



**Sukari Industries Limited v Ongele (Civil Appeal E067 of 2022)
[2024] KEHC 17036 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E067 OF 2022**

KW KIARIE, J

APRIL 30, 2024

BETWEEN

SUKARI INDUSTRIES LIMITED APPELLANT

AND

ALOICE OKWARO ONGELE RESPONDENT

*(Being an Appeal from the judgment in Ndhiwa Principal Magistrate's
SRMCC No.14 of 2016 by Hon. Mary A. Ochieng –Principal Magistrate)*

JUDGMENT

1. Sukari Industries Company Limited was the defendant in Ndhiwa Principal Magistrate's Court civil case No.14 of 2016. The respondent filed this lawsuit for a breach of contract claim and sought compensation for three unharvested cycles. On the 19th day of July 2022, Hon. Onzere presumably (for there is no lower court record) delivered the judgment on behalf of the trial magistrate, who ruled in favour of the respondent and ordered the appellant to pay Kshs.160, 800.00.
2. The appellant was aggrieved by the judgment and filed this appeal. The firm of Olendo, Olare & Samba Advocates LLP represented the appellant. The appellant raised the following grounds of appeal:
 - a. The learned trial magistrate erred in fact and in law in treating the evidence and submissions before him superficially and consequently coming to a wrong conclusion.
 - b. The learned trial magistrate erred in fact and law in ignoring the principles applicable in awarding damages and the relevant authorities on the quantum cited in the written submissions presented and filed by the appellant.
 - c. The learned trial magistrate erred in fact and law by awarding the respondent exemplary damages, yet the respondent did not plead for the award in the plaint.



- d. The learned trial magistrate erred in fact and law in finding that the respondent had proved his case on a balance of probability.
 - e. That learned trial magistrate erred in fact and law in ignoring the pleadings and submissions for the defence.
 - f. The learned trial magistrate erred in fact and law in failing to appreciate sufficiently or at all that the evidence tendered in favour of the appellant controverted and rebutted the respondent's evidence, thus lowering the respondent's probative evidentiary value.
 - g. Without prejudice to the foregoing, the award of damages in the circumstances was excessive.
3. The firm of Odingo & Company Advocates represented the respondent. The respondent opposed the appeal and contended that it was incompetent because the appeal record was incomplete.
 4. As the first appellate court, it is my responsibility to carefully review all of the evidence presented and consider that I did not have the opportunity to observe the witnesses testify and their behaviour. I will follow the principles outlined in the *Selle vs Associated Motor Boat Co. Ltd.* [1965] E.A. 123, which states that the first appellate court must examine and assess the evidence presented in the trial court and then come to its conclusions.
 5. When the record of appeal is incomplete, as in this case, the respondent is disadvantaged. The court may not be aware of what transpired in the proceedings, and the respondent may not be able to respond adequately. Order 42 Rule 13 (4) of the Civil Procedure Rules Provides:

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - (a) the memorandum of appeal;
 - (b) the pleadings
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
 6. On the 5th day of February 2024, Mr. Onyango, the advocate for the appellant, sought leave to file a supplementary appeal record within seven days. Leave was granted, but it was not filed.
 7. I, therefore, find that the appeal is incompetent and dismiss it with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF APRIL 2024

KIARIE WAWERU KIARIE

JUDGE

