



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Egesa & 2 others v Kakai (Civil Appeal E91 of 2022)
[2024] KEHC 8988 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E91 OF 2022
SC CHIRCHIR, J
JULY 18, 2024**

BETWEEN

SILAS EGESA 1ST APPELLANT

JOSEPHINE KHAGASI 2ND APPELLANT

JOSEPHANT KISENYA 3RD APPELLANT

AND

CLARENCE KAKAI RESPONDENT

*(Being an appeal from the judgment of Honourable Sylvia A. Wayodi
Adjudicator/ Resident Magistrate delivered at small claims court at
Kakamega on 14th April 2023 in small claims civil case No E 050 of 2022)*

JUDGMENT

1. The Respondent (then as claimant at the lower court) filed suit against the appellants seeking damages for a liquated amount of ksh. 650,000 being the value of a Bio-chemistry machine which was allegedly damaged while the Appellants were in the process of arresting the Respondent.
2. At the conclusion of the hearing the trial court returned a verdict in favour of the respondent herein and awarded damages for ksh. 650,000.

Memorandum of Appeal

3. Aggrieved by the judgment the Appellants filed this Appeal and set out the following grounds:
 - a). That the learned trial magistrate erred in law and in fact in finding the appellants liable in damaging a laboratory machine when the damage was not proved.



- b). That the learned trial magistrate erred in law and in fact in holding that the claimant / respondent had proved her case on a balance of probability.
 - c). That the trial magistrate erred in law and in fact in allowing a valuation report that was not authenticated as evidence of the damage caused on the machine.
 - d). That the trial learned magistrate erred in law and in fact in disregarding the appellant’s defense.
 - e). That the learned magistrate erred in law and in fact in relying on a prejudicial judicial notice as her basis of awarding the damages to the claimant/Respondent.
 - f). That the trial learned Magistrate erred in law and in fact in finding that the respondents/ appellants never acted in good faith and therefore they were not immune to civil liability.
4. The appeal was canvassed by way of written submissions.

Appellants’ submissions

5. The Appellants have submitted that this court has jurisdiction to consider both points of law and fact on this Appeal
6. They have raised two issues for consideration:
 - a. Whether the respondent proved her case on a balance of probability
 - b. Whether the appellants were liable for the damaged caused.
7. On the first issue it is submitted that whereas the small claims court are not bound by the rules of evidence , the standard of proof in civil claims remain that which the law has set under sections 107 and 108 of the Evidence Act.
8. The Appellants have also relied on the decision of Justice Mativo in the case of Hellen Wangari vs Carumera Muthini (2005) eKLR.

where it was held that the standard of proof “ must carry a reasonable degree of probability If the evidence is such that the tribunal can say ‘ we think it is more probable than not ‘ the burden is discharged, but if the probabilities are equal , it is not”
9. Turning to the evidence ,the Appellants have told the court that whereas in her evidence in chief claimant told the court that she was pulled out of an inner room , in cross- examination she admitted that she was arrested on waiting area. It is further submitted that her evidence was contradictory to that of her witness ,CW2, who told that he was in the reception and saw the machine fall and break. It is further submitted that the allegation by the Respondent herein that the enforcement officers went in through the front door was contradicted by CW2 who told the court that the officers went in through the back door. They have further questioned the testimony of this witness stating that there was no evidence to prove he was a patient at the facility or that he was at the crime scene.
10. The appellants further cast doubts on the evidence of CW3 who assessed the machine , arguing that there were no outside signs that the machine had been damaged; that the court should have ordered the machine to be brought to court seeing that it was a portable item
11. It is finally submitted that there was no prove of ownership of the machine by the respondent ; that there was no evidence that the machine that was damaged was the one indicated in the invoice and that there was no ETR receipt to show that the Respondent is the one who indeed owned the machine



12. On whether the Appellants were liable for the damage , the Appellants argue that the Appellants are law abiding officers, that the Respondent was arrested outside her facility;, that the place is near the market, it was a market day and any member of the public would have recorded the incident. It further submitted that the Respondent was simply trying to hit back for having been arrested and charged on the account of illegal water connection.
13. The Appellants fault the trial court for purporting to take judicial Notice of an alleged usual misconduct of the enforcement officers.
14. In view of the foregoing, they submit, the respondent failed to prove her case on a balance of probability

Respondent submissions

15. The respondent has brought to the attention of the court the fact that the Appeals to this court are on points of law only.
16. The respondent further states that notwithstanding the several grounds in the memorandum of Appeal , the Appellants have only addressed two issues. Consequently she will only address the two issues .
17. While relying on the case of *Selle & Ano vs Associated motor Boat Ltd & others* , the respondent argues that there is no evidence that the trial court took into account an irrelevant factor or failed to take into account an irrelevant one or that the court was plainly wrong. In the circumstances the respondent urges the court to find that the respondent proved her case on a balance of probability.
18. On whether the Appellants were liable for the damage caused, the respondent submits that the letter from the DPP's office appearing on page 29 of the record of appeal support the fact that the respondent had established a case against the Appellants.
19. The respondent submits that the assessment of the damages and the conclusion to purchase another machine was done by an expert and the value of the machine is as per the value reflected in the invoice which was submitted in evidence.
20. It is further submitted that in a material damage claim , the claimant is only required to show the extent of the damage and what it will cost to replace the damaged item , and not to necessarily show that the cost has been incurred.
21. It is finally submitted that , in any event, the Appellants did not call an expert to discredit the evidence of the claimant's expert witness.

The Evidence

a). The claimant's case

22. CW1 was the claimant . she testified that on 28/6/2022 at about midday , she was attending to a patient at the laboratory, when county police officers and two others came to her laboratory and accused her of illegally connecting water. They started pulling her and in the process a Bio-chemistry machine fell down. She was pulled into the waiting bay; her chairs in the waiting Area were spoiled. They pushed her into a vehicle.
23. During cross -examination. She stated that the machine was near the reception area, but in the room. She further stated that she resisted the arrest . She further stated that the Appellants knocked down



- the machine while they were dragging her; that the machine fell down and it broke. She was taken to the station and upon her return, she tried switching on the machine, but it did not come alive . Later on in cross-examination she sated that she did not resist the arrest.
24. CW2 was a patient at the clinic when the incident happened. He testified that he was seated at the waiting bay . Three officers entered . they were two females and one male. They entered the room where the claimant was . The claimant was seated near a machine. He further stated that he could see the other room. The officers pulled the claimant . The machine fell . He saw it falling and and heard the sound.
 25. CW3 testified that on 2/7/2022 he assessed the machine , together with an engineer. He examined the machine and filed a report. On examination they found that that the power supply system was damaged; the Adopter was split open and the electric power supply point was not receiving power due to damaged connectors. Based on the damages , he concluded that the machine needs replacement. He produced the report.
 26. On cross – examination, he told the court that the machine was a Bio- chemistry Analyser machine; that the serial number and the model of the machine is contained in the report. He further stated that the damage could have been caused by anything else , but from the history given, he concluded that the damage was caused by a fall.
 27. The claimant closed its case.

b). The respondents' case

28. DW1 told the court that she worked with Kakamega water and sewerage company as the Area manager for Malaba. She testified that on the material date, she was informed about an illegal water connection at the claimant's premises. She accompanied three officers to the scene. The claimant was arrested outside her house .; she tried resisting arrest.
29. DW2 was a county government enforcement officer .He told the court that on 28.10.2022, he went to malaba to check on an illegal water connection that had been reported. She further told the court that the claimant stepped out, and his officers arrested her. He did not see any machine, he stated. He denied that there was any commotion during the arrest.
30. DW3 told the court that he was the internal security as well as enforcement officer of the water company. He was informed by someone from malaba of the illegal water connection. . They did an excavation outside the premises and confirmed that indeed there was an illegal water connection. He called the enforcement officers. By then the claimant had locked the back door. She wanted to lock the front door . They engaged the claimant and she went to the vehicle. He further stated that she was arrested while outside the premises. He did not see any machine.

Determination

31. This court's jurisdiction in dealing with appeals from the Small Claims Court is governed by section 38(1) of the *Small Claims Court Act*, 2016 ("SCCA") which provides that 'A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.'
32. In most cases the line of what constitutes point of law and those which are points of fact is often thin. In Adan Muraguri Vs Republic (CR CR. Appeal NO. 347 of 2007) the court of Appeal stated:" As this court has stated many times before, it has a duty to pay homage to concurrent findings of facts made by the two courts below unless such findings are based on no evidence, or unless on the totality of



the evidence no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere”

33. The supreme court , in the case of Gaturu peter Munga vs Dickson Mwenda Kithinji & 3 others (2014) e KLR provided more clarity on what constitute points of law. It set out the following three elements, which were as follows:
 - a. “The technical element: involving interpretation of a constitutional or statutory provision
 - b. The practical element: involving the Application of *the constitution* and the law to a set of facts or evidence on record
 - c. The evidential element: involving evaluation of the conclusions of the trial court on the basis of the evidence on record.”
34. I have considered the grounds of Appeal . The grounds may be summarised into two grounds, namely, whether the conclusions arrived at by the trial court is based on the evidence on record , and where the conclusions was arrived at on the basis of irrelevant factors.
35. In my view the two considerations fall under evidential elements as held by the supreme court in peter munya’s case (supra) and therefore this court has jurisdiction to entertain the Appeal.(supra)
36. In my view , and bearing in mind the mandate of this court to only address issues of law, the issues for determination are two, namely:
 - a) Where the liability of the Appellants was proved
 - b). Whether the damages was proved

Whether the liability of the Appellants was proved

37. For the claimant her evidence and that of her witness (CW2) were consistent in that the Appellants went into the room where the machine was , and in the process of dragging out the claimant , the machine fell . All the Appellant witnesses on the other hand insisted that they never entered the premises; that the respondent herein was arrested outside. The trial magistrate opted to believe the evidence of the claimants and her witnesses on whether or not the claimant was pulled out and, in the process,, the machine that was on the table fell. While observing that the Appellants were employees of Kakamega water and sanitation company, the magistrate found that there was an element of lack of good faith in the manner in which the Appellants carried out their duties , making them liable. These are issues of fact. The trial magistrate is the one who saw the witnesses, and she made a decision whom to believe. I have no authority to fault her impressions of the witnesses.
38. The Appellants have faulted the magistrate for relying on what the Appellants have referred to as “prejudicial Judicial Notice”. This is what the Magistrate stated : “ This court is not convinced that the said respondents never entered the said premises considering the judicial Notice of how the ‘kanjo Askaris’ operate”.
39. It is true that the above conclusion is prejudicial and does not fall under the facts in respect the court may take judicial Notice of under section 60 of the *Evidence Act* (cap 80 ,laws of Kenya) .
40. However a further reading of the judgment show that emphasis that the manner in which the Appellants otherwise carried out the arrest was the basis of liability , not the notion that the ‘ kanjo Askaris operate in a certain manner. I hold the view therefore that there was evidence to support the conclusion of the trial court.



Whether damages was proved

41. On the prove of damage to the machines, there was an invoice showing the value of the machine at the time of purchase ; there was an assessment report done by an expert(CW3). He concluded that the machine needs to replaced. There was no other expert that was called to counter the testimony of CW3. It is trite law that it is only another expert who can counter the evidence of another expert in the same field (Ref: Ali mohammed sunkar vs Diamond Trust Bank(2011)e KLR)
42. Am satisfied that the trial court arrived at the award of ksh. 650,000 on the basis of the evidence presented.
43. The Appeal is without merit and it is hereby dismissed with costs to the Respondent

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JULY 2024.

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin – Court Assistant

Ms Masika for the Appellants

Ms Rauto for Mr. Masinde for the Respondent.

