Kenya National Highways Authority v Abdullahi (Civil Appeal 27 of 2020) [2022] KEHC 10344 (KLR) (25 April 2022) (Judgment)

Neutral citation: [2022] KEHC 10344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL 27 OF 2020

SN MUTUKU, J

APRIL 25, 2022

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT

AND

AHMEDNASSIR MAALIM ABDULLAHI ..... RESPONDENT

(Being an appeal from the whole of the judgement of the Honourable Edwin Mulochi (Resident Magistrate) delivered on 6th August, 2020 at the Kajiado in Chief Magistrates Court Civil Suit No. 393 of 2018)

JUDGMENT

The Appeal

1. This Appeal arises fro-m the judgement delivered on 6th August, 2020 in the Chief Magistrates Court Civil Suit No. 393 of 2018. The Respondent had sued the Appellant in the lower court seeking general and special damages arising from a road traffic accident as a result of which the Respondent's vehicle Registration No. KCQ 744Y Bentley Bentayga windscreen is alleged to have been damaged. The Respondent also sought interest and costs of the suit.

2. After hearing the parties, the trial court (Hon. Edwin Mulochi, RM) found for the Respondent and awarded him Kshs 750,311 special damages. The trial court declined to award general damages and ordered each party to bear own costs.

3. The Appellant is aggrieved and has preferred this Appeal. In the Memorandum of Appeal dated 14th August 2020, the Appellant has raised 20 grounds of appeal as follows:

    i) The Learned Magistrate erred in law and in fact in holding that an accident damaging the Respondent's car did occur along Nairobi – Namanga Highway when there was no accident report, no OB number, no insurance assessor's report, no photographs of the windscreen, no

eye witness to the accident and no particulars furnished by the Respondent of the purported contractors working on the road on the day of the alleged accident to corroborate the allegation by the Respondent that his windscreen was damaged by stones as a result of the Appellant's negligence.

ii) The Learned Magistrate erred in law and in fact by holding that the accident and or damage to the Respondent's car did occur in contradiction of his own finding at paragraph 31 of the judgement that the failure by the Respondent to report the occurrence of any accident as stipulated by Section 73(3) of the *Traffic Act* raised doubt to whether the Respondents windscreen was damaged by stones along Nairobi – Namanga Highway as alleged.

iii) The Learned Magistrate erred in law and in fact in failing to appreciate the fact that the effect of his judgement is to aid the Respondent to benefit from his (the Respondent's) criminal conduct in failing to comply with the provisions of section 73 of the *Traffic Act* contrary to established legal doctrine on the role of the courts.

iv) The Learned Magistrate erred in law and in fact by holding that the accident and or damage to the Respondent's car did occur along Nairobi- Namanga Highway in contradiction of his own finding that there was nothing to show the Respondent crossed the border and that his stamped passport would have been proof that he travelled to Tanzania which he failed to produce.

v) The Learned Magistrate erred in law and in fact when he failed to take cognizance of the provisions of Section 51 of the *Kenya Citizenship and Immigration Act* Cap 172 which stipulates that in any legal proceedings a certificate bearing signature of any duly accredited representative of the Government of Kenya, is prima facie evidence as proof of travel and in the absence of the Respondent's stamped passport, there was absolutely nothing on record to corroborate the allegation that he was travelling back to Kenya from Tanzania when the accident occurred.

vi) The Learned trial Magistrate erred in law and in fact in holding that an itinerary which did not bear the Respondent's name was proof of the Respondent having travelled to Tanzania contrary to the logical conclusion that, in the absence of any stamp on the Respondent's passport linking the itinerary to the Respondent and showing that in reliance on the itinerary the Respondent had travelled entered Tanzania on the said dates, the Respondent had failed to prove his case on a balance of probabilities.

vii) The Learned trial Magistrate erred in law and in fact in relying on the itinerary produced by the Respondent contrary to Section 67 of the *Evidence Act* which stipulates that documents must be proved by primary evidence and there was no evidence on record adduced by the maker of the itinerary and no evidence that the Respondent was the recipient or addressee of the itinerary.

viii) The Learned Magistrate erred in law and in fact in paragraph 36 of the judgement where he seems to equate the purported travel itinerary as evidence of travel and equivalent to certified stamped travel documents issued in accordance with section 51 of the *Kenya Citizenship and immigration Act*.

ix) The Learned Magistrate erred in law and in fact by irregularly and unlawfully shifting the burden of proof in section 107 of the *Evidence Act* to the Respondent when he held that the appellant did not demonstrate that the itinerary was fake when it was in fact the Respondent who was asserting he travelled across the boarder and had the Responsibility to show that the

itinerary was credible and or sufficient evidence to corroborate his allegation of having been on the Nairobi- Namanga Highway on 30th August, 2018.

x) The Learned Magistrate erred in law and in fact by holding invoices, payments, cheque produced by the Respondent was evidence of damage caused by the Appellant to the Respondent's windscreen when the said invoices, payments and cheque produced did not disclose what caused the damage and did not have any connection or nexus to the Appellant or any of its agents.

xi) The Learned Magistrate erred in law and in fact by applying the wrong principles in evidence which obligated the Respondent to establish the existence of an agency relationship between the Appellant and the purported contractors, agents, employees and/or sub-contractors who allegedly negligently caused the stones, shrapnel and particles to damage the Respondent's windscreen along the Namanga-Nairobi Highway.

xii) The Learned Magistrate erred in law and in fact by irregularly and unlawfully shifting the burden of proof in section 107 of the *Evidence Act* to the Respondent when he held that the Appellant did not produce evidence to lend credibility to the assertion that the damage could have been the result of a manufacturer's defect when it in fact the burden was on the Respondent to rule out the assertion.

xiii) The Learned Magistrate erred when he failed to address his mind to the Appellant's assertion that the windscreen could also have been damaged on account of the fact that the vehicle was being driven at an unreasonably high speed or a speed which was unreasonably high in the circumstances.

xiv) The Learned Magistrate erred in law and in fact in holding that it was unthinkable that the Appellant did not know of the alleged re-carpeting when the Appellant's evidence on record shows that it was not carrying out re-carpeting works on or about the 30th August, 2018 and that it did not know of the purported re-carpeting works and the Respondent failed to lead any evidence to show that the Appellant was carrying out re-carpeting works on Nairobi – Namanga Highway.

xv) The Learned Magistrate erred in fact at paragraph 37 of his judgement in holding that the accident occurred on the Nairobi – Namanga Highway without any evidence to corroborate the claim that the Respondent had been on the said road on 30th August, 2018.

xvi) The Learned Magistrate erred in law in holding the Appellant liable for damages to the Respondent's car contrary to section 93(1) of the *Traffic Act* which exonerates the Appellant from liability arising from any claims premised on the condition/and or state of the road.

xvii) The Learned trial Magistrate's decision was arrived at in a cursory and perfunctory manner in consideration of the irrelevant factors contrary to the rules of evidence and principles established by the courts in *Fred Ben Okoth -vs- Equator Bottlers Limited* [2015] eKLR and *BWK -vs- EK & another* [2017] eKLR being courts of superior record.

xviii) The Learned Magistrate erred in law and in fact by awarding the Respondent special damages without taking cognizance of the fact that the Respondent had allegedly proceeded to replace the windscreen without giving the Appellant a chance to inspect the windscreen and carry out an independent assessment of damage and independent valuation of cost replacement.

xix) The Learned Magistrate erred in law and in fact by reaching the conclusion that the Appellant breached its duty of care to the Respondent on the basis of the authority of *Holliday -vs-*

National Telephone Company [1899] 2 QB 392 without acknowledging that at no time had the Appellant based its defence on the argument that it had employed an independent contractor.

xx) The Learned Magistrate erred in law and in fact by applying the wrong principles and completely misapprehended the evidence on record and as a result arrived at a completely erroneous judgment which is not supported by the weight of evidence adduced.

4. The Appellant urges that the appeal be allowed, the trial court's judgment be set aside and/quashed in its entirety and in place an order be issued dismissing the Plaint dated 22nd November, 2018 and costs be awarded to the Appellant.

5. The Appeal was canvassed through written submissions with highlighting of the same on 17th February 2022.

Appellants Submissions

6. The Appellant filed its submissions on 22nd June, 2021 in which 6 issues have been identified for determination as shown below:

i) Whether the Respondent proved his case on a balance of probabilities.

ii. Whether the learned magistrate erred in placing reliance on documentary evidence not produced by the maker.

iii) Whether the learned magistrate wrongly shifted the burden of proof to the Appellant.

iv) Whether or not the common law of tort of negligence applies to the Appellant in the circumstances of this case.

v) Whether the Appellant has a statutory defence/immunity to the claim.

vi) Whether costs should be awarded to the Appellant.

7. On whether the Respondent proved his case on a balance of probabilities, it was submitted that the trial court based its findings on inadmissible evidence in light of the provisions of the *Evidence Act* on admissibility of evidenced; that the evidence is riddled with inconsistencies and contradictions and not capable of supporting a finding in favour of the Respondent and that the trial court elected to ignore and/or gloss over the evidence of the Respondent.

8. It was further submitted that the Respondent testified that he was travelling from Arusha Tanzania with his family when the accident occurred but he did not specify the exact location of that accident; that the location of the accident was not pleaded and that it was only in cross examination that the Respondent stated that the accident occurred somewhere between Isinya and Kajiado but this was not contained in his witness statement; that the Respondent stated that the road was being re-carpeted but this was denied by the defendant through the evidence of an expert, Engineer Frederick Oyuga Onyango; that this evidence was relevant and the trial court failed to give it weight and that this evidence, weighed against the oral evidence of the Respondent demonstrates that the Respondent did not on a balance of probabilities prove his case.

9. It was submitted that the alleged accident was not reported to the police which is a requirement of the law under Section 73 of the *Traffic Act*; that there is nothing on record to support the claim that an accident involving the Respondent's motor vehicle did occur and that the Respondent was indeed on that particular road at the alleged place and time and whether the accident was a result of stones and shrapnel purportedly on the road.

10. On whether the learned magistrate erred in placing reliance on documentary evidence not produced by the maker, it was submitted that the Respondent did not call the makers of the documents to produce them; that they did not consent to have the marked exhibits produced as evidence without their makers producing them and that producing the documents in the manner it was done makes that evidence hearsay. The Appellant cited *South Nyanza Sugar Company Limited -vs- Mary A Mwita & another* [2018] eKLR and *Kenneth Nyaga Mwige -vs- Austin Kiguta & 2 others* (2015) eKLR to support these arguments.

11. It was argued that pursuant to Section 83 of the *Evidence Act*, the purported invoice for Kshs 750,311, the confirmatio9n of payment dated 6th November 2018 and the itinerary from Travel Experts could not be presumed genuine as the were not certified copies.

12. On whether the learned magistrate wrongly shifted the burden of proof to the Appellant, it was submitted that the learned magistrate erroneously shifted the burden of proof to the Appellant, "to demonstrate that the travel itinerary is fake"; that the genuineness of a document is a matter within the special knowledge of the Respondent and not the Appellant and that the burden of proof rested on the Respondent.

13. It was submitted that the itinerary did not bear name of the Respondent; that the Respondent failed to call the maker of the itinerary or to produce his passport as proof of travel and that it was upon the Respondent, not the Appellant, to prove that the itinerary was genuine since his name was not on it.

14. On whether or not the common law tort of negligence applies to the Appellant in the circumstances of this case, it was submitted that the Appellant is a statutory body established under Section 3 of the *Kenya Roads Act* and its responsibility is set out under section 4(1) of the said Act. It was argued that the Appellant cannot be sued under the Common Law tort of negligence since in repairing the road the Appellant exercises a statutory function, governed by a statutory framework. It was submitted that the common law tort of negligence provides remedies as against torts committed by persons in a private capacity and certainly not in exercise of a statutory function.

15. It was further argued that the lower court erred in failing to appreciate that the Respondent did not prove that the Appellant owed him a statutory duty of care and that the Respondent would have required to show that he belonged to a class of persons to whom a statutory duty of care is owed. The Appellant relied on the Court of Appeal decision of *Ngera & Another -vs- Kenya Wildlife Service* (1998) 1KLR to emphasize this point.

16. On whether the Appellant has a statutory defence/immunity to the claim, it was submitted that pursuant to section 93(1) of the *Traffic Act* under Part X, the Appellant is not liable for any damage caused to any person or property occasioned through a condition of the road or failure of the road to sustain the weight of a vehicle. It was argued that the trial court erred in law and fact by reaching a conclusion that the Appellant breached its duty of care to the Respondent on the basis of authority of Holiday -vs- National Telephone Company [1899] 2 QB 392 without acknowledging that at no time had the Appellant based its defence on the argument that it had employed an independent contractor.

17. On the issue of costs, it is submitted that costs should be awarded to them as the Respondent's sued them contrary to section 93 of the *Traffic Act*. That the suit lacked merit as the Respondent is also guilty of a traffic offence for failure to report to the police station. Further that the tax payers' money is used in defending the suit and therefore fair to grant cost. That costs should also serve as a deterrence to numerous litigation that ensued from the conduct/harassment of the Respondent on his twitter handle.

Respondent's Submissions

18. The Respondent's submissions are dated 12th November, 2021. He has identified the following issues for determination:

    i) Whether the common law tort of negligence can arise against a statutory body.

    ii) Whether Section 93 (1) of the *Traffic Act* provides immunity from liability to the Appellant.

    iii) Whether the Appellant can raise issues of admissibility of evidence, not disputed I the lower court, at the appellate stage.

    iv) Whether the Respondent has proved his case on a balance of probabilities.

19. On whether the common law tort of negligence can arise against a statutory body, it was submitted that this issue was determined by the lower court pursuant to a Preliminary Objection dated 8th May, 2019 raised by the Appellant; that the lower court in its ruling completely rejected the argument by the Appellant that Common Law negligence cannot arise against it; that the Appellant did not appeal against this ruling and therefore the court should reject its attempt the sneak in that decision in this appeal.

20. The Respondent relied on the case of *Stovin and another (Respondent) -vs- Norfolk County Council (Appellants)* [1996] AC 923 to show that common law tort of negligence can arise against a statutory body. It was argued that the case of *X (Minors) -vs- Bedfordshire County Council* [1995] 2 AC classified private law into the following categories.

    i) Actions for breach of statutory duty simpliciter (i.e.) irrespective of carelessness.

    ii) Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action.

    iii) Actions based on a common law duty of care arising either from the position of the statutory duty or from the performance of it.

    iv) Misfeasance in public office, i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful.

21. The Respondent argued that his claim in the lower court was predicated on the 3rd category stated above; that the Appellant was careless by failing to erect road signs to warn of the ongoing construction; that they owed a duty of care to the Respondent as a road user and that duty was breached out of its carelessness and the result was that the Respondent suffered damages. Further that the Respondent proved his case on a balance of probabilities by way of documentary evidence and witnesses.

22. Relying on the X (Minors) case above, the Respondent argues that a common law duty can arise out of a statutory authority's careless performance of its functions. Further, the Respondent cited *Caparo Industries Plc. V. Dickman* (1990) 2 A.C 605, where it was stated that:

> " The relationship between plaintiff and defendant is sufficiently proximate and that it would be just and reasonable to impose a duty of care, an action will lie at common law. But it will lie simply because careless performance of the act amounts to common law negligence and not because the act is performed under the statutory authority."

23. On whether section 93(1) provides immunity from liability to the Appellant, it was submitted that this issue was raised in the lower court through a Preliminary Objection and ruling was made that "no

immunity is accorded to the Defendant in its parent Act. As per the section 93 of the *Traffic Act* it is the Minister of Public Roads and not the Defendant who is defined as the highway authority".

24. It was argued that the Preliminary Objection was dismissed and that the Appellant never appealed against that decision. Further that the Appellant never pleaded immunity at the trial court and even in their submissions, therefore they cannot now seek to raise it as one of the grounds of appeal. It was the Respondent's contention that parties are bound by their pleadings and they cannot raise different and new issues at this appeal stage and that a party is precluded from introducing the same issues that had been determined on points of law and no appeal was brought against the Preliminary Objection.

25. It was further argued that section 3 and 4 of the *Kenya Roads Act* provides that the Kenya National Highways Authority can sue and be sued. That the said immunity relied upon by the Appellants is afforded to the Minister and not them. That the immunity is not an absolute one. The same is qualified on "conditions of the roads" or "failure of a road to sustain the weight of a vehicle." That this only raises evidential issues to be determined at trial and that the Appellants did not meet this requirement at trial.

26. On whether the Appellant can raise issues of admissibility of evidence, not disputed in the lower court at the appellate stage, it was submitted that this issue was not raised in the lower court; that during cross-examination the Appellant did not raise any objection regarding the state of the evidence that was relied upon at trial; that it is trite law that parties are bound by their pleadings and a court of law cannot go beyond the issues raised before it as was held in *Charles C. Sande -vs- Kenya Co-operative Creameries Limited*, Civil Appeal 154 of 1992. It was argued that the Appellant had the opportunity to object to the production of the said documents but failed to exercise its right, further that "Equity aids the vigilant and not the indolent."

27. On whether the Respondent proved his case on a balance of probabilities, it was submitted that the Appellant failed to erect road signs to warn of an ongoing construction; that the Appellant owed a duty of care to them as road users and that the same was breached leading to the Respondent suffering damages. It is the Respondent's argument that he proved this at trial by adducing uncontroverted evidence. Further that during his testimony the Respondent offered to avail a copy of his passport which offer was declined by the Appellant's counsel.

28. On the issue of cause of action, the Respondent submitted that his case is based on the common law negligence, as evidenced under paragraph 4 of the Plaint. He relied on the case of Donoghue -vs- Stevenson in establishing liability and argued that a party suing a statutory body under the tort of negligence needs to only prove that a duty of care was owed and that damage was suffered from breach of the duty. It was his argument that all the required elements for the common law tort of negligence was sufficiently established and urged that this appeal should therefore be dismissed with costs.

Determination

29. Alive to my duty as the first appellate court, I have taken time to revisit the evidence on record. To this end, I have read the pleadings in the lower court file, the evidence adduced during the trial, the judgment of the lower court, the memorandum of appeal, rival submissions in this appeal and cited authorities. Mine is to evaluate all the evidence on record and arrive at my own conclusions in this matter, always alive to the fact that I did not observe the witnesses as they testified.

30. I have understood the case for the Respondent in the lower court. His claim is simply that he travelled to Arusha on holiday with his family on the 25th August 2018 and returned to Kenya on 30th August 2018 using Nairobi/Namanga Road; that while driving back to Kenya on 30th August 2018 on the same road, he was involved in an accident caused by "stones, shrapnel and particles emanating from re-carpeting road works being carried out by contractors, agents, employees and/or sub-contractors of

the Appellant. It is the Respondent's case that as a result of the said accident, the windscreen of his motor vehicle registration number KCQ 744 Bentley Bentayga was damaged. He carried out repair works on his motor vehicle and sued the Appellant for damages. The trial court found in his favour and he was awarded Kshs 750,311 for special damages. The prayer for an award of general damages was declined. The trial court ordered that each party should bear own costs.

31. This decision has aggrieved the Appellant who has mounted this appeal. The appeal was canvassed by way of written submissions following directions by this court (Mwita, J) to that effect. Parties opted to highlight the submissions and I listened to their arguments on 17th February 2022. Both parties emphasized that this is public interest case whose decision will have far reaching consequences.

32. My reading of the grounds of appeal contained in the memorandum of appeal reveals that the Appellant is accusing the learned magistrate (a) of making a finding that an accident did take place along Nairobi/Namanga Road as a result of which the windscreen of the Respondent's car was damaged without proof of such accident or proof that the Respondent travelled to Arusha along that road. (b) The learned magistrate is accused of contradicting himself in his judgment; (c) of shifting the burden of proof to the Appellant; (d) of holding the Appellant liable when section 93 (1) of the *Traffic Act* exempts the Appellant from liability; (e) of admitting evidence in contravention of the *Evidence Act* and (f) of misapprehending the evidence leading to an erroneous judgment.

33. My reading of the record of appeal, the submissions and the issues identified by each party leads me to the conclusion that the following are the issues arising in this appeal that require my determination:

    (i) Whether the common law tort of negligence can arise against a statutory body.

    (ii) Whether the Appellant has claim immunity from liability under Section 93(1) of the *Traffic Act*.

    (iii) Whether the trial court wrongly shifted the burden of proof to the Appellant.

    (iv) Whether the Appellant can raise issues of admissibility of evidence, not disputed in the lower court at the appellate stage.

    (v) Whether the Respondent proved his case on a balance of probabilities.

    (vi) Whether costs should be awarded to the Appellant.

Whether common law of tort of negligence can arise against a statutory body and whether the Appellant can claim immunity from liability under Section 93 (1) of the *Traffic Act*

34. The stand taken by both Appellant and Respondent in this issue is as varied as North is to South. The Appellant's stand is that the common law tort of negligence cannot arise against it. The Respondent holds a different view.

35. The Appellant is a statutory body established under section 3 of the *Kenya Roads Act* with responsibility of managing, developing, rehabilitating and maintaining national roads as outlined under section4(1) and (2). Section 3 of that Act provides that:

> There is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of—
>
> (a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding and disposing of movable or immovable property;

(c) borrowing money with the approval of the Minister and the Minister responsible for Finance; and

(d) doing or performing all such other things or acts for the proper performance of its functions under this Act as may lawfully be done or performed by a body corporate.

36. The Supreme Court of Kenya in *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR, considered similar issue as the one under consideration here. That court cited a paper by Paul Ward BL titled, "Liability in negligence of statutory bodies for breach of statutory duty," presented on 14th December, 2013, where the paper alludes to the challenge that courts have had to grapple with in trying to superimpose on a statutory duty a common law remedy. The author under reference stated that:

> " [I] It is clearly established in all common law jurisdictions that public bodies can be held liable in negligence for the negligent exercise of statutory duties and powers."

37. In the same case, Kenya Wildlife Service, the Court referred to the decision of the House of Lords in X (Minors) and Others v. Bedfordshire L.A [1995] 3 ALL E. R, also cited by the Respondent in his submissions in this appeal, in which the court held that a breach of statutory duty could only be maintained upon an interpretation of the statute that intended to confer a common law right of action. The Court in Kenya Wildlife case concluded that:

> " In light of the foregoing, we are persuaded that though there is no obligation expressly imposed on the appellant under the Wildlife Act to compensate for destruction of crops by wildlife, the statutory duty imposed under Section 3A(l) is actionable under common law.
>
> It would therefore be liable under the tort of negligence despite the lack of an express provision of statute to that effect. Under this tort four elements must be proven."

38. Further on the same issue, Supreme Court in the same case, Kenya Wildlife, observed that the principle in *Donoghue v. Stevenson*, 1932 SC (HL)31; (1931] UKHL 3; [1932] UKHL 100; [1932] AC 562 is applicable inrespect of where a person owes a duty of care to persons who are closely and directly affected by his act, so that he ought to reasonably foresee they will be affected.

39. The essentials of a cause of action in event of a statutory breach, were highlighted in Halsbury's Laws of England 3rd Ed. Vol. 36 para. 689 in the following words:

> " In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection and must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage."

40. I have read Section 93 (1) of the *Traffic Act* and rival submissions on the issue of immunity. The *Traffic Act* defines Highway Authority as the Minister for the time being responsible for Public Roads or any

other Authority or body to whom the Minister delegates powers subject to such terms and conditions as he may deem appropriate. The same definition is contained in the 5th Schedule to the *Kenya Roads Act*. To my understanding it is the Highway Authority as defined that has the immunity. Besides, the immunity under Section 93(1) of the *Traffic Act* is qualified as argued by the Respondent and it is hinged on the "conditions of the road" or "failure of a road to sustain the weight of a vehicle." The immunity under reference is not about negligent acts by the Appellant or its agents, contractors and sub-contractors.

41. With the above in mind, it is my finding that the Appellant owes a duty of care to road users. To my mind, the Appellant has a duty to road users to ensure that the works being carried out on the roads under its jurisdiction are undertaken with care to ensure that no road user is injured or no damage is caused due to negligent acts resulting from such works.

42. That having been said, it is my considered view that the Respondent bears the burden of proving the case against the Appellant. The outcome of this appeal shall be determined after considering all the issues before this court.

Whether the trial court shifted the burden of proof to the Appellant

43. The general rule of evidence is that the burden of proof lies on the plaintiff by dint of sections 107, 108 and 109 of the *Evidence Act*. The trial court, on paragraphs 32 and 36 of the judgment had this to say in paragraph 32:

> " The Plaintiff's failure to report the accident at a police station, in the Defendant's opinion, raises doubts as to whether, his vehicle's windscreen was indeed damaged by stones along the Nairobi-Namanga Highway. Chances are that, according to the Defendant, the damage to the Plaintiff's windscreen, and in view of the vehicle's registration date, was a result of manufacturer's defect. Nothing was however placed before this court by the Defendant to counter the Plaintiff's allegation that his windscreen was damaged by stones along the Nairobi-Namanga Highway. Nothing was also placed before this court to lend credibility to the Defendant's assertion that the damage could be as a result of the manufacturer's defect." (emphasis added).

44. Likewise in paragraph 36 the learned trial magistrate has this to say:

> " It suffices to point out that in a matter of this nature, civil, all the Plaintiff has to do is to prove his case on a balance of probabilities. It is true that he Plaintiff's stamped passport would have been good proof that he travelled to Tanzania. His failure to produce the said passport does not, however, invalidate the travel itinerary. Nothing has been placed before this court, by the Defendant, to demonstrate that the travel itinerary is fake." (emphasis added).

45. It is the requirement of the law that he who asserts must prove. The Respondent came to court claiming that he travelled along Nairobi-Namanga Road to Arusha, Tanzania and that somewhere along that road his windscreen was damaged as a result of stones, shrapnel and rubble from the road resulting from road works being undertake on it. It is the Respondent who presented an itinerary as proof of his travel to Arusha. It is a requirement of the law that he presents evidence to prove he did travel and that his vehicle was damaged as he claims. It is not for the Appellant to disprove the assertions of the Respondent.

46. I agree with the Appellant that the trial court shifted the burden of proof to it. This is contrary to the requirements of the law. I fault the trial court for this glaring blunder on its part.

Whether the Appellant can raise issues of admissibility of evidence, not disputed in the lower court at the appellate stage.

47. This issue revolves around the production by the Respondent of his list of documents as exhibits. It is contested that he was not the maker of the documents he produced and as such he could not produce them as exhibits. The documents in question are the logbook of Motor vehicle registration number KCQ 744Y; Itinerary from Travel Experts; Invoice for Kshs 750,311; Confirmation of payment dated 6th November 2018 Ref. No. RTEA0037 in respect of Cheque No. xxxx; Demand Letter dated 19th September 2018; Response to the demand letter dated 30th October 2018 and letter from the Respondent to Appellant dated 2nd November 2018.

48. The relevant part of the proceedings show that the Respondent adopted his witness statement as his evidence and told the court that he had filed a list of documents. The proceedings read as follows:

> "I also filed a list of documents dated 22nd/22/2018. I produce them as exhibits 1-7- produced."

49. The documents themselves are copies. They are not certified as true copies of the original. It is clear from the proceedings that the documents, specifically the Itinerary from Travel Experts, the Invoice, and the confirmation of payment, were not produced by the makers of those documents. The trial court accepted the production of the documents without question. They are marked as exhibits 1-7. I am not sure which of the documents is exhibit 1 sequentially to exhibit 7.

50. It is clear to me that the production by the Respondent of the documents as exhibits does not accord with the requirements of section 35 of the *Evidence Act*. This court, sitting on first appeal, has powers to revisit the evidence, consider and evaluate it and arrive at its own independent findings. My considering and evaluating the evidence and the record of proceedings of the lower court leads me to the conclusion that the trial court was in error in the manner he conducted the trial especially in the manner he accepted production by the Respondent of the documents as exhibits when he was not the maker of some of the documents.

51. It is my take that a first appellate court is empowered to correct errors of the trial court and one such error is the acceptance of the production of exhibits in a manner that is not allowed under the law.

Whether the Respondent proved his case on a balance of probabilities.

52. The applicable law, in respect of this issue, is the *Evidence Act*. Section 107(1) provides as follows.

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

Section 108 further provides that:

> "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

53. It is trite that in civil case, the burden of proof is on a balance of probabilities. The Court of Appeal in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, had this to say on the issue of proof on a balance of probabilities:

> " ..... The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
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> > "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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

54. The Appellant contests that the Respondent travelled to Arusha Tanzania using Nairobi-Namanga Road on the dates claimed; it contests that the windscreen of the Respondent's motor vehicle registration number KCQ 744Y was damaged after it was hit by rubble from the said road due to re-carpeting of the said road; it contests that the said road was under repair at the alleged date and time; it contests that the Respondent did not specify what part of the stretch of that road did the alleged accident occur.

55. The Respondent testified that he travelled to Arusha Tanzania on the 25th August 2018. To prove that he travelled he tendered an Itinerary from Travel Experts. I have seen that document. It refers to one adult and two children. It has no name on it. On the face of that document, this court is not able to tell who the one adult and the two children were. It could have been anyone. The Respondent was the only witness for the plaintiff. There is nothing wrong with that. The only problem is that his evidence as it stands requires corroboration to convince this court that what the Respondent asserts is true. As the evidence stands, it is his word of mouth alone that he travelled to Tanzania. He told the trial court that his word is sufficient. I am afraid not. At least not under these circumstances.

56. But the learned magistrate believed that evidence as the truth even though it is clear as can be seen on paragraph 36 of the Judgment that his view was that a stamped passport would have laid this issue to rest. Nevertheless, he found the fact of travel to Arusha as having been proved on a balance of probabilities.

57. The alleged accident was not reported anywhere. The Respondent is on record stating that "his was not an accident to report". Other than his evidence on the occurrence of such an accident, there is no other evidence on record. The normal procedure is to report to the insured's insurance company. But his vehicle did not have a comprehensive cover. The Appellant was not made aware of the alleged accident until the time the demand letter was sent, almost one month later. The Respondent said he called the CEO of the Appellant and informed him of the accident and that the CEO apologized to him. The problem with this evidence is that it is hearsay. This court did not have the benefit of the evidence of the said CEO.

58. In my view it is good practice to involve the other party on issues like these. Had the Respondent reported the alleged accident, or at the very least involved the Appellant or its agents, it would have been possible to have the damage on his vehicle noted by the Appellant. What happened here is that

no one else, other than the Respondent, is aware of the alleged accident. No one else, other than the Respondent, is aware that the Respondent was travelling to Nairobi from Arusha on Nairobi - Namanga Road on the 30th August 2018. The exact location of the accident is also not known. Not the Plaint or the Respondent's Witness Statement gave the exact location of the alleged accident.

59. Given the evidence of the Appellant that there were no road works, specifically re-carpeting of the Nairobi-Namanga Road on the date in question, and the Respondents evidence that there were and that the windscreen of his vehicle was damaged due to stones and rubble from the said road works, this court is left with a situation referred to in the Miller v. Minister of Pensions case as "a draw". The situation would have been different if there was other evidence supporting that of the Respondent. This court is left with a situation described in the Miller v. Minister of Pensions case. It leaves this court unable to decide one way or the other which evidence to accept. Does this court accept the evidence of the Respondent that he was on Nairobi – Namanga Road on 30th August 2018 somewhere between Kajiado and Isinya when an accident occurred damaging the windscreen of his car even when there is no evidence, other than his word of mouth, to support that? Or does the court believe the Appellant who said that there were no road works on that road on that date? The Respondent said that his word is sufficient, but is it? What would stop any other person coming to court and making similar claim and asking the court to rely on his word of mouth alone with nothing else to show in support of that word of mouth?

60. This court is not aware of the nature of the damage to the windscreen. There is absolutely no evidence on that. Not even the mechanics that repaired it came to testify. In today's world when all of us have been turned into photographers because of the mobile phones we carry around nothing would have been easier than to capture the scene with a camera. Or to report to the nearest police station, if for no other reason, for purposes of showing the court that indeed the road was under repair and that as a result of those repairs, an accident did occur damaging the windscreen. As the evidence stands now, it can only mean one thing, that the Respondent, who bears the burden of proof, has not discharged that burden. The requisite standard of proof on a balance of probabilities has not been attained.

61. I stated elsewhere in this judgment that all the issues cannot be determined in isolation. It all comes down to whether the Respondent tendered sufficient evidence to prove his case to the required standard. Once the answer to this question is in the negative, the result is one, that this Appeal must succeed.

62. Before I make my final orders, I wish to mention that the learned trial magistrate seemed unsure of what decision to make. The judgment of the trial court has a number of inconsistencies and contradictions. Upon reading it, I got the feeling that the trial magistrate was unsure which way he would make his determination. He seemed aware of the shortcomings of the Respondent's case but failed to make a different finding from what is contained in the judgment of that court.

63. Having taken into account the parties rival submissions and cited authorities, it is my determination that this appeal succeeds and is hereby allowed. The judgment of the learned magistrate dated 6th August 2020 is hereby set aside.

64. Turning on the remaining issue is that of costs, I have considered the same and I find no reason to disturb the finding of the trial court on that issue. Let each party bear own costs.

65. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 25TH DAY OF APRIL 2022

S. N. MUTUKU

JUDGE