



REPUBLIC OF KENYA



**Marete v Oketch (Civil Appeal E850 of 2023)  
[2024] KEHC 11843 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E850 OF 2023**

**RC RUTTO, J**

**OCTOBER 4, 2024**

**BETWEEN**

**KENNEDY KOOME MARETE ..... APPELLANT**

**AND**

**KENNEDY OMONDI OKETCH ..... RESPONDENT**

*(Being an appeal from the judgment delivered by Hon. S.N Muchungi  
(SRM) on 28th July 2023 in Milimani Commercial Court No. E920 of 2021)*

**JUDGMENT**

1. This appeal arises from a judgment and decree entered in Nairobi Milimani Commercial Court No. E920 of 2021. The genesis of the suit is a Plaint dated 4th February 2021, whereby the Appellant sued the Respondent for allegedly obtaining monies from the Appellant intended for the purchase of a motorcycle. The Appellant sought a refund of the principal sum of Kshs 400,000/=, reimbursement of Kshs 45,000/= being the expenses incurred and damages amounting to Kshs 400,000/= for loss of use, accrued interest, and the costs of the suit.
2. The Appellant claimed that the Respondent had committed to assist in the purchase of a 2017 Honda NC750X motorcycle, and that the total amount payable by the Appellant for the delivery of the motorcycle was Kshs 400,000/=. The Appellant further stated that they deposited the Kshs 400,000/= in two instalments into the Respondent's bank account. However, the transaction failed since the Respondent was unable to deliver the motorcycle at the agreed price and within the projected timelines, or at all. Further that the Appellant incurred a total of Kshs 45,000/= while attempting to collect the motorcycle from the Respondent's Ugandan contact, only to discover that the motorcycle did not exist.



3. In a response dated 30th June 2021, the Respondent denied any negotiations or agreement for the sale and purchase of the motorcycle. He stated that the sum of Kshs 400,000/= had been advanced to one Herman Lukwago, from whom the motorcycle was allegedly purchased.
4. During the hearing, both parties testified as witnesses, but neither called any additional witnesses. After hearing and analysis of the evidence presented before court, the trial court dismissed the suit with costs.

### **The Appeal**

5. Aggrieved by the decision of the trial court, the appellant lodged the memorandum of appeal dated 24<sup>th</sup> August 2023 which is based on thirteen (13) grounds of appeal repeated here verbatim as follows:-
  - a. That the Learned Trial Magistrate erred in fact and law by finding that the Respondent had proved his case on the balance of probabilities based on unverified electronic evidence in the form of screenshots without a certificate thereof or any explanation of the context of the content therein, documents which the Honourable trial Magistrate was duly notified that they had not been served upon the Plaintiff/Appellant and that the Appellant had never even seen them prior to the day of the hearing.
  - b. The Learned trial Magistrate disregarded and ignored the Appellant's pleaded as well as the evidence tendered before her, which included copies of two actual bank transaction slips in favor of the Defendant clearly stating the reasons why the Plaintiff made the said payments and proceeded to make findings on unpleaded allegations of agency without having afforded the Appellant to present its case on the issue which was not pleaded by the Respondent.
  - c. The Learned trial Magistrate erred in fact and law by disregarding evidence to support the fact that the Plaintiff/Appellant refused to deal with strangers who the Defendant/Respondent initially attempted to make him deal with before they subsequently agreed that the Defendant/Respondent would personally receive the Plaintiff's money which was paid to him with reasons for the transaction clearly stated on the narrations thereof and on condition that he would personally handle the transaction and deliver the Motorcycle in question to the Appellant and thereby abandoning her judicial mandate and responsibility albeit without any lawful cause or basis.
  - d. The Learned Trial Magistrate erred in fact and law by failing to pick out obvious contradictions within the Witness statement, documents and the testimony of the Defendant/Respondent such as the claims that he did not know which motorcycle it was until the problems arose, despite the fact that all monies paid to him, receipt of which he acknowledged mentioned the specific motorcycle for which the appellant was paying, claims that he immediately remitted the money paid to him to a third party despite the fact that the alleged documents meant to prove that point painted a completely different picture and that the agreement purported to be between the Appellant and the third party in question was dated three months after the Respondent received money from the Plaintiff.
  - e. The Learned Trial Magistrate erred in fact and law by failing to capture and consider the Appellant's issue concerning reasons why the Appellant sent



money to the Respondent through two well documents bank transactions in favour of the Respondent with no mentions of any third parties whatsoever and that the money was to be sent to a third party who was known to the Respondent but remained unknown to the Appellant at the time of both transaction (16<sup>th</sup> August 2018 and 12<sup>th</sup> October 2018) with no proof of transfer thereof shared by the Respondent to the Appellant prior to the day of the hearing of the case at the trial court, if the Appellant wasn't indeed paying the Respondent for the purchase and delivery of the Motorcycle in question by the Respondent.

- f. The Learned Trial Magistrate erred in fact and law by misquoting the contents of the Appellant's detailed testimony in court by incorrectly stating that the Appellant reported the matter to the Uganda Police and that he was locked up by them and forced to sign an agreement, among other things as captured in her court proceedings and thereafter proceeded to focus all her emphasis on the short cross examination thereof which was all based on the documents unduly served upon the Appellant by way of ambush after time allocation on the hearing date, a fact that can easily be proven by a quick review of the video recording of the court session on the 18<sup>th</sup> April, 2023.
- g. The Learned Trial Magistrate erred in fact and law by disregarding due process and denying the Plaintiff/Appellant the right to a fair hearing as a result of the procedure adopted by the court which curtailed the Appellant's opportunity for a fair hearing contrary to Section 50 (1) of *the Constitution* by allowing the Respondent to rely on evidence produced by way of ambush, which was served upon the Plaintiff/Appellant after parties had confirmed that they were ready to proceed and had been allocated time for hearing of the suit, six months after the court directed the Defendant/Respondent to comply with the provisions of Order 11, Civil Procedure Rules.
- h. The Learned Trial Magistrate erred in fact and in law by denying the Plaintiff/Applicant an opportunity to respond to documents served by the Defendant/Respondent by way of ambush and thereafter proceeded to dismiss the Plaintiff/Appellant's effort to address controversial issues raised by the Defendant/Respondent therein through the Plaintiff/Appellant's subsequent written submissions, a move which was unfair and detrimental to the Plaintiff/Appellant's efforts to get justice.
- i. The Learned Trial Magistrate erred in fact and law by allowing the Defendant/Respondent to evade refunding monies paid directly to him by the Plaintiff/Appellant while shifting blame to a third party despite the fact that no third-party notices had been taken out by the Respondent in a bid to transfer responsibility or seek indemnity, a move which is not reversed, could potentially restrict the Plaintiff/Appellant from ever recovering his money altogether. In any event, the issue of agency was not one directly arising from the pleaded case.
- j. The Learned trial Magistrate erred in fact and law by including several typographical errors and confusing statements in the court's proceedings such as the description of the Appellant as an "Administrator of the High Court of Kenya" as opposed to an "Advocate of the High Court of Kenya" and



“until now I haven’t raid my money or motorcycle” instead of “Until now, the Defendant has not refunded my money or motor cycle or delivered the said motorcycle which when coupled with the loads of detailed information which the Trial Magistrate left out from the Appellant’s testimony i court undermines the Appellant’s case and compromised his efforts to get justice.

- k. The Learned Trial Magistrate failed to appreciate consider and address the reliant and pertinent features of the Appellant’s case and pleadings and thereby abandoned her judicial mandate and responsibility albeit without any lawful cause or basis.
  - l. The Learned Trial Magistrate failed to cumulatively and exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and features of the suit before her (trial Magistrate) and thus arrived at an erroneous conclusion, contrary to and in contradiction of the uncontroverted evidence.
  - m. The judgment and direction of the Honourable Trial Magistrate is nullity ab initio and a mockery of the due process of the law and hence ought to be set aside ex-debito justice.
6. Reasons whereof, the appellant prayed for the following reliefs: -
- a. The Judgment of the trial court dated/delivered in 28<sup>th</sup> July 2023 in the Civil Suit Np. E920 of 2021 at Milimani be quashed and/or set aside in its entirety.
  - b. In the alternative, an order for remittal of the matter before a different Magistrate for reconsideration and to enable the proper handling of the unpleaded aspects of the decision, with the participation of any third parties adjoined thereto.
  - c. An order for the reimbursement of the monies paid by the Appellant to the Respondent and all expenses incurred during the recovery efforts thereof as prayed in trial court with interest at court rates.
  - d. An order for the payment of damages arising from the loss of use of the monies paid by the Appellant to the Respondent as prayed in Trial Court with interest at court rates.
  - e. The costs of this Appeal and the costs incurred at the trial court be granted to the Appellant against the Respondent.
7. The Court directed that this Appeal be canvassed by way of written submissions. The Appellant’s filed their submissions dated 31/5/2024 while the Respondent’s submissions were dated 6/6/2024.

### **Appellant’s submissions**

- 8. The Appellant begins his submission with an analysis of the facts, including his relationship with the Respondent concerning the sale of the disputed motorcycle. It was his submission that the trial court erred in admitting and relying on evidence submitted by the Respondent just minutes before the commencement of the hearing.
- 9. It was the Appellant submissions that the trial court erred in fact and law by allowing the Respondent to practice trial by ambush by filing documents on the hearing date, in contravention of the courts own directions. He submitted that on 23rd November 2022, the trial court granted the Respondent leave to comply with Order 11, Rule 7, but the Respondent failed to do so. Five months later, on the



morning of the hearing date, 18th April 2023, the Respondent filed unverified documents. Despite the Appellant's objections to this trial by ambush, the court admitted the documents that were filed out of time. Further, that the trial court erred in allowing the Appellant to be cross-examined on documents he did not produce, and in denying him the opportunity to respond to the ambushed documents. In support of his submission against the admission of documents filed by the Respondent without the leave of court, the Appellant relies on the case of *Neeraj Jayatilaiya Kalaiya v Dancun Cheruiyot and 5 others* [2022] KEELC 2669 (KLR).

10. The Appellant submits that the trial court failed to cumulatively and exhaustively record and evaluate the entire evidence on record, and as a result, did not capture the salient issues and features of the suit leading to an erroneous conclusion. Specifically, the court referred to the Appellant, who is an Advocate of the High Court of Kenya, as "an Administrator of the High Court." The Appellant further asserts that the proceedings are not accurate as they do not reflect the time taken during hearing and on cross-examination; and that the court misquoted him on several occasions, introducing information not present in his testimony or documents. Reliance was placed on the case of *Patriotic Guards Limited v James Kipchirchir Sambu* [2018].
11. The Appellant submitted that the trial court erred by failing to recognize that the essentials of a valid oral contract were met between the Appellant and the Respondent, including offer, lawful consideration, intention to create legal obligations, capacity, and the creation or preservation of any physical evidence or documents related to the oral contract.
12. The Appellant submits that he has been unfairly dragged through a distressful act of fraud for almost six years and therefore urges this court to consider the evidence and pleadings filed by him and enforce justice by awarding him a refund of the Kshs 400, 000/= and expenses incurred together with costs and interest of the suit.

### **Respondent's submissions**

13. Like the Appellant, the Respondent briefly stated the facts of the matter as summarized by the Appellant and in addition stated that he forwarded the amount of Kshs 400,000/= to one Herman Lukwago, and informed the Appellant to collect the motorcycle from the Ugandan contact, and this marked the end of his obligation in the transaction. He proceeded to set out three issues for determination namely: whether there was an agency relationship between the Respondent and Herman Lukwago; whether the Appellant satisfied his legal burden of proof, and whether the appeal should be allowed.
14. Regarding the existence of an agency relationship between the Respondent and Herman Lukwago, the Respondent submits that, based on the definition of an agency-principal relationship, there was neither express authority from the Respondent indicating that he was acting on behalf of Herman Lukwago, nor any implied consent by conduct on the part of the Respondent in this regard. In asserting that no agency-principal relationship exists, the Respondent relied upon the case of *Industrial & Commercial Development Corporation (ICDC) v Patheon Limited* [2015] eKLR.
15. As to whether the Appellant satisfied his legal burden of proof, the Respondent submitted that, contrary to the Appellant's allegations of notable errors, he presented clear evidence in support of his defense, which is a prerequisite for a favorable determination on the issue under consideration. The Respondent further asserted that the Appellant lacked the standing to claim that the court's decision was based on unsupported hypotheses, as the burden of proof lies with the party making such an allegation. He relies on the cases of *Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR and *Treadsetters Tyres Limited v John Wekesa Wepukhulu* [2010] eKLR, among others.



16. With regard to whether the appeal should be allowed, the Respondent submitted that the Appellant failed to sufficiently discharge his legal burden of proof and did not provide compelling evidence to support his claim thus, the appeal cannot succeed.

### **Analysis and Determination**

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. The foregoing duty was succinctly stated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 and *Peters v Sunday Post Limited* [1985] EA 424).
18. After careful analysis of the record of appeal and the parties' submissions the following issues arise for determination:
  - a. Whether the Appellant was accorded a fair hearing and
  - b. Whether the Appellant proved his case on a balance of probability

#### **(a) Whether the Appellant was accorded a fair hearing**

19. The Appellant in his submissions has repeatedly mentioned that he was not accorded a fair hearing for reasons that; the trial court conducted hearing by ambush and erred in admitting unverified evidence in the form of screenshots and that the trial court disregarded issues of late filing and service of the Respondent's documents.
20. The Appellant submitted that the Respondent was granted leave to comply with Order 11 within seven days. However, the trial court later allowed the production of documents and the adoption of the witness statement that were served five months later, specifically on the morning of the hearing date, 18th April 2023. The Appellant asserts that the admission of this evidence and the late service of the Respondent's documents curtailed his right to a fair hearing.
21. In addressing this issue, this court notes that it is a court of record and it is duty bound to rely on the record of appeal containing all the trial court's proceedings, and which are reflective of the sequence of activities during the trial period. From the record, the proceedings of 18<sup>th</sup> April 2023, which are a subject of this appeal shows that; the Appellant was represented by Mr. Waithaka for the Plaintiff. He then informed the court that the matter was coming up for hearing and he was ready to proceed with one witness. Ms. Kageha who was also present for the defendant also informed the court that she was ready to proceed with one witness and requested to proceed at 12.30pm. At this point Mr. Waithaka informed the court that he was yet to be served with the witness statements where upon the court directed that the defendant's witness statements be served before the hearing time. The Court then ordered the matter was to proceed at 12.30pm.
22. During the hearing, the Appellant gave a sworn statement and adopted his witness statement dated 4<sup>th</sup> February 2021 and produced his supporting documents. He was then cross-examined by the Respondent's counsel (Ms Kageha) and subsequently re-examined, by Mr. Waithaka. Thereafter, the Appellant closed his case and this marked the beginning of the Respondent case.
23. This court notes that up to this point the matter had proceeded without any objection being raised and with all parties willing-fully taking part in the proceedings, to the point that the Appellant was re-examined on the respondent's documents and this paved way for the defence hearing. Consequently,



- the Appellant argument that he was ambushed during the hearing does not hold any merit and the same is disregarded.
24. Further, at the hearing of the defence case, the record shows that as the Respondent was giving his evidence in chief, the Appellant's counsel raised an objection, stating that the documents filed by the Respondent should not be produced because the phone conversations were not accompanied by an electronic certificate, and therefore, their authenticity could not be confirmed. Additionally, he noted that the documents were served upon the Appellant's counsel in the afternoon. In a rebuttal, the Respondent's counsel stated that the documents had been served afresh that morning of the hearing and had been relied upon during the re-examination of the Appellant when he was giving his testimony. This led to the Appellant's counsel withdrawing his objection, allowing the hearing of the Respondent's case to proceed. Therefore, by dropping the objection and conceding to the matter to proceed with the Respondent giving his evidence and having been given an opportunity to cross-examine, the Appellant cannot then claim that the trial was by ambush.
  25. Thus, in determining, whether the Appellant was accorded a fair hearing, this court should not lose its focus that it is an appellate court whose duty is to re-evaluate and assess the evidence and make its own conclusion. The issue of the production of the electronic certificate to accompany the phone conversation to prove their authenticity and originality was one before the trial court. The sequence of events of how it was determined have been well explained in the preceding paragraphs. The Appellant withdrew the objection having been satisfied with what was happening paving way for the hearing to proceed.
  26. The circumstances would have been different if the Appellant had sustained the objection. In such a case, the trial court would have had the opportunity to consider the issue which is not being raised. Consequently, in strict compliance with the jurisdiction of the appellate court I find that the issue having been raised before the trial court and withdrawn, it cannot be raised on appeal. In the case of *Kenya Hotels Limited v Oriental Commercial Bank* (2018) eKLR, the Court of Appeal stated that;  

“In *Openda v. Ahn*, (supra) this Court identified some of the principles ... grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; .... a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point...”
  27. The Appellants have also alleged errors in the proceedings in that, the trial court mistakenly referred to the him as an “Administrator of the High Court” instead of as an “Advocate of the High Court of Kenya.” However, I note that while this is an error on the face of the record, further proceedings show that during cross-examination, the Appellant stated that he was a practicing Advocate as was so correctly captured by the Court. This court therefore finds that this error does not materially affect the facts or the determination of the case.
  28. The Appellant further claims that he provided testimony for over 40 minutes, but what was recorded did not accurately reflect what transpired, leading to the conclusion that the trial court ignored his testimony. It is important to note that the Appellant has not specified which facts were omitted from the court record, hence this court is handicapped in delving further into this issue.
  29. Consequently, as analysed above, this court finds that the Appellant was granted a fair hearing hence the ground of appeal on this issue fails.



### **b. Whether the Appellant proved his case on a balance of probability?**

30. The burden of proof as per Section 107 (1), 109 and 112 of the [Evidence Act](#), Cap 80 Laws of Kenya is outlined as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

31. The applicable law as to the burden of proof is found in Sections 107, 108 and 109 of the [Evidence Act](#). The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides as follows:

“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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“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.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the [Evidence Act](#), (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

32. Thus, the duty of proving the averments contained in the plaint lay squarely upon the Appellant.

33. This court is reminded of the provisions of section 78 of the [Civil Procedure Act](#) and its duty to re-evaluate and assess the evidence in order to make its own conclusions. It is clear that this Court is not bound to follow the trial Court's findings if it appears that either the trial Court failed to consider particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

34. The uncontested facts in the present appeal are that the Appellant and the Respondent know each other and that, when the Appellant intended to purchase a motorcycle, the Respondent was involved,



and money was sent to the Respondent by the Appellant. Additionally, it is undisputed that, regardless of any arrangements made, the Appellant did not receive the motorcycle.

35. Upon reviewing the evidence on record, and based on the assertion contained in the plaint, the Appellant has only established the uncontested facts. Conversely, the Respondent has provided evidence extending beyond the uncontested facts. The Respondent's evidence indicates that the Appellant was acquainted with a third party named Herman, who received the Appellant's money for the motorcycle purchase, as evidenced by the agreement entered into between the Appellant and Herman.
36. Ideally, the party that ought to have been sued, based on the agreement between the Appellant and the third party, would have been Herman with the Respondent as a witness. It is also noteworthy that the Appellant did not contest the existence of the agreement between himself and Herman. Despite asserting that the said agreement was null and void, no evidence was presented to substantiate this claim of nullity.
37. Consequently, I am satisfied that the learned trial magistrate correctly determined the matter as she did, and I see no reason to interfere with the trial court's findings. Therefore, the appeal fails.
38. In light of the foregoing, I find no merit in the appeal and thus proceed to dismiss it with costs to the Respondent.
39. Orders accordingly

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 4<sup>TH</sup> DAY OF OCTOBER 2024**

For Appellant:

For Respondent:

Court Assistant:

