



**Musee & 2 others v Shitoshe (Civil Appeal E102 of 2023)  
[2024] KEHC 14053 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E102 OF 2023**

**AC BETT, J**

**NOVEMBER 8, 2024**

**BETWEEN**

**JOHN MWACHI MUSEE ..... 1<sup>ST</sup> APPELLANT**

**DENNIS SHILAVIKA ..... 2<sup>ND</sup> APPELLANT**

**PAUL SHILAVIKA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**CALEB SHITOSHE ..... RESPONDENT**

*(Being an appeal from the Judgement and orders of Hon. S. Wayodi (Adjudicator/Resident Magistrate), in Kakamega SCCC. No. E092 of 2023 delivered on 16th day of June 2023)*

**JUDGMENT**

1. This is an appeal against the Judgement of the Hon. Sylvia Wayodi, Adjudicator/Resident Magistrate given in SCCOM E092 of 2023 on 16<sup>th</sup> June 2023.
2. The Appellants listed their grounds of appeal as follows:-
  - a) That the Honourable Magistrate misdirected herself by failing to make findings against the Plaintiff/Respondent.
  - b) That the Honourable Magistrate erred in fact and law by appreciating evidence tendered with regard to the Plaintiff/Respondent presenting none of the documents.
  - c) That the Honourable Magistrate erred in law by incorrectly applying the law and legal tests on the case and therefore arriving at a fatally erroneous finding of fact and decision.
  - d) That the Honourable Magistrate erred in law by misapprehending, mischaracterizing, distorting and slanting relevant evidence before her.



3. The Respondent instituted a suit in the Small Claims Court at Kakamega seeking for judgement against the Appellants for a sum of Kshs.130,000. The Respondent claimed that he took his motorbike for repair at the 1<sup>st</sup> Appellant's place and upon his return to pick up his motor bike, he was informed that the 2<sup>nd</sup> Appellant had taken the motor bike on allegations that he was sent by the Respondent to do so. He testified that he followed up on the issue but he was unable to get his motor bike and this led him to report the matter at Kabras Police Station vide OB No32/14/05/19. He further testified that he was approached by the 2<sup>nd</sup> Appellant who wanted to pay him a sum of Kshs. 7,000/= as settlement for the use of his motor bike, an offer which he refused. He stated that he later got information that his motor bike was at the 3<sup>rd</sup> Appellant's home where he went and confirmed the same. He further stated that the motor bike was taken into police custody and the Appellants were released from custody with the OCS promising to summon them on a later date. He stated that he was later called to the police station to take his motor bike and repair it but he refused. He claimed special damages for loss of user and the value of the motor bike.
4. The 1<sup>st</sup> Appellant in response to the Respondent's claims denied knowing the Respondent or the reason why he was in court. Upon cross examination, he denied ever repairing the Respondent's motor bike.
5. The 2<sup>nd</sup> Appellant denied being found with the motor bike and stated that there is no proof that he conspired with the police to destroy evidence.
6. The 3<sup>rd</sup> Appellant denied on cross examination ever sending money to the Respondent and conniving with the OCS to destroy the case.
7. The Small Claims Court entered judgement against the Appellants by finding them liable to pay the Respondent a sum of Kshs. 130,000/= being the value of the motor cycle, to pay interest at court rates from the date of filing of the claim and to pay costs to the Respondent in form of disbursements.
8. Aggrieved by this decision, the Appellants filed the appeal before this court with the grounds of appeal being as mentioned above and seeking the following orders: -
  - a. That the small claims Judgement dated 16<sup>th</sup> June 2023 be set aside in its entirety.
  - b. That the court issues an order of stay of execution of the Judgement and Orders delivered by the Adjudicator/Resident Magistrate in the Small Claims Court.
  - c. That this court should rule in favour of the Appellants and substitute the decision of the Adjudicator/Resident Magistrate.
  - d. Any other orders this court might deem fit to grant.
9. Both parties canvassed the appeal by way of written submissions. The Appellants in their submissions stated that the Respondent did not avail witnesses to support his claim and neither did he furnish evidence to prove ownership of the motor cycle. They further submitted that the Respondent did not clearly tell the court where the motor cycle went after he saw it in the police station. The Appellants also submitted that the Respondent intentionally altered the name of one of the Appellants in his statement of claim without a formal application to amend the statement of claim. The Appellants further submitted that the trial magistrate assumed that the motor cycle was new and awarded Kshs. 130,000/= but the motor cycle was second hand and did not deserve such an award. The Appellants also submitted that the Respondent told the court that police officers from Kabras police station would come and give evidence to the court but none came and that the trial Magistrate failed to order the police officers to come to court.



10. The Respondent in his submissions claimed that the Appellants have been uncooperative for not submitting the record of appeal or taking the mention date since the case started. He further submitted that the Appellants have been declining receipt of summons and documents from the Respondent. He also submitted that other documents were found in another file after the case had closed meaning that they had not been considered during Judgement. The Respondent also submitted that the Appellants have colluded with the OCS of the police to hide evidence of recovery of the motor cycle since it was being used by the Appellants to earn a living and that the police failed to arrest the Appellants until the Respondent accepts seventy (70) days payment for their use of the motor bike in return.

### **Analysis and Determination**

11. Section 38 of the Small Claims Act provides as follows: -

- “(1) 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.
- (2) An appeal from any decision or order referred to in subsection (1) shall be final.”

It is clear that Section 38 of the Small Claims Act as mentioned above renders only one chance of appeal to this court and that is on matters of law.

12. This being a first appeal, the court is duty bound to re-evaluate the facts of the case afresh and come up with its independent findings and conclusion while bearing in mind that unlike the trial court, it did not have the privilege of seeing and hearing the witnesses as they testified. In the case of *Gitobu Imanyara & 2 others -vs- Attorney General* [2016] eKLR the Court of Appeal held as follows:-

“...an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

13. A look at the 1<sup>st</sup> ground of appeal in the memorandum of appeal shows that the ground primarily relates to questions of facts which this court is not in a position to interfere with.
14. In the case of *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR, the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the court under Section 38 of the Small Claims Court, stated as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”



15. The 2<sup>nd</sup> and 4<sup>th</sup> grounds of appeal in the memorandum of appeal both relate to the issue of evidence and how the court below handled itself on the same. On this issue, I rely on the decision in the case of Philip Waciuri Wachira vs Philip Mathenge Mwai [2024] eKLR where the Court rendered itself as follows: -

“The court below is entitled to evaluate the evidence and come up with the evidence they believe. The strict rules of evidence do not bind the Court below. This is on the basis of Section 32 of the Small Claims Court, which provides as follows:-

“32

- (1) The Court shall not be bound wholly by the Rules of evidence.
- (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
- (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
- (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
- (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.”

The court further stated as follows: -

“The court cannot be faulted that it reached a decision on no evidence. The Small Claims Court is the queen when it comes to evidence. I have evaluated the same and noted that the court exercised its discretion correctly.”

16. In this case and in relation to Section 32(2) of the Small Claims Act, I find that the Respondent rendered sufficient evidence to the court to warrant the court’s decision. The Respondent furnished the court with a receipt as evidence of ownership of the motor cycle. The Respondent also furnished a written agreement between him and the 2<sup>nd</sup> Appellant on the payment of money for the usage of the motorcycle before it is given back. The Respondent also adduced in court written statements by persons who witnessed the agreement and/or are privy to the facts concerning the case, further furnished the court with summons by the OCS to the Appellants in this matter that show that indeed



the Appellants had a case to answer before the police. In defence, each of the Appellants claimed not to know why they were in court and were subjected to lengthy cross-examination by the Respondent.

17. In *Mitchell Cotts -vs- Badi Omar* [2023] KEHC 23424 (KLR) the Court cited the case of *Peters -vs- Sunday Port Limited* [1958] CA 424 where the Court of Appeal held as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

18. Flowing from the aforesaid holding, this court must exercise great caution in reviewing the evidence so as not to overturn the trial court’s decision without sufficient cause.
19. Once the Respondent had tendered his evidence and the documents in support, he had discharged the evidentiary burden stipulated by Section 107 of the *Evidence Act*. Consequently, the burden shifted to the Appellants who were then under duty to disprove the Respondent’s case. By merely stating that they did not know why they had been brought to court, the Appellants fell short in discharging their duty.
20. Having considered the entire evidence, I find that the Respondent herein met the evidentiary burden as provided for under Section 32 of the Small Claims Act and that the Adjudicator/Resident Magistrate was right in her findings in the case.
21. On the 3<sup>rd</sup> ground of appeal, I find that the Adjudicator/Magistrate correctly applied the law and the legal tests on the case both on the issue of evidence which has been explained above and on the issue of costs which were the main issues for determination in the suit.
22. In light of the foregoing, I make the following orders: -
- a) The appeal herein lacks merit and is consequently dismissed with costs to the Respondent. The costs are assessed at Kshs. 20,000/= for both the lower court and the appeal.
  - b) The file is closed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8<sup>TH</sup> DAY OF NOVEMBER 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

Both parties present

Court Assistant: Polycap

