



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 227 OF 2017

GATEWAY INSURANCE CO. LTD.....APPELLANT

VERSUS

JAMILA SULEIMAN

AISHA MWARO OKUMU.....RESPONDENTS

(Being an appeal from the judgement of Hon. J M Nangea in the Mombasa

Chief Magistrate's Court Civil Case No. 1951 of 2012

delivered on 29th August, 2017)

BETWEEN

JAMILA SULEIMAN.....PLAINTIFF

AND

GATEWAY INSURANCE CO. LTD.....DEFENDANT

JUDGEMENT

1. This appeal arises from the decision made in the Mombasa Chief Magistrate's Court Civil Case No. 1951 of 2012. According to the Plaintiffs in that suit, the Respondents herein, the Defendant therein, the Appellant herein was the insurer of motor vehicle Reg. No. KAE 613E, Nissan matatu owned by **Michael Ngige** (hereinafter referred to as "the insured") under insurance policy number 040/089/000/01 which inter alia required the Appellant to indemnify the said insured and/or its driver, servant or agent in respect of any accident involving the said motor vehicle and a third party claimant and/or to satisfy or indemnify the insured against any claim or decree arising from any such accident or otherwise that may be passed in favour of any such claimant.

2. It was pleaded that on or about the 28th June, 1999 during the currency of the said policy, whilst the deceased, **Suleman Ali Musa**, was a lawful passenger in the insured's said motor vehicle, the same was so negligently driven, managed and controlled that it violently collided with another lorry and as a consequence the deceased was seriously injured, suffered loss and damages. Thereafter the Respondents after serving on the Appellant the relevant statutory notice instituted civil proceedings for general and special damages against the said insured vide Mombasa HCCC No. 536 of 2000 – **Jamila Suleman & Aisha Mwaro Okumu vs. Michael Ngige**.

3. According to the plaint the said case was concluded on 4th November, 2011 and judgement entered for the Respondents against the Appellant in the sum of Kshs 3,063,276.75 an amount which the Respondents claimed against the Appellants in the matter appealed from. The claim according to the Respondents was based on sections 5 and 10 of the **Insurance (Third Party Motor-Vehicle Risk) Act** Cap 405 (hereinafter referred to as "the Act"), and the policy in question under which the Appellant became liable to pay the Respondents herein the decretal sum arising from their suit against the insured.

4. In a short judgement, the Court entered judgement for the Respondents against the Appellants as prayed in the plaint.

5. It was that judgement that triggered this appeal.

6. Testifying as PW1, **Aisha Mwaro**, stated that her co-respondent was her daughter and that she had been given letters of administration ad litem to file the said suit. According to her testimony, they sued the Appellant because it insured motor vehicle that caused the death of the deceased, who had sued the insured and judgement was entered in his favour. However the deceased passed on before the said judgement was delivered. However the deceased was awarded Kshs 2,700,000 plus the costs of the suit.

7. It was her evidence that her advocates demanded for the said payment and that the Appellant was notified of the intention to file the original suit. She also testified that an abstract had been issued to the deceased. She therefore prayed that judgement be entered plus interest and costs. It was her evidence that the Appellant insurance company had issued a policy of insurance to the defendant in the original suit. In support of her case, PW1 produced copies of the letters of administration and demand letter as exhibits while copies of the original judgement, notice of intention to file the original suit and abstract were marked for identification.

8. **Patrick Maina Thuku**, an Executive Assistant attached to the High Court who testified as PW2 produced a copy of the judgement in HCCC No. 536 of 2000 after which the Plaintiff closed her case.

9. After seeking time to call its witnesses, the Appellant's case was eventually closed without any defence witness testifying.

10. In this appeal the Appellant has set out the following as its grounds of appeal:

1) That the judgement by the trial court is a nullity, as the judgement amount is in excess of the amount decreed to be paid by the appellant under the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya.

2) The Learned Trial Magistrate erred in law and in fact in holding that the respondent had proved her case on a balance of probability.

3) That the Learned Trial Magistrate erred in law and in fact in holding that the statutory notice required under the under the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya.

4) The Learned Trial Magistrate erred in law and in fact by relying on hearsay evidence and placing a lot of weight on it in determining that the Statutory notice had been served by the respondent.

5) The Learned Trial Magistrate erred in law and in fact in failing to find that the plaintiff respondent had not proved her case under sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya.

11. The Appellant therefore prayed that the judgement of the Chief Magistrate dated 29th August 2017 be set aside and be replaced with an order dismissing the respondent's case with costs and that the appellant do have the costs in the subordinate court as well.

12. On behalf of the appellant it was submitted that from the plaint and plaintiff's statement, the respondents herein are the administrators of the estate of the late **Suleiman Ali Musa** who died on 29th June 2003. At the time of his demise he had been involved in a road traffic accident on 28th June 1999 and filed HCCC No. 536 of 2000 (also herein after referred to as the primary suit) seeking general damages and special damages. Since the suit survived his death, the respondents herein obtained letters of administration on 18th October 2004 and were substituted in the suit as plaintiffs in his place. According to the Respondent, by the time they got letters of administration the suit in the primary case had abated and there is no indication it was revived; though they subsequently obtained judgement for Kshs. 2,700,000/= plus costs and interest on 4th November 2011. The Appellant noted that by the time the current respondents started participating in the matter in the High Court viz HCCC No. 536 of 2000 the same had been pending in the High Court for (4) years. To the Appellant, this is important in considering their role in the events preceding the filing of the primary suit.

13. It was further contended that after obtaining judgement in the primary suit, the respondent filed Chief Magistrate Civil Case No. 1951 of 2012 against the appellant being a suit brought under the provisions of Section 5 as read together with Section 10 of the Chapter 405, Laws of Kenya, whose judgement gives rise to this appeal.

14. It was submitted that this court's power as the first appellate court was as aptly put up by the court of appeal in **Mwanasokoni vs. Kenya Bus Services Ltd (1985) eKLR** and **Ndiritu vs. Ropkoi & Another Nyeri Civil Appeal No. 345 of 2000.**

15. It was the appellant's case that the trial court erred in law and in fact in holding that the appellant had proved his case on a balance of probability and relied on extraneous issues to make a determination. Setting out the Respondents' case in the plaint at paragraphs 3, 4 and 10 it was submitted that the Respondents in a nutshell alleged the following:-

(i) The appellant predecessor in title Gateway Insurance Company Limited had issued policy number 040/089/000108/99/01 to one **Michael Ngige** motor vehicle registration number KAE 613E pursuant to the provisions of Section 5 of the **Insurance motor vehicle Third Party Risks Act**, Chapter 405 Laws of Kenya.

(ii) Before the filing of **HCCC No. 536 of 2000 RD** the deceased plaintiff in that suit had served **Gateway Insurance Company Limited** with a statutory notice under the provisions of Section 10 of the **Insurance (Motor Vehicle Third Risks) Act** Chapter 405 of the Laws of Kenya.

(iii) As a consequence of the aforesaid Gateway Insurance Company Limited was obligated statutory to settle the decretal amount decreed by the High Court in HCCC No. 536 of 2000.

16. It was submitted that this case was done casually and the respondents failed to produce evidence to prove the aforesaid facts hence the judgement by the magistrate was wrong leading to this appeal. According to the Appellant, the Respondents had the duty of proving the aforesaid facts even if the appellant chose to remain silent. In this respect the Appellant relied on **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, and **Isca Adhiambo Okayo vs. Kenya Women Finance Trust (2016) eKLR**, **JRS Group Ltd vs. Kennedy Adhiambo Adndwak (2016) eKLR** and the case of **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR**.

17. It was submitted that the respondents did not tender any evidence at all to prove the aforesaid facts as enumerated below hence there was no basis at all for the trial court to hold the case proved.

18. It was further submitted that the finding of fact by the magistrate that the policy of insurance is exhibited is not borne out by the evidence. It was not even one of the documents listed in the list of documents found at page 12 of the record of appeal. Being a finding of fact made without evidence this court sitting on appeal should set it aside. Further to that the policy of insurance number was to be found in the police abstract. Unfortunately this document was also just marked for identification and not produced.

19. On service of the relevant statutory notice, it was submitted that the statutory notice just like the police abstract was marked for identification but was never produced as an exhibit. Neither was the magistrate told who served and how service was done, and when. No affidavit of service or certificate of posting were produced to prove this allegation. This becomes even more clouded considering that the current respondent were not parties to the primary suit at its inception and only joined that case after 4 years i.e. 2004 yet it was filed in 2000. To the Appellant, PW1 evidence on the issues before she joined the primary suit is just speculative and hearsay. To the Appellant, regardless of the defendant/appellant failure to testify, the plaintiffs was still under a duty to prove the service of the statutory notice since silence on the part of the appellant does not diminish the burden at all. In this respect the Appellant relied on **Mariam Njeri Njau vs. Attorney General (2016) eKLR**.

20. According to the Appellant, from the general nature of evidence by PW1 on the statutory notice and failure to produce the same as an exhibit, the respondent did not discharge their evidential burden of showing the statutory notice was served before the filing of the primary suit, hence the learned trial magistrate had no basis of holding as he casually did.

21. To the Appellant, the trial court was wrong in relying on PMFI-5 (police abstract) and PMFI-4 (notice), as they had not been produced as exhibits hence they were extraneous consideration warranting interfering with the finding of fact by the magistrates. That the marked but unproduced document is hearsay, untested and unauthenticated account was set out in **Kenneth Nyaga Mwise vs. Austin Kiguta & 2 Others (2015) eKLR**.

22. In the Appellant's view, the trial court misdirected itself on this document, and if it had properly directed itself it would have reached a different decision. The Appellant reiterated that if the court has properly directed its mind to the evidence and the standard of proof, it would have had that the respondents had not proved their cases on a balance of probability.

23. It was further submitted that the judgement by the trial court is a nullity, as the judgement amount is in excess of the amount decreed to be paid by the appellant under the ***Insurance (Motor Vehicle Third Party Risks) Act*** Chapter 405 Laws of Kenya. Its case was that if the respondents had proved their case which they didn't then the provisions of Section 5 (b) (iv) of the ***Insurance Motor Vehicle Third Party Risks Act***, Chapter 405 Laws of Kenya would come into play.

24. To the Appellant, this would mean that for the decree and certificate of costs found at page 171 of the record of appeal the appellant would only be obligated to pay a maximum of Kshs. 3,000,000/= under the Act. The Court was urged to so decree, if the case had been proved which, according to it, hadn't.

25. It was therefore the Appellant's prayer that the court allows allow the appeal set aside and magistrate judgement in the subordinate court and in its place dismiss the suit with costs to the appellant both in the Magistrate Court and the High Court.

26. The Appeal was, as expected, opposed by the Respondents. According to them, the suit emanates from the primary suit HCCC No.536 of 2000; **Suleiman Ali Musa vs. Michael Ngige**, whose facts were that on or about the 28th day of August, 1999 along Mombasa – Malindi road whilst the deceased was a lawful passenger in Motor-vehicle registration No. KAE 613E, the Defendant and or his agent and/or servant acting within the scope of the employment and with the authority of the Defendant drove the aforesaid motor-vehicle in such a negligent manner that he caused the same to violently collide with another lorry as a consequence of which the Plaintiff was seriously injured and suffered loss and damages. The Plaintiff prayed for General damages and special damages amounting to Kshs. 137,650 plus costs of the suit and interest thereof.

27. The Plaintiff testified on 16th May, 2002 by way of formal proof but however died before the suit was finalized. As such the Plaintiff was substituted by the Respondents herein vide amended Plaint dated 10th August, 2009. Judgment in the primary suit was delivered on 4/11/2011 and entered in favour of the Plaintiff for Kshs. 2,700,000/= being General damages and special damages of Ksh.137, 650, the total sum being Ksh.2,837,650/=. The Plaintiff was also awarded costs and interest whereof the same was tabulated and the overall sum owing to the Plaintiff is therefore Ksh.3, 053,276.75.

28. Subsequently the Respondents filed the declaratory suit in the trial court on behalf of the deceased in CMCC No.1951 of 2012- **Jamila Suleiman & Aisha Mwaro Okumu vs. Gateway Insurance Company Limited** vide the amended Plaint dated 21st August, 2013. The Plaintiff sought payment of the Kshs. 3,063, 276.75 being the sum inclusive of General damages, Special damages plus costs and interest and the trial court yet again found in favour of the Plaintiff and compelled the Appellant herein to pay the Respondent Kshs. 3,063,276.75. It is the said Judgment in the declaratory suit that has formed the subject of this Appeal.

29. In their submissions the Respondents identified the following issues for determination:

- 1. Whether the trial court erred in law and in fact in holding that the respondent had proved her case on a balance of probabilities.**
- 2. Whether the learned trial magistrate erred in law and in fact in holding that the statutory notice required under the insurance (Motor Vehicle Third Party Risks) Act CAP 405 Laws of Kenya without evidence of a process server or a certificate of posting.**
- 3. Whether the learned Magistrate erred in law and in fact in relying on hearsay evidence and placing a lot of weigh on it in determining that the statutory notice had been served by the respondent.**
- 4. Whether the trial magistrate erred in law and in fact in failing to find that the Plaintiff respondent, had not proved her case under section 5 and 10 of insurance (Motor Vehicle Third Party Risks) Act CAP. 405 Laws of Kenya.)**
- 5. Whether the Judgment by the trial court is a nullity as the judgment amount is in excess of the amount decreed to be paid by the Appellant under the Insurance (Motor-vehicle Third Party Risk) Act Chapter 405 Laws of Kenya.**

30. According to the Respondents, the Appellant was served with summons to enter appearance in the declaratory suit and it instructed the firm of Mburu Kariuki & Company Advocates who entered appearance on its behalf and even filed its Defence but the Appellant did not file any documents or witness statements to support its defence. During the hearing, the Appellant was granted several opportunities to defend its suit but the Appellant failed to call any witness to testify on its behalf and eventually the Appellant through its advocates confirmed it had no witnesses and the Appellants case closed. As such the Respondents' case was uncontroverted.

31. In this respect the Respondents relied on **D. T. Dobie & Company (K) Ltd vs. Wanyonyi Wafula Chebukati [2014] eKLR** in which the decision in **Linus Nganga Kiongo & 3 Others vs. Town Council of Kikuyu [2012]eKLR** .

32. The Respondents further submitted that the Executive Officer produced the entire court file in the primary suit confirming the Judgment duly entered in favour of the Plaintiff which judgment was never appealed or set aside which Court file includes the Plaintiff's list of documents at page 12 of the Record Appeal which confirms that the Respondent received a statutory Notice and appended their stamp and signature. It was averred that the Plaintiff testified that the Deceased was issued a police Abstract and that the number of the Policy was indicated on the Police Abstract which said Police Abstract formed part of the trial court file which was produced as Exhibit 6 in the trial court. That evidence was similarly uncontroverted.

33. It was the Respondents' submission that the Appellant and its insured were at all material times the custodians of the Policy document and the Respondent could not have expected to produce a policy document which the Respondent and its insured were the custodians of at all material times when the traffic accident occurred. This aspect being challenged now at the Appellate stage was not brought up in cross-examination when the plaintiff was testifying. The police conducted their investigations and confirmed that the Appellant was the insurance of the owner of the Motor –Vehicle Registration No. No. KAE 613E, owned by **Mr. Michael Ngige**, the Appellant's insured. It was therefore submitted that the learned trial Magistrate did not err in law and in fact in finding that the Respondent proved her case on a balance of probabilities hence this ground lacks merit and the same be rejected.

34. As to whether the Respondent issued statutory notice, it was submitted that the Respondent testified that the Appellant was notified of the intention to file the original suit and that at Page 12 of the Record of Appeal is a List of Documents and the first document attached thereto is the statutory Notice dated 20th March, 2000 which statutory notice bears a receipt stamped by the Appellant and the same was produced in the primary suit and by the executive officer as Exhibit 6 in the declaratory suit. At page 161 of the proceedings the executive officer produced the entire court file in the primary suit in which all the documents being part thereof were filed. The Respondents Advocates did not challenge the production of the primary suit file or the contents therein even in cross-examination. The same was produced without any objection. The stamp on the statutory notice bearing the names of the Appellant was not rebutted and can therefore not be challenged at the Appellate stage. To the Respondents, the stamp is enough proof of evidence of service hence the demand for a process server to swear service or certificate of postage is far-fetched as it is evident that the Appellant was served and they accepted service. Furthermore, the call for a process server would only apply if the Appellant was denying service of summons and pleadings hence would demand an affidavit of service, but in this case record would speak for itself the Appellant was personally served and received the statutory notice and the Appellant has not denied service of summons.

35. It was therefore submitted that the trial Magistrate was right to find that the Respondent proved its case on a balance of probabilities and the Judgment is therefore in Order and that the ground on the service of the statutory notice be rejected as the same lacks merit.

36. As to whether the learned Magistrate erred in law and in fact in relying on hearsay evidence and placing a lot of weight on it in determining that the statutory notice had been served by the respondent, the Respondents' position was that it is not hearsay that there was a primary suit and that Judgment was entered in favour of the Respondent. It is not hearsay that the Police Abstract shows that the motor-vehicle in issue was insured by the Appellant and the Policy number was identified by the Police. The Honourable trial Magistrate based its decision by considering the Respondent's evidence before it. As such it was submitted that the Appellant is liable to indemnify its insured and compensate the Respondent herein. In this regard the Respondent relied on **section 10(1) of the Insurance (Motor-vehicle Third Party Risk) Act** Chapter 405 Laws of Kenya which binds the Appellant as follows;

“If after a policy of Insurance has been effected judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section pay to the persons entitled to the benefit of the

judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

37. **The Court was therefore urged to find that the Court did not rely on hearsay but on the record which speaks volumes in support of the Respondents case.**

38. **On the issues whether** the Judgment by the trial court is a nullity as the judgment amount is in excess of the amount decreed to be paid by the Appellant under the *Insurance (Motor-vehicle Third Party Risk) Act* Chapter 405 Laws of Kenya, it was submitted based on section 5b(iv) of the *Insurance (Motor-vehicle Third Party Risk) Act*, Chapter 405 Laws of Kenya that the Judgment clearly states that the Defendant shall pay the Plaintiff General Damages for Pain and Suffering and loss of future earnings in the sum of Kshs. 2,700,000/= plus special damages. It is therefore not true that the Respondent’s claim on liability is beyond the 3,000,000/= provisions of the insurance Act. In the Respondents’ view, the Appeal is only an attempt by the Appellant to evade payment of costs and interest which it is trite law that costs follow the event and reliance was placed on section 27 of the *Civil Procedure Act, 2010* as well as the case of **Joseph Oduor Anode vs. Kenya Red Cross Society [2012] eKLR.**

39. The Respondents’ position was that the trial magistrate embraced the trite principle on costs while making the award for General damages inclusive of costs and interests hence there was no error either by fact or law. If at all the Appellant maintains that the amount is excessive, nothing bars the Appellant from pursuing its insured to pay the balance thereof so that the Appellant pays the General damages and Special damages owing to the Respondent. However it was argued that in the unlikely event that the Honourable Court finds that the award is excessive, in the interest of justice and fairness to the Respondent, the Appellant should be compelled to pay the Ksh.3, 000,000/= within its statutory mandate alleged.

40. In conclusion, the Respondents submitted that they had proved their case on a balance of probabilities that the judgment was fair and just in all circumstances and therefore the Appeal therefore is lacking in merit and should be dismissed with costs to the Respondent. In the event that the appeal were to succeed, the Court was urged to order each party to bear own costs.

Determinations

41. I have considered the submissions of the parties in this appeal.

42. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

43. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

44. However in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge’s conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

45. However in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

46. It is contended that the Respondents did not prove their case on a balance of probabilities. 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 dependent on the existence of facts which he asserts must prove that those facts exist.

47. This is called the legal burden of proof. There is however 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 that 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 that fact is upon him.

48. The two provisions were dealt with in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

“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 cast 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.”

49. It follows that the initial burden of proof lies on the plaintiff, the respondent in this appeal, but the same may shift to the defendants, the appellant in this appeal, depending on the circumstances of the case.

50. In this case what the Appellant contends that the Respondents did not prove were the allegation that the appellant’s predecessor in title Gateway Insurance Company Limited had issued policy number 040/089/000108/99/01 to one **Michael Ngige** in respect of motor vehicle registration number KAE 613E pursuant to the provisions of section 5 of the *Insurance (Motor-vehicle Third Party Risk) Act*, Chapter 405 Laws of Kenya and that before the filing of HCCC No. 536 of 2000 RD the deceased plaintiff in that suit had served Gateway Insurance Company Limited with a statutory notice under the provisions of section 10 of the *Insurance (Motor Vehicle Third Risks) Act* Chapter 405 of the Laws of Kenya.

51. In the record of appeal however, there is a notice directed to Gateway Insurance Co. Ltd which bears the stamp of the Appellant. In the absence of evidence that the said document or stamp are forgeries and as the record was prepared by the Appellant itself that document cannot be ignored by this Court more so as the Appellant did not cross-examine the Respondent at all in their evidence in chief.

52. Similarly the Respondents testified that the insurance had issued a policy of insurance to the defendant in the original suit. This fact was never contested either by way of cross-examination or by evidence to the contrary. **Kimaru, J** in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 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 than 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.”

53. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

54. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002, **Lesiit, J** citing the case of Autar Singh Bahra And Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail”.

55. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

56. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon”.

57. 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 vs. 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”.

58. Similarly in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. This is my understanding the holding of Rajah, JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59 that:

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

59. It is therefore my finding that based on the only evidence on record, which evidence was not challenged even in cross-examination, it cannot be successfully contended that the Respondents failed to prove the said factual averments.

60. As regards the evidence of the policy in question as stated hereinabove, it is clear that the existence or otherwise of the policy in question must have been especially within the knowledge of the Appellant and/or its insured. Therefore pursuant to section 112 of the *Evidence Act*, the burden of proving or disproving that fact was upon the Appellant which the Appellant failed to do.

61. I agree with the position in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR that:

“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.”

62. However, the Court of Appeal in Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003 expressed itself as follows:

“The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence. The issue of the ownership was first raised on behalf of the respondent by its counsel in his submissions in the Superior Court... As a general rule an appellate court has a discretion to allow an appellant to take a new point on appeal if full justice can thereby be done to the parties... However in the exercise of that discretion the appellate Court ought only to decide in favour of an appellant on a ground raised for the first time if it be satisfied beyond doubt, that it has before it all the factors necessary to determine the issue raised as would have been done at the trial, and a satisfactory explanation has been given as to the failure to raise it at the earliest opportunity. It is too late in the day to challenge the admissibility by the trial Magistrate of the police abstract form. There is no explanation given or available as to why the issue was not raised at the trial regarding the competence of the appellant to produce the document. The respondent was represented by legal counsel who did not even cross-examine the appellant on the matter. The respondent was satisfied with the evidence and it should not be heard to complain about the issue.”

63. It is my view that having failed to challenge the Respondents' evidence given on oath, the same challenge cannot be taken at this stage without causing injustice to the Respondents who may have believed that since their case was not being challenged there was no reason to adduce further evidence.

64. As to whether the Judgment by the trial court is a nullity as the judgment amount is in excess of the amount decreed to be paid by the Appellant under the *Insurance (Motor-vehicle Third Party Risk) Act* Chapter 405 Laws of Kenya, section 5b(iv) of the *Insurance (Motor-vehicle Third Party Risk) Act*, Chapter 405 Laws of Kenya provides that:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

(iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person.”

65. My understanding of the said section is that in respect of a claim by one person the insurer's liability ought not to exceed Kshs Three Million. In other words the Court may only enter judgement against the insurer up to a maximum of Kshs Three Million. That however does not mean that a person who is entitled to file a declaratory suit against the insurer but to whom an award has been given exceeding Kshs Three Million is thereby prevented from filing a suit against the insurer. He can do so but his entitlement as against the insurer cannot exceed Kshs 3,000,000.00

66. In the premises a judgement of up to Kshs 3,000,000.00 is not a nullity.

67. Accordingly while I find no merit in the other grounds, I find that judgement ought not to have been entered against the Appellant for a sum exceeding Kshs 3,000,000.00. To that extent this appeal succeeds and the judgement in the sum of Kshs.3,053,276.75 is hereby set aside and is substituted with a judgement in the sum of Kshs 3,000,000.00 which sum is inclusive of costs and interests, if any.

68. There will be order as to the costs of this appeal.

69. Judgement accordingly.

Read, signed and delivered in open Court at Mombasa this 19th day of December, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ombat for the Respondent

Miss Okundi for Mr Jengo for the Appellant

CA Lavender