



REPUBLIC OF KENYA



KENYA LAW
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**Mutembei v Luba (Civil Appeal E085 of 2023)
[2025] KEHC 1991 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E085 OF 2023
HM NYAGA, J
FEBRUARY 13, 2025**

BETWEEN

VINCENT MUTEMBEI APPELLANT

AND

NACHE SIKE LUBA RESPONDENT

*(Being an appeal against the judgment and decree of the Hon. T. M. Mwangi
(SPM) in the Chief Magistrate's Court at Meru Civil case No. 297 of 2022)*

JUDGMENT

Background

1. The Appellant commenced suit in the Chief Magistrate's Court, Meru vide a plaint dated 4th October, 2022, seeking general and special damages for injuries that he sustained in a road traffic accident that occurred on 10th July, 2022 along Meru-Nanyuki road.
2. It was the Appellant's case that he was riding a motorcycle registration number KMCW 943W along the said road when the driver of motor vehicle registration number KBU 936W so negligently drove the said vehicle that he caused it to ram into the Plaintiff's motorcycle and as a result the Plaintiff sustained serious bodily injuries.
3. The Appellant blamed the driver of the said motor vehicle registration number KBU 936W causing the accident. The particulars of negligence are set out in the plaint.
4. The Defendant/Respondent was sued as the owner of the said motor vehicle registration number KBU 936W and that which the Plaintiff/Appellant held him vicariously liable for the acts/omissions of his driver.
5. The Defendant/Respondent did not enter appearance despite service and the Appellant applied for interlocutory Judgment, which was entered on 30th November, 2022.



6. On 11th April, 2023 the matter proceeded for formal proof. The appellant adopted his witness statement as his evidence. He also produced several documents marked as exhibits 1 to exhibit 7.
7. The Appellant's witness, one Kenneth Mwiti also testified and adopted his witness statement as his evidence.
8. On 18th May, 2023, the trial court delivered its judgement, where it found that the Appellant had not proven his case, and proceeded to dismiss the suit.
9. Aggrieved by the said decision, the Appellant filed a memorandum of appeal dated 31st May, 2023.

The Appeal

10. The Appellant set forth the following grounds of appeal;-
 - i. That the learned trial magistrate erred in law and fact by dismissing the Appellant's case despite the overwhelming evidence.
 - ii. That the learned trial magistrate erred in law and fact in holding that the Appellant had not established and/or proved the ownership of motor vehicle registration number KBU 936W.
 - iii. That the learned trial magistrate erred in law and fact in disregarding the Appellant's sufficient evidence regarding ownership of motor vehicle KBU 936W.
 - iv. That the learned trial magistrate erred in law and fact in dismissing the Appellant's claim which claim had not been rebutted by the Respondent, thus raising the burden of proof above the balance of probabilities.
 - v. That the learned trial magistrate erred in law and fact by placing more weight on assumptions rather than facts.
 - vi. That the learned trial magistrate erred in failing to appreciate that the Appellant had proved their case on a balance of probabilities.
11. The Appellant thus sought orders that:-
 - a. The Appeal be allowed.
 - b. The Honourable court maintains the award of Kshs. 500,000/- on general damages and Kshs. 40,000/- as special damages.
 - c. Costs of the appeal be provided for.

Appellant's submissions

12. The Appellant framed the following issues for determination:-
 - a. Whether the learned trial magistrate erred in law and in fact in holding that the Appellant had not established and/or proved the ownership of motor vehicle registration number KBU 936W.
 - b. Whether the learned magistrate erred in law and in fact in failing to appreciate that the Appellant proved his case on a balance of probability.
13. It was submitted that the requisite proof in civil cases on a balance of probability and cited was the case of Mumbi M'Nabea Vs David M. Wachira 2016 eKLR.



14. It was further submitted that the Appellant had produced the requisite documents including the police abstract, the official motor vehicle search, medical reports, demand letter and notice under Section 10 of the Insurance /Motor Vehicle Third Party Risks) Act. That in addition the Appellant tendered oral evidence which was corroborated by an eye witness.
15. As regards ownership of motor vehicle registration number KBU 936W, the Appellant submitted that Section 8 of the *Traffic Act* is to the effect that the person in whose name a vehicle is registered shall, until the contrary is proved, be deemed to be the owner of the vehicle.
16. It was further submitted that since the Defendant/Respondent did not defend himself, then the Appellant's evidence was not controverted.
17. The Respondent did not file any response.

Analysis and determination

18. Being a first appeal, the court is enjoined to look at the evidence afresh and come to its own independent decision. This was reiterated in the well-known case of *Selle and Another vs Associated Motor Boat Co. Ltd and others* (1968)EA 123 as follows:-

“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.”

19. The only issue for determination is whether the Appellant proved his case on a balance of probability, during the trial.
20. The degree of proof in civil cases is well known that is a balance of probability. In *William Kabogo Gitau Vs George Thuo and 2 Others* (2010) eKLR the court held 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.”

21. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

“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 probability are equal it is not.



This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

22. When the Plaintiff filed his claim in the lower court, he also filed documents as required under the Civil Procedure Act and Rules. All the trial he produced them as follows:-
 - a. Police Abstract as EXH 1.
 - b. P3 report as EXH 2.
 - c. Discharge summary as EXH 3.
 - d. Doctor’s report as EXH 4.
 - e. Motor vehicle search as EXH 5.
 - f. Receipts in support of special damages as EXH 6.
 - g. Demand notice as EXH 7.
23. In his Judgment, the trial magistrate found that the motor vehicle search records did not indicate who the owner of the motor vehicle registration number KBU 936W was at the time of the accident, on the date of the accident that is an 16th July 2022. It is for this reason that the court dismissed the suit.
24. The law is quite clear on proof of ownership of a motor vehicle. Section 8 of the Traffic Act provides that:-

“The person in whose name a vehicle registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.” The section provides the general rule with regard to ownership of the motor vehicle but there may be circumstances where this may vary. Registration of a person is prima facie evidence of ownership but the contrary may be proved.”
25. By producing the copy of records, which showed that prior to filing suit, the Defendant was the registered owner. The Appellant filling complied with the law on the proof of ownership. In my view, to ask the Appellant to avail other proof of ownership was erroneous. The records show that the Respondent was the registered owner and at the date indicated, that of 29th September, 2022, meaning that he was the owner at the time the search was done. There was no evidence adduced to rebut that document.
26. It is also to be remembered that the Respondent did not enter appearance and interlocutory Judgment, on liability had been entered by the same court. What was pending was the assessment of damages.
27. It is my further view that the learned magistrate was wrong to look at the copy of records in isolation. The same ought to have been looked at together with other documents produced, including the police abstract, which is a summary of the investigation file. The abstract gave details of the insured and the insurer, at the time of the accident. The same match the copy of records produced in court.
28. It is my finding that the Appellant, having produced the copy of records, had tendered prima facie evidence of ownership, which was not rebutted.
29. There are many authorities on the issue.



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

“we agree 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.”

31. Having considered the matter, I am inclined to set aside the orders of the trial court dated 18th May, 2023 and substitute it with an order that the Appellant had proven his case on a balance of probability.

32. The trial court was right to assess the damages even after it dismissed the suit. There being no appeal against the award of damages, I see no reason to set them aside.

33. The final orders are as follows:-

1. The Plaintiff/Appellant has proven his case on a balance of probability and judgment is entered against the respondent.
2. General damages are assessed at Kshs. 500,000/-.
3. Special damages are assessed at Kshs. 40,000/-.
4. There shall be no orders as to costs on this appeal.

SIGNED, DATED AND DELIVERED AT MERU THIS 13TH DAY OF FEBRUARY, 2025.

H. M. NYAGA

JUDGE

