



REPUBLIC OF KENYA



KENYA LAW
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**Pateta v Sirengo & 3 others (Civil Appeal 118 of 2019)
[2023] KEHC 20583 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20583 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 118 OF 2019**

**WM MUSYOKA, J
JULY 21, 2023**

BETWEEN

PAUL PATETA APPELLANT

AND

JOHN SIRENGO 1ST RESPONDENT

SARAH SIRENGO 2ND RESPONDENT

ELIZABETH MANG'ENI 3RD RESPONDENT

JOSEPH SINDANI 4TH RESPONDENT

*(Appeal from ruling and order of Hon. CN Njalale, Senior Resident
Magistrate, SRM, in Butali SRMCCC No. 19 of 2018, of 24th October 2019)*

JUDGMENT

1. The appellant had sued the respondents, at the primary court, for release of his alleged motorcycle, registration mark and number xxxx, which they had allegedly impounded and handed over to the police, and compensation for loss of use of the said motorcycle. The respondents filed a defence, admitting that they impounded the motorcycle, and took it to the police for safe custody, as they awaited proof of ownership by the appellant. The matter was disposed of orally. 2 witnesses testified for the appellant, and 4 for the respondents.
2. PW1, the appellant, testified that the respondents came to his Kaburengu boda boda stage, on January 10, 2018, and took the motorcycle away. They had no court order. They took it to the Matete Police Station. He said that the motorcycle was his sole source of income, and he made Kshs 1, 500.00 to Kshs 1, 800.00 daily . He said that he reported the matter to the police, after he was assaulted by the respondents, but the police arrested him as a suspect of theft, on allegations that the motorcycle was stolen property. He said that when he took his documents to the police, the police refused to release the



motorcycle, before he had paid the respondents. He said that he was not indebted to the respondents. He said he bought it from Kenyatta, who had bought it from Imbwaka Muya. He denied being funded by the respondents. PW2, David Kenyatta, testified that he sold the motorcycle to the appellant in 2011, who paid him partially, leaving a balance of Kshs 5, 000.00.

3. DW1, Tony Sirengo Wanyama, the 1st respondent, was the local village elder, to whom a women group reported that the appellant owed them money, and needed his assistance to recover the same. He summoned the appellant, who admitted the loan, and proposed to repay, in instalments. He stated that the appellant did not honour his pledges, and the women group members brought a motorcycle to him, which they said they had impounded from the appellant, and asked him to keep it for them. The motorcycle was later taken by the police, on January 13, 2018, after the appellant brought the police to his home. The appellant then presented documents to the police on January 15, 2018, but another man showed up claiming the same motorcycle, and that person and the appellant were locked up. During cross-examination, he said that he had no documents to show that the appellant admitted the debt, and had pledged to repay it. He said that it was the women group that took the motorcycle to him. He said that it was the appellant who brought the police, who took away the motorcycle, to enable him provide documents of ownership.
4. DW2, Sarah Sirengo, the 2nd respondent, was a member of the women group. She testified that the group lent some money to the appellant. He defaulted in payment, and deposited his motorcycle as security, and that he was the one who proposed that they should give it to DW1 for safe custody, and they did so. On January 10, 2018, another person came to the group claiming to be the owner of the motorcycle, and that the appellant was a mere rider. He proposed that the motorcycle be handed over to the police. The police later informed the group, on January 13, 2018, that it had stolen a motorcycle. It was said that they had impounded a motorcycle, belonging to the third party, which had been in possession of the appellant, and they had assaulted the appellant. The police took the motorcycle away from DW1, and moved it to the police station. They explained that the appellant had borrowed money from them, which he had not repaid, and he had offered the motorcycle as security. The appellant and that other person were detained in the cells, but were released later, and the appellant was given time to repay the money. She denied that they took the motorcycle to the police, and said that the averment, in their defence, to that effect, was in error.
5. DW3, Elizabeth Mang'eni, the 3rd respondent, was also a member of the women's group. She testified that the group loaned money to the appellant. She stated that the appellant was unable to repay the money, and that, on January 10, 2018, he brought to them a motorcycle, and left it with them as security. Later that day, he came back with another person, saying that the motorcycle belonged to that other person, and that he, the appellant, was only a rider for that other person. The group insisted that the appellant repay his loan first before the motorcycle could be released, whereupon the two men went to the police station. They reported that the motorcycle had been stolen from them. The police later came and took it away. She visited the police station, and explained what had happened, whereupon the appellant and the other man were locked up in the cells, and were released only after the appellant pledged to repay the money.
6. DW4, Joseph Jume Sindani, the 4th respondent, was the chairman of the Kaburengu market boda boda group. He said that the appellant was one of them, and a group of women had approached him for assistance to recover money from the appellant. He wrote a letter, for the women, on the matter, addressed to the police. He said that the women did not steal the motorcycle, instead it was the appellant who brought in another man to claim that the same belonged to that other.
7. At the end of it, the trial court found that there existed a money lending arrangement between the appellant and the women group, and that by that arrangement the motorcycle was offered as security.



On how the motorcycle ended up at the police station, the court ruled that the respondents had only impounded the same, whereupon the appellant reported the same as having been stolen, and that was how the police came in, and took it to the police station. It was concluded that the respondents did not have possession of the motorcycle, and an order for it to be released by them could not issue. On compensation, it was ruled that the appellant had offered the motorcycle as security for the money borrowed, and the respondents did not have possession of the motorcycle, so the issue of them compensating him for the detention of the motorcycle could not arise.

8. The appeal herein arises from that judgment of October 24, 2019. The appellant has listed 22 grounds of appeal.
9. No directions were given, with regard to how the appeal was to be canvassed, but the appellant filed written submissions, the respondents did not. In his written submissions, the appellant addresses several issues: the statements in court by the respondents not being in tandem with their defence on how the motorcycle ended up at the police station, the conclusion by the court that it was him who took the motorcycle to the police and should have sued the police, and the existence of a money lending agreement between the appellant and the women group.
10. Parties are bound by their pleadings, that is the general principle. In this case, the respondents pleaded, in their defence statements, that it was them who took the motorcycle to the police for safe custody. They changed that stance, at the oral hearing, saying that that was an error in their pleading, for it was in fact the appellant who took the motorcycle to the police. What does the recorded evidence demonstrate? The appellant testified that it was the respondents who took the motorcycle to the police, while the respondents said otherwise, that it was the appellant who caused the motorcycle to be taken to the police, when he alleged that it had been stolen from him, yet he was the one who had surrendered it to the respondents after offering it to them as security, and the police took it from DW1, on the basis that it was stolen goods. The 2 versions are mutually exclusive, and only the police would have shed light, but none of the parties called them. The documents filed by the respondents are unanimous that the motorcycle was handed over to the police for the appellant to prove that he owned it. That is what can be gleaned from their defences and affidavits. That aligns with the allegation by the appellant, that it was them who gave the motorcycle to the police. The respondents are bound by their defences, they did not amend them. The inconsistencies, in the finer details in their oral narratives in court, on what exactly transpired, betrays them. I shall take it that it was them that took the motorcycle to the police, so that the police could verify ownership. The trial court was in error in finding otherwise. That should answer most of the issues, leaving only 2, whether the appellant should have sued the police or the respondents, and whether there was a money lending agreement between the appellant and the respondents.
11. Who should have been sued? It is common ground that the subject motorcycle is not in the possession of the respondents, but it is in police custody. That fact alone should be sufficient to dispose of the matter, for the respondents have no control over the police, and were not shown to have had any such control. If the police did not find any justification to continue holding on to the motorcycle, they would, no doubt, have released it to whoever they thought, or were convinced, was the proper person to release the motorcycle to. I agree with the trial court; the respondents cannot be liable for detaining a motorcycle that is not in their possession.
12. Does the fact that it was the respondents who took it to the police make a difference? It does not. It is not the business or work or mandate of the police to keep property in safe custody for the owners. If there was no justification for the motorcycle to remain in their custody, the police would have released it, as discussed above. It is only the police who can account for why they have continued to hold on to the motorcycle. The respondents say that part of it is so that the appellant could prove ownership.



That sounds credible. The appellant did not exhibit any document establishing that he owned the motorcycle. Ground vehicles powered by a motor are subject to some form of registration process. That includes motorcycles. xxxx is said to be the registration number for this vehicle. The appellant did not place any document on record, from the registration bureau for motorcycles, as proof that he was the registered owner of the motorized cycle. He presented PW2 as his witness, who claimed to have had sold the motorcycle to him, yet PW2 did not present any document showing that he was, himself, at some point or other, the registered owner of that motorcycle, neither did he present any document showing that he transferred ownership to the appellant. The appellant mentioned Imbwaka Muya, as the original owner of the motorcycle, but he did not present him as a witness, nor documents from him as evidence of his registered ownership of the motorcycle. One cannot claim to own a motorcycle or motor vehicle without producing registration documents. Sale agreements which are not supported by registration documents cannot be proof of ownership of such vehicles. The appellant did not prove that he owned the motorcycle. It is little wonder, therefore, that the police is still holding on to the said motorcycle. It is little wonder that respondents had the wisdom to surrender the motorcycle to the police, as its ownership was unknown, and they could be accused of handling suspected stolen property.

13. The last issue is on whether or not the appellant was indebted to the women group. I agree, that the materials placed on record, to prove the debt, were mixed up. However, whether there was a debt or not, is neither here nor there, for the suit before the court was not a debt recovery claim. It was about release of the motorcycle. The motorcycle is not in the possession of the women group or the respondents, and so, whether there was an issue of a debt between them and the appellant is of no moment. Similarly, whether they ought to pay compensation, is also tied up with that issue of possession, and detention, and whether there is debt or not will not help in determining the question of compensation.
14. I find no merit whatsoever, in the appeal herein, and I, accordingly, dismiss it. The respondents did not participate in the appeal, so I shall make no orders on costs. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....
21STDAY OF.....JULY.....2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Paul Pateta, he Appellant, In Person.

