Karangu v Musembi & another (Civil Appeal E191 of 2023)
[2025] KEHC 10831 (KLR) (Civ) (2 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10831 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E191 OF 2023

JM OMIDO, J

JULY 2, 2025

BETWEEN

SIMON KARANGU ..... APPELLANT

AND

DOMITILA NDINDA MUSEMBI ..... 1ST RESPONDENT

MWIKI PSV SACCO SOCIETY LIMITED ..... 2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. J.W. Munene, Resident Magistrate/ Adjudicator delivered on 23rd February, 2023 in Milimani SCCC No. E2601 of 2022)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. J.W. Munene, Resident Magistrate/ Adjudicator delivered on 23rd February, 2022 in Milimani SCCC No. E2601 of 2022.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 15th March, 2023 upon which he seeks to upset the judgement and decree of the lower court are as follows:
    i. The learned Magistrate erred in fact and in law by directing the Appellant how to prosecute its case.
    ii. The learned Magistrate erred in fact and in law in failing to consider the material issues of fact and of law raised by the Appellant in his affidavit and that of his witnesses, written submissions and the authorities filed on the part of the Appellant.
    iii. The learned Magistrate erred in fact and in law in finding that motor vehicle KBM 9X6P, which did not belong to the Appellant, was responsible for the accident.

iv. The learned Magistrate erred in fact and in law in that the Appellant was 100% liable for the accident in the absence of convincing evidence to establish the assertion.

v. The learned Magistrate erred in fact and in law by basing the quantum of damage to motor vehicle KBX 1X7K does not belong to either the Appellant or the 1st Respondent herein (sic).

vi. The learned Magistrate erred in fact and in law by finding that the Appellant was liable to pay the Respondent Ksh.196,038/-.

3. The Appellant proposes that the appeal be allowed and that this court sets aside the trial court's judgement and decree and substitutes the same with an order that the 2nd Respondent bears the claim with costs.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. The matter before the trial court, based on tortious liability (a material damage claim), was commenced under the doctrine of subrogation, by way of a statement of claim dated 23rd June, 2022 filed by the 1st Respondent herein (the Claimant before the trial court). The 1st Respondent pleaded that her motor vehicle registration number KCH 2X6Z was damaged on 10th September, 2019. She stated in her Statement of Claim that the 2nd Respondent's motor vehicle was carelessly and or negligently driven and/or controlled as a result of which it collided with the 1st Respondent's motor vehicle, which was stationary.

6. The 1st Respondent proceeded to repair her vehicle and sought to be recompensed on the amount expended in repairs. She sought the following reliefs against the 2nd Respondent:

a. Repair costs: Ksh.178,985/-.

b. Assessment fee: Ksh. 6,380/-.

c. Re-inspection fee: Ksh. 2,900/-.

d. Tracing fee: Ksh. 20,950/-.

Total Ksh.209,215/-.

7. The 2nd Respondent resisted the claim by filing a Response to Statement of Claim dated 23rd September, 2022 denying liability to the 1st Respondent. The 2nd Respondent issued an undated Third Party Notice, effectively bringing on board the Appellant as a Third Party to the suit before the trial court. The 2nd Respondent pleaded in the Third Party Notice the Appellant was liable to the 1st Respondent as that as at the time of the accident, motor vehicle registration number KCG 9X7K belonged to and was in the possession and control of the Appellant and that the 2nd Respondent was only a financier.

8. On his part, the Appellant denied liability and proffered the position that he was not in possession and/or control of motor vehicle registration number KCG 9X7K as at the time the accident occurred and that it is the 2nd Respondent who had such possession and control.

9. The matter proceeded vide viva voce evidence. The 1st Respondent called Peter Murimi Mwaura who testified and adopted the contents of his statement dated 23rd June, 2022. In precis, the witness told the trial court that on 10th September, 2019, he parked the 1st Respondent's motor vehicle registration

number KCH 2X6Z at a garage at Kariokor area. The vehicle was hit from the rear and damaged by another vehicle, registration number KCG 9X7K.

10. The second witness that the 1st Respondent called was Police Constable Jesse Mwololo Kasyoka, who produced a police abstract that was issued after the accident was reported to Pangani Police Station Traffic Base.

11. Joseph Karanja Muchiri, a legal officer at CIC General Insurance testified as the 1st Respondent's third witness and stated that CIC were the insurers of the 1st Respondent's motor vehicle and that the said insurers paid for the repairs and filed the suit through the 1st Respondent under the doctrine of subrogation to recover from the 2nd Respondent the monies expended in undertaking the repairs. He produced documents in support of the claim.

12. The 2nd Respondent called Bianjo Mwaniki as its witness. The witness told the trial court that at the time of the occurrence of the accident, the Appellant was in possession and control of motor vehicle registration number KCG 9X7K and that the 2nd Respondent was only a financier.

13. In his testimony before the trial court, the Appellant stated that it was the 2nd Respondent who had possession and/or control of the vehicle. The Appellant stated that the 2nd Respondent repossessed the vehicle on 9th September, 2019 on the basis of the false claim that the Appellant was behind in the loan repayment and remained in such possession upto and including the time of the accident. On 11th September, 2019, he was informed that his vehicle had been abandoned at Gikomba stage and immediately went to collect it. The same had no signs of having been involved in an accident.

14. Upon being cross examined, the Appellant stated that he did not report the repossession to the police.

15. Armstrong Njuguna Njeri, the Appellant's witness told the trial court that he was present when the Appellant's vehicle was repossessed by a group of people directed by one Joshua, who was the Chairman of the 2nd Respondent and one Mwaniki, under the instructions of the 2nd Respondent.

16. The Appellant called a third witness whose name or identity the learned trial Magistrate did not indicate in the proceedings. Although the witness adopted the contents of an affidavit sworn on 14th October, 2022, it is difficult to get the identity of the witness as the said affidavit was jointly sworn by two people, Gaspery Bundi Muchiri and Ombaso Dominic Elkanah.

17. Be that as it may, the two deponents indicated in the affidavit that they were the driver and conductor of the Appellant and that the vehicle was forcefully taken away from them on 9th September, 2019 at Commercial Stage by Joseph Mwaniki and Joshua Githinji, the 2nd Respondent's credit officer and chairperson respectively.

18. The last witness that the Appellant called was Elizabeth Nyaguthie Waruru. The testimony of the witness was that she was the Appellant's employee and would collect cash from the Appellant's vehicles and bank the same. The witness stated that she did not collect cash from motor vehicle registration number KCG 9X7K on between 9th and 11th September, 2019 as the same had been forcefully taken away by the 2nd Respondent.

19. In determining liability, the learned trial Magistrate rendered himself/herself thus:

> " This court notes that the Third Party did not call any independent witness like an eye witness present during the alleged repossession but chose to call his employees who are under his employ. Their evidence without collaboration (sic) from an independent source is not independent (sic) for the court to rely on.

> This court also finds it highly coincidental that after the alleged repossession, the Claimant's motor vehicle is involved in an accident the following day.
>
> Section 112 of the same Act (sic) 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."

20. With that, the learned trial Magistrate went on to find that the Appellant was 100% liable and went on to award the 1st Respondent Ksh.196,035/- against the Appellant. The suit against the 2nd Respondent was dismissed with no order as to costs. The Appellant was condemned to pay the 1st Respondent's costs of the suit.

21. I have perused and considered the record of appeal, the submissions by the two sides and the record of the trial court. What is clear to me is that the Appellant does not challenge the amount awarded to the 1st Respondent. There is also no dispute to the finding that motor vehicle registration number KCG 9X7K was wholly to blame for the accident. What the Appellant is aggrieved with is the finding that he is 100% liable. He seeks that the said finding be upset and this court proceeds to find the 2nd Respondent to be 100% liable to the 1st Respondent.

22. Thus then, the single question for this court to address and determine is who between the Appellant and the 1st Respondent was in possession and control of motor vehicle registration number KCG 9X7K on 10th September, 2019 when the same was involved in an accident.

23. The legal burden of proof in a civil case was discussed in the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR where the court stated as follows:

> " 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(1) 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 the Act 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."

24. What amounts to proof on a balance of probabilities was discussed by Kimaru J. (as he then was) in the case of William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526 where the court held as follows:

> " 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."

25. In the same breath, the Court of Appeal in the case of Palace Investment Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR observed as follows:

> " Denning J. in Miller v 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 degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained.""

26. In view of the above, the burden of proof lay with the Appellant to establish his claims, on a balance of probabilities, that the 2nd Respondent repossessed his vehicle on 9th September, 2019 and remained in possession and control of the same when the accident occurred.

27. The position that the 2nd Appellant presented to the trial court was that it financed the Appellant to purchase motor vehicle registration number KCG 9X7K and that as at the date of the accident, the Appellant had possession and control of the said vehicle to the exclusion of the 2nd Respondent.

28. While admitting that the 2nd Respondent financed him to purchase the vehicle, the Appellant presented the position that the 2nd Respondent unlawfully forcefully repossessed the vehicle from the Appellant's driver and conductor on 9th September, 2019 and that the same was abandoned and recovered and restored to the Appellant on 11th September, 2019. That as such, the vehicle was in the possession and control of the 2nd Respondent on 10th September, 2019, when the accident is said to have occurred.

29. As we have seen above, the trial Magistrate, when considering the positions of the two parties, dismissed the Appellant's version on the ground that the Appellant did not call eye witnesses to testify as to the fact of forceful repossession of the vehicle by the 2nd Respondent, but only chose to call his employees, whose evidence was in the trial court's view not credible, to testify to that fact.

30. With profound respect, I think that the learned trial Magistrate discerned that wrong position from the assumption that is not supported by evidence that there were other independent witnesses to the fact that were known to the Appellant.

31. There is nothing that impedes employees of a party from testifying in support of their employer's case and the mere fact that the witnesses are employed by the party does not lessen the veracity of their evidence, more so where such witnesses state that they were present when the particular activity in question occurred.

32. Be that as it may, the Appellant and his witnesses were cross examined and stated that the alleged forceful repossession of the Appellant's vehicle from his employees was not reported to the police. I find that to be curious. I say so because if indeed the repossession by "goons" on the instructions of the 2nd Respondent was unlawful and that the Appellant did not know the whereabouts of his vehicle for 2 to 3 days, one would reasonably expect that the matter would be reported to the police or other authorities. The fact that the Appellant did not make a report to the police vitiates his version, with the result that the same is more unlikely to have occurred. My view then is that on a balance of probabilities, the Appellant had the vehicle in his possession and control on 10th September, 2019 when the accident occurred.

33. That said, I reach the finding that the trial Magistrate, albeit on different grounds, reached the proper finding that the Appellant was 100% liable.

34. The result I then reach is that the appeal lacks merit and I proceed to dismiss the it with costs to the Respondents.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 2ND DAY OF JULY, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: No appearance.

For Respondent: No appearance.

Court Assistants: Mr. Juma & Mr. Ngoge.