



**Mwambichi v Mwaluma (Civil Appeal 240 of 2017)  
[2023] KEHC 27604 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 27604 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 240 OF 2017  
F WANGARI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**HANNINGTON MWAMBICHI ..... APPELLANT**

**AND**

**DAVID MWALUGHU MWALUMA ..... RESPONDENT**

*(Being an appeal from the Entire Judgment and Decree of Honourable A.S Lesootia,  
Senior Resident Magistrate in Mombasa SRMCC No. 475 of 2003 Hannington  
Mwambichi v David Mwalughu Mwaluma delivered on the 19th October, 2017)*

**JUDGMENT**

1. This is an appeal from the Judgment and Decree of the Learned Senior Resident Magistrate Hon. A.S. Lesootia in Mombasa SRMCC 475 of 2003 given on 19<sup>th</sup> October, 2017.
2. The Appellant appealed on the whole judgement and proceeded to set out seven (7) grounds against the judgment delivered by the Court.
3. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
4. This was aptly stated in the cases of *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

5. In *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that: -

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this 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 allowances in this respect”

### **Pleadings**

6. The Plaintiff (Appellant herein) instituted a suit against the Defendant (Respondent herein) seeking delivery up to the motor vehicle or payment of Kshs. 735,563/= its value, interests, costs of and incidental to the suit and any other or further relief this Honourable Court deems fit to grant. It was pleaded that at all material times to the suit, the Appellant was the owner of an unregistered motor vehicle chassis number KRGE 24 – 003618, white Nissan Hormy valued at Kshs. 735,563/=.
7. By an oral agreement made on or about February, 2002 between the Appellant and the Respondent, it was agreed that the Appellant delivers to the motor vehicle to the Respondent’s garage at Majengo/ Sparki Area, Mombasa for service.
8. It was averred that the Respondent wrongfully and without the consent, permission and/or authority of the Appellant drove the motor vehicle to Kisauni, Mombasa where the Respondent resides for reasons unknown to the Appellant and thereafter informed the Appellant that the motor vehicle had been stolen.
9. It was thus averred that the Respondent was in breach of contract by converting the motor vehicle to his own use thus depriving the Appellant of its use and benefit. Accordingly, the Appellant lost the vehicle and he thus claimed the value of the motor vehicle.
10. The claim was defended. A statement of defence dated 20<sup>th</sup> February, 2003 was filed on 21<sup>st</sup> February, 2003. In the said defence, the Respondent denied that the vehicle was valued at Kshs. 735,563/= as according to him, the motor vehicle was a ramshackle of a motor vehicle as it was with dire need of mechanical and body repairs.
11. He denied owning any garage at Majengo/Sparki Area of Mombasa as well as existence of any agreement oral or otherwise. He thus prayed that the suit be dismissed with costs. The matter went through the usual motions and the same was finally heard and a judgement was delivered on 19<sup>th</sup> October, 2017 dismissing the suit. It is this decision that precipitated the present appeal.

### **Evidence**

12. The Appellant (PW1) testified on 13/6/2017. In summary, he stated that sometimes in 2001, he had a plan to import a motor vehicle from Dubai. His friend, one Saleh Nasir promised to assist him get a



motor vehicle from Dubai. After importing the motor vehicle on 8<sup>th</sup> February, 2002, he took the motor vehicle to the Respondent's garage for servicing and fitting.

13. The Respondent later told him that the vehicle had been stolen. He was told by the Respondent that he had taken the motor vehicle to Kisauni where he had placed it and it was stolen in the night of 8/2/2002. The matter was reported at Nyali Police Station and he thereafter sought to have the Respondent pay or compensate him but the Respondent refused.
14. According to him, he had left the motor vehicle in the hands of the Respondent who had assured the Appellant that it was safe before he left the vehicle with him. He produced several documents among them a sale agreement dated 21/11/2001.
15. On cross examination, he stated that the motor vehicle neither had a registration number yet nor a log book. He added that he had incurred a total sum of Kshs. 735,563/=. Referred to the sale agreement, he stated that the agreement was for Kshs. 400,000/= and that he had no other receipts in court.
16. He stated that he had no evidence that the Respondent owned the garage where he had taken the car. He added that he was to pick the car in the evening but the Respondent assured him that it will be safely kept. He further stated that he did not know where the Respondent was to keep the motor vehicle. He narrated that the Respondent had other mechanics in the garage as he was the owner and in charge of the other mechanics.
17. He confirmed that it is the Respondent who reported to the police that the motor vehicle had been stolen and that he did not prefer any criminal charges against the Defendant.
18. Lastly, he stated that he did not know where the Respondent resided. On re-examination, he stated that he was yet to process the log book and the registration plates of the motor vehicle but that he had left the vehicle in the hands of the Respondent. He reiterated that it was the Respondent who reported the matter to the police. That marked the close of the Appellant's case.
19. The Respondent sought for time for defence hearing but the same was declined for reasons that he had not filed any documents. The defence case was thus closed. However, an application was thereafter made to re-open the defence case and the Respondent be allowed to file its statement and documents. The same was allowed.
20. The Respondent testified on 25/7/2017. He stated that in the year 2002, he was staying in Kisauni. He was a mechanic operating near Sparki Area which was an open air garage with several other mechanics. The Appellant brought a motor vehicle for repair. He examined the motor vehicle and noted that it had several defects among them springs and clutch. He thus asked for some spare parts from the Appellant.
21. The repairs were done and in the process, the Respondent learnt that the Appellant was staying in Magongo and that the vehicle could not be driven there. He told the Appellant that he did not have a safe parking but the Appellant told him to find a safe place. He thus took the motor vehicle to Kisauni Filling Station which was near his home.
22. In the morning when he went for the vehicle, he noted that it was not there. He went to Kisauni Police Station but he was told to go to Nyali Police Station as it was the one with the requisite jurisdiction. He thereafter informed the Appellant and he got agitated saying that he could not allow his car to go up and his sweat to go down the drain.
23. Upon reporting, two police officers assisted him to look for the vehicle. They searched Mombasa, Kilifi, Malindi, Msambweni, Nyeri, Nairobi, Taveta and even Tanzania. He denied stealing the vehicle and that the vehicle's keys had been handed over to Nyali Police. He confirmed that he was not charged for



- stealing the motor vehicle. He reiterated that he left the motor vehicle at the filling station, a fact the Appellant knew very well. He thus prayed for the dismissal of the suit.
24. On cross examination, he denied being involved in the disappearance of the motor vehicle as the same had been left in a Filling Station. He confirmed that he was not accompanied by the Appellant when he went to park the vehicle and that he did not know the Appellant until he brought the vehicle. He further stated that the motor vehicle was not registered and that he did not know for how long the vehicle had been in the country.
25. He stated that though the motor vehicle was mobile, it was moving with difficulty and that it is not unusual to get imported vehicles that are defective. He added that there was no agreement that the motor vehicle be parked at a specific filling station and that he never colluded with any other person to steal the Appellant's motor vehicle. He concluded that he was now a garage owner not far away from where the motor vehicle was stolen. The defence case was thereafter closed.
26. Both parties filed their submissions before the Trial Court and judgement subject of this appeal was delivered on 19<sup>th</sup> October, 2017. As stated above, the suit was. I note that there was a notice to show cause to have the appeal dismissed for want of prosecution. However, by the time the same came up for hearing, the Appellant had already filed the record of appeal and I thus exercised my discretion to delve in the substantive appeal rather than the notice to show cause. Neither of the parties filed their submissions on the appeal.

### **Analysis and Determination**

27. I have carefully considered the pleadings, evidence, submissions, judgement, the grounds of appeal and the law and accordingly, the following are the issues for determination: -
- a. Whether the appeal is merited;
  - b. Who bears the cost?
28. On the first issue, it is trite that he who alleges must prove. In the present case, it was the Appellant's duty to prove his case on a balance of probabilities. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 the Court of Appeal had the following to say: -
- “...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 case 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...”
29. The ownership of the motor vehicle is not in question. Similarly, the fact that the motor vehicle was delivered to the Respondent for repairs is not in dispute. However, what is in dispute is whether the Respondent had the authority to park the motor vehicle where he alleges to have parked. Having reviewed the evidence on record, it is not in dispute that there was no specific agreement as to where the motor vehicle was to be parked overnight.
30. Considering that the only witnesses that testified were the Appellant and the Respondent, this was a case of one's party's word against the other with no corroboration whatsoever. In *Alex Muriithi Nkanda v National Police Service Commission & 2 others* [2021] eKLR, the court while dealing with a case of one's words against the other held as follows: - “...This is a case of your word against mine. In this circumstances, matter is decided on a balance of probabilities...”



31. The balance of probability was defined in the case of *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR where it was held thus: -

“...when the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other...”

32. Putting the facts and the law into perspective, there was no agreement as to where the motor vehicle was to be parked. The Respondent in his view decided to drive it to a Filling Station next to his residence. Once he discovered that the motor vehicle was missing, he took an initiative to look for the same including going all the way to Tanzania.

33. The police officers who were involved in the search were satisfied that the Respondent had nothing to do with the disappearance of the motor vehicle and that is the reason they did not prefer any charges against the Respondent. In the circumstances therefore, I have no reason to depart from the Trial Court’s judgement and I thus proceed to uphold the Lower Court’s judgement. It is thus this court’s view that the appeal herein lacks merit.

34. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the *Civil Procedure Act*. However, the court retains its discretion to order otherwise. In the circumstances, though the Respondent has succeeded, I direct that each party to bear their own costs.

35. Flowing from the foregoing, I proceed to make the following orders: -

- a. The appeal is found to be without merit and it is hereby dismissed;
- b. Each party to bear their own costs.

Orders accordingly

**DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

.....

**F. WANGARI**

**JUDGE**

In the presence of:

N/A by the Appellant

N/A by the Respondent

Barile, Court Assistant

