



**Namwamba v Ithiri & another (Civil Appeal 174 of 2018)
[2023] KEHC 18804 (KLR) (Civ) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18804 (KLR)

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

CIVIL

CIVIL APPEAL 174 OF 2018

CW MEOLI, J

JUNE 12, 2023

BETWEEN

BEN NAMWAMBA APPELLANT

AND

MUTALII SYMON ITHIRI 1ST RESPONDENT

DERICK KIMATHI 2ND RESPONDENT

*(Being an appeal from the judgment of Mbeja, D.O, SRM.
Delivered on 6th March 2018 in Nairobi CMCC No. 1408 of 2009)*

JUDGMENT

1. This appeal emanates from the judgment delivered on 6th March, 2018 in Nairobi CMCC no 1408 of 2009. The suit in the lower court was commenced by way of the plaint dated 20th February, 2009 and amended on 27th May, 2013, and was filed by Ben Namwamba, the plaintiff in the lower court (hereafter the Appellant) against Augustus Kimondo and Derick Kimathi, the defendants in the lower court (hereafter the 1st and 2nd Respondent/Respondents respectively).
2. The claim was for special damages in respect of a road traffic accident which occurred on or about the 22nd day of July, 2007. It was averred that the 1st Respondent so negligently drove, managed, handled and/or controlled the motor vehicle registration number KAE xxxN (hereafter the 2nd motor vehicle) belonging to the 2nd Respondent, that he caused and/or allowed it to collide with the Appellant's motor vehicle registration number KAT xxxC (hereafter the 1st motor vehicle). It was further averred that as result of the said collision the first motor vehicle suffered extensive damage, occasioning the Appellant loss and damage.



3. The Respondents jointly filed the statement of defence dated 7th April, 2009 and amended on 1st February, 2016 denying the key averments in the plaint and liability. Alternatively, the Respondents pleaded contributory negligence against the driver of the Appellant’s motor vehicle. The suit proceeded to full hearing with the Appellant calling three (3) witnesses. The Respondents did not call any evidence. Upon the close of the trial court judgment was delivered on 6th March, 2018 dismissing the Appellant’s suit with costs.
4. Aggrieved with the dismissal order, the Appellant preferred this appeal which is based on the following grounds:
 - “ 1. THAT the learned magistrate erred in law and fact by making a finding that the 1st Defendant was driving motor vehicle registration number KAE xxxE instead of KAE xxxN in reliance with proceedings in Machakos Tr. Case no 5112 of 2007 *R v Mutalii Symon Ithiri* contrary to evidence on record and thereby arriving at a wrong decision.
 2. THAT the learned magistrate erred in law and fact by failing to appreciate that though the motor vehicle Reg. no KAE xxxN was on 29/5/2013 as per the records of the Registrar of Motor Vehicles was indicated to have been registered in the names of Ngigi Joseph that the same is a rebuttable presumption of ownership which was legally rebutted by evidence of PW2- Police Constable Timothy Kiptoo who even produced the police investigation diary that confirmed that Kimathi Derrick to be the owner of motor vehicle KAE xxxN.
 3. THAT learned magistrate erred in law and fact by making a finding of fact that no evidence was furnished to prove that motor vehicle KAE xxxN was involved in the road traffic accident on 29/5/2013 contrary to evidence on record thereby reaching a wrong finding.
 4. THAT learned magistrate erred in law and fact by failing to appreciate that the standard of proof in civil cases is on balance of probabilities and not beyond reasonable doubt.
 5. THAT the judgment of the learned magistrate is against the weight of evidence and a miscarriage of justice.” (Sic)
5. The appeal was canvassed by way of written submissions. Counsel for the Appellant commenced his submissions by asserting that the trial court fell into error in its finding that no evidence was tendered to show that the second motor vehicle was involved in the material accident despite evidence by the Appellant indicating that the second motor vehicle collided with the first motor vehicle. Counsel further faulted the trial court’s finding that the second motor vehicle was registered in the name of one Ngigi Joseph and not the 2nd Respondent, contrary to evidence tendered.
6. Counsel cited the proviso of Section 107(1) of the *Evidence Act* and the case of *Yumen Ali Shamil v Kabunda Ndune Ndago & 2 others* [2021] eKLR to argue that a log book is *prima facie* evidence of ownership. Reiterating the Appellant’s evidence at the trial, counsel asserted that in the absence of any evidence by the Respondents, the Appellant’s evidence stood uncontroverted. He relied on several decisions including *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] eKLR and *Karuru Munyororo v Joseph Ndumia Murage*[1988] eKLR.



7. Counsel further contended that the trial court ought to have found the 2nd Respondent vicariously liable by virtue of his ownership of the second motor vehicle which was at all material times being driven by the 1st Respondent. On that point, he cited the Court of Appeal decision in *Tabitha Ndubi Kinyua v Francis Mutua Mbuvi & another* [2014]. It was the further submission by the Appellant’s counsel that in the absence of any evidence to prove otherwise, or to support the defence of contributory negligence, the Respondents ought to have been held wholly liable for the accident. Therefore, counsel urged the court to set aside the dismissal order by the trial court and to substitute therefor a finding of liability against the Respondents, and to award the Appellant the sum of ksh667,000/- being proven special damages arising out of the material damage claim. He relied on the case of *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR.
8. The Respondents naturally defended the trial court’s dismissal order. Counsel for the Respondents anchored his submissions on the decisions in *Thuranira Karauri v Agnes Ncheche* [1997] eKLR and *Yumen Ali Shamil v Kabunda Ndune Ndago & 2 others* [2021] eKLR on the question of proof of ownership of a motor vehicle. Counsel asserted that the trial court was correct in finding that the averment in respect of ownership of the second motor by the 2nd Respondent had not been proved as the official motor vehicle record tendered disclosed a different person as its registered owner. Counsel further asserted that no evidence was tendered by the Appellant to prove that the second motor vehicle was involved in the material accident.
9. Counsel asserted that the Respondents did not deem it necessary to call any evidence to rebut the evidence tendered by the Appellant as it lacked credibility and that in any event, counsel for the Respondent ably cross-examined the witnesses who testified in support of the Appellant’s case. Counsel therefore submitted that the appeal lacks merit and ought to be dismissed with costs.
10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 in the following terms:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.”
11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.



12. Upon review of the memorandum of appeal and submissions by the respective parties before this court it is evident that the appeal is essentially challenging the decision by the trial court to dismiss the Appellant's suit on the issue of liability. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

13. The Appellant by his amended plaint averred at paragraphs 3, 4, 5, 6, 7 and 8 that:

3. At all material times relevant to this suit, the plaintiff was the registered owner of motor vehicle registration number KAT xxxC.
4. At all material times relevant to this suit, the 1st Defendant was the lawful driver, agent and or servant of the 2nd Defendant the registered owner of motor vehicle registration no KAE xxxXN.
5. On or about the 22nd July 2007 at about 11.00am while the Plaintiff's agent one Kaleb Jaoko was lawfully driving motor vehicle registration number KAT xxxC along Nairobi-Namanga Road near Shell Petrol Station, the 1st Defendant being the driver, agent or servant of the 2nd Defendant drove motor vehicle reg. no KAE xxxN negligently and dangerously drove at high speed and or controlled the said motor vehicle along the road in complete disregard of the Traffic Code and other road users and allowed it to knock Motor vehicle Reg. no KAT xxxC causing extensive damage to motor vehicle Reg. no KAT xxxC and the Plaintiff's agent sustained serious injuries.
6. The Plaintiff states that the said accident was solely caused by the negligence of the 1st Defendant and do hold the 1st Defendant liable and the 2nd Defendant vicariously liable.

Particulars of Negligence

- a. Driving motor vehicle Reg. no KAE xxxN at an excessive speed in the circumstances.
- b. Driving motor vehicle Reg. no KAE xxxN on the wrong side of the road and permitting it to hit motor vehicle Reg. no KAT xxxC.
- c. Driving motor vehicle Reg. no KAE xxxN without due care and attention and or regard to other road users and in particular motor vehicle KAT xxxC.



- d. Failing to control, manage and swerve to avoid hitting the plaintiff's motor vehicle.
 - e. Failing to observe the Highway Code.
7. The 1st Defendant after the accident was subsequently arraigned in Machakos Law Courts for traffic charges on 14.8.2007 in Traffic Case no 3112 of 2007 arising from the said accident before Senior Principal Magistrate M.N. Gicheru where he pleaded guilty of having been careless and was fined ksh 5,000/-. The Plaintiff therefore avers the 1st Defendant was the sole author of the said accident.
 8. The 1st Defendant was subsequently arraigned in Machakos Court and fined for the traffic offence.” (sic)
14. The Respondents filed an amended statement of defence denying the key averments in the plaint by stating at paragraphs 4, 5 and 6 that:

- “ 4. The defendants deny that the collision occurred as a result of any negligence on the part of the defendants. Each and every particular of negligence set out in paragraph 6 of the amended plaint is denied.
5. The collision was caused or contributed to by the negligence of the driver of motor vehicle KAT XXXC.

Particulars of Negligence

- i. Driving too fast in the circumstances.
 - ii. Failing to keep a proper lookout or to have sufficient regard to the presence of motor vehicle KAE xxxN on the road.
 - iii. Failing to heed or observe the presence of motor vehicle KAE xxxN on the road.
 - iv. Failing to stop, to slow down or to swerve or in any other way manage or control his motor vehicle so as to avoid the collision.
 - v. Driving without due care and attention.
6. The defendants deny that after the accident, the first defendant was arraigned at Machakos Law Courts in Traffic Case Number 3112 of 200 where he pleaded guilty to the offence of careless driving and was fined ksh 5,000/- and the plaintiff is put to strict proof thereof.” (sic)
15. To succeed, the Appellant had the onus to prove the particulars of negligence pleaded in his plaint. The trial court after restating and analyzing the evidence concluded as follows in respect to the Appellant's suit:

“I have considered the evidence so far on record and the testimonies of the plaintiff's witnesses. I have also considered the provisions of section 8 of the Traffic Act which state and I quote;



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

The claim against the second defendant cannot succeed. The owner of motor vehicle registration KAE xxxN one Ngigi Joseph was not joined as a party to this suit. I am not satisfied that the vehicle which was involved in the accident was owned by the second defendant. No evidence has been furnished to prove the contrary. The proceedings in the traffic case relate to a different motor vehicle altogether. This court is not satisfied that the plaintiff has established a *prima facie* case against the defendants on a balance of probabilities. The probative value of the evidence so far adduced by the plaintiff is not credible. The plaintiff did not testify in these proceedings. He donated a special power of attorney to Kaleb Jaoko who testified s PW1 whose testimony I have considered. This court has also considered the decision of the court of appeal in the case of *Thuranira Karauri v Agnes Ngeche* [1997] eKLR where it was observed and I quote;

“The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it.”

Having all the above into consideration, the pleadings and evidence so far on record coupled with the submissions filed by the parties together with the authorities cited, this suit is dismissed with costs to the defendants all circumstances considered” (sic)

16. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M’Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides 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.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal no 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law



and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

17. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

“Denning J, in *Miller v 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

18. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.” (Emphasis added).

19. On the question of ownership of the second motor vehicle, the court notes upon reviewing the record that the Appellant produced the copy of records dated 29th May, 2013 as an exhibit, indicating that at all material times, the registered owner of the second motor vehicle was one Ngigi Joseph. That person was not a party to the suit.
20. The contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of Section 8 of the *Traffic Act*, Cap. 403 Laws of Kenya which provides that the person whose name appears on the registration document in respect to a motor vehicle will be considered the owner of the same. Moreover, the police abstract which the court has similarly re-examined, does not give the name of the owner of the second motor vehicle.
21. There was no evidence to prove beneficial or any other type of ownership of the said vehicle by the 2nd Respondent. Therefore, the court agrees with the reasoning of the trial court that the Appellant did not tender any credible evidence in support of his averment that the 2nd Respondent was the registered and/or beneficial owner of the second motor vehicle, hence justifying a finding of vicarious liability against the said Respondent.
22. Concerning the 1st Respondent who, the Appellant averred that he was the driver of the second motor vehicle on the material date. The police abstract which was tendered as an exhibit, indicates that the



1st Respondent was the driver of the second vehicle at the material time. Furthermore, the Appellant tendered a certified copy of the criminal proceedings in Machakos Traffic Case no 3112 of 2007 before the Chief Magistrate's Court at Machakos, to confirm that the 1st Respondent was after the accident charged with a traffic offence, apparently of careless driving in relation to the material accident. He was convicted following his guilty plea and sentenced to pay a fine in the sum of ksh 5,000/-.

23. The abovementioned documents are supported by the respective testimonies of Caleb Jaoko (PW1) being the driver of the first motor vehicle on the material date and Police Constable Timothy Kiptoo (PW2) who confirmed that the driver of the second motor vehicle was blamed for causing the accident. The Appellant complained that the trial court erred in determining that the motor vehicle particulars in the criminal proceedings differed from those of the second vehicle in the suit. On the court's re-examination of the record, it is more plausible than not that the citation of the motor vehicle which was involved in the accident as registration number KAE xxxE in the traffic proceedings resulted from an inadvertent typographical error, since the documentation which formed the basis for the criminal proceedings bore the correct details of the second motor vehicle. In the court's view, the trial court ought to have appreciated this.
24. Hence for the above reasons, the court disagrees with the finding by the trial court in respect of the 1st Respondent's liability. The court is satisfied that on a balance of probabilities, the Appellant had proved his pleaded case against the 1st Respondent. Consequently, the court finds that the trial court's finding on liability against the 1st Respondent ought to be disturbed.
25. Regarding the suit reliefs, by the amended plaint it is apparent that while the Appellant sought both general and special damages, he did not pursue the former and it is safe to conclude that the claim was abandoned. Concerning special damages, the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR stated:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store*, Civil Appeal no 5 of 1990 (unreported) and *Idi Ayub Sabbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Part Hotel Limited* [1948] 64 TLR 177 thus; “Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.”

26. Further Chesoni, J (as he then was) stated in the case of *Ouma v Nairobi City Council* (1976) KLR 304

“Thus, for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damages, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen LJ said at pages 532, 533; -

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to



the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.” (Emphasis added)

See also *Hahn v Singh* [1985] KLR 716.

27. The Appellant through Kariuki Mwangi (PW3) an insurance motor assessor with Pragma-Tech Auto Assessors Limited tendered as an exhibit an assessor’s report documenting damage to his vehicle as assessed by PW3. The witness testified that the damage caused to the first motor vehicle was uneconomical to repair and was written off. And that he charged the sum of ksh 6,000/- for the assessment and preparation of the report, which sum was paid by PW1. On his part, the Appellant sought the total sum of ksh 656,000/- constituting the assessment charges of ksh6,000/- and the pre-accident value of the first motor vehicle assessed at ksh 650,000/-. However, at the final submission stage, the Appellant also prayed for the respective sums of ksh 6,000/- and ksh 4,000/- on assessment court attendance fees and towing charges.
28. In *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR stated that:
- “In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of... . In *Ratcliffe v. Evans* [1892]2QB 524 Bowen LJ said:
- “The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”
29. On the basis of the Appellant’s pleadings and evidence and the above decision, the court is satisfied that the Appellant is entitled to the sum of ksh 595,000/- being the pre-accident value of his vehicle as tabulated in the assessment report dated 8.7.2009. However, save for the fee note dated 8.7.2009 for the sum of ksh 6,000/- which was tendered as an exhibit, the Appellant did not tender a copy of the receipts evidencing payment of the said sum. Additionally, the court is of the view that pursuant to the principle that special damages must be both specifically pleaded and strictly proved, the Appellant would not be entitled to the further sums sought in his submissions.
30. The upshot therefore is that the appeal partially succeeds. Consequently, the dismissal order by the trial court is hereby set aside and is substituted with a finding of liability against the 1st Respondent. Judgment will be accordingly entered for the Appellant against the 1st Respondent for special damages in the sum of ksh 595,000/- with costs and interest from the date of filing of the lower court suit. The appeal against the 2nd Respondent is hereby dismissed. In the circumstances, a fair order is to direct the parties to each bear their own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.

**C.MEOLI
JUDGE**



In the presence of:

For the Appellant: Ms. Murangiri h/b for Ms. Ali

For the Respondent: Ms. Obwangi h/b for Mr. Makori

C/A: Carol

