



REPUBLIC OF KENYA



KENYA LAW
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**Kinyua v Kipseremelly (Civil Appeal E021 of 2023)
[2025] KEHC 2323 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E021 OF 2023
AN ONGERI, J
FEBRUARY 24, 2025**

BETWEEN

SIMON MUNDIA KINYUA APPELLANT

AND

ISAAC KIPSEREMMELLY RESPONDENT

*(Being an appeal from the Judgment of Hon. A. M. Obura (CM)
in Voi CMCC No. E170 of 2021 delivered on 4th May, 2023)*

JUDGMENT

1. The Appellant sued the Respondent in Voi CMCC No. E170 of 2021 seeking a refund of Kshs. 207,700/= being expenses incurred in repairing the Respondent's motor vehicle registration number KBB 701F.
2. The Appellant's evidence in brief is that he was the owner of motor vehicle registration number KBB 701F.
3. The Appellant allowed the Respondent to use the said motor vehicle in June 2019 while it was in good condition.
4. He collected the motor vehicle in January 2021 and found it in a state of disrepair. He said it had been mishandled, damaged with internal systems interfered with and unauthorized spare parts installed.
5. The Appellant said he incurred a total of Kshs. 207,700/= in repairing the car.
6. The Respondent denied the appellant's claim and said that the Appellant picked his motor vehicle while it was in good condition.
7. He said he kept the vehicle and for the Appellant and took an insurance cover to test run the engine so that it does not lock.



8. The trial court dismissed the Appellant's case and said it was unfair to lump the repair charges upon the Respondent.
9. The Appellant has now appealed to this court on the following grounds:-
 - i. That the Learned Magistrate erred in law and in fact by finding that the Appellant claim had no credibility.
 - ii. That the Learned Magistrate erred in law and in fact in finding that the Appellant was not entitled to the sum claimed in the plaint.
 - iii. That the Learned Magistrate erred in law and in fact by considering in her judgment or guided by the evidence which was never given or adduced in the trial court.
 - iv. That the learned Magistrate erred in law and in fact by dismissing the Appellant case without proper or adequate reasons.
 - v. That the Learned Magistrate erred in law and in fact in finding that the Appellant did not prove his case on a balance of probabilities.
10. The parties filed written submissions as follows:- The appellant submitted that he gave the subject motor vehicle to the Respondent and provided funds for repairs which were supported by receipts. The appellant further asserted that the Respondent used the vehicle for 17 months and paid for a 24-month insurance certificate. Therefore, the Respondent cannot claim otherwise.
11. The appellant further submitted that the trial court failed to understand that the initial cost of Kshs:16,900 and the assessed damages by the mechanic of Kshs. 97,200 was part of the cost incurred which eventually amounted to Kshs. 207,700 and therefore there was no disparity of the figures at all. The appellant further claim that the trial court did not appreciate that the respondent had used his motor vehicle for a period of 17 months and thus should have compelled him to pay for the usage of the same.
12. The respondent alternatively submitted that the appellant had a duty to prove that the damage on the vehicle was directly linked to the respondent and that there were no other intervening circumstances. PW3 did not confirm that he was not the only mechanic that had worked on the vehicle. All this was done in the absence of the respondent and at a time when the appellant had already travelled with the subject vehicle. The testimonies provided failed to sufficiently prove that the respondent caused the damage but also suggested that there was a possibility that the damage was caused by all the various mechanics who worked on the vehicle.
13. It was therefore the respondents submission that based on the evidence that was produced in the trial court the appellant was unable to prove his claim to the required standard and as such the court came to the correct conclusion.
14. This being a first appeal, the duty of the first appellate court is as follows: In *Selle v Associated Motor Boat Co.* [1968] EA 123 where the Court held: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An 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 allowance in this respect.

In particular, this 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."

15. The issues for determination in this appeal are as follows:-
 - i. Whether the Appellant proved his case to the required standard in civil cases.
 - ii. Whether the trial court was right in dismissing the Appellant's case.
16. On the issue as to whether the Appellant proved his case, I find that it is not clear on what terms the Appellant gave his vehicle to the Respondent.
17. There is no indication what arrangement was put in place for the use of the motor vehicle.
18. The Appellant said he lent him on brotherhood condition while the Respondent said he was keeping the vehicle for the Appellant and only used to test run the engine to ensure it does not lock.
19. There is evidence that the Appellant drove the vehicle to several counties before he discovered that it was in a state of disrepair.
20. There is no indication that the Appellant brought to the attention of the Respondent those issues before taking the vehicle away. The appellant should have taken precautions to have the motor vehicle checked before he drove it away.
21. I agree with the Respondent that the testimonies provided failed to sufficiently prove that the respondent caused the damage but also suggested that there was a possibility that the damage was caused by all the various mechanics who worked on the vehicle.
22. There is also evidence that the Appellant at first demanded Kshs. 16,900/= from the Respondent subsequently the amount changed to Kshs. 97,200/= then to Khss. 207,700/=.
23. The assessments were done in the absence of the respondent.
24. The trial court was right in dismissing the Appellant's claim in the circumstances of this case.
25. I find that this appeal has no merit and I dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF FEBRUARY 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

The Appellant present in person in court

Mr. Mutinda for Respondent

