



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ondwasi v Ombera & another (Civil Appeal E910 of 2022)  
[2024] KEHC 10884 (KLR) (Civ) (9 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10884 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E910 OF 2022**

**CJ KENDAGOR, J**

**SEPTEMBER 9, 2024**

**BETWEEN**

**LESLINE NANZALA ONDWASI ..... APPELLANT**

**AND**

**JOEL DAVID AKUMU OMBERA ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET AKINYI ONYANGO ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. M.W Murage, SRM,  
delivered on 07th October, 2022 in Milimani CMCC No. E7761 of 2019)*

**JUDGMENT**

1. In the Complaint dated 22<sup>nd</sup> October, 2029, the Appellant claimed that she was driving her motor vehicle registration number KBM 015T along Uhuru Highway on 21<sup>st</sup> October, 2016, when the 2<sup>nd</sup> Respondent, acting as driver and/or agent of the 1<sup>st</sup> Respondent, negligently drove the 1<sup>st</sup> Respondent's motor vehicle registration number KCA 679B, that she caused the same to run into the rear of the Appellant's motor vehicle, thereby occasioning damage to it.
2. The claim was for special damages of Kshs.116,093/= (95,120 cash in lieu of repairs and 20,973/= investigation fees) plus costs and interests of the suit and was based on the principle of subrogation. The principle gives rights to the insurer under the relevant policy, to defend, settle and or prosecute any claims in the insured's name.
3. The Plaintiff did not testify in the matter. The Claim's Officer at the First Assurance Company, who had insured the Appellant's motor vehicle at the material times to this suit, testified. The Respondents did not call any witnesses. On 10<sup>th</sup> July, 2022, the lower court dismissed the Appellant's suit with costs to the Respondents.



4. The Appellant, dissatisfied with the lower court's Judgment, appealed to this court through a Memorandum of Appeal dated 3<sup>rd</sup> November, 2022. Her grounds of appeal are as follows;
  1. The Learned Magistrate misapplied the law on the Insurance Principle of Subrogation in finding that the Appellant must attend court to adduce evidence thus placing a burden of proof higher than the requisite balance of probability.
  2. The Learned Magistrate erred in evaluation of the uncontroverted evidence which was tendered in the suit by finding that the Appellant failed to prove her case on a balance of probabilities and thereby erroneously dismissed the Appellant's suit.
  3. The Learned Magistrate erred in law and fact in misapprehending the Insurance Principle of Subrogation by failing to find that having indemnified the Appellant, the Appellant's Insurance obtained the right to sue (through her) and obtain damages that would otherwise be due to the Appellant.
  4. The Learned Magistrate showed extreme prejudice by totally ignoring the evidence on record and the Appellant's Counsel's submissions and thereby arrived at an erroneous conclusion.
5. She asked this court to set aside the Trial Court's judgment dismissing her suit and substituting it with an order allowing the same as prayed.
6. The appeal was canvassed through written submissions.

#### **The Appellants Submissions**

7. The Appellant submitted that the Learned Trial Magistrate misapplied the law on the standard of proof in civil matters, leading to an erroneous conclusion. She argued that the lower court placed a burden higher than proof on a balance of probabilities. She submitted that, even though she did not testify at the trial, the Police Abstract produced by her witness is prima facie evidence that an accident occurred. Her main argument is that the Respondents' Advocates did not raise any objection to the production of the Police Abstract.
8. She also argues that her failure to testify at the trial should be of no consequence to the case's outcome. She cited a legal authority to amplify her argument that she did not have to testify personally and that the law allows a plaintiff to prove their case by the evidence of a witness other than himself. He relied on *Mutiga Kamau vs Pius Muthuri Mukaria* [2020] eKLR, *Julianne Ulrike Stamm vs Tiwi Beach Hotel Ltd* [1998] eKLR, *Karisa and Another vs Solanki and Another* [1969] E.A., and *Barnabas Biwott vs Thomas Kipkorir Bundotich*[2018] eKLR.

#### **The Respondents' Submissions**

9. The Respondents made submissions requesting the court to dismiss the appeal with costs. Their main argument is that the Appellant's failure to testify at the trial court was fatal, leaving essential elements of the claim unproven. They relied on the cases of *Thomas Mvoka Muthoka vs Earnest Jacob Kisaka* HCC No. 1453 of 2008, [\*David Gichiri vs Emmali Kerubo Sese Civil Appeal E266 of 2020\*](#), and [\*Obiero vs Stephen Kosgei & Others Civil Appeal No. 47 of 2013\*](#).



10. Being a first appeal, the duty of this court is to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 where the Court held:

“...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 ...”

11. The main issue for determination is whether the Appellant proved her case on a balance of probabilities. The Appellant argues that she tendered enough evidence to establish her case on a balance of probabilities. She submitted that the evidence of her main witness, Mr. Njenga, and the Police Abstract were enough proof of negligence against the Respondents.
12. I have looked through the typed proceedings of the lower court, particularly on 9th June, 2022, when the Appellant’s only witness, Mr. Njenga, testified in Court. I have looked at the exhibits produced in the lower court to ascertain how the accident happened, who caused the accident, and whether the 2<sup>nd</sup> Respondent was liable for negligence.
13. The Police Abstract does not describe how the accident happened. Even though the Appellant had filed her detailed witness statement on how the accident occurred, she did not testify in court, and hence, her account of the incident remained unproved. The statement remains a statement, and nothing more.
14. It was not mandatory for the Appellant to testify in court, but she could have proved the essential elements of the claim through other witnesses. In the case of *Sofie Feis Caroline Lwangu v Benson Wafula Ndote* [2022] eKLR, the Environment and Land Court held stated as follows;

“The law does not require that a Plaintiff or Defendant must testify in a matter. Where they choose to testify there is no prescribed order of calling witnesses or producing the documents or marking them before the witness produces them. The parties may call witnesses in any order to produce the documents they are entitled by law to produce provide the rules of evidence are followed.”

15. Similarly, in the case of *Gekonge v Mochoge* (Environment and Land Appeal 20 of 2021) [2023] KEELC 108 (KLR), the Environment and Land Court states as follows;

“I, however, do not agree with the appellant’s position that the trial magistrate erred in allowing the case to proceed, without him (as plaintiff) giving evidence. The fact that one is plaintiff does not mean that he must testify. I am not aware of any rule that prescribes that the plaintiff (or indeed any party to a suit) must testify. It is the prerogative of the plaintiff (or such other party to the suit) to either testify or refuse to testify. A party can indeed prove a case through the testimony of other witnesses, and it is not a requirement that before a case can be considered as proved, then the plaintiff must testify.”

16. The appellant was, therefore, supposed to adduce evidence to show how the accident happened and satisfy the court that the 2<sup>nd</sup> Respondent was responsible for the accident on account of her negligence.



17. The standard of proof in civil cases is on a balance of probability. The burden of proof is on the party alleging the existence of a fact he wants the Court to believe. Section 107 (1) and (2) of the Evidence Act provides as follows: -

107(1) “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”

(2) “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”

18. In *Miller V. Minister of Pensions* 1947 All E.R 372, Lord Denning puts this standard in the following terms: -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

19. It follows that a claim cannot be allowed simply because the opposing party did not call any witnesses; the required standard of proof must be met.

20. The claims officer, in cross-examination, acknowledged that some damages in the vehicle were not consistent with the description in the assessment report, showing that the motor vehicle had damages both at the front and rear. The investigation report was not helpful in the aspect of liability; it was centred on tracing the address of the physical owner of the motor vehicle registration number KCA 679B. The insurer placed reliance on proving that the claim was paid and that they are entitled to the amounts in lieu of repair and the investigation fees. They failed to prove how the loss occurred, who was liable for the accident, and thus responsible for the damages.

21. Subrogation allows an insurer to step into the insured’s shoes and pursue third parties responsible for a covered loss. In this case, the Appellant did not provide evidence to establish the Respondents’ primary liability for the accident; therefore, they cannot be held liable to pay the damages.

22. Based on the above, I find and hold that the trial court reached the correct conclusions, and I see no reason to disturb its findings. Consequently, I dismiss the appeal with costs to the Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 09<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Dalphin

Advocate for Appellant: Ms. Njoroge



Advocate for Respondents: Absent

