



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nelima v Wachira (Civil Appeal E005 of 2023)  
[2025] KEHC 5375 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL E005 OF 2023**

**JN KAMAU, J  
APRIL 29, 2025**

**BETWEEN**

**MARY OBURA NELIMA ..... APPELLANT**

**AND**

**ROBERT WACHIRA ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon M. M. Gituma (SRM) delivered at Vihiga in the Senior Resident Magistrate's Court Civil Case No E061 of 2021 on 6th March 2023)*

**JUDGMENT**

**Introduction**

1. In her decision of 6<sup>th</sup> March 2023, the Learned Trial Magistrate, Hon M. M. Gituma, Senior Resident Magistrate, dismissed the Appellant's suit with costs to the Respondent.
2. Being aggrieved by the said decision, on 6<sup>th</sup> April 2023, the Appellant herein filed a Memorandum of Appeal dated 5<sup>th</sup> April 2023. She relied on fifteen (15) grounds of appeal.
3. Her Written Submissions were dated 29<sup>th</sup> August 2023 and filed on 2<sup>nd</sup> September 2024. The Respondent did not file any Written Submissions. The Judgment herein is therefore based on the said Appellant's Written Submissions only.

**Legal Analysis**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of



fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the Grounds of Appeal and the Appellant's Written Submissions, the Appellant summarised her fifteen (15) grounds of appeal into four (4) Grounds of Appeal. As all the Grounds of Appeal were related, they were dealt together. It appeared to this court that the only issue that had been placed before it for determination was whether or not the Appellant had proven her case against the Respondent on a balance of probabilities as required in civil cases.
7. The Appellant submitted that it was uncontested that the Respondent's Motor Vehicle Registration Number KCJ 327X Isuzu FRR Lorry (hereinafter referred to as the "subject motor vehicle") was involved in a self-involving accident on 26<sup>th</sup> March 2021 along Chavakali-Kapsabet road past Shiru Market after a tyre burst, while ferrying different goods belonging to customers. She said that the subject Motor Vehicle landed in a ditch and the said goods were looted and/or stolen. She said that she reported the matter to the Police.
8. She testified that she bought electrical goods at a sum of Kshs 615,250/= and instructed Geoffrey Gachuhi Wanyoike (hereinafter referred to as "PW 2") to load them into the subject Motor Vehicle at the Country Bus Station in Nairobi.
9. She argued that when the owner of goods hired an agent, such as the delivery person to transport goods, an agency relationship was formed with the agent acting on behalf of the owner. She submitted that the agent had the authority to act in the owner's interest. She was categorical that by sending PW 2, her agent, to deliver the goods to the Respondent, she had delegated the responsibility of transporting those goods and that the Respondent who was the courier in this case, was responsible for the safe and timely delivery of the goods once they took possession of them from her agent.
10. She further asserted that it was the duty of the Respondent to have ensured that the goods loaded in his subject Motor Vehicle were safely transported and delivered to their owners and a duty to ensure that the subject Motor Vehicle was well maintained and in a sound mechanical state. She asserted that the subject Motor Vehicle was involved in an accident due to negligence and consequently her goods, were destroyed and/or stolen.
11. It was her contention that the Trial Court erred in holding that for a duty of care to arise, there had to be a direct relationship between her and the Respondent. She was emphatic that that position was erroneous as an agent delivering the goods to the courier created a duty of care that extended from the owner to the courier, which now had a legal obligation to ensure that the goods were handled properly and delivered to the intended recipient. It was her submission that if the courier failed in that duty, for example, through negligence, the owner had a claim against the courier for any damages resulting from that failure.
12. She added that it was also the responsibility of the Respondent as a carrier for goods to have taken out an insurance cover for goods he ferried and/or indemnify her in the event of loss.
13. She faulted the Trial Court for disregarding PW 2's evidence which was not rebutted to her detriment and which showed the nexus between her and the Respondent. She also blamed the Trial Court for holding that she did not prove that she was owed a duty of care because PW 2 did not tell the court whether he paid for the transportation of the goods to establish a relationship between him and the Respondent. She reiterated that the Trial Court failed to consider her evidence and that of PW 2 thus arriving at a wrong conclusion that she had not proved her case on a balance of probabilities. She therefore urged the court to allow her appeal.



14. Notably, the burden of proof lay with the Appellant as stated in Section 107(1) of the *Evidence Act* Cap 80 (Laws of Kenya). The said Section provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
15. Section 108 of the *Evidence Act* further provides that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
16. The Appellant produced the Police Abstract Report, Invoices from Goldmax Electrical Ltd, Cash sale receipt from Magnetic Electronic, Demand Letters to the Respondent and to Sanlam General Insurance Ltd, Payment Receipt for Demand Notices by SOM Advocates, Search for the subject Motor Vehicle and the receipt for the Search in support of her case. She sought for compensation for the loss of her goods from the Respondent and his insurers but the same was not honoured. She prayed that the value of the stolen goods be refunded to her.
17. PW 2 testified that he loaded her goods in the subject Motor Vehicle for delivery to Shianda as per her instructions but that he later heard that the said subject Motor Vehicle was involved in an accident at Kapsabet. He pointed out that he knew the Respondent as the driver but he paid the transportation money to one Tony.
18. The Respondent stated that he had been engaged in the transportation business since 2017. He informed the Trial Court that he normally transported goods from one point to another and he would give a receipt to show that he had carried the goods. He said that the clients would give him delivery notes to show that he had carried their goods.
19. He said that on the material date of 25<sup>th</sup> March 2021, he had a delivery note for Obuyanzi Parcel Services and that when the accident occurred, the recipients were called to pick their goods. He denied knowing the Appellant or PW 2. He denied being aware of carrying her goods worth Kshs 615,000/= on the material date.
20. On cross-examination, he admitted having been given work to transport goods to Shianda, Kakamega, Mbale and Busia but could not tell if the Appellant’s goods were among the goods. He produced the Delivery Note from Obuyanzi Parcel Services and photographs of the accidents as exhibits.
21. The Trial Court held that there was no evidence produced for transportation or payment and/or delivery note to show the nexus between the Appellant and the Respondent hence a duty of care could not arise based on a claim not backed by evidence.
22. Notably, the Respondent herein was a common carrier as there was no special written contract in place between him and the Appellant. Under the 11<sup>th</sup> Edition of the Black’s Law Dictionary, a common carrier was defined as a commercial enterprise that held itself out to the public as offering to transport freight or passengers for a fee. It further states that a common carrier was generally required by law to transport freight or passengers without refusal if the approved fare or charge was paid, also termed as a public carrier.
23. A common carrier could also be explained as:-

“... to bring a person therefore within the description of a common carrier, he must be engaged in the business of carrying goods for others as a public employment .... And this



duty or obligation to the public by reason of the public nature of the employment and the increased responsibility imposed upon him by the law upon the grounds of public policy, mainly distinguish the common from the mere private carrier for hire.”

24. This court had due regard to the case of Express (K) Limited vs Manju Patel [2001]eKLR, where the Court of Appeal was categorical that a custodian of goods was liable if the same were lost or damaged in his custody and he gave no explanation on how such loss occurred.
25. The question that arose, therefore, was whether the Respondent as common carrier was in custody of the Appellant’s goods on the material date for transportation to Shianda.
26. The Appellant also called a witness to explain how her goods were loaded and how she was to pay for the same. Her submission was that she was to pay upon the goods reaching her destination. This assertion was not in her evidence. On the other hand, PW 2’s told the Trial Court that she sent him the transportation costs and she paid for the same. This was a material contradiction. There was an consistency regarding payment of the transportation costs to the Respondent herein, payment that the Respondent had contested.
27. The burden of proof lay with the Appellant to demonstrate the movement of monies from her to and from PW 2 to the said Tony. This could have been demonstrated by way of MPESA statements because it was clear from PW 2’s evidence that she sent him “his costs and those of transportation of the goods.”
28. She could have made her case cogent by adducing evidence linking the copies of receipts to the purchases through monetary transactions. This could have included Mpesa or bank statements to show that she did in fact use her money to purchase the goods so as to sustain a claim for loss. Indeed, receipts were not sufficient to prove that she purchased the goods after she was put on notice in the Amended Defence dated 28<sup>th</sup> March 2022 and filed on 30<sup>th</sup> March 2022 that the Respondent had denied the particulars of special damages and put her to strict proof thereof. Most receipts were illegible and did not bear her name. In the absence of this proof, this court agreed with the Trial Court that a duty of care could not arise based on a claim that had not been prove by evidence.
29. Under normal circumstances, if the Appellant had demonstrated that monetary connection to the Respondent herein, this court would have been satisfied with the evidence relating to the agency relationship between her and PW 2. Indeed, it was not uncommon in Kenya for goods to be loaded in motor vehicles on behalf of clients by third parties creating agency relationships. Without belabouring this point, this court took a different view from that of the Trial Court regarding the relationship between the Appellant and the Respondent herein.
30. The Respondent was emphatic that he could not tell if the Appellant’s goods were in the subject Motor Vehicle when it was involved in the accident. His testimony was that he had carried several goods on behalf of Obuyanzi Parcels to deliver to different clients. If he had not carried goods for any other client, he then ought to have been very certain of the goods that he had carried. This raised a red flag.
31. However, while he owed his customer’s a duty of care and was legally liable in case of loss and/ or damage, that duty could only arose where it was proved that he indeed received goods for transportation and that the same were not delivered as agreed. As there were inconsistencies and gaps in the Appellant’s case, this court could, therefore, not fault the Trial Court for having found that she failed to prove her case to the required standard which in civil cases was proof on a balance of probabilities.



## **Disposition**

32. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 6<sup>th</sup> April 2023 was not merited and the same be and is hereby dismissed. The effect of this is that the Trial Court's Judgment in Vihiga PMCC No E061 of 2021 be and is hereby upheld.
33. As it was not clear to this court if the Respondent actually carried the Appellant's goods but the Appellant fell short in proving her claim to the required standard, this court deviated from the general principle that costs follow the event and hereby directs that each party will bear its own costs of this Appeal.
34. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 29<sup>TH</sup> DAY OF APRIL 2025**

**J. KAMAU**

**JUDGE**

