Nthiga v John (Civil Appeal 54 of 2019) [2025] KECA 556 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KECA 556 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 54 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

MARCH 14, 2025

BETWEEN

JOHN NJERU NTHIGA ..... APPELLANT

AND

MURIITHI JOHN ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 19th October 2017 in H.C.CA No. 63 of 2016.)

JUDGMENT

1. John Njeru Nthiga, the appellant, appeals from the judgment of the High Court of Kenya at Embu (Muchemi, J.) dated 19th October 2017 in HCCA No. 63 of 2016. The case started in the Chief Magistrate's Court at Embu, Civil Case No. 67 of 2017 which was filed by Muriithi John, the respondent, against the appellant via plaint dated 25th March 2016 seeking judgment against him for Kshs.160,200/- plus interest and costs.

2. The claim was premised on grounds that the appellant refused, ignored or declined to honor an agreement entered between the respondent and the appellant on 25th January 2016 for compensation for the repair of damage occasioned on the respondent's motor vehicle registration no. KAP 050A by the appellant on 24th January 2016 at Gatunduri, Kivue along Embu – Chuka road. The respondent averred that the matter was reported to police vide Occurrence Book report no. 14/24/1/2016, Embu Traffic Base particulars which were well within the appellant's knowledge.

3. The terms of the contract were that the value of the damage was estimated at Kshs.155,000/-, which amount was to be paid in instalments; Kshs.50,000/- at the execution of the agreement, and Kshs.105,000/- to be paid on or before 5th February 2016. They further agreed that any party that breached the terms and conditions of the agreement would pay the aggrieved party 50% of the agreed costs and or amount being liquidated.

4. The appellant paid Kshs.50,000/- and a further Kshs.24,300/- leaving a balance of Kshs.80,700/-, which he refused to pay upon demand and threatened to report to IPOA. The appellant was subjected to the default clause as per the agreement.

5. The appellant entered appearance, filed his statement of defence dated 27th April 2016 and averred that the respondent's claim for Kshs.160,200/- lacked basis as he had fully catered for the repair costs of the subject motor vehicle, and even paid for the loss of business when the motor vehicle was in the garage. He further claimed that the stated agreement was entered under duress as the respondent claimed that he was a police officer, armed; and therefore that the agreement was null and void.

6. The respondent filed his reply dated 9th May 2016 in response to the appellant's statement of defence. He maintained that the claim for the stated amount was sound and solid thus valid and unchallengeable as the parties' entered into the agreement freely and voluntarily, without any element of duress or coercion from him. The respondent denied the allegation that he was a police officer or that at the time he was armed. He further claimed that the police released the subject motor vehicle to him and he took it to the garage in Nyeri for repairs. He stated that the agreement did not provide for the appellant to take it to a garage for repairs. He trashed receipts issued to the appellant as malicious and fraudulent. The respondent thus prayed that the appellant's statement of defence be dismissed and judgment entered in his favor as prayed.

7. At the hearing of the matter, the respondent testified that on 25th January 2016, he recorded an agreement with the appellant and on the same day the appellant paid him Kshs.50,000/- as part payment as agreed. That on 5th February 2016 the appellant paid Kshs.24,300/- towards their agreed amount leaving an outstanding amount. The respondent stated that the total amount paid of Ksh.74,300/- did not include Kshs.160,000/-. He urged that the total amount owed to him by the appellant was Ksh.234,300/-. He stated that when he received the Ksh.24,300/- the appellant told him that he would not pay him anything more. He acknowledged that he saw a quotation of Kshs.102,000/- from one Bernard and that he paid that amount. He stated that what he paid excluded the cost of the engine repair. Lastly he stated that the vehicle was towed at Kshs.550,000/- to 600,000/- and that the cost of repair was almost half the value of the car. The respondent stated that the appellant did not repair the subject motor vehicle. He denied taking advantage of the appellant. He also said that he communicated with the appellant through the Assistant Chief.

8. On his part the appellant called three (3) witnesses. The appellant confirmed that he paid the respondent Kshs.74,300/- in cash. He further confirmed that the subject motor vehicle registration number KAP 050A was first towed to Embu Police Station and thereafter to Embu Brothers' garage where it was repaired. He also confirmed that on 25th January 2016 they recorded an agreement and thereafter they reported the accident to the Police Station. The appellant further stated that the respondent and the garage owner told him that the motor vehicle would be left with Caleb Onyango who was to do the repairs and after that, they would agree on the cost. He testified that he bought all the items that were required for repairs and as proof he produced receipts of Kshs.40,000/-, Kshs.2,670/-, Kshs.13,500/-, Kshs.1,500/-, Kshs.700/- and finally Kshs.26,500/- which was to the garage owner for the cost of repairs. The appellant maintained that he footed the entire bill of the spares and the cost of repair. He stated further, that he sent the respondent Kshs.24,300/- made up of Kshs.3000/- daily charge for loss of business for 8 days that the motor vehicle was out of use and a transaction fee of Kshs.300/-. He said that the amount paid was in full and final settlement of the entire amount due.

9. The appellant testified that in total he paid Kshs.159,170/- which was above the agreed sum of Kshs.155,000/- agreed, and added that he had paid the respondent Ksh.50,000/-at the advocate's office. Lastly, the appellant testified that the respondent went and saw the vehicle on 1st February 2016 and

was satisfied, and on 2nd February 2016, he sent his driver to collect it. The appellant maintained that he was coerced into entering the agreement and stated that if he had not seen the pistol, he would not have recorded the agreement.

10. His next witness was Caleb Onyango, owner of Embu Brothers Garage. He confirmed that on 25th January 2016, the respondent took to him a vehicle registration no. KAP 050A and wanted him to repair it as it had been involved in a road accident. He confirmed that the appellant bought all the spares for the repairs. He further confirmed that the subject vehicle was in the garage for 8 days and that when it left the garage, it was in good condition. He also confirmed that the door of the vehicle was replaced with a new one. Lastly, he confirmed issuing a receipt for Kshs.26,500/- to the appellant for the cost of repairs.

11. The appellant's last witness, Boniface Mutugi Kariuki confirmed that he was given work by the respondent to tow a motor vehicle registration number KAP 050A which had been impounded. He confirmed that he towed it from the scene of the accident to Embu Police Station and thereafter to Embu Brothers' Garage. He stated that he did not tow the vehicle to Nyeri.

12. In the judgment of the trial court dated 10th October 2016, Gicheru, C.M. (as he was then) found that there was overwhelming evidence to prove that the repairs were done at Embu and not Nyeri and noted that the respondent did not give convincing evidence at all. He further found that there was clear evidence that the parties entered into a subsequent agreement that was oral, that resulted in the vehicle being taken to the garage in Embu where the appellant paid for the repairs, as Caleb the garage owner confirmed.

13. In conclusion, the trial court found that the respondent had not discharged the burden of proof as required by law as he did not have answers to the many questions that his case raised and the appellant who had provided the said answers. The court therefore held that the respondent's case was not proved to the required standard and dismissed it with costs.

14. Aggrieved with the said judgment, the respondent filed an appeal to the High Court at Embu, to wit, Embu High Court Civil Appeal No. 63 of 2016. The appeal was canvassed by way of written submissions, with highlighting of the same. In the judgment of dated 19th October 2017, Muchemi, J. found that the evidence before the learned magistrate was sufficient proof of the respondent's claim and further, that the evidence regarding subsequent verbal agreement was not adequately evaluated leading to the wrong finding. Muchemi, J. therefore set aside the judgment of the lower court and substituted it with one in favor of the respondent against the appellant for Kshs.160,000/= plus interest at court rates accruing from the date of the lower court's judgment.

15. Aggrieved with the said judgment the appellant has now preferred his appeal to this Court and prays that the appeal be allowed, the judgment of the superior court be set aside, the judgment of the trial court be confirmed, costs of the appeal and costs in the courts below be awarded to him. In his memorandum of appeal dated 22nd March 2019 the appellant faults the learned Judge on the following grounds :

    1. The learned judge misdirected herself in law and facts placed before her and thereby reaching into an erroneous decision.

    2. The learned judge misdirected herself in law and fact thereby reaching a conclusion that there was no subsequent verbal agreement between the appellant and respondent contrary to evidence on record.

3. The learned judge misdirected herself in law by raising the standard of proof in a civil case from a balance of probabilities to one of beyond reasonable doubt.

4. The learned judge misdirected herself in facts thereby reaching a decision on existence or non-existence of a verbal agreement based on incident in the entire evidence, that the appellant was threatened."

16. When the appeal came up for hearing before us on 11th November 2024, the appellant was represented by learned counsel Mr. Mugambi Njeru. The respondent's counsel Mr. Gori Ombongi was not present despite being served with a hearing notice on the 22nd October 2024. Mr. Mugambi relied on the appellant's written submissions dated 4th June 2024, which he also briefly highlighted. The respondent did not file any written submissions.

17. Mr. Mugambi in his submissions relied on three grounds of appeal:

1. That the learned Judge misdirected herself in law and fact placed before her thus reaching an erroneous conclusion;

2. That the learned Judge erred in law and fact in making a finding that the existence of a subsequent oral agreement was not proved; and,

3. That the learned Judge erred in law by raising the standard of proof in a civil claim from a balance of probabilities to one of beyond reasonable doubt.

18. On the first issue, Counsel submitted that the learned Judge misdirected herself on the evidence on record and erroneously found that an oral contract was not proved. That the finding that the sum of Kshs.24,000/- made to the respondent via M- pesa as a final payment was made in pursuance of the written agreement amounts to a consideration of matters she should not have considered. He urged that the appellant had testified that the amount was to cover 8 days for which the respondent's vehicle had not worked charged at 3,000/: per day plus 300/: for M-pesa withdrawal. He submitted that the Judge's finding that the appellant had not explained why he sent the money if indeed there was a subsequent oral agreement in existence is a misdirection of the settled law on the role of a first appellate court which is to re-evaluate the evidence on record and arrive at its independent conclusion with a caution that as the 1st appellate court it neither had the advantage of seeing nor hearing the witnesses.

19. On the second issue, counsel urged that the parties' conduct in delivering the motor vehicle at Embu Brothers Garage and obliging the appellant to foot the repair costs and cost of spare parts needed met the legal requirement needed to be proved to establish the existence of an oral contract independent from the written one. Counsel relied on this Court's decision in Ali Abid Mohammed vs. Kenya Shelt & Company Limited [2017] eKLR, for the proposition that a contract between parties can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. He urged that the parties intended to have motor vehicle KAP 050A repaired for the accident damages and the record shows that those damages were repaired at Embu Brothers Garage and the appellant paid for the costs.

20. On the third ground, Mr. Mugambi submitted that the learned Judge erred in her appreciation of the standard of proof required in civil cases in finding that the appellant had not proved the existence of a subsequent oral contract. It is trite that in civil cases, the required standard of proof is that of a balance of probabilities. He urged that the learned Judge ought to have weighed the appellants' evidence on the existence of an oral contract on a balance of probabilities; and that the appellant called two witnesses who buttressed his testimony that the parties herein took the motor vehicle KAP 050A to Embu Brothers Garage where it was repaired at the appellant's expense. That the only legitimate conclusion

ought to have been a finding that indeed there was a subsequent oral contract. He relied on the High Court case of in William Kabogo Gitau vs. George Thuo & 2 Others [2010] I KLR 526 where Kimaru, J. (as he then was) persuasively discussed what amounts to proof on a balance of probabilities as follows:

> "In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 5l% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

21. We have considered the whole record, submissions made by appellant's counsel, cases cited and the law. This being a second appeal from the decision of Muchemi, J. in Embu High Court Civil Appeal No. 67 of 2017, we are restricted to determining points of law and not of fact. As explained by this Court in the case of Stanley N. Muriithi & Another vs. Bernard Munene Ithiga [2016] eKLR 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.
>
> We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."

22. Having considered the above, we are of the view that what falls for our determination is whether the learned Judge misdirected herself and applied the wrong standard of proof thus reaching a decision that the parties' written agreement was not varied by an oral agreement.

23. The agreement of the parties was among the exhibits produced in court. It was dated 25th January 2016 and provided in part:

    4. "That the parties herein have totally agreed that the owner of motor vehicle Registration NO. KAE 569R being JOHN NJERU NTHIGA to cater for all the damages caused on both vehicles herein.

    5. That the total value of the damages caused oh motor vehicle Registration NO. KAP O5OA belonging to Muriithi John has been estimated to be Kshs.155,000/: which amount will be paid as follows;-

        a. Kshs.50,00O/- (Fifty thousand shillings) which amount MURITTHI JOHN will acknowledge receipt today and upon executing this agreement.

        b. Kshs.105,000/:= (One hundred and five thousand shillings) to be paid on or before 5th February 2016.

    6. That the parties herein do not desire to pursue this matter (accident) with the police and/or court.

    7. .....

    8. .....

9. That any party who ·breaches the .terms and conditions of this agreement shall pay the aggrieved party 50% of the agreed costs and or amount being liquidated."

24. The learned Judge, after considering the submissions of the parties identified the issues for determination as follows:

a. Whether there was a subsequent agreement to replace written one made on 25/02//2016 (sic).

b. Whether the appellant's vehicle was repaired at Nyeri at his cost.

c. Whether the vehicle was repaired in Embu at the cost of the respondent.

d. Whether the appellant proved his claim to the standards required in civil cases.

e. Who will meet the costs of the suit.

25. The issue is whether the written agreement between the appellant and the respondent, dated 25th January 2016 was varied. Dealing with the issue of variation of contracts, in the persuasive authority of the High Court in Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999, it was held:

> "...Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract." [Emphasis added]

26. In this case, it was not an issue that parties could vary their written agreement. The learned Judge analyzed the evidence adduced in the case and found no evidence of variation of agreement. She delivered herself thus:

> "34. The respondent's witness DW2 testified he is a panel beater in Embu. He stated that on a date he did not give, the parties [appellant and respondent] went to his garage. His evidence was that they said that the respondent would buy all the spares as the plaintiff was busy in Nairobi. This statement cannot be said to be evidence of any oral agreement. If the parties went to DW21s garage together, it was to give DW2 instructions for repair of the vehicle but not to have him witness their oral agreement. The oral agreement, if any, must have taken place elsewhere before the parties proceeded to the garage."

27. The learned Judge observed as follows as basis of testing whether the respondent had proved there was a variation of their agreement:

> "The respondent talks of successive events that happened on the same day the written agreement was entered into. The existence of a subsequent oral agreement and at what point as well as why it was entered into to replace the written one was not mentioned let alone explained."

28. The question is whether there was evidence of variation of agreement by both parties with the meeting of the minds. Proof of the meeting of the minds can be inferred by oral agreement or conduct of the parties. In this case, the appellant's evidence was that after the agreement was made, the two parties reported to the Police where the vehicle was towed to after the accident. The vehicle was then released to the respondent for repairs, and that they proceeded to DW2's garage, where the respondent told

DW2 that he would repair the vehicle and that the appellant would meet the entire cost. Taking the vehicle from the police was as per paragraph 6 of their agreement, where they contracted that they did not wish to have the matter handled by either the police or the court.

29. DW2 of Embu Brothers Garage testified that the respondent and the appellant went to his garage with the respondent's vehicle. According to DW2, the respondent told him to repair the vehicle and that the appellant would pay the cost. The evidence of DW2 corroborated the appellant's evidence that the engagement of DW2 in the repair of the respondent's vehicle was an action undertaken by both parties together.

30. There was clear proof that the respondent and the appellant varied the terms of their contract when, by conduct, soon after signing their agreement, they took the vehicle to DW2. The respondent himself gave orders to DW2 that the appellant would meet the repair costs. The orders or directions the respondent gave to DW2 altered the terms of the parties in their agreement, varying how the vehicle would be repaired, by leaving the supervision of repairs at the hands of the appellant instead of what had been agreed that the appellant would make payment in agreed instalments to cover repairs and other costs. The evidence was adduced, complete with receipts that the appellant indeed met the cost of repairs, including the charges of DW2 who carried out the repairs on the vehicle.

31. We find that the learned Judge misconstrued the evidence adduced by the parties, failed to apply the correct principles of testing whether variation took place, and therefore came to the wrong conclusion. There was a variation of the terms of the agreement of 25th January, 2016, by the conduct of the parties.

32. The other issue raised by the appellant has to do with the standard of proof. It was contended that the learned Judge applied the wrong standard of proof 'of proof beyond any reasonable doubt' yet this was a civil claim, instead of the correct standard of proof 'on balance of probabilities.'

33. The learned Judge considered the evidence of the respondent's case and observed:

> " 22. It was in the reply to the statement of defence filed on 13/05/2016 that the appellant [respondent on appeal] stated that the police released the vehicle to him and he took it to Nyeri for repairs. He attached a bundle of documents showing that the vehicle was released to him by Traffic Base Commander on 25/01/20016. In the bundle of documents were receipts for vehicle spares and labour amounting to Kshs.102, 200/=.
>
> 23 ... The contentious issue is his claim whether he took the vehicle to Nyeri for repair and paid for the repairs.
>
> 24. The repair of the vehicle by the appellant was so crucial to his case that he ought to have adduced all the relevant evidence when he filed the case. He also ought to have included the evidence in his original statement. No further statement was filed to include the evidence of the Nyeri repair."

34. Regarding the appellant's case, the learned Judge observed that DW2 needed to produce documentary proof that he had the vehicle in his garage and failed to produce any. The appellant on the other hand was challenged for failing to mention a variation of the agreement in his pleadings. As for DW3, the court found that he needed to have proved that he towed the vehicle to Embu Brother's Garage and not to Nyeri. She delivered herself thus:

> " 33. The respondent talks of successive events that happened on the same day the written agreement was entered into. The existence of a subsequent oral

agreement and at what point as well as why it was entered into to replace the written one was not mentioned let alone explained. An oral agreement to replace the written one was so crucial that the respondent could not have overlooked it in his statement or in his evidence in chief. His evidence cited above gives the impression that there was no such agreement.

35. DW2 did not produce a single document of booking the vehicle in his garage or any movement record to show that he received the vehicle on a given date and when he released it.

36. DW3 testified that he towed the motor vehicle. KAP 050A to the police station and later to the garage and that he was paid through mpesa by' the plaintiff. He did not produce any receipt for the money paid to him or even produce the mpesa statement. He gave the wrong registration number of the vehicle in his statement and only corrected it to read KAP 050 A when he testified in court. Although I did not have the chance to see the demeanor of the two witnesses DW2 and DW3, their evidence cast doubt on its credibility."

35. After this analysis the learned Judge found the respondent's case proved and entered judgment in his favour; "It is my finding that the evidence before the learned magistrate was sufficient proof of the appellant's claim. As I have indicated earlier, the evidence regarding the alleged subsequent verbal agreement was not adequately evaluated leading to the wrong finding."

36. Yet the learned Judge's conclusion of the respondent's case was that there was insufficiency of evidence to establish his claim. The Judge's conclusion as shown above was: "The repair of the vehicle by the appellant was so crucial to his case that he ought to have adduced all the relevant evidence when he filed the case. He also ought to have included the evidence in his original statement. No further statement was filed to include the evidence of the Nyeri repair." Having found that the respondent should have attached proof that he repaired the vehicle, and that he had carried out the repairs in Nyeri, how this could lead to a finding that the respondent's claim was proved is a mystery.

37. The learned Judge was also wrong in her analysis regarding the appellant. Contrary to her findings, the appellant pleaded in his statement, not just that there was a change of agreement, but also that he paid for the repair works and bought all the items required for the repairs. DW2 corroborated his evidence to the letter. As for DW2 and DW3, the appellant was present with them when DW3 towed the vehicle to DW2's garage. Furthermore, the appellant directed DW2 on how to repair the vehicle and who would pay for the repair work. The most critical evidence is that the appellant took away his vehicle 8 days later from DW2 after the repairs. The 8 days were also the basis of the payment for loss of business, a payment the appellant proved with documents that he paid to the appellant at the rate of 3000/- per day.

38. We agree with the appellant that the learned Judge applied different standards of proof. As against the appellant the standard applied was proof beyond reasonable doubt, while as against the respondent, who was the Plaintiff in the trial court, the Judge applied a standard below that of a balance of probabilities.

39. In the end, we enter judgment as follows:

    i. We find the appellant's appeal has merit and it therefore succeeds;

    ii. The judgment of the Embu High Court Civil Appeal No. 63 of 2016 dated 19th day of October, 2017 be and is hereby set aside in its entirety;

iii. The respondent will meet the costs of this appeal, the appeal before the High Court and the suit before the Chief Magistrates' court.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF MARCH, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR