANT

Versus

SOUTH NYANZA SUGAR CO. LTD.....RESPONDENT

(Being an appeal from the judgment and decree by Hon.P. Areri, Senior Resident Magistrate in Migori Chief Magistrate's Civil Suit No.1350 of 2015 delivered on 29/09/2020).

JUDGMENT

The Appellant sued the Respondent vide Plaintiff dated 3rd June 2015 seeking that the court declares that the Respondent was in breach of the cane contract between them; he also sought for compensation for 300 tonnes plus harvest and transport; costs of the suit and interest

Upon consideration of the evidence tendered by the parties the Trial Magistrate found that the sugar cane subject of the contract between the Appellant and the Respondent having been burnt the doctrine of frustration was became applicable and as such the contract became incapable of performance by either party and the parties are discharged from any future obligations under the contract. The Trial Magistrate therefore made a finding that the Respondent did not breach any contract and was therefore not liable to compensate the Appellant who did not prove that he harvested the burnt sugar cane and transported to the Respondent's factory for milling. It was also determined that the Appellant did not explain how the initial expected yield of 88.8 tonnes became 300 tonnes. It was also determined that the Appellant did not specifically plead and strictly and satisfactorily prove that he paid any money for transportation of the alleged sugar cane.

The Appellant's claim was therefore found to lack merit and the same was dismissed with costs.

The Appellant was aggrieved by the judgment and he lodged the appeal herein vide Memorandum of Appeal dated 27th October 2021 on the following grounds:-

- a) The Learned Trial Magistrate erred in law and fact when he failed to consider and evaluate the evidence thereby reaching to a wrong conclusion that the Appellant had failed to prove his case on a balance of probability.
- b) The Learned Trial Magistrate erred in law when he held that the Appellant did not prove that he contacted the Respondent about the burnt sugar cane and he was allowed to harvest and deliver the burnt crop to the Respondent yet the Respondent did not produce any evidence to rebut the Appellant's evidence
- c) The Learned Trial Magistrate erred in law by purporting to raise the threshold of proof to a level higher than that required by law.
- d) The Learned Trial Magistrate was biased against the Appellant.

REASONS WHEREFORE the Appellant prays that:

- I. This appeal be allowed
- II. The judgment and decree of the trial court be set aside and substituted with suitable order
- III. Costs of the appeal

This appeal was canvassed by way of written submissions. The Appellant's submissions are dated 27th March 2025 and were filed on 8th May 2025. The Respondent's submissions dated 16th June 2025 were filed on 18th June 2025. The respective submissions have been considered by this court for purposes of determining the appeal here below.

ANALYSIS AND DETERMINATION

From the record of the Trial Court, the grounds of appeal and the rival submissions the following issues arise for determination:

1. Whether the Trial Magistrate failed to properly evaluate the evidence.
2. Whether the doctrine of frustration was correctly applied.
3. Whether the Magistrate elevated the standard of proof.
4. Whether bias was demonstrated.
5. Whether the trial court's decision should be disturbed.

An appellate court can only interfere with factual findings where the trial court misapprehended evidence, acted on no evidence, or drew conclusions no reasonable tribunal could. In this case the Trial Magistrate evaluated central questions whether the Appellant harvested any cane after the fire; whether any cane was delivered to the Respondent's factory; whether 300 tonnes were proved despite the contract's expected yield of 88.8 tonnes and whether transport expenses were pleaded and proved.

There was no documentary evidence such as delivery notes, transport receipts and weighbridge tickets that were tendered by the Appellant. The inconsistency between 88.8 tonnes and the alleged 300 tonnes was unexplained. The trial court was therefore correct in finding that the Appellant did not prove his case. The ground that the Trial

Magistrate failed to properly evaluate evidence is therefore unfounded and must fail.

The undisputed fact is that the cane was burnt before harvest. The law is clear that where neither party is responsible for the burning, the contract becomes incapable of performance thereby discharging parties from further obligations.

The Appellant did not prove that he harvested or delivered any burnt cane for milling. The contract was therefore incapable of performance and the trial court correctly applied the doctrine of frustration.

On the standard and burden of proof the trial court did not elevate the standard of proof; rather, the Appellant claimed *special damages* which must be specifically pleaded and strictly proved. The court merely required basic evidentiary documentation for the claimed losses. The Appellant therefore misconstrued the evidentiary requirement and no error of law on the standard of proof can be found on the part of the Trial Court.

The Appellant also claimed that the Trial Magistrate was biased but no instances of bias were demonstrated. Adverse findings do not amount to bias. This ground was unsubstantiated and therefore lacked merit.

Given the evidentiary gaps and correct legal principles applied, the trial court's decision was well-founded. This Court finds no basis to interfere as the appeal lacks merit and is hereby dismissed with costs to the Respondent. Costs of the suit remain as awarded by the trial court.

Right of appeal within 30 days explained

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 26th day of
February, 2026.**

**ANNE ADWERA-ONG'INJO
JUDGE**