



REPUBLIC OF KENYA



**Muindi & another (Suing as the legal representatives of the Estate
of Francis Munene Muriithi - Deceased) v Kiura (Civil Appeal
E004 of 2022) [2023] KEHC 17803 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 17803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E004 OF 2022
LM NJUGUNA, J
JANUARY 18, 2023**

BETWEEN

PHILLIP MURIITHI MUINDI 1ST APPELLANT

PETER RUTERE MURIITHI 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FRANCIS
MUNENE MURIITHI - DECEASED**

AND

BARAZA NJIRU KIURA RESPONDENT

*(Being an appeal against the judgment of Hon. H. Nyakweba
(SPM) delivered on 16.12.2021 in Embu CMCC No. 57 of 2018)*

JUDGMENT

1. The appellants herein who were the plaintiffs in the lower court, filed the instant appeal having been dissatisfied with the judgment by the trial magistrate.
2. In their plaint filed and dated February 14, 2018, they averred that on or about the June 21, 2017, the deceased was riding his motor cycle registration number KMDZ 238C along Embu- Karuruina road, carrying one David Mugendi when at Matangiri area, the defendant and/or his designated agent, driver, servant, employee and/or assignee so negligently and carelessly or recklessly drove, managed and controlled the defendant's motor vehicle KBS 285G that he caused or permitted the same to knock and fatally injure the deceased.
3. The particulars of the injuries, those of negligence and special damages are set out in paragraphs 4, 5, and 7 of the plaint.



4. The respondent entered an appearance and filed a defence dated April 27, 2018 wherein he denied the occurrence of the accident on the material day and that the deceased sustained injuries as pleaded in the plaint. He also denied the particulars of special damages as pleaded by the appellants.
5. The appellants filed their reply to defence on May 7, 2018 and reiterated the entire plaint and denied each and every allegation of facts and law as pleaded in the defence save for such admissions made thereunder.
6. The trial magistrate after considering the facts and evidence adduced before him, dismissed the plaintiffs' suit against the defendant.
7. The appellant herein listed eight (8) grounds of appeal in the memorandum of appeal dated January 14, 2022. The appeal is on liability only.
8. Directions were given that the appeal be disposed off by way of written submissions and wherein all the parties complied with the directions. The court has considered the said submissions, the grounds of appeal and has re-evaluated the evidence as it's required of it, being the first appellate court.
9. The appellants submitted that they adopted their statements dated February 14, 2018 and in addition, testified on October 19, 2021 and closed their case; that the respondent did not tender any evidence to controvert the plaintiff's evidence nor did they cross examine them and thus the matter proceeded *ex parte*. That the trial court went overboard by stating that in the absence of a copy of records from the NTSA to prove that indeed the said motor vehicle belonged to the respondent, then the appellants had failed to prove their case given that the respondent had denied ownership of motor vehicle KBS 285G in his defence. It was submitted that proof of ownership of a motor vehicle is not only by way of copy of records and reliance was placed on section 8 of the *Traffic Act*. It was their case that they produced a police abstract which indicated the owner of the motor vehicle and it is clear that it was insured by Africa Merchant Insurance Company Limited. That the respondent did not tender any evidence to controvert or contradict this evidence. It was their submission that it is not enough just to deny ownership in a pleading and fail to testify; to support their contention, the appellants made reference to sections 107, 109 and 112 of the *Evidence Act*. Further, reliance was placed on the case of *Kurawa Industries Ltd v Dama Kiti and another* (2017) eKLR and *Lake Flowers v Cila Franklyn Onyango Ngonga and another* (2008) eKLR.
10. The respondent submitted that the appellants did not prove on a balance of probabilities that he was the owner of motor vehicle KBS 285G and thus urged this court to dismiss the appeal herein. That the burden of proof in a case rests on the person alleging and that the burden does not shift even if the defendant elects not to testify. That the appeal is premised on the ownership of the motor vehicle registration number KBS 285G which the respondent denied owning and as such, it was upon the appellants to prove ownership notwithstanding the fact that the respondent did not tender any evidence. Reliance was placed on the cases of *Charles Nyanguto Mageto v Peter Njuguna Njathi* (2013) and *Thuranira Kaururi v Agnes Mucheche* (19917) eKLR. In the end, the respondent urged this court to dismiss the appeal.
11. As already stated in this judgment, the appellants contest the trial court's finding on liability only.
12. This being a first appeal, the court relies on a number of principles as set out in *Peters v Sunday Post* 1958 (EA) 424.
13. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the



- appeal herein has merits. The court will address its mind to whether the appellants proved their case on a balance of probability.
14. The applicable law as to the burden of proof is found in section 107 (1) of the [Evidence Act](#) which states 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.”
 15. Section 108 further provides that:

“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.”
 16. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probability. See decision by the Court of Appeal in [Palace Investment Ltd v Geoffrey Kariuki Mwenda & another](#) [2015] eKLR.
 17. The appellants have challenged the determination by the trial court in dismissing their suit against the respondent. The circumstances under which this court can upset such a determination have been previously laid down by the Court of Appeal in the case of [Mbogo & another v Shah](#) [1968] EA where it was held that:

.....that this court will not interfere with the exercise of...discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
 18. Similarly, Madan JA (as he then was) in [United India Insurance Co Ltd v East African Underwriters \(Kenya\) Ltd](#) [1985] EA held that:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
 19. From the impugned judgment, the trial court noted that:

The plaintiffs allege that the defendant is the owner of m/v KBS 285G as at June 21, 2017. This was denied by the defendant. So as to prove this, it was necessary for the plaintiffs to produce a copy of the records from NTSA. This was not done. In the absence of a copy of records from NTSA, the issue of ownership cannot be said to have been established.
 20. The appellants have submitted that the trial court went overboard by stating that in the absence of a copy of records, the appellants failed to prove their case. They further submitted that proof of



ownership of a motor vehicle is not only by way of copy of records and reliance was placed on section 8 of the Traffic Act which states as follows:

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

21. The respondent on the other hand submitted that the appellants did not prove on a balance of probability that he was the owner of motor vehicle KBS 285G and thus urged this court to dismiss the appeal herein. That the burden to prove a case rests on the person alleging and that the burden does not shift even if the defendant elects not to testify.
22. I am in agreement with the respondent that indeed the burden to prove that he was the owner of motor vehicle KBS 285G rested with the appellants. The appellants relied on the police abstract to prove that the respondent was the owner of motor vehicle KBS 285G. A perusal of the said abstract herein reads the name of the respondent as the owner of motor vehicle KBS 285G. It is trite that a police abstract which is an official and public document issued by the police giving the particulars established at the time of a road traffic accident can be used to determine and clarify the ownership. Section 116 of the Evidence Act provides:-

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”
23. In the case herein, the respondent in his statement of defence dated April 27, 2018 denied that he was the owner of the said motor vehicle. In Wellington Nganga Muthiora v Akamba Public Road Services & another CA Kisumu 2010 eKLR.

“where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence and not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within standards of probability and not beyond reasonable doubt as it is criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicle or any other proof such as an agreement for sale of the motor vehicle which would be conclusive evidence in the absence of the proof to the contrary.”
24. In the case herein, though the respondent denied ownership of the vehicle, in his defence, the appellants produced a police abstract which proves that the respondent was the owner of motor vehicle KBS 285G at the material time of the accident. The evidence by the appellants was not challenged by way of cross-examination or by any other means.
25. By producing the police abstract, the appellants discharged their burden of proof on a balance of probability, as required under section 8 of the Traffic Act, as no evidence was produced by the respondent to the contrary save for what was pleaded, but which was not supported by way of evidence as the respondent did not call any witnesses. Their evidence was therefore not challenged by way of evidence or by cross examination.
26. From the foregoing, I find that the trial magistrate erred in finding that the appellants did not prove their case on a balance of probability and in dismissing their case.



27. The order of the trial court dismissing the suit is hereby set aside and in its place an order is hereby issued awarding the damages at Kshs 1,146,850/= which the trial court had assessed and which it ought to have awarded the appellants.
28. Costs of the appeal are awarded to the appellants.
29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JANUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

