



REPUBLIC OF KENYA



**Kalume v Harris & 3 others (Civil Appeal E035 of 2023)
[2024] KEHC 14097 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E035 OF 2023
SM GITHINJI, J
NOVEMBER 11, 2024**

BETWEEN

HAMISI SAIDI KALUME APPELLANT

AND

JOSEPHINE HARRIS 1ST RESPONDENT

RICHARD PEANCE 2ND RESPONDENT

CAR & GENERAL TRADING LIMITED 3RD RESPONDENT

REUBEN CHENGO KAHINDI 4TH RESPONDENT

(Being an appeal on the finding of liability in the Judgment and decree of Hon. J.M. Kituku (C.M) delivered on the 21st day of February, 2023 at Kilifi in Kilifi SPMCC No. 137 of 2017)

JUDGMENT

Representation:

Kanyi J. & Co. Advocates for the Appellant.

Lumatete Muchai & Company Advocates for the Respondents.

1. The Appellant aggrieved by the Judgment of the learned Chief Magistrate in Civil Suit No. 137 of 2017 dated 21st February, 2023 set forth the following grounds in the Memorandum of appeal dated 16th March, 2023;
 1. That the learned Magistrate erred in law and in fact in exonerating the 3rd Respondent from liability and costs emanating from the accident involving Motor Vehicle Registration Number KTTWA xxx Y on 24th December, 2016.



2. That the learned trial magistrate erred in law and in fact in finding that the 3rd Respondent had sold motor vehicle registration number KTWA xxx Y when the 3rd Respondent's witness admitted in court the contrary.
 3. That the learned magistrate erred in law and in fact in failing to find that there was an admission by the 3rd Respondent that an invoice is not evidence of sale.
 4. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's suit against the 3rd Respondent.
 5. That the learned magistrate erred in law and in fact in ignoring binding authorities submitted to it by the appellant.
2. The Appellant sought to have the finding of the Learned magistrate exonerating the 3rd Respondent from liability and costs be set aside and be substituted thereof with a finding that the 3rd Respondent was the Registered and/or beneficial owner of Motor Vehicle Registration number KTWA xxx Y as at the time of the accident.

Summary of the Evidence

3. PW1 Hamisi Saidi Kalume adopted his statement dated 30.03. 2017 as his evidence in chief and further stated that on or about the 24th day of December, 2016, he was lawfully travelling as a passenger aboard motor tricycle registration number KTWA xxx Y along the Malindi – Kilifi Road which was carelessly and negligently driven at excessive speed when motor vehicle registration number KAX xxxL which was parked off the road, entered the road and hit the tricycle and as a result of the impact, he sustained serious injuries.
4. On cross examination, he stated that he blamed motor vehicle KAX xxxL which had been parked off the road.
5. DW1 Dennis Onger Oseko, the Assistant Marketing manager of Car and General (Trading) Limited told the court that on or about March, 2017, the 3rd Defendant was served with a plaint dated 30th March, 2017 where the Plaintiff claimed that the 3rd defendant was the registered owner of motor tricycle registration no. KTWA xxxY. He also stated that the said motor tricycle registration no. KTWA xxx was at the time of the accident sold to a third party, Said Muridi Matano Seif. That the third-party notice dated 12th February, 2018 was filed in court and served to the 3rd party by way of registered post.
6. He further stated that the accident was caused solely and wholly by the negligence of the authorized driver and/or agent and/or employee and/or servant who drove motor tricycle registration number KTWA xxx .

Analysis and Determination

7. I have carefully considered the appeal herein, the grounds therein and the parties' submissions. The court is alive to the fact that it did not hear the witnesses testify nor did it observe their demeanor and therefore lacks that benefit of which the lower court had. This court is also alive to the fact that an appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it and draw its own conclusions. In Peter M. Kariuki -vs- Attorney General (2014) eKLR the court held inter alia as follows:

We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and



to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

8. In my view, the main issue for determination is;

Whether the trial court erred in dismissing the case against the 3rd Defendant.

9. In this appeal, it is clear that the determination of the appeal revolves around the question of liability. That the burden of proof was on the appellant to prove his case is not in doubt. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

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.”

10. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the said Act as follows:

109. 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 the fact shall lie on any particular person.

112. 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.”

11. I have considered the evidence of PW1 who stated that he blamed the driver of Motor Vehicle KAX xxxL for the accident. DW1 on the other hand stated that the said motor tricycle registration no. KAX xxx was at the time of the accident sold to a third party, Said Muridi Matano Seif. That the third-party notice dated 12th February, 2018 was filed in court and served to the 3rd party by way of registered post.

12. The Appellant in this Appeal questions why the trial court exonerated the 3rd Respondent from liability and costs emanating from the accident involving Motor tricycle registration number KTWA xxxY . In my view, the evidence led by PW1 pointed to the fact that KTWA xxxY was not to blame for the accident. Be that as it may, DW1 adduced evidence showing that it had already sold the Motor tricycle to the 3rd party, Said Muridi Matano Seif and had its name entered in the logbook merely as a financier to protect its interest.

13. In this case, there was evidence that the accident was caused by the negligence of the driver of the motor vehicle registration number KAX xxxL , PW1 did not state in his evidence how KTWA 725Y caused the accident which is the crux of this appeal. Whereas the testimony of DW1 is to the effect that the said motor tricycle registration no. KTWA xxxY was at the time of the accident sold to a third party, Said Muridi Matano Seif, and the 3rd Respondent’s name was only entered in the log book merely as a financier to protect its interests. In my view, this is not a case where there was no sufficient evidence to support the findings of the learned trial magistrate. Accordingly, this Court cannot interfere with the court’s decision to exonerate the 3rd Respondent from liability.

14. In the end and on the basis of the above reasons, this appeal is found in want merit. It is dismissed in its entirety with costs to the respondents.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 11TH DAY OF NOVEMBER, 2024.

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S.M. GITHINJI



JUDGE

In the Presence of; -

1. Miss Wangu holding brief for Mr Lumatete for the 3rd Respondent
2. Mr Achoka for the Appellant – absent

