IN THE COURT OF APPEAL
AT NAKURU

(CORAM: WARSAME, MATIVO & GACHOKA, JJ. A.)

CIVIL APPEAL NO. E039 OF 2020

BETWEEN

CHRISTOPHER ORINA.....APPELLANT

AND

HARDWARE TRADING STORES LIMITED.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Joel Ngugi, J.) delivered on 18th June 2020

in

HCCA No. 95 of 2018)

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REASONS FOR JUDGMENT

1. This appeal was dismissed when it came before us for hearing on 28th January 2026. Having considered the record of appeal and the written submissions filed by both parties, we dismissed the appeal on the spot with costs to the respondent under Rule 34 of the Court of Appeal Rules 2022, and reserved the reasons for a later date. These are the reasons for the dismissal.

2. The genesis of the matter lies in a commercial transaction or,

as the appellant would have it, the complete absence of one.

Hardware Trading Stores Limited, the respondent herein, avers that it carries on business in Nakuru dealing in general hardware tools, building materials, sanitary ware and assorted electrical goods. The respondent further contends that **Christopher Orina**, the appellant herein, was its customer and that on diverse dates between 2nd August 2009 and 9th November 2009, it supplied him with goods at his request, on credit, the total value of which amounted to Kshs. 1,109,825.81. The respondent maintains that, despite repeated demands, the appellant refused and neglected to settle the outstanding sum.

3. On his part, the appellant denies any indebtedness to the respondent. He contends that he never ordered the goods, never received them and never received any of the invoices said to have been issued by the respondent. Notably, however, the appellant's statement of defence does not rest on denial alone. In the alternative and in terms that would come to acquire considerable significance as the litigation progressed, the appellant avers that all goods supplied to him were paid for, upon delivery.

4. The respondent's claim was commenced in the Chief Magistrate's Court at Nakuru as Civil Case No. 497 of 2015, founded in breach of contract and seeking judgment in liquidated damages of Kshs. 1,109,825.81 together with interest and costs.

5. At the trial, the respondent called one witness: Refendra R. Patel, its Managing Director. Mr. Patel testified that the appellant had purchased road construction materials on credit between 2nd August 2009 and 9th November 2009. He produced certified copies of six invoices bearing invoice numbers 54045, 54046, 54048, 54210, 54616 and 54618 and a demand letter dated 3rd November 2009, and testified that the appellant refused to pay despite repeated demands.

6. The appellant called no witnesses. When the court directed both parties to file written submissions, the respondent complied. The appellant failed to do so despite being granted ample time.

7. The trial court delivered its judgment on 13th July 2018, dismissing the suit with costs. Upon scrutinising the invoices,

the court found that they were unsigned, that no delivery notes had been produced, and that the Local Purchase Orders said to

have been issued were never placed before the court. On those findings, the trial court concluded that it was not possible to establish whether the goods had been duly received by the appellant, and that the respondent had therefore failed to discharge the burden of proof.

8. Dissatisfied with that outcome, the respondent appealed to the High Court. The appeal came before Joel Ngugi, J. (as he then was) who in a judgment dated 18th June 2020 allowed the appeal and found that the trial court had fallen into fundamental error. Rather than applying the simple and flexible balance of probabilities standard, the trial court had elevated the evidential threshold beyond what the law of civil proof requires. The learned judge stated thus:

> *"With respect, the Learned Magistrate went far beyond this simple test. In scrutinizing the invoices and deducing that the fact that they were not signed by the Respondent meant that the standard of proof had not been reached, the Learned Magistrate elevated the evidential threshold beyond that required in civil cases. Rather than simply use the flexible standard to ask whether on the strength of the un- rebutted evidence presented by the Plaintiff it was more probable than not that the event occurred, the Learned Trial Magistrate embarked on a project to test the un-rebutted evidence produced against an unstated*

ideal mode of evidential proof."

9. The legal consequence of that misdirection was stated by the learned judge in terms that bear repetition:

> "*The practical effect of correctly utilizing the balance of probabilities test is that in cases where the Plaintiff adduces evidence which is unrebutted by the Defendant, the failure by the Defendant to call evidence has the effect of converting the evidence called by the other party, so long as credible, even if slender, into sufficient proof. So it was here.*"

10. It was on that finding that the learned judge set aside the judgment of the trial court and entered judgment in favour of the respondent for the sum of Kshs. 1,109,825.81.

11. Aggrieved by that decision, the appellant filed the instant appeal citing three grounds of appeal. That the High Court Judge erred in law and fact by:

    a. *Entering judgment against the appellant in circumstances where the respondent had not discharged the requisite standard of proof.*

    b. *Failing to consider the pleadings and evidence of the defendant and critically analyse the same and accord it due weight to the extent that it was able to prove its case.*

    c. *holding that the appellant had established a prima facie case based on its defence and evidence but failed to award as per the prayers sought.*

12. The appeal came up for hearing before us on 28th January 2026 at Nakuru. Learned Counsel Mr. Oumo appeared for the appellant. Learned counsel Ms. Chepngetich, appeared for the respondent. Both counsel relied entirely on their written submissions; the appellant's dated 22nd March 2024 and the respondent's dated 25th March 2024. It is against that background that the grounds of appeal and the parties' submissions fall to be considered.

13. Mr. Oumo, for the appellant, submitted that the respondent failed at every level to establish the primary elements of its claim: that the goods were ordered by the appellant, delivered to the appellant, and that an invoice was thereafter duly received by him. Counsel submitted that the only document produced by the respondent at the trial was an invoice, and that no Local Purchase Order, delivery note or acknowledgement of receipt was tendered in evidence. It was submitted that an invoice is merely a request for payment and a one-sided document recording a transaction; it does not, in itself, establish the existence of a contract or proof of delivery.

14. On the question of contract formation, counsel relied on the English Court of Appeal decision in **Entores v Miles Far East Corporation (1955) 2 QB 327**, in which Lord Denning held that no contract comes into existence unless and until an offer is communicated and acceptance is received by the offeror. The appellant invoked this authority for the proposition that, in the present case, no contract for the supply of goods had been established because there was no evidence of any order being placed by the appellant and no evidence of acceptance of any arrangement for the supply of goods on credit.

15. On the question of whether the High Court was justified in disturbing the findings of the trial Court, the appellant relied on **Mbogo and Another v Shah [1968] EA** and **Wachira Karani v Bildad Wachira (2016) eKLR** for the proposition that an appellate court may only interfere with the decision of a lower court where it is demonstrated that the court acted on a wrong principle, mistook the facts, took into account irrelevant matters, or failed to take into account relevant ones and submitted that none of those conditions had been

satisfied in the present case.

16. On its part, the respondent submitted that this being a second appeal, the sole legal question, in its submission, is whether the High Court erred in setting aside the decision of the Chief Magistrate's Court on the ground that the Magistrate had incorrectly elevated the evidential threshold beyond that required in civil proceedings. The respondent contended that the applicable standard is proof on the balance of probabilities, and relied on **Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR** for that proposition.

17. On the shifting of the evidentiary burden, the respondent relied on the majority decision of the **Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR**, for the proposition that while the legal burden remains constant with the plaintiff throughout the trial, the evidential burden shifts, and its position at any given time is determined by asking who would lose if no further evidence were introduced. The respondent submitted that once it adduced uncontroverted oral testimony and

documentary evidence, the evidential burden shifted to the

appellant, and that the appellant's complete failure to call any evidence, left that burden undischarged on his side.

18. The respondent anchored these submissions in the express provisions of sections 107 and 108 of the Evidence Act, which provide that whoever desires a court to give judgment as to any legal right or liability dependent on the existence of a fact must prove that fact, and that the burden of proof lies on the person who would fail if no evidence at all were given on either side. The respondent submitted that it had discharged that burden through the uncontroverted evidence of its Managing Director and the invoices produced, and that the appellant's failure to call any witness had the legal effect of converting that evidence into proof sufficient on the balance of probabilities.

19. In dismissing the appeal, two questions presented themselves for consideration: whether the Learned Trial Magistrate incorrectly elevated the standard of proof in civil proceedings and whether, in the absence of any evidence from the appellant, the respondent's uncontroverted evidence was sufficient proof on the balance of probabilities. We address

each in turn.

20. Before we do so, we state the jurisdictional compass that governs this Court on a second appeal. Under Rule 31(1)(a) of the Court of Appeal Rules 2022, this Court on a second appeal concerns itself principally with matters of law. It is not this Court's function to retry the facts or to substitute its own findings for those of the courts below, unless there is a demonstrable error of law that infected the outcome. The appellant bears the burden of demonstrating such an error. (See **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR**).

21. The standard of proof in civil cases is, and has long been, proof on the balance of probabilities. It is a flexible standard not a mechanical one. The question a court asks is a simple one: is it more likely than not that the events alleged by a party occurred? The court does not demand perfection of documentation. It does not impose a hierarchy of evidence. It asks, looking at the totality of what is before it, which version of events is more probable.

22. In the celebrated passage in **In re H (Minors) [1996] AC 563**, Lord Nicholls illuminated this standard by explaining that

the more improbable the event, the stronger the evidence required

before the court concludes that it occurred but the standard itself does not rise. As Lord Denning put it in **Miller v Minister of Pensions [1947] 2 All ER 372**, in civil cases, the law requires only that the evidence be sufficient for the court to say: "We think it more probable than not." The learned judge in the High Court was entirely correct in his statement and application of these principles, and we affirm them.

23. The trial court, in our view, fell into the very error the High Court identified. By subjecting the invoices to scrutiny for the absence of signatures, and then holding that failure to produce delivery notes and Local Purchase Orders was fatal to the respondent's case, she elevated the evidential threshold beyond what the law requires. The balance of probabilities test is not a documentary checklist. There is no rule of law that a claim for goods sold and supplied can only succeed upon production of a signed invoice, a delivery note and a Local Purchase Order. Each case turns on its own peculiar evidence.

24. The position is rendered more acute when one considers the

appellant's own statement of defence where, the appellant

pleaded in the alternative that all goods supplied to him were paid for upon delivery. That is not a denial of supply or delivery. By pleading in the alternative that he received and paid for the goods, the appellant effectively conceded that the goods may well have been delivered, which is the precise fact the Magistrate found unproven. The absence of signed invoices and delivery notes could not have been fatal where the appellant’s own pleading had already acknowledged the very delivery their absence was said to leave unproven. That was a fundamental misdirection. Consequently, the first issue is resolved against the appellant.

25. Beyond the question of the standard of proof, the appellant's conduct at trial raises a separate and equally determinative question on the legal consequence of his complete failure to adduce any evidence in support of his filed defence.

26. The position in law on this point is settled and unambiguous. Sections 107 and 108 of the Evidence Act are clear: the burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side. That burden lay with the

respondent. It discharged it by calling a witness who gave uncontroverted evidence of the transaction and producing documentary evidence in support.

27. Once the respondent discharged that initial burden, the evidential burden shifted to the appellant to adduce evidence in rebuttal. The appellant did not do so. He filed a defence but he called not a single witness to support it. He was directed to file written submissions and was granted ample time; he filed none. The practical and legal consequence of that sustained silence is not a matter of controversy. Where a party fails to call evidence in support of its case, the pleadings remain mere averments. A statement of defence, however carefully drafted, is not evidence. It does not, by its mere existence, constitute proof of the facts it asserts.

28. The appellant's counsel sought to argue before this Court, from the bar, that there was no relationship between the parties and no transaction whatsoever. That position was fundamentally at odds with the appellant's own pleading. A party cannot advance

a case that his own defence has already contradicted. The appellant was bound by his pleadings.

29. Similarly, the appellant invited this Court to make a finding that the respondent's failure to produce Local Purchase Orders and delivery notes meant the evidential burden never shifted to the appellant. With respect, that submission cannot be sustained. The shifting of the evidential burden is not contingent on the respondent producing any particular species of documentary evidence. It is contingent on the plaintiff adducing credible evidence, of whatever kind that establishes, on a balance of probabilities, the facts asserted. The respondent did that. The burden then shifted. The appellant chose silence. The legal consequence of that silence is well established and was correctly applied by the High Court.

30. We are fortified in our view by the consistent line of authority before this Court. In **Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] eKLR**, this Court held that;

> "*The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in*

rebuttal. This constitutes evidential burden. Therefore, while both the legal and

> *evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.*"

31. On the consequence of a defendant's failure to call evidence, this Court held in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter, Civil Appeal No. 23 of 1997**, that:

> "*In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.*"

32. This Court further held in **Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR** that before concluding that a plaintiff's case is proved on the balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced credible and believable evidence which can stand in the absence of rebuttal. That condition is fully met in the present case. The evidence of the respondent's Managing Director was credible, direct and

consistent throughout. The uncontroverted oral evidence and the invoices produced were, in the

circumstances, sufficient proof on the balance of probabilities that the goods were delivered and that the appellant failed to pay for them.

33. In the end, we find that the learned judge correctly identified and applied the standard of proof in civil cases and correctly articulated the legal consequence of the appellant's failure to adduce evidence. Every claim that passes through the doors of a court of law must, in the end, answer to evidence. Evidence is the acid test through which every case passes and the crucible in which assertion is separated from proof, and allegation from established fact. When a party enters the witness stand and speaks to matters within their knowledge, and the other side offers nothing in reply, the law does not leave the court without a compass. It provides one through Sections 107 and 108 of the Evidence Act. The law does not bend to accommodate a party who, having been given every opportunity to present his case, elected silence and then sought to reverse the outcome of that silence on appeal.

34. For all the reasons set out above, this appeal was dismissed with costs to the respondent on 28th January 2026.

It is so ordered.

Dated and delivered at Nakuru this 25th day of March, 2026.

M. WARSAME

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JUDGE OF

APPEAL J.

MATIVO

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed _

DEPUTY

REGISTRAR