Ngugi v Gitau & 2 others (Civil Appeal 81 of 2018) [2024] KEHC 9977 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 81 OF 2018

S MBUNGI, J

JULY 30, 2024

BETWEEN

SAMUEL KIARIE NGUGI .... APPELLANT

AND

SAMUEL GITAU .... 1ST RESPONDENT

ERNEST MWAURA KAMUNYA .... 2ND RESPONDENT

MONICA WAMAITHA NJOROGE .... 3RD RESPONDENT

JUDGMENT

1. This appeal arises from a decision of Hon. K. M Njalae (SRM) on a trial in which the appellant had sued the respondents for special damages on account of material damage caused to the appellant motor vehicle registration number KAL 085X following a road traffic accident of 29/10/13 involving the plaintiff's motor vehicle and the motor vehicle registration number KQU 827. After a full trial and consideration of the evidence and authorities cited to Hon. Njalae on 26/06/2019 awarded the plaintiff damages to be borne by the 2nd defendant and found liability wholly against the 2nd defendant while the claim against the 1st and 3rd defendant was dismissed with costs. That judgement triggered the present appeal as epitomised in the memorandum of appeal crafted as follows:-

    a. The learned magistrate erred both in law and fact in failing to hold that the appellant had proved his case on liability against the 1st and 3rd respondents on a balance of probabilities and proceeded to make an award in favour of the appellant.

    b. The learned magistrate erred in law and fact in holding that only the 2nd respondent was 100% liable and failing to uphold that the 1st and 3rd respondents were also severally and jointly liable to the appellant.

c. The learned trial magistrate erred in law and fact in failing to hold that the appellant was entitled to the reliefs claimed in the suit as against all the respondents.

d. The learned trial magistrate erred in both law and fact in dismissing the case against the 1st and 3rd respondent amidst overwhelming evidence to hold them liable.

e. The learned trial magistrate erred in law in proceeding under the wrong principles of the law relating to negligence, vicarious liability and undertakings and acknowledgement of liability.

f. The learned magistrate erred in law in failing to determine all issues placed before her for determination and/ or arising from the pleading and the evidence adduced by the parties.

g. The learned trial magistrate erred in law and fact in failing to appreciate the correct evidence adduced and tendered in court.

h. The learned magistrate misdirected herself in her analysis, interpretation and assessment of evidence and thus arrived at a wrong, erroneous and unjust conclusion and judgement.

i. The learned magistrate erred in both law and fact in failing to correctly evaluate the entire evidence given and failing to properly evaluate the appellants submissions.

j. The learned magistrate erred in law in her failure to give due regard to the appellants documentary evidence and in particular evidence to show that the 1st and 3rd respondents had admitted liability to the appellant.

k. The learned magistrate erred in law in basing her decision on extraneous factors.

l. The learned magistrate erred in law in entering a judgement on ;liability as against the 1st respondent without making a specific award on quantum and hence rendered an inconclusive and enforceable judgement.

m. The decision in its entirety is against the evidence adduced before the trial court.

n. The entire decision is contrary to law and a misapprehension of the law.

2. The appeal was canvassed by way of written submissions. The appellant vide its submissions dated 14th May 2024 gave brief facts of the case and identified issues for determination to be as follows:-

a. Whether the 1st respondent is vicariously liable for the acts and omissions of the 2nd respondent?

b. Whether the 3rd respondent agreed, admitted and bound herself to settle the amount owed to the appellant?

c. In the circumstances whether the respondents are jointly and severally liable for the damages caused on the motor vehicle registration number?

d. Who should bear the cost of this appeal?

APPELLANTS SUBMISSIONS

3. The appellant submitted that the 1st respondent was vicariously liable for the acts and omissions of the 2nd respondent relying on a plethora of cases that the 2nd respondent was at the time of the accident an employee of the 1st respondent. He further submitted that the 1st respondent was liable on the account that there existed a valid employer- employee relationship between the 1st and 2nd respondent. The 2nd respondent is faulted on the account that during the course of his employment he negligently

drove the appellants motor vehicle registration number KAL 085X and caused it to violently ram into motor vehicle registration number KQU 827. The 1st respondent was to be found vicariously liable since the accident occurred during the course of the 2nd respondent duties.

4. They further submitted that the 2nd respondent was liable since he breached the duty of care owed during the course of his employment and subsequently the appellant suffered damages.

5. They further submitted that the appellant entered into an agreement with the 1st respondent who admitted liability and committed and undertook to repair the appellant's motor vehicle. The import of the agreement was that it created a binding contract between the 1st respondent and the appellant. The said contract was never terminated or rescinded and further throughout the trial as the 1st respondent never raised any vitiating factors that prevented him from the performance of his obligations under the said contract.

6. By virtue of this the 1st respondent was to be found liable. There was no express or implied agreement between the appellant and the 1st respondent to exclude him from liability or limit him from liability.

7. On the basis of admission there was also no assertion of coercion or undue influence in making the admissions and therefore the 1st and 3rd respondent cannot therefore be heard to be made refuting the existence of liability to the appellant. The 3rd respondent equally admitted liability under oath on cross examination when she confirmed that she had via the letter dated 14th January 2014 that she would meet the cost of repairs and even went ahead and paid a deposit of Kshs. 20,000/.

RESPONDENTS SUBMISSIONS

8. The respondents chose not to escalate themselves further in the matter.

ANALYSIS AND DETERMINATION

9. Having considered the submissions, this is the view I form of this matter. This being a first appellate court, as was held in Selle –vs- Associated Motor Boat Co. [1968] EA 123:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

10. In Coghlan vs. Cumberland (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgement appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgement is wrong.When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite

apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

11. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

12. However, as was appreciated in Peters –vs- Sunday Post Limited [1958] EA 424:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the court of appeal) of having the witnesses before him and observing the manner in which their evidence is given… Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears form the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question….it not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

13. It was therefore held by the Court of Appeal in *Ephantus Mwangi & Another –vs- Duncan Mwangi, Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that
>
> (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or
>
> (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

14. In this appeal, it is clear that the determination of the appeal revolves around the question of liability. That the burden of proof was on the appellant to prove his case. Section 107 (1) of the *Evidence Act*, provides that:

> "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

15. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

16. The two provisions were dealt with in Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> "As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

17. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, depending on the circumstances of the case.

18. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

19. Further the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

20. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> "In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

22. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> "Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degre e of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

23. As was held by the Court of Appeal in Micheal Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR:

> "The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley vs. Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> > 'To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

24. In this case it is the evidence of the appellant that the 1st respondent undertook and committed himself in writing to effect repairs on the appellant motor vehicle together with the 3rd respondent and that later on the 1st and 3rd respondent recused themselves on the obligation of effecting repairs and stated that the responsibility remained with the 2nd respondent solely. It is also the evidence of the appellant that he resolved to take charge of the repairs of his motor vehicle which was extensively damaged and he incurred expenses to repair the same. The respondents had denied the appellants claim denying the occurrence of the alleged accident and any responsibility thereof, and that if the accident occurred then it was attributed to the 2nd respondent while acting on his own frolic. The appellant had sought loss of user for the period his motor vehicle wasn't in use as he was a farmer. He also alleged that the 1st and 3rd respondents had accepted liability.

25. The 1st respondent testified that he had employed the 2nd respondent and had no permission to drive a client's vehicle and on that material day he was not at work. He confirmed having written the agreement upon agreeing with the 3rd respondent and her husband and that the 2nd respondent then took responsibility. He also testified that the 3rd respondent took over since the 2nd respondent had no money.

26. The 3rd defendant denied the occurrence of the accident based on the fact that her brother, the 2nd respondent, could not drive. She repaired the motor vehicle and instructed the appellant to deduct the amount from the 2nd respondent's salary as he was to take responsibility. She also testified that she had agreed to help settle the cost of repairs by virtue of the 2nd respondent being her brother.

27. The trial court in making its determination found that the accident indeed occurred and apportioned liability to the 2nd respondent solely and absolved the 1st and 3rd respondent of any liability whatsoever and found that the agreement was not binding upon them. "That being the owner of a garage does not mean that as an individual he is liable for any wrong doing done within the premise of his business."

28. In this case this court is being called upon to interfere with the trial court's finding of liability. In Khambi and Another vs. Mahithi and Another [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

29. That seems to have been the position in Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

30. It is not disputed that indeed the accident occurred despite there not being a police abstract, any investigators report to confirm the same or police sketch plan or photograph of the scene availed before the trial court. The accident as it occurred was caused by the 2nd respondent who drove the motor vehicle which was left at the carwash by the appellant. The question is whether the 1st and 3rd respondents are vicarious liable for the acts of the 2nd respondent by virtue that the 1st respondent was the employer to the 2nd respondent, and the 3rd respondent was her sister who accepted liability by virtue of an agreement which was to oversee the cost of repairs effected accordingly.

31. As regards the issue of vicarious liability, it was held in Kansa vs. Solanki [1969] EA 318 that ;

> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 557.) This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

32. What elements have to be proved before one can be made vicariously liable for the torts of another?

First there must exist a relationship between the two persons which made it proper for the law to make the one pay for the fault of the other. Second there was the connection between that relationship and the tortfeasor's wrongdoing, where the tort had to be committed in the course or within the scope of the tortfeasor's employment which has now been broadened. Further in the case of P.J Dave Flowers Ltd v David Simiyu Wamalwa (2018) eKLR it was held that-;

> "The employer is made vicarious liable for the tort of his employees not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it was a case in which the employer having put matters into motion should be liable if the motion that he had originated lead to damages to another. It also held that the burden of proving a claim anchored on torts of negligence or breach of statutory duty of care rested on the claimant throughout the trial on balance of probabilities."

33. Similarly in the case of Edward Mungai Waweru v Samson Ochieng Kagunda & another (2017) eKLR, it was held that;-

> "The law would permit the recovery of damages by a person for torts committed by another where the relationship between them and the interest of the one in the conduct of the other was such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or where in the eye of the law the one was in the position of the owner's servant."

34. Was the 2nd respondent using the car at the material time at the request of the 1st respondent or on his instructions?

    ii) if so was he driving the car in performance of a task or duty delegated to him by the 1st respondent?

    On the facts the first question must be answered firmly in the negative. Not only was the 2nd respondent not using the car at the time of the accident at the 1st respondent request or the appellant's but he drove the said car furtively against any instructions. In view of the answer to the first question the second does not arise.

35. The appellant left his car at the premise of the 1st respondent where the 2nd respondent tasked with washing it drove the said car on his own frolic and caused it to ram into another motor vehicle. In the present appeal the 2nd respondent was not driving the vehicle as a servant or agent of the 1st respondent. The 2nd respondent was not driving for the benefit of the 1st respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit and interest. In the upshot vicarious liability against the 1st respondent must fail as there is no nexus to apportion liability. The 2nd respondent is solely to blame for the accident that occurred during his own frolic.

36. The 3rd respondent is sued jointly on the basis that she and the 1st respondent undertook and committed themselves to effect repairs on the appellant's vehicle via an agreement dated 29th October 2013. Thereafter the 1st and the 3rd respondents recused themselves from effecting repairs contrary to the agreement they made prior. I do find that the agreement was binding notwithstanding that the 3rd respondent stopped payment when the appellant failed to deduct the amount from the 2nd respondent salary.

37. The Supreme Court of the United Kingdom in the case of RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh & Co KG (UK Production) [2010] UKSC 14,[45] held that;-

> "The general principles are not in doubt. Whether there is a binding contract between the parties and if so, upon which terms depends upon what they have agreed. It depends not upon their subjective state of mind but upon a consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations. Even if certain terms of economic or other significance to the parties have not been finalised an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

38. The case law may only be of persuasive value but they set out sound and the correct legal principles applicable to common law jurisdictions on contract law. What is for review presently is what the parties said and did and from the material before me infer whether there existed an objective intention as expressed to each other to have a mutually binding contract. Submissions of course do not constitute

evidence, besides the court should not make findings on matters not pleaded. It is common cause and trite law that not all agreements need be in writing. An agreement will be deemed duly formed and binding where there consideration is present and acceptance having been offered. An agreement also need not be in any special form or writing unless statute expressly provides for it. Where therefore parties reach an agreement on all the terms of the contract they regard (or the law requires) as essential, a contract is deemed to have been formed. What is deemed essential is the legal minimum to create a contract; these are the intention to create legal obligations and consideration. Other terms are secondary as far as formation of a contract is concerned. Parties may agree to any terms and the court will, once it is shown that the parties agreed and valid consideration exists, always hold the parties to their bargain.

39. The import of the agreement dated 29/10/2013 was for the respondents to effect repair of the appellants car. The 3rd respondent paid kshs. 20,000/ and stopped payments thereafter. It is my considered view that there was part performance of the agreement. The partial performance and acceptance of monies by the appellant was clear evidence of the parties intention to be bound as under the agreement. It is also my considered view that there existed a legal and binding agreement between the parties and that the agreement is not vitiated by any factor and finally that there was part performance of the agreement when the amount of Kshs. 20,000/ was paid to the appellant which he accepted, instead the parties(the 1st and 3rd respondents) have shown to have breached the agreement.

40. I am aware that specific performance is a discretionary remedy and the court has a choice and is entitled to consider whether it would be fair to grant it in any particular circumstances.

41. Forthwith the 1st and 3rd respondents shall complete their part of the bargain as espoused in the agreement dated 29/10/2013 for repairs of the appellant's motor vehicle. Therefore the appeal succeeds as prayed

42. given the history of the matter, 2nd defendant is to bear the costs of the appeal for 1st and 3rd respondent were messed by the 2nd respondent

SIGNED, DELIVERED & DATED AT KAKAMEGA VIRTUALLY THIS 30TH DAY OF JULY 2024.

J. S. MBUNGI

JUDGE.

In the presence of: -

Ms Ngigina for the Appellant – Present

Respondent – Absent

Court Clerk – Elizabeth Angonga