



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Gachary (Civil Appeal 57 of 2023)
[2025] KEHC 12896 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 57 OF 2023
M THANDE, J
SEPTEMBER 19, 2025**

BETWEEN

MICHAEL KAMAITHA KARIUKI APPELLANT

AND

FRANCIS M. M. GACHARY RESPONDENT

JUDGMENT

1. The Appellant instituted Mariakani RMCC No. 183 of 2019 by way of plaint dated 1.7.19 against the Respondent, seeking the sum of Kshs. 600,000/= together with interest at bank rate from 30.11.16 till settlement of the suit. He also sought the sum of Kshs. 7,000/= together with interest at court rate from the date of filing suit till settlement of the same.
2. In his suit, the Appellant stated that vide an agreement dated 30.11.16, he hired out his vehicle KCB 162W to the Respondent on the same date, on the assurance that it would be used within Mombasa town; that it was a term of the agreement that the Respondent would be responsible for any damages arising from his fault; that on the same day in the afternoon, the vehicle was involved in a road traffic accident in Kakotoni area, Mariakani, along the Mombasa-Nairobi Highway with another vehicle KBE 250L; that as a result of the accident, the Appellant's vehicle was extensively damaged and was written off; that upon investigations, the Respondent was blamed for the accident and charged with the offence of causing an accident by reckless driving, in criminal case no. 26 of 2017. The Appellant's claim against the Respondent was for material damage caused to his vehicle.
3. The Respondent opposed the suit vide his statement of defence dated 20.11.19. The Respondent denied all allegations in the plaint and asked that the suit be dismissed with costs.
4. The matter proceeded to hearing and at the conclusion, the trial Magistrate found that the Appellant had not proved his case and proceeded to dismiss the same with costs to the Respondent.



5. Being aggrieved, the Appellant filed the Appeal herein raising the following grounds:
 1. The learned Principal Magistrate erred in law and fact in holding that the Appellant failed to point out any specific clause on the signed hand written agreement of hire while it is in evidence that as the hiree the Respondent retained with the original copy of the said written agreement with conditions overleaf.
 2. The learned Principal Magistrate erred in law and fact in laying much emphasis on the standard form agreement for hire and went ahead and to hold that it was neither signed by the Respondent nor bears his name, while it was in evidence that the same was just a sample of what the agreement the Respondent signed and declined to produce.
 3. The learned Principal Magistrate erred in law and fact in holding that there was no meeting of mind to make the Respondent liable.
 4. The learned Principal Magistrate erred in law and fact in holding that the Respondent was not liable to negligence while upon police investigation he was found negligent and responsible for the accident, and was charged, pleaded not guilty, and was eventually convicted, and since the two matters proceeded at the same time, the said judgment could not be availed as exhibit in the lower court.
 5. The learned Principal Magistrate erred in law and fact in holding that the Appellant failed to prove his case on a balance of probability.
 6. The learned Principal Magistrate erred in law and fact in ignoring the holding by Hon Justice D.K.S. Aganyanya in *The Car Hire Company-vs-Susan Njoroge HCC No.673 of 1996 NBI*.
6. The Appellant prayed that the appeal be allowed and that the judgment of the trial court be set aside. He further prayed for costs of the appeal and the suit in the court below.
7. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123). The Court is also guided by the Court of Appeal decision in *Samuel Mwanasokoni v Kenya Bus Services Ltd* [1985] eKLR, where it stated:

Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in *Sotiros Shipping v Sauviet Sohold*, *The Times*, March 16, 1983:

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said.”
8. Parties filed their written submissions which the Court has duly considered.



9. The Appellant faults the trial Magistrate for dismissing the suit on the ground that he failed to point out the specific clause in the handwritten agreement between the parties showing that the Respondent was to be liable for the loss and damage of the vehicle. He contends that he explained to the trial court that the hand-written agreement was in standard form, the carbon copy of which the Appellant retained, while the Respondent had the original, which had all the conditions overleaf. Further that he exhibited the sample standard form of agreement to demonstrate what the original, which the Respondent had declined to produce, looked like. His view is that it was unnecessary for the trial court to go into the exhibited standard agreement.
10. For the Respondent, it was submitted that the agreement between him and the Appellant was oral and that he met the 2 conditions imposed by the Appellant's agent, namely production of his driver's licence and payment of Kshs. 2,000/=. He denied signing any agreement. Further that both parties confirmed at the trial that no agreement was signed at the time of hire and was only signed after the accident for purposes of getting compensation from the insurance. It was further submitted that being in the car hire business, the Appellant was presumed to have comprehensively insured his vehicles. Further that an accident cannot be anticipated or predicted and that no one can deliberately cause an accident. The Respondent asserted that allowing the Appeal would be tantamount to rewriting the contract for the parties.
11. In his judgment, the trial Magistrate noted that the exhibited agreement signed by the Respondent did not have a clause making him liable for loss and damage. Additionally, that the exhibited standard form of agreement which contains the said clause was not signed by the Respondent. Further that in any event, under the standard form of agreement, the obligation on the Respondent to indemnify the Plaintiff for any damage to or loss of the vehicle, would only arise if the Respondent were negligent.
12. I have looked at the record and note that the exhibited agreement signed by the Respondent does not contain any undertaking that the Respondent would compensate the Appellant for any loss or damage caused to the vehicle. Further, there is nothing in the signed agreement indicating the words "Mombasa Town" meant that the vehicle was to be used within Mombasa town only. The exhibited standard form of agreement contains the terms and conditions under which vehicles are hired. However, what was exhibited by the Appellant is not signed by the Respondent. Additionally, the signed agreement cannot be said to be a carbon copy of the standard agreement. The 2 documents are totally different. Indeed, contrary to the Appellant's claim, the clause making a hirer of a vehicle liable for all damages to the vehicle is on the front page of the standard agreement and not overleaf. One would also wonder why the Appellant would not retain the portion of the agreement that contains such a critical condition. Taking the foregoing into consideration, I find that the alleged undertaking on the part of the Respondent to compensate the Appellant is unsupported by evidence.
13. It is trite law that he who alleges must prove. Section 107(1) of the *Evidence Act* provides:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
14. Section 109 stipulates that:

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 that fact shall lie on any particular person.



15. In *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR, the Court of Appeal addressed the purport of the above provisions and stated:

We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

16. In the instant case, I find that based on the evidence on record, the Appellant did not discharge the burden placed upon him to prove his claim that there was an agreement between him and the Respondent that the Respondent would be liable for any damage or loss to the vehicle. The evidence on record established a preponderance of probability in favour of the Respondent (see *Siraj Din –Vs- Ali Mohamed Khan* (1957) EA 25). I accordingly find no fault in the finding of the trial court that the Respondent was not contractually liable for the loss of or damage to the vehicle.
17. On the ground that the trial Magistrate erred in finding that negligence on the part of the Respondent was not proved, the Appellant submitted that following investigations, the Respondent was charged and found guilty. The judgment could not however be produced in court as the case was concluded after the parties had closed their cases. In an apparent departure from the ground raised, the Appellant asserted that the case between him and the Respondent was one of contract and not of negligence.
18. The Court has already made a finding that the trial court was correct in holding that the Respondent was not contractually liable to compensate the Appellant for loss and damage of the vehicle. The Court thus need not expend time delving into the issue of negligence given the Appellant’s submissions on the same.
19. As regards the decision of Aganyanya, J. in *The Car Hire Company-vs-Susan Njoroge* HCC No.673 of 1996 NBI, the Appellant’s submission on the same is vague. Other than stating that the decision was binding on the trial court and that the trial court erred in law and fact in ignoring the same, the Appellant did not state the holding therein and in what manner it was applicable in the matter herein.
20. In the end and in view of the foregoing, I do uphold the decision of the trial court. The Appeal lacking in merit is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF SEPTEMBER 2025

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M. THANDE

JUDGE

