



**GOO (Suing as Next Friend of LA ) v Hui Commercial (Civil Case  
140 of 2021) [2023] KEHC 20834 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 140 OF 2021  
DKN MAGARE, J  
JULY 25, 2023**

**BETWEEN**

**GOO (SUING AS NEXT FRIEND OF LA ) ..... APPELLANT**

**AND**

**HUI COMMERCIAL ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and decree of the Honourable Chief Magistrate, Hon Francis Kyambia on 19/8/2021 given in Mombasa CMCC 70 of 2017. The plaintiff's suit was dismissed with costs to the defendant. This is a case where every part of the proceedings should count. I will be allowing the appeal shortly as the court's decision was clearly erroneously. The court started on frolics of its own and set up a case that was not before the court.
2. It should be remembered that the entire court file is one complete record. Each section should feed the other. The court should never limit itself on the directions of the parties.
3. The standard of proof that the Appellant was subjected to appears to be higher than the balance of probabilities. The test in civil cases is not beyond reasonable doubt.
4. The issue of what amounts to proof on a balance of probabilities was discussed in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 where Court, Luka Kimaru, J, as then he was, 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 51% 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.”

5. In *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR the case stated as doth: -

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
6. This means that the burden of proof is not on the plaintiff alone. The plaintiff bears the burden of proof in proving negligence and damages. However, he only needs to set up a prima facie case on respect of these matters. The question always is not whether there is proof beyond reasonable doubt. It is the question of believability.
7. The court decides, on basis of evidence and demeanor of witnesses that this was the most likely thing that could have happened. The court could be wrong. There is nothing much that one loses other than money. The standard is higher in criminal cases since personal liberty is at stake.
8. The matter proceeded for formal proof and a judgment was entered ex parte. The defendant applied to set the judgment aside on grounds that: -
  - a. The defendant was not served.
  - b. The affidavit of service was false as the person served does not work for the defendant
  - c. Interest of justice will be served if the defendant is allowed to defend the suit.
  - d. In that application Philip Sadhi Mrima of P.O Box 7389 Mombasa, swore that he is a representative of the defendant Applicant. He stated that Bernard who was served does not work for the defendant.
  - e. He annexed a warrant issued to Makuri Auctioneers.
9. After hearing the matter, the same court set aside the judgment and allow the defendant to file defence. The defendant filed defence and admitted paragraph 1 and 2 of the Plaintiff. These 2 paragraphs define the parties. Paragraph 2 of the Plaintiff, that was admitted stated that the Defendant was a limited liability company.
10. In a strange twist of fate, the same Philip Sadhi Mrima wrote a witness statement.
11. He was an authorized officer of the business premises that was served with pleadings. He stated that there are 5 companies under Hui Commercial. In testimony he still said a different thing. He works for hui commercial enterprises limited. He was employed as a supervisor. He admitted that Hui Commercial. Enterprises limited is the defendant in court. I digress.

## Evidence

12. The Appellant called 2 witnesses. That is the Plaintiff and Dr. S K Ndegwa. only Philip Sadhi Mrima testified that hui commercial has 5 names. He produced some online garbage and called it evidence.



- The same was pure verbiage. If the wished to disprove that the defendant is not the owner of the motor vehicle in issue, it was their duty y to plead so. The name was not in dispute as the witness came out clear that his employer, Hui commercial enterprises Africa is the defendant in the case.
13. His evidence is real village gossip. Did not deal with the case in court. I asked myself, how many times do officious bystander turns up in court to set aside judgment against a stranger, turns up to testify for the Stanger and then gets believed.
  14. From the evidence the Respondent and the fictitious witness did not attack the affidavit. Did not attack the accident. The police abstract was admitted without any query.
  15. The Court dismissed the Appellants’ suit hence the Appeal. The memorandum of appeal raised 5 grounds that is, the magistrate erred by: -
    - a. Failing to consider that the respondent caused the Accident
    - b. Shifted the burden of proof on ownership
    - c. Disregarded the police abstract on ownership of Motor Vehicle Registration Number KBP 358 F, FAW Canter.
    - d. The appellant was a child at the time the accident occurred.
    - e. Consider the evidence of the police officer.
  16. All these grounds basically mean that the Appellant was raising one question only, that is the court erred in in its finding in liability.
  17. The dispute in this appeal is on liability. There is no issue of quantum. On quantum the court assessed as follows: -
    - a. General Damages Ksh. 1,500,000/=
    - b. Specials a sum of Ksh. 23,500/= was pleaded but there is no indicated in the defence,
  18. Clearly the court was under duty to assess both general and special damages. On special damages the court clearly failed on that duty. The plaintiff pleaded specials and as such the court was duty bound to make a finding. In Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR, the court therein stated as doth: -
 

“Turning to issue No. 2, the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:

“The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court’s then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment”
  19. I shall revert on the same.



## Duty of the first Appellate Court

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
21. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated: -

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
22. The duty of the 1<sup>st</sup> Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
23. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
24. In the case of Peters vs Sunday Post Limited [1985] EA 424, court therein rendered itself 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...”
25. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”
26. The High Court, pronounced itself succulently on these principles in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court



of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

27. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

28. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

### **Respondent's submissions**

29. The respondent field submissions in which he relied on the case of The respondent relied on the Authority of MARY WAMBUI KABUGU v KENYA BUS SERVICE LIMITED [1997] eKLR, Bosire JA stated as doth: -

“The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case.

30. He also relied on the case of Thuranira Karauri Versus Agenes Ncheche, which to the best of my recollection is bad law.

### **Analysis**

31. The issues related to liability the duty to prove the case is on the party that asserts. The duty is on whosoever asserts. On the other hand, there is not duty to prove a negative or an admitted fact. Sections 107,108 and 109 of the [evidence act](#) provides as doth; -

“

“107. Burden of proof

- (1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

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.

109. Proof of particular fact

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 that fact shall lie on any particular person.”

32. In *Treadsetters Tyres Ltd –Vs- John Wekesa Wepukhulu* [2010] eKLR, Ibrahim J, as then he was allowed an Appeal, on negligence and quoted with approval a passage in quoted Charlesworth & Percy *On Negligence*, 9<sup>th</sup> edition at P. 387 on the question of proof, and burden thereof where it is stated: -

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise,

- (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

33. The former east African court of Appeal stated as doth in the locus classicus case of *Butt v Khan* [1978] eKLR, KAR where Law JA stated that;

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This, with respect, is what I think happened in this case. The learned judge attached undue importance to the likelihood of epilepsy developing in the future. To what extent this view influenced him in awarding the amount he in fact awarded is a difficult question to answer.”

34. The issue of ownership was also raised and the court relied on the same. The court was clearly wrong in believing a witness who was not testifying on behalf of the defendant. He raised no issue on liability. The abstract being uncontested was proper evidence. The defence witness conceded that the defendant hui commercial is also hui commercial Enterprises Africa limited. The court of Appeal in *Joel Muga Opija v East African Sea Food Limited* [2013] eKLR, posited as doth: -

“We find of persuasive value the view held by Ali Aroni J. when she considered a similar issue of ownership in the case of *Collins Ochieng Ondiek vs Walter Ochieng Ogunde* – [HC Civil Appeal No. 67 of 2008,] (UR). She distinguished Thuranira’s case from the case that was before her as follows:-

“The Court of Appeal overruled this Court and found the High Court decision in *Collins Ochung Ondiek versus Walter Ochieng Ogunde Civil Appeal No. 67 of 2008* persuasive on this point. The Court quoted Ali Aroni, J. in that case in which she held:



“In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously”

The court held the evidence by a police abstract that defendant was the owner of the accident vehicle was “not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence.” In allowing the appeal, the court concluded that:

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied.”

I would have been prepared to find that the police abstract which the police produced was sufficient proof of ownership of the vehicle in light of the foregoing decisions but even without the respondent’s rebuttal the appellant’s testimony together with that of her witness were not only inconsistent in themselves but were also contrary to the particulars in the abstract. The person who was sued was not the same person identified in the abstract as the owner of the vehicle. A certificate of official search from the registrar of motor vehicles would perhaps have shed some light on this question.

The case of *Thuranira Karauri vs Agnes Ngeche* can be distinguished from the current case in many ways, it had several loop holes, it was time-barred and no proof of extension of time was produced in evidence, other material documents were produced in breach of provisions of Section 35 of the *Evidence Act* which is not the case here.”

In the more recent case of *Ibrahim Wandera vs P.N. Mashru Limited*, [Civil Appeal No. 333 of 2003] (unreported) this Court, again differently constituted considered a similar scenario. In that case only the appellant testified and on appeal the issue of whether ownership was proved was raised. Coincidentally, the advocate for the appellant was the same as is in this case and some of the grounds advanced in the Memorandum of Appeal were very close to the grounds raised in this appeal. This Court stated as follows: -

- a. “The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J. proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned Judge, with respect to him, did not at all make any reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashiru of P.O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross examined on it. It means the respondent was satisfied with that evidence.”

35. In the case of *Martin Oguta Mirembe v James Iboi Kimamu* [2018] eKLR, the court stated as doth: -

“

- “ 10. Appellant sued respondent whom he alleged was owner of the accident motor vehicle. He placed reliance on the police abstract which listed respondent as owner. I have considered the case of *Joel Muga Opija -Vs- East Africa Sea Food Ltd* [2013] eKLR where the Court of Appeal held as follows:-

“We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but



when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

11. Defendant gave evidence in his defence to challenge the plaintiff’s evidence regarding ownership of the motor vehicle in question. He successfully challenged plaintiff’s evidence contained in the police abstract and produced a copy of records which shows that the vehicle was as at the time of the accident, registered in the name Victory Construction Company.”

36. Andrew Mwori Kasaya v Kenya Bus Service [2016] eKLR, the court noted that a police abstract is sufficient proof of ownership.”

37. That decision has since been cited and followed by some courts, and was followed by Musinga Ag. J. (as he then was) in a similar case arising from this same accident (HCCA No. 188 of 2002) which Mr. Mahinda cited before us as an authority. We recently considered the Thuranira case (supra) in the case of Margaret Waithera Maina v. Michael K. Kimaru Civil appeal No. 16 of 2015 (UR) and observed that the courts are moving away from that rigid position and have stated as follows:-

i. “It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant’s evidence that the Police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

38. In the case of Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR, Hon lady Justice R.E. Aburili, stated as doth: -

”The appellant having candidly testified that he was running across the road when he was hit, and there being no evidence that the respondent was driving at an excessive speed in the circumstances, I find no valid basis for apportioning liability against the respondent, in as much as I appreciate the fact that determination of liability in road accidents cases is not a scientific affair as Lord Reid put more graphically in *Stapley – Vs – Gypsum Mines Ltd (2) (1953) AC 663* at pg 681 that

“To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of ..... It is quite irrelevant in this connection in a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of items. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that



one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

As stated above, there were specific acts of negligence pleaded by both parties in their pleadings and the onus of proving the said allegations lay on both, on a balance of probabilities. However, as this was the appellant’s case, and as the respondent had no counterclaim against him, it was upon him to demonstrate to the court how negligent the respondent was in the manner he drove or managed the accident motor vehicle. If the appellant checked the road to ensure that it was safe before crossing and there being no motor vehicle on site before he embarked on crossing – which only came in cross examination, it is surprising that he was hit by a motor vehicle which he did not see or even hear its emergence.”

39. The onus of proving negligence was on the respective parties. However, the plaintiff was a child of tender years. He was 14 at the time of testifying. *Patrick Muli v EM (Minor suing through her Mother and Next Friend WG) [2021] eKLR,*

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- “46. However, just like any other general rule, there are exceptions to this rule. The plaintiff herein was a child aged 8 years. In *Bottorff v. South Construction Company*, 184 Ind. 221, 110 N.E. 977 (1915), the Indiana Supreme Court stated:

“It has been laid down by law writers and the courts that the time of infancy is divided into three distinct periods, during each of which different presumptions prevail; the first period is that up to the age of seven years, during which the infant is conclusively presumed to be incapable of understanding the nature of crime and can in no way be held responsible therefor; the second is that between the ages of seven and fourteen years. An infant between these ages is presumed to be incapable of committing crimes, but the presumption may be rebutted by proof that the infant possessed sufficient discretion to be aware of the nature of the act. The third period is after the age of fourteen years when the infant is presumed to be capable of committing a crime and can be held the same as an adult. It seems that the greater weight of authority is to the effect that the same rule applies in negligence cases.”

47. The law in cases involving children of tender years was however reiterated by the Court of Appeal in *Rahima Tayab & Others vs. Anna Mary Kinanu Civil Appeal No. 29 of 1982 [1983] KLR 114; 1 KAR 90* where it was held that:

“The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not



the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy.”

40. He raises issue that a police officer was not called. This is not the issue because no evidence was tendered to rebut the occurrence of the accident. A stranger testified. The plaintiff's evidence remains unchallenged. The case involved an adult driver and a child. The driver knew how the accident occurred. Indeed the defence was based on his evidence. The contributory negligence pleaded became otiose. This were allegations without proof. They cannot be evidence. Further this occurred near a school. The speed limit is 50 Kph. There is no evidence on how the this occurred.
41. In the case of *Andrew Mworu Kasaya v Kenya Bus Service* [2016] eKLR, the Court of Appeal stated as follows: -

“With regard to issue No.1, It is evident from the record that the only reason the two courts below failed to find the respondent liable for the accident was because of lack of, or failure of the appellant to produce a search certificate from the Registrar of Motor Vehicles to prove ownership of the offending vehicle to the respondent. In so finding both the two courts below approved the decision in the *Thuranira* case (*supra*), and dismissed the receipt the appellant produced as proof that he was a passenger in the accident vehicle which had no registration number of the accident vehicle.

This Court had the occasion to restate the position of the law on this aspect recently in the case of *Charles Mageto and Another versus Sospeter Ndung'u Kamau* (Suing as the legal Representative of his late son *Arthur Nderitu Ndung'u Nyeri* CA No. 158 of 2011 where the following observations were made:

“For these submissions, Mr. Mahida relied on the decision of this Court in *Thuranira Karauri vs. Agnes Ncheche* – [Civil Appeal No. 192 of 1996] (UR) where it was stated in obiter dicta thus:

- i. “The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership.”

42. That decision has since been cited and followed by some courts, and was followed by *Musinga Ag. J.* (as he then was) in a similar case arising from this same accident (HCCA No. 188 of 2002) which Mr. Mahinda cited before us as an authority. We recently considered the *Thuranira* case (*supra*) in the case of *Margaret Waithera Maina v. Michael K. Kimaru* Civil Appeal No. 16 of 2015 (UR) and observed that the courts are moving away from that rigid position and have stated as follows: -

“It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the *Thuranira* case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect



of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.” See Joel Muga Opija v East African Sea Food Limited [2013] eKLR; Superform Ltd & Anor. vs Gladys Nchororo Mbero (2014) eKLR; and Wellington Nganga Muthiora vs Akamba Public Road Services & Anor. (2010) eKLR.

- i. Turning to proof by a passenger, we stated as follows in the Margaret Waithera Maina case (supra):
- ii. “The notion that only documentary evidence would be acceptable for strict proof of all facts has been decried before by this Court and we echo the case of Jacob Ayiga Maruja & Another v. Simeon Obayo Civil Appeal No. 167/02 (UR), thus:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

43. Having analyzed the evidence, it comes out clearly that there is something amiss with the case herein. The witness who testified did not testify how the accident happened. He stated he had worked for the defendant for 12 years. He states there are many companies under the hui brand. That is hui commercial, Hui commercial EPZ, Hui Commercial (Epz) Ltd, Hui Commercial Group Hui Commercial enterprises ltd. Apart from his employer, he knew no other company known as hui commercial.
44. What he produced were google pages of dubious authenticity. Being electronic records they did not comply with section 106(4) B of the [evidence Act](#).
45. In essence he was saying that his employer hui commercial enterprises Africa limited should have been sued. He did not state how the accident occurred.
46. However, it should be recalled, that the very same person, applied to set aside Ex parte judgment stating that his employer, the defendant, was not served. It is not everyday that a stranger out of sheer magnanimity of heart, what someone once called feeling sufficiently philanthropic to come to set aside judgment not against them. If execution is levied against a stranger, order 22 Rule 51 provides for objections as doth: -
  - i. “51. Objection to attachment
    - a. Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.
    - b. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.



- c. Such notice of objection and application shall be served within seven days from the date of filing on all the parties.”
- ii. The entry of appearance was not for the companies he is alleging but hui commercial.
47. In essence the evidence of the Appellant was not rebutted. The same remains. The court erred in finding a minor of tender years liable without basis. The one person who ought to have said that the accident occurred without negligence is the Respondent’s driver.
37. Accidents don’t just occur they are caused. There is a rebuttable presumption against children being liable, and particularly so near schools. A vehicle, properly driven does not have a self-involving accident. This is so also where, as in this case, where injuries are so serious. This must have occurred due to high speed. We will never know scene the only adult in the matter chose not to testify. Under section 112 of the *evidence act*, he had special knowledge and as such we are bound to construe that any evidence he failed to give was against his employer.
48. In the circumstances I find the Respondent 100% liable. I set aside judgment on liability and in liability and enter judgment for the Appellant on 100% basis. Without testimony on liability from the Respondent, this court cannot take into consideration contributory negligence. In any case this was a minor.

### Quantum

49. As earlier stated, there is no appeal on quantum. The court however, awarded only general damages. I have no reason to set the same aside. Therefore, judgment on quantum is entered as per the lower court judgment for 1,500,000/=.
50. However, the court did not deal with special damages. In the case of Swalleh C. Kariuki & another v Viloet Owisio Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -
- “In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
- A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR; Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR; Sanya Hassan v Soma Properties Ltd.)
51. Receipts produced in this matter amount to 24,000/=. However only 23,500 is pleaded. Therefore, I award this amount of Ksh. 23,500/=.



## **Determination**

52. The upshot of the foregoing is that the appeal succeeds and I allow it in the following terms: -
- a. The judgment entered in Mombasa CMCC 703 of 2017 is set aside in toto. In lieu thereof, judgment is entered for the Appellant against the Respondent at 100% liability
  - b. The appellant is awarded general damages of Ksh. 1,500,000/=
  - c. Special damages of 23,4000/=
  - d. Costs in the lower court to the Appellant
  - e. Costs of this appeal of Ksh 135,000/= to the appellant
  - f. There be 30 days stay of execution.
  - g. This file is closed

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 25<sup>TH</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Miss Aroka for the Respondent

No appearance for Maiga

Court Assistant - Brian

