



**Cadama Builders Limited v Mutamba ((Suing as the administrators
of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal
E093 of 2021) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E093 OF 2021
MM KASANGO, J
JULY 27, 2022**

BETWEEN

CADAMA BUILDERS LIMITED APPELLANT

AND

FRANCIS NDOLO MUTAMBA RESPONDENT

**(SUING AS THE ADMINISTRATORS OF THE ESTATE OF PHILIP MUSEI
NDOLO) (DECEASED)**

*(An appeal from the judgment of the Chief Magistrate's court at Gatundu
Hon H Ng'ang'a, PM dated May 19, 2019 in Civil Case no 218 of 2019)*

JUDGMENT

1. This appeal calls upon this court to determine one main issue. That is, did the respondent prove negligence on the part of the appellant.
2. The respondent filed a case before Gatundu Magistrate's court as the administrator of his deceased's son, Philip Musei Ndolo (deceased). The claim before that court was based on the allegation that the appellant/or its authorized agent negligently drove/controlled motor vehicle KAL 140 V thereby hitting the deceased causing him to suffer fatal injuries.
3. At the trial, evidence was adduced by the respondent and the police officer who produced the police abstract.
4. The trial court in its judgment of May 19, 2021 apportioned liability for the accident equally between the appellant and the respondent and awarded damages to the respondent for special and general damages.



5. The appellant was aggrieved by that judgment and filed this appeal. The main issue in this appeal as stated before is, the appellant's contention that the respondent did not establish before the trial court, negligence on the part of the appellant.

Analysis

6. The trial court in its judgment acknowledged that the respondent did not avail an eye witness, that is, one who witnessed the accident. The trial court noted that the police abstract indicated the deceased was to blame for the accident but discounted that blame by finding that the abstract could not be relied upon in the absence of it being produced by the investigating officer of the accident. The trial court further stated:-

“The onus of proof is always on the party who alleges. What is not in dispute is that the deceased was hit by the suit vehicle. Doing the best in the circumstances, I can only apportion liability equally between the deceased and the driver of the suit vehicle.”

7. As stated before, only two witnesses testified on behalf of the respondent. The first witness was a police officer, Charles Mwachima from Thika police station. He produced the police abstract in respect of the accident. He was not the investigating officer but he stated the investigating officer indicated in the abstract that the pedestrian, the deceased, was to blame for the accident.
8. The second witness was the respondent. His evidence only related to the occupation of deceased, deceased's financial support for his family and the expenses the respondent incurred in the burial of the deceased.
9. Section 107 of the *Evidence Act* requires the one who alleges to prove what he alleges. That Section provides:-

“107 Burden of proof

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

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

10. The respondent alleged that the appellant through its negligence caused the accident, which led to death of his son. The respondent needed to prove by evidence, the fault/negligence of the appellant. It is helpful to consider what was stated in the case of *Kiema Mutuku vs Kenya Cargo Holding Services Limited* (1991) eKLR thus:-

“There is, as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

11. No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant's pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent's pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in



those terms in the case of *Charterhouse Bank Limited (under statutory management) vs Frank Kamau* (2016) eKLR, as follows:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *KARUGI & ANOTHER V. KABIYA & 3 OTHERS* (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.

12. On the burden the respondent bares and the need to satisfy that burden, was discussed in the Court of Appeal in the case *Mbuthia Macharia vs Annah Mutua Ndwiga & Another* (2017) eKLR stated:-

“The judge alluded to the provisions of section 107 of the *Evidence Act*, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading text book:- *The Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”(emphasis added)

16 The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either



side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

13. The trial court fell in error in finding any liability was proved or could be imputed because the appellant did not adduce evidence.

14. The respondent by the written submissions in this appeal seemed to suggest that the trial court was right to have been ‘sympathetic’ to him and finding the appellant liable. This is what the respondent stated in his written submissions:-

“As a plaintiff (here respondent) we submit that and (sic) a citizen of Kenya, the law requiring on forcing the plaintiff to have a real or made up eye witness should not curtail the rights of such plaintiff who has lost a son at age 26 years to an accident that was not the fault of the plaintiff. These strict adherence ought not cause the suffering of the plaintiff.”

15. This court sympathizes with the respondent but that is as far as this court will go. It was the duty of the respondent, as the law requires to provide evidence of liability for the accident on the part of the appellant. He did not. There was no scintilla of the evidence by respondent on which the court can or could base the finding of liability. For that reason, this appeal succeeds.

DISPOSITION

16. The judgment of this court is as follows:-

- (a) The judgment of the lower court be and is hereby set aside.
- (b) The lower court case is hereby dismissed.
- (c) The appellant is awarded costs of this appeal and of the lower court costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Court assistant:- Mourice

For appellant:- Mr Njuguna

For respondent:- No appearance

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

