Omar & another v Wachira (Civil Appeal 67 of 2022)
[2023] KEHC 25664 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25664 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 67 OF 2022

SM MOHOCHI, J

NOVEMBER 23, 2023

BETWEEN

JUMA OMAR ..... 1ST APPELLANT

ALI OMAR ALI ..... 2ND APPELLANT

AND

JOHN JOMO MWANGI WACHIRA ..... RESPONDENT

(Appeal from the Judgment/Decree of Hon. Richard Koech, Senior Principal Magistrate at Nakuru, entered on the 14th day of April 2022, in Eldama Ravine CMCC Number E009 of 2020)

JUDGMENT

Introduction

1. The Appellant's herein were the 1st and 2nd Defendants' respectively in Eldama Ravine CMCC NO. E009 OF 2020 in which the Respondent instituted a suit against them on 5th November, 2020.

2. It is the Respondent's case that on 21st May, 2018 or thereabout the Respondent was lawfully driving motor vehicle registration number KBL 852L along Nakuru-Eldoret Road at Equator when motor-vehicle registration number KBP 852L belonging to the 2nd Appellant and being driven by the 1st Appellant was so negligently and or carelessly driven caused it to hit Motor Vehicle Registration No. KBL 852L occasioning extensive damage to the same.

3. The Appellants' entered appearance on 27th April, 2021 and later filed their statement of defence on even date in which they denied the claim by the Respondent and averred that if at all an accident occurred (which they totally denied) the same was occasioned by the negligence on the part of the Respondent in the manner in which he handled, controlled and or managed motor vehicle registration number KBL 852L.

4. The matter came up for hearing on diverse dates wherein some documents were produced as evidence and some marked for identification.

5. However, after negotiations parties consented on liability in the ratio of 80:20: The only issue that was left for determination was on quantum, however parties agreed to canvass the same by way of written submissions. Consequently, on 14th April, 2022 judgment was entered in favour of the Respondent against the Appellants in the sum of Kshs 1,184,000/= plus costs and interest from the date of the judgment.

6. The Appellants' being aggrieved by the said judgment, preferred the present appeal by filing a Memorandum of Appeal [in which they raised the following grounds:

    a. That, the learned magistrate erred in law and fact by allowing production of documentary evidence, more specifically the assessors report, without calling the maker of the document and therefore contrary section 35 of the *Evidence Act* (CAP 80) Laws of Kenya.

    b. That, the learned trial magistrate erred in law and fact, in admitting documentary evidence without calling the maker on the basis that parties had already consented on the issue of liability.

    c. That, the learned trial magistrate erred in law, in failing to consider that no proper documentary evidence was strictly produced and as such the award issued is contrary to the principal governing awards for Special Damages.

    d. That, the learned trial magistrate erred in law and in principle, in tailing to appreciate the defendants/ appellants submissions and the recent comparable cases cited therein and thus making a prejudicial award to plaintiff/ respondent as against the defendant/ appellant.

The Appellants Case

7. In their written submission dated 28th February 2023, the Appellant has consolidated all ground (i - iv) of the Memorandum of Appeal

8. That, the Respondent pleaded to have incurred the following damages;

    i. Pre-accident Value Kshs 2,100,000.00

    ii. Recovery and Towing Charges Kshs 75,000.00

    iii. Assessment fee Kshs 7,000.00

    iv. Tracing charges Kshs 30,000.00

    v. Estimated loss of revenue Kshs 200,000.00

    TotalKshs 2,412,000.00

9. That on the 11th of November. 2021 PW-2 John Jomo Mwangi testified that; on 21st May, 2018 at around 9.00pm he received a call from his driver PW-1 James King'ori Nyagaka that he had been involved in a road traffic accident at Equator. PW-2 testified that PW-1 did not sustain any injuries but damage was occasioned on his motor vehicle registration no KBL 852L in which he now Seeks for compensation. On cross-examination PW-2 confirmed that there were no receipts for recovery and towing charges, assessment fee and tracing charges before court at the time of hearing.

10. The Appellant further submits that, PW-2 further testified that he had a contract between Arishaw and Mt Meru in Uganda to deliver fuel from Mombasa to Kampala worth Kshs 8,000,000.00 which he lost after the accident. The Respondent produced invoices as proof of loss of revenue but the same were not admitted as evidence rather marked as PMFI-5. PW-2 further testified that he engaged an assessor to assess the damage occasioned to motor vehicle registration no KBL 852L. The assessors report cited the pre-accident value of the vehicle to be Kshs 2,100,000.00 and the Salvage value to be Kshs 620,000.00, however the report was not produced as exhibit but was marked as PMFI-6.

11. That on 27th January, 2022, the matter came up for mention wherein parties recorded a consent on liability in the ratio of 80:20 and proceeded to prepare submissions without going for hearing in order to have the makers of the documents marked for identification attend court and produce the Same, The trial court then proceeded to prepare the judgement wherein it relied on the assessor's report marked for identification to award the Respondent the sum of Kshs 1,184,000.00 which the appellants herein are appealing against.

12. The Appellants' position is that the trial court misdirected itself by relying on the plaint and the plaintiffs list of documents and more specifically the assessor's report which were filed in the said suit to arrive at its decision. It is important for this honourable court to note that no hearing took place address the assessors report and the invoices marked for identification nor did the parties agree to produce any document by consent or otherwise.

13. It is the Appellants position that, parties only recorded a consent on liability and the consent did not deal with the calling of witness. It was not stated in the consent that the aforesaid documents were to be produced in evidence. It would seem that the court was misguided believing that parties having recorded a consent on liability all the documents filed in the suit were automatically admitted as evidence.

14. The Appellants' position is that once parties had recorded a consent on liability, the next step would have been for the Respondent to prove the loss suffered particularly as regards special damages which must not only be specifically pleaded but must be strictly proved by calling the makers of the documents marked for identification to attend court and be examined on the same. The invoices and assessment report were not produced as exhibits before the trial court.

15. The Appellants submit that, the law is quite clear on how exhibits are to be produced. Even in a full-fledged trial, if documents are simply referred to by witnesses but not formally produced, they do not acquire the status of exhibits in the case and can therefore not form as a basis to any award.

16. To further buttress this point, the Appellants' refer to the case of Kenneth Nyaga Mwige v Austin Kiquta & 2 others [2015] eKLR wherein the court had this to say:

> "
>
> > " 16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?
> >
> > 18. ...The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First,

when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a

document it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the end document alone but it would take into consideration all facts and evidence on record.....

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for it's authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj SharmaReginam [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value."

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification

being MFI 1, MFI 2 and MFl 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court, they were simply been marked for identification and thev have no evidential weight. The record shows that the trial court relied on the document "MEI 2" that was marked tor Identification in its analysis of the evidence and determination of the dispute before the Court. We are persuaded by the dicta in the Nigerian case of Michael Hausa -vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formaly produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.....

17. Further reliance is placed the Court of Appeal case, in Finmax Community Based Group & 3 others v Kericho Technical Institute [2021] eKLR the court observed that:

> " As part of that consent the parties were also emphatic that the accounts report would not be produced alongside the other documents but, instead they were to be "Marked for identification" (MFI. 10).
>
> We understand this to mean that the respondent was to call a witness to prove the accounts report before they could be admitted in evidence. Up to the point the judgment was pronounced, the accounts report had not been produced.
>
> Until a document marked for identification" is formally produced, it is of very little, if any, evidential value. See Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR.
>
> The report in question which we suspect was the genesis of the amount claimed by the respondent was not produced and appears not to be part of this record. We come to the conclusion on this question that the respondent did not present any proof of how the figure of Kshs. 11,261,901.28. was arrived at. The learned Judge clearly erred in failing to analyze the evidence in respect of proof of the figure claimed.
>
> Having found that the respondent did not discharge its burden of proof, we need not consider the next and final ground...."

18. The Appellants Submit that, in this case, no witness was called to produce the invoices and the assessors report. From the proceedings, it is very clear that parties did not indicate to court on the date that they consent on liability that they would also be consenting to the production of the aforesaid documents without calling their makers.

19. That, the Respondent ought to have called the makers and them produce the documents which would have given the Appellant herein an opportunity to cross-examine the maker. As long as this was not done by the Respondent greatly reduces the value and weight of the evidence.

20. That, it is instructive to note that, special damages must both be pleaded and proved, before they can be awarded by the court. In Hahn vs. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 17, and 721 the Court (Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – as he then was, emphasised that:

> " 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".

21. That, the rationale for requiring a party to plead and prove special damages was given by the Court in Jackson Mwabili v Peterson Mateli [2020] eKLR, as follows;

> " ..the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss, He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing." (Emphasis supplied)

22. The Appellants further submit that, the learned Magistrate failed to consider and/or ignored the Appellants' submissions on record thus arriving at a wrong conclusion in assessing damages. The impugned judgement of the lower court is found at [page 72-76 of the Record of Appeal. Of particular importance is [page 73 of the Record of Appeal] where the learned trial Magistrate proceeds to assess the quantum of damages on the basis of the documents in the Plaintiff's List of documents and renders his decision on quantum. It is also important to note that the trial court only refers to the list of documents by the Plaintiff and ignores that which was tendered by the Appellants in callous disregard of the principles of fair hearing enshrined in Article 50 of *the Constitution* of Kenya, 2010.

23. That the upshot of the Appellant's submissions is that, the appeal filed herein has merit, the same should be allowed and the lower court decision reversed and/or set aside and substituted with a judgment that meet the ends of justice.

Respondents Case

24. The Respondent humbly submit that, it is not in dispute that the accident happened. Neither is the admission of liability disputed as it is evidenced by the consent at 80:20 on liability in favour of the Respondent. It is also not in dispute that the motor vehicle belonging to the Respondent sustained damage.

25. That, the appellants demanding the failure to call an assessor is trying to steal a match after consenting to liability. We rely on the principle of nullus commodum capere potest de injuria sua propria (no man can take advantage of his own wrong)

26. That it is an established legal principle that the fact that damages cannot be assessed with certainty does not relieve the wrong doer of the necessity of paying them as every wrong must be remedied, and the court is duty bound to do the best in the circumstances no matter the difficulty, reliance is placed on the following authorities:

    i. McGregor on Damages 19th edition paragraph 10-001 paragraph 10-003 and page 348 to 350

    ii. Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR

    iii. Patrick Wambugu Gitahi t/a Wambugu Garagev Kenya Power Limited Company [2010] eKLR

27. The Respondent submit that, the best judge of the facts of the case was the learned magistrate, having heard the plaintiff's witnesses and arrived at the conclusion that the evidence placed before him was sufficient.

28. That is also true in the fact and law that it is not mandatory to produce an assessment report.

29. That the evidence of the Respondent in the trial court was enough and that, the burden of proof in civil matters is on a balance of probabilities and failure to call the assessor did not take anything away from his duty which in our humble submission was discharged.

30. That, the Appellants have relied on the court of appeal decision in Finmax Community Based Group & 3 others Vs Kericho Technical Institute (2021) eKLR where the court allowed the appeal since the case was instituted by an unincorporated organization thus lacking capacity to sue in its own name. The case the appellant seeks to rely on is not relevant to the present appeal.

31. The Respondent submit that, the Appellant have also sought to rely on the Court of Appeal decision in the case of Kenneth Nyaga Mwige v Austin Kiguta (2015) eKLR which was a defamation claim that dealt with issues to deal with general damages and exemplary damages unlike the case that is the subject of this Appeal.

32. The Respondent submit that, all the documents were produced by consent of all parties and the appellant cannot change tune by challenging the evidence in the documents. Reliance is placed on the case of David Chege Ndungu v Robert Macharia and 2 others [2015] eKLR.

33. The Respondent submit that, the Court of Appeal in Nkuene Dairy Farmers Co-operative Society 7 Another Vs Ngacha Ndeiya [2010] eKLR held:

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show that the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damaged complained of."

34. That, the decision in Nkune has been echoed and relied upon in Geranda Maria Simon Vs Global Trucks [2020] eKLR where the High Court at Naivasha found that an assessor's report without calling the assessor is sufficient evidence of material damage claim.

35. That it is clear that the Respondent only needed to prove the extent of the damage to his motor vehicle. The Respondent submit that, it is a cardinal principle in law that the burden of proof was on the plaintiff at all times and was on a balance of probabilities.

36. Further reliance is placed on the case of Jebrock Sugarcane Growers Company Limited v Jackson Chege Busi Civil Appeal Number 10 of 1999 which has been cited by the Court of Appeal in Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR where the court stated as follows:

> " The fact that damages are difficult to estimate and cannot be assess with certainty or precision does not relieve the wrong doer of the necessity of paying damages for his breach of duty and is no ground for awarding only normal damages.
>
> Where it is established, however, that damage has been incurred for which a defendant should be held liable, the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus, the court or jury doing the best that can be done with insufficient material may have to form conclusion on matters on which there is no evidence and to make allowance for contingencies even to the extent of making a pure guess."

37. Further the Respondent posits that, it is well settled that the award of damages is always at the discretion of the trial court. An appellate court should not interfere with the trial court's award on damage unless

it is satisfied that in awarding the damages, the trial court misapprehended the facts or applied the wrong legal principles or that the award was either too high or too low as to lead to an inference that it was an erroneous estimate of the loss or damaged suffered.

38. That, the Learned trial Magistrate used the correct principles in settling, that the Plaintiff was entitled to the differential amount between the vehicle's pre-accident value and the salvage value as was determined in the case of Permuga Auto Spares & Another v Margaret Korir Tagi [2015] eKLR where Mulwa J held that:

> " It is the courts view that once a vehicle has been written off the only compensation is the pre-accident value, less salvage value assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation."

39. The Respondent submit that, this position was advanced in the case of Concord Insurance Company Limited v David Otieno Alinyo & Another [2005] eKLR where the Court of Appeal while discussing the measure of damage to chattels agreed with the principles laid down by Herman LJ in Darbishire v Warran [196311 WLR 1067 at page 1070 thus.

> " The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiffs duty to minimize his damages..."

40. That more recently in Burdis Vs Livsey [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84:

> " When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to it's pre-accident condition".

41. That, the Appellants seek to rely on the case of Jackson Mwabili Vs Peterson Mateli (2020) eKLR which the Respondent submit that it is not relevant as it pertained to loss of user which was not awarded by the lower court in this present appeal.

42. That. the upshot of the Respondent's submission is that, the appeal as filed has no merit and its only aim is to delay the Respondent's claim therefore it is in the interest of justice that the same should be dismissed with costs.

Analysis and Determination

43. That this being the first appeal against judgment and on finding of fact, is by way of a re-trial and the Appellate court is duty bound to re-evaluate and scrutinize the totality of evidence on record in order

to draw its own conclusions as was held in the much-celebrated case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial iudae's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

44. As a first appeal court according to Peters v. Sunday post Ltd (1958) EA 424, I am only allowed to interfere with a finding of fact, if, it is not supported by evidence or it is contrary to the totality of the evidence produced at trial.

45. This court has considered the appeal herein, the evidence before the trial court, the grounds of appeal and the rival submissions by both the appellant and respondents' counsel both before the trial Magistrate and before this court. In my humble view, the only issue for consideration is whether the Appellant Proved the damages resulting from the alleged accident on a balance of probability?

46. After re-assessing the entire evidence, I find as a fact that, the trial court was in error to admit marked documentary evidence not produced or proven in evidence and proceeded to ascribe probative value and asses quantum on the basis of the Respondent's list of documents.

47. This court finds that the trial magistrate was in gross error in his view at Line 14-19 page 73 Record of Appeal that:

> " I am of the view that, when the parties recorded a consent on liability they intended that documents to prove quantum be admitted without calling the makers.
>
> Otherwise the consent recorded will be of no value in any event the statement of the Plaintiff had been adopted as his evidence in chief. In the circumstances I do proceed to assess the quantum of damages on the basis of the documents in the
>
> Plaintiffs list of documents.

48. This court has perused the court record and the same shows that, the case the subject matter of this appeal, came up for hearing on the 11th day of November 2021, PW1 testified and adopted his written statement as his evidence in chief, PW2 testified and adopted his statement as evidence in chief, he further produced Exhibits 2, 3, 4, 7 and 8 and identified PMFI 1 and PMFI5, PMFI 6 being the police abstract, Invoices and the Assessors Report respectively.

49. At the Close of hearing on the 11th November 2021, Mr. Kogi dutifully informed the court he shall at a future date be calling two more witnesses.

50. On the 22nd January 2022, the matter came up for hearing, Mr. Gatonye held Mr Mureithi's brief for the Appellants herein while Mr. Nyagaka held Mr. Kogi's brief for the Respondent herein. Mr. Nyagaka indicated that parties hand agreed to enter a consent at the ratio of 20;80 on liability, urging the court to give them a date for submissions. The position was supported by Mr Gatonye.

51. The court proceeded to adopt the consent marking the matter to be mentioned on the 3rd March 2022.

52. There is no record of the intention of the parties to either by consent produce all other documents on record yet to be produced and in fact the record is silent as to whether the parties closed their respective cases.

53. Order 18 of the Civil Procedure Rules (2010), Cap 21 Laws of Kenya is very comprehensive on how a trial should proceed in court including the recording and production of evidence of importance to this court is Order 18 Rules 1 and 2 which provide as follows: -

> " 1. The plaintiff shall have the right to begin unless the court otherwise orders.
>
> 2. Unless the court otherwise orders—
>
> (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. The party beginning may then reply.
>
> (3) After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited."

54. In view of the above provisions, can the procedure that was adopted by the parties be said to have complied with the procedure as laid down in the *Civil Procedure Act*? I find not.

55. I am persuaded by the court of appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta and 2 others [2015] eKLR that had this to say on production of documents.

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the documents are filed, the documents though on the court file does not become part of the judicial record.
>
> Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.
>
> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record.

56. The Court of Appeal further stated: -

Once a document has been marked for identification it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for is authenticity and relevance to the facts of the case. Once the foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit; it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an authenticated account.

57. This court is well guided by the Court of Appeal in the case of Nzuki Isaac Muveke v Francis Njogu Niehia [2021] eKLR:-The Court of Appeal is entitled to interfere (with a finding) if one or more of the following mattes are established:first, that the Judge misdirected himself in law;secondly, that he misapprehended the facts;thirdly, that he took account of or consideration of which he should not have taken account;fourthly, that he failed to take account of or consideration of which he should have taken account;fifthly, that his decision, albeit a discretionary one, is plainly wrong."

58. On this sole important issue, the law is clear that he who alleges must proof. The term burden of proof draws from the Latin Phrase Onus Probandi and when we talk of burden we sometimes talk of onus.

59. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:

> " Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win."

60. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

61. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

62. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that, the burden of proof as to any particular fact, lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

63. The Court of Appeal in Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR stated:

> "... Since the plaintiff did not object to that evidence being adduced and allowed the said cheques to be introduced in evidence and are therefore on record, this court cannot simply ignore or overlook them. They must be taken into account more so considering the contrasting evidence tendered on the same by both the plaintiff and defendant..."

64. I am of the Considered View that, the Respondent had not discharged the burden of proof and proved on a balance of probabilities, that the Appellants were negligent, causing the aforesaid accident and that as a result thereof he suffered loss and damage. The Consent on liability at the Ratio of 80:20 is indicative of where the blame lay.

65. The decision of the trial magistrate's finding, that when the parties recorded a consent on liability they intended that documents to prove quantum be admitted without calling the makers was in error and is hereby set aside.

66. In view of all the foregoing and since the documents referred to in the list of documents were not formally produced in support of the suit, coupled with the fact that the correct procedure for recording and production of evidence as laid down in Order 18 Rules 1 and 2 was not complied with, the learned magistrate, with tremendous respect, fell into error and the whole trial was rendered a nullity. There was no trial at all as contemplated by the law.

67. This Appeal accordingly succeeds on that limb the Judgment/Decree of Hon. Richard Koech, Senior Principal Magistrate at Nakuru, entered on the 14th day of April 2022, in Eldama Ravine CMCC Number E009 of 2020 is hereby set aside.

68. The matter is hereby remitted to the trial court for hearing and determination in the manner stated hereinabove.

69. Since the parties had entered into a consent on the flawed procedure, each party should bear its own costs of the appeal.

It is so ordered.

DATED and DELIVERED at NAKURU On this 23rd day of November, 2023.

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S. Mohochi

(Judge)