



REPUBLIC OF KENYA



**Matiangi v Kisii Bottlers Limited & another (Civil Appeal 25 of 2020)
[2021] KEHC 13708 (KLR) (30 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 13708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 25 OF 2020
AK NDUNG’U, J
SEPTEMBER 30, 2021**

BETWEEN

BILLIAH MATIANGI APPELLANT

AND

KISII BOTTLERS LIMITED 1ST RESPONDENT

ABRAHAM WATA WAFULA 2ND RESPONDENT

*(An appeal from the Judgment and Decree of Hon. Nathan Shiundu
(C.M) in Kisii CMCC No. 491 of 2014) delivered on 29th January 2020)*

JUDGMENT

1. The appellant sued the respondent for damages following a collusion between the appellant’s motor vehicle KAK 194E and the 1st respondent’s motor vehicle KAJ 137E. The appellant alleged that the respondent’s motor vehicle was being driven negligently causing the accident and as a consequence the appellant’s motor vehicle was written off.
2. The respondents filed a defence denying occurrence of the accident or negligence on the part of its driver. It attributed negligence to the appellant. In its judgment dated 29th January 2020, the trial court found the appellant did not tender any evidence to prove that the motor vehicle belonged to her. The trial magistrate further found that the police abstract and valuation reports were not produced.
3. The appellant was aggrieved with the finding of the trial magistrate and filed a memorandum of appeal dated and filed on 28th February, 2020, raising the following grounds of appeal:
 1. The learned trial magistrate erred in law by finding the appellant failed to prove her case on a balance of probabilities.



2. The learned trial magistrate erred in law and misdirected himself fundamentally in holding that the appellant's case is not predicated on material evidence when her testimony and that her witness was not controverted.
 3. That the learned magistrate erred in law by finding that the plaintiff did not tender any evidence to demonstrate that the motor vehicle in question belonged to her.
 4. That the learned trial magistrate erred in law in failing to correctly evaluate, both oral and documentary evidence tendered by the appellant thereby arriving at a wrong decision.
 5. The learned trial magistrate made a decision against the weight of the evidence on record.
4. This being a first appeal, this Court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the Court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR).
 5. At the trial, the appellant called 2 witnesses. John Moseria Omasa (Pw2) recalled that on the fateful day at Misisita area he saw an oncoming motor vehicle, the respondent's vehicle, being driven at high speed. The vehicle then veered off from its lane into Pw2's lane (the left side) causing the head on collision. Pw2 testified that he was then admitted at Getembe Hospital after the accident. Bilha Kerubo Matiangi (Pw1) testified that her vehicle motor vehicle KAK 194E was involved in accident and the vehicle written off. She told the trial court that the value of the vehicle was Kshs 650,000/- at the time of the accident.
 6. The respondent did not call any witness in support of their case.
 7. The only issue that arises is whether the appellant proved that the accident was caused by the respondents' negligence and whether she is entitled to the damages sought.
 8. On whether the appellant proved negligence on the part of the respondent Pw2 gave clear evidence that the respondent's vehicle was being driven in a negligent manner. The respondent on the other hand did not call any evidence to displace the case established by the appellant regarding the issue of negligence on the respondent's part. However it was also necessary for the appellant to prove that she was the owner of motor vehicle KAK 194E. There was however no documentary evidence that was availed to prove ownership and the trial magistrate dismissed the appellant's claim because she had not proved ownership.
 9. The appellant submitted that although documents may not have been produced as evidence, nevertheless the oral evidence which was not challenged cannot be said to be worthless.
 10. The Court of Appeal in the case of *Joel Muga Opinja -vs- East African Sea food limited* (2013) eKLR cited with approval the decision in *Ignatius Makau Mutisya -vs- Reuben Musyoki Muli* where the court found that:

“ the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied.”
 11. Where a plaintiff gives evidence in support of her case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya)*



Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

12. The fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

(See *Kirugi and Another v Kabiya and Others* [1983] e KLR).

13. The appellant despite the absence of evidence from the respondent was obligated to prove its case on a balance of probabilities. Although there was no evidence from the respondents, the appellant did not present any evidence to prove that she was the owner of motor vehicle KAK 194E and this was very crucial for the success of her case.

14. I now turn to consider the issue of damages. The appellant submits that the matter commenced at the High Court and the appellant partially testified and produced documents. The matter was later transferred to the subordinate court and at the time of transfer some of the exhibits produced at the High Court could not be traced. The appellant submitted that the motor vehicle assessors that had been instructed by the Respondents closed his practice due to complications arising from old age and went back to India. The appellant’s evidence was thus oral evidence. They acknowledged that the documents they produced in court were lost during cross-examination by the Respondent.

15. The respondent in opposition submitted that the appellant’ claim was in the nature of special damages and must be strictly proved with as much particularity as circumstances permit (see *Jackson Mwabili v Peterson Mateli* [2020] eKLR). They advanced that documents marked for identification cannot be construed as evidence. They cited the case of *Kenneth Nyaga Mwige vs. Austin Kiguta & 2 others* [2015] eKLR where the Court of Appeal held as follows:

“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?

17.

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 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 its 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 Sharma -v- Reginam* (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.”
16. After carefully considering the proceedings at the trial court, the assessment report was marked as PMFI1 and the police abstract as PMFI2. Both documents were not produced by the appellant and are not in the lower court file. The appellant’s claim on damages was largely dependent on the assessment.



Unfortunately both PMFI1 and PMFI2 were not produced as evidence for the court's scrutiny and therefore the trial magistrate cannot be faulted for not awarding damages. In any event, even if both documents were in the court file but had not been produced as exhibits they would not form part of the evidence that is properly before the trial magistrate.

17. The Court of Appeal in *Finmax Community Based Group & 3 others v Kericho Technical Institute* [2021] eKLR 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.

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Until a document “marked for identification” is formally produced, it is of very little, if any, evidential value. See *Kenneth Nyaga Mwigie vs. 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. Since the damages sought were in the nature of special damages, it was necessary to produce evidence that supported the special damage claim for the court's scrutiny. It is trite law that special damages must not only be specifically pleaded but also strictly proved. The court could not simply award a figure without any evidence to support it. The Kshs 650,000/- claimed by the appellant is not supported by evidence.
19. In the end, this court finds that the appellant did not produce sufficient evidence to discharge its burden of proof. With the results that the appeal herein is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF SEPTEMBER, 2021.

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A. K. NDUNG’U

JUDGE

