



**Ragot, Njer & Owiti t/a Owiti, Otieno and Ragot Advocates v Okoyo (Civil Appeal E155 of 2023) [2024] KEHC 15004 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15004 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E155 OF 2023  
RE ABURILI, J  
NOVEMBER 21, 2024**

**BETWEEN**

**JUDE THADEUS RAGOT, DAVID OTIENO NJER & KENNEDY ODHIAMBO  
OWITI T/A OWITI, OTIENO AND RAGOT ADVOCATES ..... APPELLANT**

**AND**

**SHEM OMONDI OKOYO ..... RESPONDENT**

*(Appeal from the judgment and decree in Kisumu CMCC No. 332 of 2020 delivered on 16<sup>th</sup> August, 2023 by Hon. G. C. Serem, Adjudicator, Resident Magistrate)*

**JUDGMENT**

**Introduction**

1. The appellants are advocates partners in the law firm of Owiti, Otieno & Ragot Advocates. They sued the respondent vide an amended plaint filed on the 27<sup>th</sup> August 2021 in which they sought special damages for costs of repairing a motor vehicle of Kshs. 79,860 from the respondent who was its former employee.
2. It was the appellants' case that on or about the 10<sup>th</sup> day of September 2019, the respondent was assigned the appellants' motor vehicle registration number KCR xxxB to proceed to Migori County where he was to handle a court matter when he reported to the office that he had been involved in an accident in Homabay when motor vehicle registration KCU xxxK that had been negligently driven so as to collide with the vehicle driven by the respondent.
3. The appellants averred that after preparing the appropriate pleadings ready for filing, the respondent declined to sign the witness statement he had prepared and declined to participate in the suit for recovery of funds from the offending motor vehicle on the basis of personal reasons which he declined to disclose and as such the respondent was personally liable to compensate it for the loss on account of his breach of his common law duty of care owed to the appellant.



4. The respondent filed an amended statement of defence dated 23<sup>rd</sup> September 2021 denying the appellant's averments and stating that such a claim lay on the insurers and not on it and as such the claim ought to have been dismissed.
5. The appellants filed a reply to the amended statement of defence dated 1<sup>st</sup> September 2021 stating that the respondent had declined to participate in legal proceedings against the alleged owners of the offending vehicle registration number KCU xxxK and hence the said suit stood no chance of success.
6. In her judgement, the trial magistrate held that the appellants failed to prove their case on a balance of probabilities and as such she proceeded to dismiss the suit with costs to the respondent.
7. Aggrieved by the said decision, the appellants filed a memorandum of appeal dated 15<sup>th</sup> September 2023 raising the following grounds of appeal;
  - a. The learned trial magistrate erred in law and fact by failing to appreciate and thereby misdirecting herself on the unequivocal evidence (Exhibits No. 16 and 17) placed and produced before court, in writing, by the appellant on this issue of the respondent having declined to sign the witness statement or participate at all in the hearing, in circumstances where the respondent was the sole witness in the would be case against the offending motor vehicle of registration number KCU 15K and therefore the basis for which the respondent was sued.
  - b. The learned trial magistrate erred in law and fact by directing herself on a case of negligence and the legal principles of the law of negligence thereby reaching a finding that there was no proof of negligence against the respondent yet the appellants 'case was purely based on the principle of bailment which can also be seen from the fact that no particulars of negligence were pleaded in the plaint.
  - c. The learned trial magistrate erred in law and fact by failing to appreciate that the appellants having allocated the respondent use of the said motor vehicle as a means of transport to Migori to conduct office duties, the appellants had entrusted the vehicle into the respondent's care and it was implied that the respondent would drive the said motor vehicle to Migori and hand it over back to the appellants in the same proper state as had been delivered to him, and as such a bailment was created.
  - d. The learned trial magistrate erred in law and in fact by failing to appreciate that the common law duty of care as a bailee, imposed on the respondent, included the duty to take reasonable care of the motor vehicle, use reasonable skill in its management and use and account for the same appellants', and that in the event of any injury or harm to the vehicle, by providing to the bailor, the explanation of the circumstances of such injury or harm to the motor vehicle, and in case of a suit against any Third Party causing the accident or harm to the motor vehicle, to provide such evidence as would be necessary to protect the interest of the bailor to recover compensation thereof.
  - e. The learned trial magistrate erred in law and fact by failing to appreciate and thereby misdirecting herself on the unequivocal evidence that the respondent failed to provide any evidence of the circumstances of the accident by way of the witness statement relating to the accident, after the pleadings had been drawn, in the unique circumstances where he was the sole identified witness to the accident and therefore as such, breached his duty as a bailee to account to the bailor on the said injury to the chattel, which entitled the bailor to sue him to recover from him the damages arising from such injury occasioned to the motor vehicle under his care and possession at the time of the alleged accident.



- f. The learned trial magistrate erred in law and fact by failing to appreciate that the appellants had sufficiently discharged the burden of proof placed on them in contemplation of the express and mandatory provisions of sections 107, 108 and 109 of the Evidence Act by placing concrete evidence in support of their case before court in view of which the said suit ought not to have been dismissed.
  - g. The learned trial magistrate erred in law and fact by failing to consider the appellants' submissions and relying on principles and case law that are not in any way related to appellants' case at hand, thereby ignoring the relevant guiding facts to reach a fair and reasoned determination and ultimately, erroneously finding against the appellants.
8. The parties agreed to canvass the appeal by way of written submissions.

### **The Appellants' Submissions**

9. The appellants submitted that the trial court's position that the appellant failed to prove its case on a balance of probabilities was erroneous as it failed to consider the contents of the two letters produced by the appellant in evidence, detailing communication between the parties herein regarding the respondent's participation in a potential suit against the offending suit vehicle.
10. It was submitted that the trial court failed to consider that once the respondent had failed to sign the witness statement and participate in the intended trial for compensation, the appellant was not in any position to prosecute any suit against the offending motor vehicle owner and driver as it would be bereft of any evidence to sustain the case.
11. The appellants submitted that its claim against the respondent for recovery of costs of repairing its motor vehicle was based on the common law principle of bailment which had been sufficiently proved.
12. It was submitted that trial magistrate erroneously misdirected herself that the appellant's claim was one of negligence instead of bailment and as such arrived at the wrong final decision.

### **The Respondent's Submissions**

13. The respondent submitted that the Appellants would have as a sign of good faith and upon being informed by the said Lydia Mwanajuma that the Respondent had allegedly refused, on personal reasons to sign the alleged written statement, sent to the Respondent the draft witness Statement for his perusal and execution.
14. It was submitted that though the appellants sought to rely on the contents of the correspondence dated 7<sup>th</sup> July 2020, the said letter was never corroborated by production of the draft Plaintiff and or Written Statement and or calling of the Said Lydia Mwanajuma as a witness.
15. The respondent submitted that the doctrine of bailment was not applicable under the Employer – Employee relationship such as the one that existed between the appellants and respondent herein. It was further submitted that the Appellants failed to deduct the costs of repairs of the suit motor vehicle from the Respondent during his employment as provided under Section 19 (1) (b) of the Employment Act.
16. It was submitted that that the Appellants failed to substantiate the element of foreseeability more so, having failed to produce any draft pleadings and or witness statement in the respondent's name and or proof of service of the aforesaid documents and further it was imperative for the court to determine whether the damages sustained by the appellant were the kind the respondent was under duty to prevent.



17. The respondent submitted that the respondent did take steps to recover the cost of repairs incurred by the Appellants however, upon termination of the Respondent's employment, it was upon the Appellants to continue with the said action of recovering the costs of repairs which unfortunately, they failed to demonstrate before the Trial court by producing any draft pleadings and or witness statements and as such cannot claim any breach of the said duty by the Respondent.
18. It was submitted that in the instant case, it was clear that the motor vehicle the subject matter of this suit had already been repaired and that the appellant had not surcharged the Respondent for the costs incurred during the duration of the Respondent's employment, further that no draft witness statement or pleadings were ever prepared and or served upon the Respondent for perusal and execution. The respondent submitted that the only thing that the Appellants did was to serve the Respondent with a demand notice for the costs of repairs long after termination of employment and this was a sign that the appellants failed to prove on a balance of probability that the respondent owed them common duty of care and that the same was breached.

### **Analysis and Determination**

19. This is a first and last appeal from the Small Claims Court to this Court on points of law only, as dictated by section 38 of the *Small Claims Court Act* which provides that:

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- (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"

20. Parties are nonetheless entitled to expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court on points of law only with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated:

"[A]n 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"

21. With the above principles in mind, I now proceed to determine the merits of the Appeal.
22. I have considered the grounds of appeal, the submissions and the authorities relied on by the respective parties. I find the issue for determination to be whether the appellant proved their case beyond reasonable doubt to warrant grant of the orders sought. An additional question is whether the dispute between the parties is one that ought to have been determined by the Employment and Labour Relations Court.
23. Commencing with the last part of the issue as framed above, there is no doubt that the appellant and respondent were in an employer – employee relationship at the time when the accident occurred leading up to the damage occasioned on the appellant's motor vehicle registration number KCR 074B.



24. The evidence on record further reveals that following the occurrence of the accident and during the pendency of the respondent's employment, the respondent commenced steps towards the recovery of the funds used to repair the suit vehicle by obtaining a police abstract after reporting the incident at a police station, issuing a demand letter to the third party and ascertaining ownership of the offending motor vehicle, and all these steps were undertaken by him on behalf of his employer, the appellant herein.
25. PW1, Jude Ragot, an advocate of this Court testified on behalf of the plaintiff, now appellant law firm that he had sued the respondent who was the sole witness of the accident and who declined to participate in the proceedings for recovery of the repair funds expensed by the appellant. It was his testimony that without the participation of the respondent employee who was in possession and use of the motor vehicle during the material accident, the plaintiff/ appellant's case lacked merit as there was no evidence to substantiate the claim on account of the respondent being the only witness to the accident; that the appellant had reached out to the respondent who declined to sign the witness statement on which the cause of action was premised and finally, that the respondent owed the appellant a duty of care under the common law principle of bailment.
26. On his part the respondent testified that after leaving employment of the appellant at the end of October 2019, in July 2020 he received a call from the appellant's secretary informing him to sign a witness statement to which he responded by telling her to send over to him the necessary documents for his signature but that the following day, he received a demand letter from the appellant claiming refund of the repair cost.
27. It was the respondent's case that the accident was caused by negligence of a third party and in cross-examination, the respondent testified that if the appellant pursued the case, he would not be a witness. He admitted that he owed the appellant a duty of care.
28. Having set out the evidence presented before the trial court; the question is whether this court really is the correct forum for the appellant to ventilate this appeal and whether the suit in the Small Claims Court was competent to hear and determine the claim. I say so because jurisdiction is everything without which, a court of law acts in vain. In this case, the jurisdiction in issue is the inherent jurisdiction, not pecuniary or geographical.
29. Section 13(5) of the *Small Claims Court Act* bars the Small Claims Court from hearing and determining certain disputes. The section stipulates as follows:
- 13 (5) A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
30. Section 12 of the Act is the section that provides for the jurisdiction of the Court as follows:
- 12.
- (1) Subject to this Act, the Rules and any other Nature of claims and pecuniary law, the Court has jurisdiction to determine any civil claim relating to—
- a. a contract for sale and supply of goods or services;
  - b. a contract relating to money held and received;
  - c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;



- d. compensation for personal injuries;
  - e. and set-off and counterclaim under any contract.
- (2) Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
  - (3) The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings.
  - (4) Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.”
31. A reading of section 12(1) (c) of the Act gives the impression that the claim by the appellant against the respondent is covered under the Act. However, one must read this section together with section 13(5) thereof and consider the relationship between the appellant and the respondent when the cause of action arose.
32. Additionally, section 12 of the *Employment and Labour Relations Court Act* No. 20 of 2011 that provides for the jurisdiction of the Court established under Article 162(2) of *the Constitution* stipulates as follows:
12. Jurisdiction of the Court
- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
    - (a) disputes relating to or arising out of employment between an employer and an employee;
    - (b) disputes between an employer and a trade union;
    - (c) disputes between an employers’ organisation and a trade union’s organisation;
    - (d) disputes between trade unions;
    - (e) disputes between employer organisations;
    - (f) disputes between an employers’ organisation and a trade union;
    - (g) disputes between a trade union and a member thereof;
    - (h) disputes between an employer’s organisation or a federation and a member thereof;
    - (i) disputes concerning the registration and election of trade union officials; and
    - (j) disputes relating to the registration and enforcement of collective agreements.
  - (2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.
  - (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
    - (i) interim preservation orders including injunctions in cases of urgency;



- (ii) a prohibitory order;
  - (iii) an order for specific performance;
  - (iv) a declaratory order;
  - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
  - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
  - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
  - (viii) any other appropriate relief as the Court may deem fit to grant.
- (4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.
- (5) The Court shall have jurisdiction to hear and determine appeals arising from—
- (a) decisions of the Registrar of Trade Unions; and
  - (b) decisions of any other local tribunal or commission as may be prescribed under any written law. [*Act No. 18 of 2014*, Sch.]”

33. The paragraph relevant to this appeal is section 12 (1) paragraph (a) of the *Employment and Labour Relations Court Act*, which provides for jurisdiction in ‘(a) disputes relating to or arising out of employment between an employer and an employee’.
34. This appeal and the suit in the Small Claims Court arose out of a cause of action founded on an employer- employee relationship and the corresponding obligations of duty of care in the use of the motor vehicle which was being used by the respondent in the course of his employment with the appellant law firm and for the benefit of the said law firm and with the authority of the law firm in question.
35. That being the case, it is my finding that the Small Claims Court and this Court are bereft of the requisite jurisdiction to determine the suit as filed and on appeal in this Court. It is trite that jurisdiction is everything as was stated in the locus classicus Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989), without which, a court of law acts in vain. Further, Article 165(5) (b) of *the Constitution* expressly bars this Court from entertaining disputes which are exclusively reserved for the Courts contemplated and later established under Article 162(2) of *the Constitution* and the Supreme Court. I find section 13(5) of the *Small Claims Court Act* to be akin to Article 165(5) (b) of *the Constitution*.
36. Decided cases on this issue are legion and I can only cite a few of them. In the case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another [2013] eKLR it was held that “When a suit has been filed in a court without jurisdiction, it is a nullity.”
37. It is clear from the foregoing that the claim and this appeal were filed before courts that were devoid of jurisdiction. I hereby dismiss it with no orders as to costs, of this appeal and of the Claim made before the Small Claims Court, the parties being members of this noble profession and in order to promote harmony and reconciliation between them.



38. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

