



**Anyona v Wells Oil Limited & 2 others (Civil Appeal E091 of 2022)  
[2023] KEHC 26833 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E091 OF 2022  
RE ABURILI, J  
DECEMBER 20, 2023**

**BETWEEN**

**ELIZABETH ATIENO ANYONA ..... APPELLANT**

**AND**

**WELLS OIL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN OKELLO OKUMU ..... 2<sup>ND</sup> RESPONDENT**

**SERE TRADING COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal arising out of the Judgment of the Honourable F.M.  
Rashid in the Senior Principal Magistrate's Court at Winam  
delivered on the 26th August 2022 in Winam SPMMC 27 of 2017)*

**JUDGMENT**

**Introduction**

1. The appellant is Elizabeth Atieno Anyona. She sued the respondents herein for general damages *vide* an amended plaint dated May 8, 2019, for compensation for injuries sustained in a road traffic accident that occurred on the November 2, 2015 along the Kisian – Kisumu road.
2. The appellant's case as per the pleadings and the witness statement which was adopted as her evidence in chief was that she was a pillion passenger aboard motorcycle registration number KMDL 876V and that while keeping to his left side at around Kicomi area moving towards Kisumu area, the respondents' motor vehicle registration number KAK 078J which was moving from the opposite direction swerved on to their lane forcing the rider of the motorcycle to swerve and collide with motor vehicle registration number KAK 078J. The appellant testified that she was injured on the left leg where she sustained a cut wound, on the right shoulder and that she had scratches on the chest and forehead. She further testified that her left toe nail was removed.



3. In her evidence in cross-examination, the appellant testified that she blamed the rider of motorcycle registration KMDL 876V on which she was a passenger as he lost control and hit the tanker then ran away, further that the said rider was speeding so he could not stop. The appellant further stated that they were three people on the motorcycle and that it was their motorcycle rider who hit the motor vehicle registration number KAK 078J.
4. PW3 George Mwita, a clinical Officer testified that he examined the appellant at Jaramogi Oginga Odinga Teaching and Referral Hospital and noticed that the appellant sustained soft tissue injuries. In cross-examination, PW3 stated that he only examined the appellant for purposes of filing the P3 form.
5. PW4 No. 71788 PC Simon Binott testified and produced the Police Abstract as PEX3. In cross-examination, he stated that it was the motorbike that hit the lorry from the rear. He further stated that the permissible capacity for a motorbike was one passenger whereas in the instant case there were two, the appellant and another juvenile.
6. The 2<sup>nd</sup> respondent testified as DW2 and adopted his witness statement dated July 25, 2019 and filed in court on the August 19, 2019. It was his testimony that he was the 1<sup>st</sup> respondent's director and that by a vehicle hire agreement dated 3<sup>rd</sup> January 2014, he had hired out the motor vehicle registration number KAK 078J to the 3<sup>rd</sup> respondent for a period of 10 years at a monthly rate of Kshs. 120,000 and further that the 3<sup>rd</sup> defendant was liable during the term of the agreement to insure the said motor vehicle.
7. DW1, Stephen Omondi Okelo's testimony was adopted from Winam CMCC No. 28/2017. In summary, DW1 had testified on behalf of the 3<sup>rd</sup> respondent and stated that he was the driver of the motor vehicle registration number KAK 078J on the date of the accident. He testified that on the material date, he was driving along Obote road along the Kisumu – Busia road heading towards Kenya Pipeline from Kisumu Town.
8. DW1 testified that the road was being constructed and therefore, vehicles were using the right side of the road and that as he approached the diversion, he saw a motorcycle approaching while on the right side, a car was also approaching and as the motorcyclist passed, the front cabin of his car, while he, DW1 was still stopping, he saw the motorcyclist hit the left side of the tanker between the front and rear tyres on the ladder. It was his testimony that the motorcycle had carried two passengers. He testified that he then stopped and helped the injured who were taken to hospital.
9. In cross-examination DW1 testified that the rider and the passenger did not have any helmet though he did not have evidence of the same.
10. In the impugned judgement, the trial magistrate found that the appellant failed to prove her case on a balance of probabilities and thus dismissed her claim. The trial magistrate held that had the appellant proved her case he would have awarded general damages of Kshs. 200,000.
11. Aggrieved by the trial court's judgement, the appellant filed the instant appeal *vide* a memorandum of appeal dated August 30, 2022 and filed on the 6th September 2022 raising the following grounds of appeal:
  - a. The learned trial magistrate erred in fact and in law in finding and holding that the appellant failed to prove his case on a balance of probabilities despite the appellant having tendered direct evidence on the circumstances of the suit accident as an eye witness.
  - b. The learned trial magistrate erred in fact and in law by holding that the appellant failed to call another pillion passenger who was also at the scene



of the accident to testify meant the appellant failed to prove his case on a balance of probabilities thus ignoring the evidence of the appellant and instead taking into account extraneous circumstances which were clearly out of the appellant's control.

- c. The learned trial magistrate erred in law and in fact by ignoring the appellant's evidence and version of the circumstances leading to the accident and basing her decision only on the respondent's witnesses evidence.
  - d. The learned trial magistrate erred in law by failing to critically analyse the evidence and submissions on liability on quantum together with the authorities submitted by the parties consequently coming to a wrong conclusion on the same.
  - e. The learned trial magistrate erred in law and in fact in writing a judgement which is at variance with the pleadings, against the weight of evidence and contrary to the principle as established by precedent.
12. The parties filed submissions to canvass the appeal.

### **The appellant's submissions**

13. The appellant's counsel submitted that the trial magistrate did not critically analyse the appellant's case and evidence as well as submissions on liability together with authorities filed by the parties hence she came to a wrong conclusion by dismissing the plaintiff/appellant's case for want of proof. The appellant's counsel reproduced the evidence as adduced in the lower court by the appellant and her witnesses including PW4 who produced the police abstract form of the reported accident. He also reproduced what the appellant stated in her witness statement. Reliance was placed on [Francis Njeri Mwangi v James K. Mwangi](#) [2015] eKLR where it was stated *inter alia*, that liability is proved by evidence usually of the victim and witnesses.
14. Further reliance was placed on the case of [Peter Kanithi Kimunya v Aden Guyo Haro](#) [2014] e KLR where this court held that a case is not just proved by documentary evidence but that it depends on the circumstances of each case. In the case, only the appellant who was the victim testified on how the accident occurred.
15. Counsel maintained that the appellant testified on how the accident occurred as an eye witness and victim of the accident hence the trial magistrate's requirement of a sketch plan of the scene of accident was asking too much of the appellant in a civil matter.
16. Further submission was that the trial court placed a heavier standard of proof to the appellant thereby coming to a wrong conclusion that the occurrence of the accident was not proved by the appellant. Reliance was placed on the case of [Sammy Ngugi Mugo v Mombasa Salt Lakes Ltd and another](#) [2014]e KLR where this court emphasized that the standard of proof in civil cases was on a balance of probabilities and not beyond reasonable doubt. Further reliance was placed on [Miller v Minister for Pensions](#) 1947 ALL ER 372 on the standard of proof which is a reasonable degree of probability and not so high as is required in criminal cases. Further reliance was placed on [James Muniu Mucheru v National Bank of Kenya Ltd](#) CoA ca 365 of 2017 [2019] e KLR still on the standard of proof required in civil cases.



17. Counsel then submitted that the appellant was only a passenger aboard a motorcycle hence the third respondent was wholly liable for the accident wherein she was injured. He urged the court to allow the appeal herein and set aside the judgment of the lower court dismissing the appellants' suit.

### **The 3<sup>rd</sup> Respondents' Submissions**

18. It was submitted that this court should examine and re-evaluate the evidence, and not to differ from the finding, on a question of fact, of the trial magistrate who tried the case, and who has had the advantage of seeing and hearing the witnesses, and interfere only when the finding of fact that is challenged on appeal is based on no evidence, or on a misapprehension of the evidence, or the trial magistrate is shown demonstrably to have acted on wrong principles in reaching the finding he did as was held in the case of *Simon Taveta v Mercy Mutitu* [2014] eKLR.
19. The 3<sup>rd</sup> respondent submitted that the burden of proof in this case rested on the Appellant in accordance with sections 107,108,109 and 112 of the *Evidence Act*. It was thus submitted that for the Appellant to succeed, she was required to prove the particulars of negligence alleged in the plaint which she failed to do as there was no evidence presented to support the allegations of negligence made against the 3<sup>rd</sup> Respondent and thus the appellant's suit was properly dismissed.
20. It was submitted that the evidence adduced did not support the allegations of negligence made against the 3<sup>rd</sup> Respondent as the evidence of the Appellant (PW-1), the police officer (PW-4) and the lorry driver, (DW-1) showed there was no evidence of any negligence against the lorry driver.
21. The 3<sup>rd</sup> respondent submitted that the Appellant did not, thus, as pleaded, prove that the lorry veered off its lane and hit the motorcycle but instead supported the 3<sup>rd</sup> Respondent's version of the accident and thus there was no evidence of negligence established against the Respondents.
22. It was submitted that the Appellant ought to have sued the motorcyclist and not the Respondents, for it was clear from her evidence that it was the motorcyclist, the third party, who lost control, and ramed onto the lorry.

### **Analysis and Determination**

23. 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 in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

24. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”



25. In this appeal, it is clear that the determination of the appeal revolves around the question of liability. That the burden of proof was on the appellant to prove her case on a balance of probabilities is not in doubt. Section 107 (1) of the *Evidence Act*, cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

26. This is called the legal burden of proof. There is however the evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. 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 the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

27. The two provisions were interpreted by the Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, as follows:

“As a general proposition under section 107 (1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act.”

28. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the respondents, the defendants in this appeal depending on the circumstances of the case.

29. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general preposition 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 fi no evidence at all were given as either side.”

30. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 stated that:

“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 that 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.”



31. Similarly, Lord Nicholls of Birkenhead in *Re H and others (Minors)* [1996] AC 563, 586 held that:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

32. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

33. However, as was held by the Court of Appeal in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd* (2) (1953) AC 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation 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 them. 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...”

34. In this case, the appellant pleaded in her amended plaint dated the May 8, 2019 that it was the respondents’ driver’s negligence that caused the accident that led to her sustaining the injuries for which she sought compensation. She also had her witness statement adopted as her evidence in chief wherein she reiterated the pleadings.

35. However, in her testimony in cross examination, the appellant testified that she blamed the rider of motorcycle registration KMDL 876V on which she was a pillion passenger for causing the accident as the motorcycle rider lost control and hit the tanker then ran away. Further, she stated that the said



- rider was speeding so he could not stop. The appellant further stated that they were three people on the motorcycle and that it was their motorcycle rider who hit the motor vehicle registration number KAK 078J.
36. I need not say more. The appellant shortened the game. In a football match, if a player scores own goal against his team, that score goes in favour of the opposite team and that is exactly what happened in this case. It is evident from the appellant's testimony in cross examination that she blamed the motorcycle rider for the occurrence of the accident. The motor cycle rider was not a party to the suit.
  37. Albeit the pleadings and part of her evidence in her witness statement blamed the 3<sup>rd</sup> respondent for the accident, that evidence was watered down in cross examination.
  38. Cross examination in itself cannot make a case for the defence where they have no credible defence. However, where a claimant in cross examination gives evidence which is totally at variance with the evidence in chief, then, where such contradiction is material, the court cannot ignore that evidence which materially differs from the pleadings and evidence in chief.
  39. I will briefly discuss what cross examination is and examine its importance.
  40. Cross-examination occurs after examination in chief and is the process of questioning the opponent's witness. As the word suggests, cross-examination is to cross-examine the opposition witnesses' testimony. During cross-examination, the cross examiner is able to challenge the truth or accuracy of the opponent's witness's version over disputed events.
  41. As to why cross examination is important, first and foremost is that it is a sure way of guaranteeing a party the right to a fair hearing and in criminal cases, the right to a fair trial. Cross-examination allows the accused in criminal cases or the defendant in civil cases to thoroughly analyse and challenge the evidence brought forward by opposing witnesses.
  42. According to John Wigmore, "Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. In the same way, a lawyer can do anything with cross-examination if he is skilful enough not to impale his own cause upon it." Cross-examination seeks out the truth. When a witness brings their account of disputed events, cross-examination gives the cross-examiner the ability to question all evidence brought forward by the witness. Separating lies from the truth is essential during cross-examination."<sup>1</sup>
  43. Cross examination also establishes inaccuracies in a case. Determining inaccuracies in a witness' statement can damage the overall case brought forward by the opposing party.
  44. Cross examination also tests the credibility of the witness. The credibility of a witness relates to their sincerity and whether they are speaking the truth as they believe it to be.
  45. Cross examination also challenges the reliability of the witness and the evidence adduced. Challenging the reliability of the witness's testimony will make or break a case. If the witness brought forward unreliable evidence in their testimony, it is the duty of the cross-examiner to challenge such a testimony. Points such as accuracy, truthfulness, and credibility all come in play here. If the cross-examiner notices questionable areas in a testimony, they can challenge the reliability of these areas to ensure that the evidence presented in the case is true, reliable, and fair.

<sup>1</sup> *The Principles of Judicial Proof* by John Henry Wigmore  
Review by: E. R. T. *Harvard Law Review*, Vol. 27, No. 7 (May, 1914), pp. 692-694 (3 pages)



46. F. Dennis Saylor IV and Daniel I. Small ) June 29, 2017 on “The why of cross-examination” writes that,

“First is the belief that “truth” is not that simple, that there is often more than one version, or at least more than one perspective. The Greek fabulist Aesop, writing in the sixth century BC, put it remarkably well:

“Every truth has two sides,  
It is well to look at both,  
before we commit ourselves to either.”

Second is our recognition that human beings are not perfect. All people make mistakes. And too many of them are willing to fabricate testimony, even in a formal, sworn courtroom setting. Because those mistakes (and lies) may favor one side of a dispute, it is the advocate for the other side who has the strongest motive and understanding to bring them to light.

A witness who is telling the truth need not be cross-examined. Unfortunately, human beings often make mistakes and sometimes lie.

Martin Luther King Jr. said: “Darkness cannot drive out darkness. Only light can do that.”

In a court of law, we rely on the advocate for the opposing side to shine the light on false statements and other forms of darkness.

Everything about cross-examination reflects that basic reliance on the lawyer as advocate and truth-seeker. The focus of cross is on the lawyer, including the form of questions (leading), the positioning and attitude in court (the lawyer on center stage), and the subject matter (the lawyer choosing specific points of substance or credibility, not just having the witness repeat or tell a story.

Cross-examination is one of our system’s essential means for testing the evidence, and thus finding the truth...”<sup>2</sup>

47. I can’t agree more with the above statements. In the instant case, the appellant’s evidence in chief was put to test and it failed the test. What she had told the court as to how the accident in question happened changed completely to be something totally different.

48. Albeit the appellant’s counsel has put up a spirited fight on the occurrence of the accident and how it happened, regrettably, he did not mention the evidence by his client in cross examination which destroyed the evidence in chief. Whatever the case, that evidence is on record and it cannot be erased. Neither can the court ignore it otherwise it will be creating its own case and determining it.

49. Accordingly, I find and hold that the appellant failed to prove allegations of negligence against the respondents as contained in her amended plaint and her witness statement which she had adopted as her evidence in chief. She did not enjoin the motor cycle rider to the suit although she blamed him for being negligent. That being the case, the trial court cannot be faulted for dismissing her suit for want of proof of liability, on a balance of probabilities. A court of law determines a case based on pleadings and evidence adduced to support the pleaded facts. Evidence is that which is given in chief, in cross examination and in re-examination. In this case, the appellant was re-examined and she stated that she relied on her statements. that may be so, but she had already relied on the said statements and that evidence had been tested in cross-examination wherein she gave a totally different version of how the accident occurred hence she could not change that evidence.

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50. It is important to note that even if the pleadings are meticulous but the evidence in support contradicts the pleadings, the court cannot twist the case to favour the plaintiff. The plaintiff was the author of her own evidence on oath, in chief and in cross examination. She cannot be seen and heard to be asking the court to plead the case for her and adduce evidence for her. Having cooked her own goose, she must eat it.
51. I thus find no fault in the decision of the trial court dismissing the appellant's case. I uphold the trial court's finding that the appellant failed to prove her case against the respondents on a balance of probabilities and as such the suit was properly dismissed.
52. The upshot of the above is that this appeal lacks merit and is dismissed with an order that each party bear their own costs of the appeal. The lower court file to be returned together with a copy of this judgment to be returned forthwith.
53. This file is closed.
54. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**R.E. ABURILI**

**JUDGE**

