Equity Bank (K) Limited v Wambua & 2 others (Civil Appeal E246 of 2023) [2025] KEHC 2555 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2555 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E246 OF 2023

MW MUIGAI, J

FEBRUARY 17, 2025

BETWEEN

EQUITY BANK (K) LIMITED ..... APPELLANT

AND

MESHACK MUNYOKI WAMBUA ..... 1ST RESPONDENT

STUNNER TRAVEL LIMITED ..... 2ND RESPONDENT

BENJAMIN NGUI ..... 3RD RESPONDENT

(Being an Appeal from the Judgment of the Honourable M.A Otindo (Principal Magistrate) at Machakos delivered on 5.09.2023 in Machakos Chief Magistrates Court Civil suit no 759 of 2019)

JUDGMENT

Plaint

1. The cause of action arose on 25.02.2019 where the Plaintiff was lawfully and carefully walking along Shell Petrol station when Motor vehicle registration number KBQ 89N registered in the name of the 1st and 2nd Defendants while the 3rd Defendant was a beneficial owner or otherwise had a beneficial interest in it, was negligently and carelessly driven that it hit the Plaintiff as a result of which he sustained the following injuries;
    a. Blunt injuries to the neck
    b. Blunt injuries to the lower back
    c. Blunt injuries to the right elbow
    d. Blunt injuries to the right hip joint.

2. The Plaintiff prayed for general damages, special damages of Kshs 6,350, costs and interest.

Defence

3. The 1st Defendant denied the contents of the Plaint save that he admitted that he is the registered owner together with the 2nd and 3rd Defendants but averred that the interest was purely as a financier as the motor vehicle was used as security for a loan advanced to the 2nd and 3rd Defendants

4. The 2nd and 3rd Defendants did not file any defence.

Hearing

5. The Plaintiff called two witnesses. PW1, the Plaintiff stated that he works at Shell Machakos Petrol station as a pump attendant and on 25.02.2019 he was at the pump and vehicle KBQ 809N was reversing and it hit him. He stated that he was injured on his back, shoulders and right hip joint. He stated that he still had pain on the right hip joint, back and shoulders. He blamed the driver and averred that he was reckless and reversed without minding other users. He produced the following documents;

    a. P3 form

    b. NTSA copy of records and receipt

    c. Demand letter

    d. Statutory notice

    e. Medical report by Dr. Titus Ndeti

    f. Treatment notes

    g. Receipts in support of special damages

6. Upon cross examination, he stated that he was not standing behind the car, he was near the pumps area and the car was at the tyre centre.

7. In Re-examination, he stated that he tried to avoid the accident but the vehicle was too fast. That the vehicle ownership search showed that Equity Bank, Stima Travel Limited were owners of the vehicle. He stated that Benjamin Ngui was the driver of the vehicle.

8. By consent it was agreed that the police officer would produce the police abstract for both CC 759/2019 and CC 760/2019

9. PW2,PC Gideon Kipruto produced the abstract that was filled on 4.09.2019 and stated that the accident occurred on 25.02.2019 at around 1200 hours at Shell Petrol Station involving Motor vehicle KBQ 809 N Toyota Wish and pedestrian who was hit and sustained injuries.

10. Upon cross examination, he stated that he was not the investigating officer and was relying on the occurrence book an abstract as PC Tumno who was transferred to Matuu police station. He was not aware if the investigation was concluded.

11. The Defendants did not call any witness.

Judgment

12. The Trial Court in its judgment delivered on 05.09.2023 found as follows;

    a. Liability at 100% against the Defendants jointly and severally in favour of the Plaintiff

b. General damages for pain and suffering at Kshs 300,000

c. Special damages of Kshs 6350

d. Costs

e. Interest on general damages from the date of judgment and on special damages from date of filing the suit.

The Appeal

13. Dissatisfied by this judgment, the Appellant filed a memorandum of Appeal on 26.09.2023 seeking to have the Judgment set aside and the same substituted with a Judgment of this court as well as an award for costs on the grounds that;

    a. The learned Magistrate erred in law and fact by holding that the Appellant is liable for the accident caused.

    b. The learned Magistrate erred in law and fact by not considering documents submitted by the Appellant.

    c. The learned Magistrate erred in law and fact by failing to declare the Appellant as financiers of Motor Vehicle KBQ 809N

    d. The learned Magistrate erred in law and fact by totally failing to take the submissions of the Appellant into account.

14. The Appeal was canvassed by way of written submissions.

Appellant Submissions Dated 11.10.2024

15. The Appellant submitted that the Respondent did not adduce any evidence that the 1st Defendant did retain care, custody or control of the said motor vehicle and the driver of the vehicle was not the 1st Defendant's driver, servant and or agent at the material time or at all and the 2nd Defendant did not have authority over the other Defendants in the driving of the said vehicle. It was thus contended that he was not vicariously liable for any acts or omission of any such driver of the said vehicle. He contended that he was merely a financier and had annexed an offer letter dated 12.02.2013 in its application dated 7th March. Reliance was placed on the cases of Consolidated Bank of Kenya Limited vs Mwangi & Another [2022] Eklr, Ali Dere vs Hash Hauliers Limited & Another [2018] e KLR and Jane Wairimu Turunta vs Githae John Vicjery & 2 OTHERS [2013] e KLR.

1St Respondent's Submissions Dated 10.11.2024

16. It was submitted that the Respondent produced a copy of records as proof of ownership of the motor vehicle and the police abstract confirmed that the vehicle was owned or driven by the 3rd Respondent. In addition, that the statement of defence cannot amount to evidence. It was contended that the document that the Appellant referred to in support of an application was dismissed for want of prosecution on 21.02.2023 and the same cannot form part of the evidence to be considered as it did not seek to rely on any documents or statement. Reliance was placed on the case of Ngugi vs Karanja 7 Another [2923] KEHC 2368, Grace Nxula Mutungs vs Joyce Wanza Musila [2017] e KLR, Kenya Power & Lighting Co Limited vs Rasul Nzembe Mwadzaya [2020] e KLR.

17. The court was urged to dismiss the appeal with costs.

Determination

18. I have considered the Memorandum of Appeal, the Trial court record and the submissions of parties and find that the issues for determination are;

    a. Whether the Defendants were 100% liable for the accident

    b. Whether the award of quantum should be tampered with.

    c. Whether the trial court considered the evidence of the Appellant

19. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified.

20. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P) stated that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 demeanor of a witness is inconsistent with the evidence in the case generally."

21. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:-

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

22. In this case, I agree with the Trial Court to the extent that it is not in contention that the accident occurred and that the Respondent sustained the injuries from the accident of motor vehicle Reg KBQ809 N reversing and hitting him as pleaded.

23. From the Memorandum of Appeal, the Appellant does not contest the issue of quantum and costs but the only takes issue with the issue of liability. The court has been asked to declare that the Appellant was only a financier and thus not liable for the accident.

24. Section 8 of the *Traffic Act* provides as follows;

> " The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

25. The Respondent produced a copy of records that indicated that the Appellant is one of the owners of the motor vehicle jointly with the 2nd and 3rd Respondent. The bank on the other hand did not produce any document nor call any witness to support its case.

26. In the case of *Adembesa & another v Gweno (Civil Appeal E192 of 2023*) [2024] KEHC 5379 (KLR) (17 May 2024) the court stated as follows

> " It is trite that 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 v 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".

26. 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)."

27. The Court of Appeal in the case of; Joel Muga Opinja -vs- East African Sea food limited (2013) eKLR quoted in the case of Ignatius Makau Mutisya -vs- Reuben Musyoki Muli where the court stated that

> " we agree that the best way to prove 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."

28. In this case, I note that the allegation that the Appellant was a financier remains just that as no witness or evidence was produced in support of the same. I am guided by the finding of the court in Migori High Court Civil Case No. 13 of 2015 County Government of Homa Bay vs. Oasis Group International & Another (2017) eKLR thus: -

> '47. In this case all parties filed various documents and entered into two pre-trial consents on the 16/09/2015 and 29/09/2015. Since the twin consents did not expressly state how the documents filed through the parties' Lists of Documents were to be transformed into exhibits, I hold that the documents were hence left to the prevailing rules of evidence. It therefore means that despite the currency of the so many documents on the record, this Court would only deal with those 16 documents that were taken through the rigors of identification and were eventually produced as exhibits thereby becoming part of the judicial record.

29. The foregone position has been fortified by the Court of Appeal in the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR which decision I hereby reproduce a substantial part thereof on what my Lordships rightly held on the issue: -

30. 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?

31. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.

32. 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 became 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 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.

33. 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 the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

34. 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 or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents 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 be hearsay, untested and unauthenticated account.

35. In Des Raj Sharma –vs- 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 – vs- 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.

36. Guided by the decision 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 o 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.

37. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for

identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of Michael Hausa – vs- The state (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

38. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification.....'

39. In light of the above, due to lack of evidence on the part of the Appellant, I find that the Trial Court made a proper finding on this issue. The Appellant ought to have called its own witnesses or produce any evidence to support its contention. Courts have found Financiers not to liable on the basis of the evidence produced before it. The Appellant did file an application to be struck out but the same was dismissed and that application is not the subject of this appeal thus this court cannot address its mind to it.

40. From my perusal of the Trial Court Judgment, the court considered the Appellants submissions contrary to what is alleged in the Memorandum of Appeal.

41. The Appellant referred the Trial Court to Consolidated *Bank of Kenya Limited vs Mwangi & Anor Civil Appeal E056 of 2021* similar circumstances where the Appellant a Financier Bank filed Defence on no liability or contribution to the accident. The appellant filed Application to be struck out which was denied.

Hon D Majanja J (as he then was) stated as follows;

> "Ownership of a motor vehicle does not, of itself, establish liability for an accident. The plaintiff must prove that the owner is vicariously liable for the acts of the driver of the motor vehicle by showing that the driver is an employee or agent (see Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene Don ML HCCC No. 483 of 2012 [2012] eKLR). As whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier's only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason. In Ali Abdi Dere v Hash Hauliers Limited & Another MKS HCCC No. 16 of 2014 [2018] eKLR the court held that the position of a financier was merely to protect its interest in the motor vehicle it had financed and could not be held vicariously liable for the actions of its driver while in Justus Kavisi Kilonzo v Coast Broadway Company Limited MSA HCCC No. 169 of 2007 [2008] eKLR the court was of the view that a financier who had been registered as a co-owner of a motor vehicle did not mean that it was a necessary party to proceedings. The same position was taken by the Court of Appeal in Mohammed Hassan Musa and Another v Peter Mailanyi and Another NYR CA Civil Appeal No. 243 of 1998 [2000] eKLR."

42. It is understandable that the 1st Defendant failed to provide evidence to confirm that though registered they were only Financiers but it is admitted documents attached to an application that was dismissed for want of prosecution as stated in the Judgment.

43. Curiously, the original Trial Court file was not availed for verification of proceedings as per the Record of Appeal. This Court shall then give benefit of doubt to the Appellant that what is in the Record of Appeal is in the Original Trial Court Record.

Disposition

44. In the end, the appeal succeeds with regard only to the Appellant; 1st Defendant who filed Defence and submitted that it was registered as a Financier only.

45. The rest of the Trial Court's Judgment on liability leaves out/omits 1st Defendant and remains wholly against 2nd & 3rd Defendants jointly and severally for the Plaintiff, they did not enter appearance, nor file Defence and Interlocutory judgment was entered and Formal Proof proceedings commenced with PW1 & PW2 only.

46. Costs of this appeal are awarded to the Respondent.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON LINE ON 17/2/2025.

M.W. MUIGAI

JUDGE