Christopher Sinare t/a Kimala Enterprises v Kamau (Civil Appeal 241 of 2018) [2022] KEHC 17075 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 17075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 241 OF 2018

MN MWANGI, J

JULY 29, 2022

BETWEEN

CHRISTOPHER SINARE T/A KIMALA ENTERPRISES .... APPELLANT

AND

JULIA WANJIRU KAMAU .... RESPONDENT

(n Appeal from the judgment of Hon. E. M Kagoni, Senior Resident Magistrate, delivered on 25th October, 2018 in Mombasa CMCC No. 1272 of 2016)

JUDGMENT

1. The suit against the respondent in the lower Court was that on the September 2, 2015, the appellant entered into an agreement with the respondent to collect cooking oil worth Kshs. 1,400,500.00 at the premises of Pwani Oil Products in Mombasa and transport the same to Taveta using her motor vehicle registration number KBW 149P Mitsubishi. That on the said date, the cooking oil was loaded on the said motor vehicle and the respondent directed her driver to deliver the same to Taveta onSeptember 23, 2015 but the cooking oil was never delivered. The appellant averred that it was a term of their agreement that the respondent would be liable for any loss or damage which would occur during the transportation exercise.

2. On July 29, 2016, the respondent filed her statement of defence where she denied the contents of the appellant's plaint and averred that her driver never took any documents to her showing that he had entered into an agreement with the appellant to collect or transport any goods for him. She further averred that on September 22, 2015, she had travelled to Tanzania and was not aware or privy to any arrangements between her driver and the appellant herein.

3. The respondent stated that on September 22, 2015, she received a call from her driver at about 5:30p.m., informing her that they had been involved in a road traffic accident at Mackinnon area. That a few minutes later she received a call from one Onesmus who informed her that the appellant's wife

had called him saying that the appellant had goods, in her motor vehicle and was requesting her to assist in rescuing the goods a fact that she was not aware of. She further stated that she requested the appellant's wife to send her motor vehicle to go and collect the goods but she refused saying that her motor vehicle had another cargo.

4. The respondent further stated that by the time she arrived at the scene of the accident, the goods had already been stolen. She stated that she has never received any payment or documents of payment from the appellant over the said cargo and usage of her motor vehicle. The respondent stated that if the motor vehicle was used to transport the appellant's goods, the same was done without her authority and with the connivance of the appellant hence she is not liable for the same.

5. In the lower court, judgment was delivered on October 25, 2018, where the court held that without evidence showing the cause of the accident, it becomes difficult for the court to find the defendant liable as the goods were lost as a result of looting by members of the public. Consequently, the trial court found that the defendant was not liable for the loss and dismissed the appellant's suit with costs to the respondent.

6. The appellant was dissatisfied by the decision of the Trial Magistrate and onNovember 23, 2018, he filed a Memorandum of Appeal raising the following grounds of appeal-

    1. That the trial court erred in law and fact in failing to find that the respondent was not liable for the loss of the appellant's goods;

    2. That thetrial court erred in law and fact in failing to find that it was a term of the contract between the appellant and the respondent that the respondent would be liable for the loss or damage of the appellant's goods which would ensue during the transportation exercise;

    3. Further to ground 2 above, the trial court erred in law and fact in holding that the appellant did not prove that it was a term of the contract that the respondent would be liable for the loss or damage of the appellant's goods which would ensue during the transportation exercise solely because there was no written contract between the appellant and the respondent to that effect;

    4. That the trial court erred in law and fact in holding that the appellant could only be remedied for the loss of his goods if he had issued his goods (sic);

    5. That the trial court erred in law and fact in finding that without evidence showing the cause of the accident which resulted in the loss of the appellant's goods, the respondent could not be held liable for the loss of the appellant's goods yet the respondent was wholly in charge of the transportation of the appellant's goods;

    6. Further to ground 5 above, the trial court erred in law and fact by failing to find that the respondent did not prove the cause of the accident which resulted in the loss of the appellant's goods when the burden to prove the aforesaid act was upon the respondent;

    7. That the trial court erred in law and fact in failing to find that there can never be a wrong and/or loss without a remedy; and

    8. That the trial court erred in law and fact in arriving at a decision that was wholly against the weight of the evidence and the law.

7. The appellant's prayer is for this court to allow the appeal with costs and set aside the judgment/decree of the Senior Resident Magistrate's Court at Mombasa (Hon. E.M Kagoni) dated and delivered onOctober 25, 2018in Mombasa CMCC No. 1272 of 2016 and in lieu thereof, the prayers in the plaint dated July 6, 2016be allowed as prayed.

8. The appeal herein was canvassed by way of written submissions. The appellant's submissions were filed on February 17, 2020 by the law firm of Gikandi & Company Advocates whereas the respondent's submissions were filed by the law firm of Munyithya, Mutugi, Umara & Muzna and Company Advocates on August 4, 2020.

9. Ms. Murage, learned Counsel for the appellant submitted that transportation and safe delivery of the appellant's goods by the respondent to Taveta was a fundamental requirement of the contract entered into by the parties herein. She further submitted that the contract of carriage was one of strict liability and the respondent having admitted that it was a carrier contracted to carry the appellant's goods for gain, she was under strict liability to deliver the goods as agreed. Ms Murage relied on the case of *H.N Kariithi v Vivek Investments Ltd* [2011] eKLR, where the Court defined the duty imposed on a common carrier. She contended that a common carrier is liable to indemnify the owner of the goods in case of any loss or damage to the goods during carriage or at any time under the possession of the carrier, and therefore, the respondent is responsible for the loss that the appellant suffered

10. It was submitted by Ms. Murage that the respondent failed to prove the cause of the accident which resulted in the loss of the appellant's goods since it was upon her to provide evidence showing the cause of the accident. To this end, she cited the case of *William Cheruiyot Kandie v Republic* [1997] eKLR, where the Court held that whoever fails to produce relevant evidence in his position means that the evidence if produced would be prejudicial to his case.

11. Ms. Murage submitted that thecourt is only supposed to rule on the evidence presented by the parties and not introduce its own theory of evidence. She further submitted that the appellant tendered evidence that his goods were never delivered to him by the respondent as per the agreement and as a result, the appellant suffered loss of his goods valued at Kshs. 1.400,500.00, which value is ascertainable from the exhibits produced by PW3 in form of invoices and payment receipts issued by Pwani Oil Products to the appellant.

12. Mr. Mutugi, learned Counsel for the respondent submitted that from the evidence before court, there was neither a written nor an oral agreement between the parties herein, and at no time did they meet to discuss a contract or carriage of goods. She submitted that there was lack of privity of contract between the appellant and the respondent. He further submitted that the dealings between the appellant and the respondent's driver were illegal as they were not sanctioned by either the respondent or her Manager. He stated that the respondent did not hold herself out as a transporter ready and willing to carry any goods as a business, and as such, the court cannot impose a contract which does not exist to the parties in the suit herein.

13. He contended that whereas the driver was the respondent's employee, he did not have authority to enter into any contract on behalf of the respondent. He stated that the evidence on record shows that the motor vehicle in question was used for transporting the respondent's goods and in the event of transportation of anything besides her goods, she had a Manager who would deal with any customer. He stated that since the arrangement between the appellant and the respondent's driver did not fall within this scope, the respondent could not be vicariously liable for her driver's illegal acts. Mr. Mutugi relied on the case of *Jane Wairimu Turanta v Githae John Vickery & 2 others* [2013] eKLR, to support his submission in that regard. .

14. It was submitted by Mr. Mutugi that under the common carrier doctrine, a transporter is liable for loss or damage arising out of her act of negligence. He also referred to the case of *P N Mashru Transporters Limited v Rayshian Apparels Limited* [2016] eKLR, where the Court of Appeal held that the liability of a common carrier begins when he has accepted goods for carriage and once he assumes the goods

for carriage. He submitted that in the absence of an undertaking, readiness and acceptance by a carrier, such a carrier cannot be found to be liable in any manner or form.

Analysis And Determination.

15. This court is alive of its duty as the first appellate court, which duty was restated in the case of *Selle and another v Associated Motor Boat Company Ltd & others* (1968) E A 123 -126 (CA-2) as hereunder-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which 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 demeanor of a witness is inconsistent with the evidence in the case generally."

16. I have re-examined the entire Record of Appeal and given due consideration to the submissions by the parties' respective Counsel. This court will only interfere with a lower court's judgment if the said court misdirected itself on the facts of the case or the applicable law. This was the Court of Appeal's holding in *Mkube v Nyamuro* [1983] LLR, 403-415, at 403 where JA, Kneller & Hannox Ag JJA held that;

> " Acourt on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

17. The issue that arises for determination herein is whether there was a contract of carriage between the appellant and the respondent and if there was, if there was breach of contract.

18. The appellant's claim is for a refund of Kshs. 1,400,500.00 being the cost of the cooking oil which was loaded on the respondent's motor vehicle. This being a claim for special damages, they must not only be specifically pleaded but also strictly proved. I am guided by the Court of Appeal holding in the case of *Hahn v Singh* [1985] KLR 716 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

19. The appellant who testified as PW1 contended that on 21st September, 2015, he wanted to transport cooking oil from Mombasa to Taveta and so he approached one Nzomu a broker who offered to organize for the transport. That Nzomu introduced him to the driver of the lorry which was to transport the cooking oil, who in turn introduced him to the owner of the said lorry, one Julia Wanjiru. He averred that he discussed the terms with the respondent in the presence of Nzomu the driver (sic), and that the respondent agreed to transport the goods. That an agreement was done and the respondent gave him the driver's details after which the appellant sent an email to the company which had the goods to allow them to release the goods.

20. The appellant produced a copy of the letter of instructions which indicated that the respondent was the transporter, and the driver was Stephen Mtinda. The said letter also indicated that cooking oil valued at Kshs. 1,400,500.00 ('the goods') was to be loaded on September 22, 2015from Pwani Oil Products factory in Jomvu, Mombasa. PW1 stated that upon loading the goods, the driver was given the delivery note and weighing ticket from Pwani Oil Products factory which indicated that the number plate of the vehicle was KBW 149P. He further stated that the goods were to be delivered either on September 22, 2015orSeptember 23, 2015but they were never received.

21. In re-examination, the appellant stated that he did not have a written transport contract with the respondent and that the cargo was not insured. He further stated that he was not aware that the said motor vehicle was involved in an accident and he did not report the theft to the police.

22. PW2 a representative from Pwani Oil Products factory testified that the appellant paid Kshs. 1,378,565.20 for the goods. PW3 testified that he took the respondent to the appellant's shop and left them to agree on the terms.

23. The respondent testified that on September 20, 2015she went to Tanzania with her motor vehicle registration No. KBW 149P and loaded it with beans destined for Likoni. That she dispatched the said vehicle and the following day the shop attendant one Boniface Maingu informed her that the goods had been delivered. That at around 3.00 p.m., the Turn Boy asked for cash to fuel the car and she advised them to fuel. That she paid for the fuel through the petrol station's number and went out of network. She stated that her driver was called Mutinda Nzoia.

24. She further testified that the following day at about 5. 00 a.m., she received a call from her driver who informed her that the said motor vehicle had been involved in an accident. That she immediately went to the scene of the accident with Stephen Muchiri, a mechanic and while on her way, she received a call from a police officer who asked her to rush to the scene because the goods in the lorry were being looted. She stated that thereafter, she called her contact called Muli and they got to the scene at about 9.00 a.m. The respondent produced a copy of the police abstract. She testified that she knew the appellant but she never had a discussion with him regarding transport of cooking oil from Mombasa to Taveta.

25. The appellant herein alleged that he got into an oral contract with the respondent for transport of cooking oil worth Kshs. 1,400,500.00 from Mombasa to Taveta using the respondent's motor vehicle registration number KBW 149P. The appellant's witness who allegedly took the respondent to the appellant's shop testified that he left them at the shop to agree on the terms. The respondent on the other hand contends that she had no discussion with the appellant regarding transport of cooking oil from Mombasa to Taveta and that the appellant's goods were in her vehicle illegally since her driver was not authorized to get into agreements for transport without her express consent.

26. Given the said circumstances, this court has to determine whether there existed a contract between the appellant and the respondent, written, implied and/or oral for transport of cooking oil from Mombasa to Taveta. It is trite law that for a valid contract to exist, the appellant has to demonstrate to this court that an offer was made, there was acceptance of the said offer and consideration for performance of the said contract. It therefore has to be seen that the parties herein had an intention to create legal relations. In *Garvey v Richards* [2011] JMCA 16 Harris JA made the following observation when dealing with the essential components of a contract-

> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable essential terms

governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

27. It is not disputed that the appellant purchased cooking oil from Pwani Oil Products factory and that the respondent is the owner of motor vehicle registration number KBW 149P which was transporting cooking oil from Mombasa when it got involved in a road traffic accident. It is also not disputed that the cooking oil was looted and/or stolen by members of the public after the said accident occurred.

28. The appellant in his examination-in-chief contended that he entered into an oral agreement with the respondent and they discussed the terms of the said agreement in the presence of PW3 and the respondent's driver. PW3 during examination-in-chief stated that he took the respondent to the appellant's shop and left them to agree on the terms. The respondent on the other hand contended that she was in Tanzania on 21st September, 2015 hence there was no way she could have gone to the appellant's shop physically. The respondent further stated that her driver had no authority to get into any contracts for transport of goods on her behalf.

29. This being a civil suit, the appellant had to prove his case on a balance of probabilities. It is evident that neither PW2 nor PW3 corroborated the appellant's testimony as to the existence of the contract between the appellant and the respondent. PW3 could not testify as to the contents of the alleged meeting between the appellant and the respondent as he stated that after he took the respondent to the appellant's shop, he left them to discuss the terms. He was therefore not privy to the contents of the discussions therein.

30. I am of the considered view that from the evidence on record, the appellant got into a contract with the respondent's driver who would have been in a better position to confirm whether or not he received instructions from the respondent. As correctly submitted by the appellant's Counsel, whoever fails to produce relevant evidence to support his case means that if the evidence would have been produced it would have been prejudicial to his case. That was the position taken by the court in the case of *William Cheruiyot Kandie v Republic* [1997] eKLR. The respondent's driver, Stephen Mutinda, was however not called as a witness by the appellant to corroborate his case that it was the respondent who instructed him to collect the cooking oil for transportation.

31. This court finds that the appellant failed to prove, demonstrate and/or establish the three elements that constitute a contract. He failed to prove that there was a contract of any kind between him and the respondent for transportation of cooking oil from Mombasa to Taveta. Since he failed to prove the existence of a valid binding contract and/or the intention to create legal relations him and the respondent, the respondent cannot be held liable as a result of the loss of the cooking oil.

32. The upshot is that the appeal herein lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29TH DAY OF JULY, 2022.

Judgment delivered through Microsoft Teams online platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ondego holding brief for Mr. Gikandi for the appellant

Mr. Mutugi for the respondent

Mr. Oliver Musundi – Court Assistant.