



Njau v Muiyoro (Civil Appeal 170 of 2023) [2024] KEHC 8061 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 170 OF 2023
FN MUCHEMI, J
JULY 4, 2024**

BETWEEN

ANTONY NG'ANG'A NJAU APPELLANT

AND

EVANS KARANI MUIYORO RESPONDENT

(Being an Appeal from the Judgment of Hon V. A. Ogutu (Adjudicator/RM) delivered on 4th April 2023 in Thika Small Claims Court Civil Case No. E579 of 2022)

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Resident Magistrate/Adjudicator in Small Claims Court Civil Case No. E579 of 2022 in a claim that arose from a road traffic accident resulting to material damage to the motor vehicle registration number KAJ 254N whereby the trial court entered judgment in favour of the respondent for a sum of Kshs. 145,550/- plus costs and interest.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 3 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in by failing to appreciate that it was by law required that the claimant produce the maker of the police abstract alluded as the only main form of evidence that placed the appellant in the current suit.
 - b. The learned trial magistrate erred in law and in failing to exercise her discretion in determining whether the claimant had ownership of the motor vehicle registration number KAJ 254N that denied him locus in the suit.
3. Directions were issued that the appeal be canvassed by way of written submissions. The court record shows that only the appellant complied in filing submissions on 20th May 2024.



Appellant's Submissions

4. The appellant submits that the whole cases solely depended on the police abstract yet when he requested the court to avail the maker of the police abstract, his request was unjustly denied. The appellant further relies on the case of *Z.O's and C.A.O (Suing as the legal representative in the Estate of S.A.O) v Amollo Stephen* (2019) eKLR and submits that the trial learned magistrate erred by concurring with the police abstract that indeed an accident took place without proper inquiry on the whole case and evidence provided.
5. Relying on the case of *Variety Flooring Works Limited v Fredrick Mutinda Mutuku* (2020) eKLR, the appellant submits that he challenges the authenticity of the police abstract as the respondent produced the said police abstract instead of the maker and further no witnesses testified to the actual occurrence of the accident.
6. The appellant argues that the respondent did not have ownership over motor vehicle registration number KAJ 254N and therefore he lacked the locus standi to claim damages in the suit. Further, the appellant submits that the respondent did not produce any log book to show ownership of the said motor vehicle. The appellant further submits that although the respondent stated in his testimony that he had bought the motor vehicle, he did not adduce any evidence of ownership and the sale agreements produced did not indicate the respondent's motor vehicle. Relying on Section 9 of the *Traffic Act* and the case of *Joel Muga Opija v East African Sea Foods Limited* (2013) eKLR, the appellant argues that the respondent produced a sale agreement of an unidentified motor vehicle between him and a third party who was not a party to the suit, that transpired 17 years ago which the trial court adopted as proof of the respondent's motor vehicle registration number KAJ 254N.
7. The appellant relies on Section 106B of the *Evidence Act* and submits that he is not liable for the subject accident as he was away on holiday on the material day of the accident and his car was under lock and key. The appellant produced Kenya Airways plane tickets and MPESA statements to show that he was in Mombasa at the day of the material accident and therefore the police abstract ought to have captured who was driving his motor vehicle and make him a party to the present suit.

Issue for Determination

8. The main issue for determination is whether the appeal has merit.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1 EA 123:

“.....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 into account of particular circumstances or probabilities materially to estimate the evidence.”

10. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal 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.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

12. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:-

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.

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

- (108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

13. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah v Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided...The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

14. Similarly, in the Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14:-

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 had failed to establish these to the appropriate standard, he will lose. 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.

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.

15. The appellant faults the trial court in finding that the respondent proved his case by solely relying on the police abstract without interrogating the facts of the case. From the record, when the matter came up for hearing on 22nd March 2023, both parties indicated that they were ready to proceed. The respondent adopted his witness statement and list of documents and produced the documents as exhibits. The appellant objected to the production of the police abstract by the respondent as he was not the maker of the said document. The trial court disallowed the objection on the premise that the appellant did not raise the issue at pre-trial and gave no reasons why he did not raise the issue at the pre-trial stage. Section 32 of the [Small Claims Court](#) provides for the exclusion of strict rules of evidence and provides:-
 1. The Court shall not be bound wholly by the rules of evidence.
 2. Without prejudice to the generality of sub section (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
16. It is thus evident that before the matter proceeded for hearing, it came up for mention five (5) times giving the appellant ample time to have raised his concerns on the police abstract before the matter proceeded for hearing. Further, on 1st March 2023, the respondent's advocates indicated to the court that upon serving the appellant with the pleadings and documents, the appellant did not file his response. The advocates asked the court adopt the respondent's documents filed and render a judgment but the trial court set the matter up for directions, giving the appellant time to file his response. The rules of evidence that documents be produced by the makers is not strictly applicable in proceedings before a small claims court in my view of the provisions of Section 32 of the [Small Claims Court Act](#) which exclude the strict application of the rules of evidence to facilitate the purpose and aspirations of the law in creating the court.
17. The appellant further argues that the trial court solely relied on the police abstract to determine that the accident occurred on the material day. During the hearing, the respondent testified that on 23rd November 2019, he was driving motor vehicle registration number KAJ 254N along Mugutha road when motor vehicle registration number KCL 199Q hit his motor vehicle from the rear side and caused extensive damages. The respondent further testified that motor vehicle registration number KCL 199Q was being driven without due care and attention and was at a high speed and carelessly. The appellant denied that his motor vehicle registration number KCL 199Q was involved in an accident as he was away in Mombasa and provided a plane ticket and MPESA statements to show so. The police abstract as produced indicated that an accident did occur on 23rd November 2019 between motor vehicle registration number KAJ 254N and KCC 199Q. The abstract further indicated the insurance details of both motor vehicles, which the appellant admitted in his evidence belonged to him were those of the appellant. The air tickets produced in evidence by the appellant show that he departed from Mombasa to Nairobi on 25th November 2019 and therefore does not account for where he was on 23rd November 2019 which was the date of the accident. The respondent that even after seeing



the police abstract, the appellant did not take any action to follow with the police if the information was wrong. The appellant only complained that his motor vehicle was blamed for an accident he was allegedly not involved in. It is thus evident that the respondent's testimony which was corroborated by the police abstract placed the appellant's motor vehicle at the scene of the accident and by the fact that the appellant confirmed that the insurance details belonged to his motor vehicle. It is therefore my considered view that the respondent proved that the accident occurred involving his motor vehicle registration number KAJ 254N and KCL 199Q on 23rd November 2019.

18. The appellant further argues that the respondent did not have locus to institute the suit as he was not the registered owner of motor vehicle registration number KAJ 254N. On perusal of the record, the respondent produced a copy of records of motor vehicle registration number KAJ 254N indicating the owner of the motor vehicle as one Kitema Maingi Jeremiah. The respondent further attached a motor vehicle sale agreement dated 16th February 2007 between him and one Joakim K. Kamere. The respondent indicated in his pleadings that the said Joakim Kamere purchased the subject motor vehicle from Kitema Maingi Jeremiah.

19. The issue of various ownerships was discussed in the case of *Charles Nyambuto Mageto v Peter Njuguna Njathi* [2013] eKLR where it was held as follows:-

From the interpretation of Section 8 of the *Traffic Act* as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The court recognizes that there are various forms of ownership, that is to say, actual, possessionary and beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract report, even as held in Thuranira and Mageto case that the police abstract is not, on its own, proof of ownership of a motor vehicle. If however, there is no evidence to corroborate the contents of the police abstract as to the ownership then the evidence in totality may lead the court to conclude on the balance of probability that ownership.

20. In the instant case, the respondent, in his pleadings stated that he was the beneficial owner of motor vehicle registration number KAJ 254N and provided evidence linking him as the beneficial owner of the said motor vehicle. Further, the police abstract indicated the details of insurance by the respondent which showed that he was the policy holder. It is my considered view that the respondent established that he is the beneficial owner of the motor vehicle registration number KAJ 254N. Accordingly, the respondent proved his case on a balance of probability as against the appellant.

21. In view of the foregoing, I find that the appeal lacks merit and is hereby dismissed with costs.

22. It is hereby so ordered.

JUDGMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 4TH DAY OF JULY 2024.

F. MUCHEMI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

