



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J]

CIVIL APPEAL NO. 173 OF 2018

MILKA AKINYI OUMA (Suing as the.....)APPELLANT

-versus-

1. KENYA POWER & LIGHTING CO LTD

2. JAMES OBENGE OCHIENG.....RESPONDENTS

(Being an appeal arising from the judgment and decree by Hon. R. K. Lang'at Senior Resident Magistrate in Rongo Magistrate's Civil Case No. 3 of 2015 delivered on 3/12/2018)

JUDGMENT

1. This judgment is in respect of the appeal lodged against the dismissal of **Rongo Senior Resident Magistrate's Civil Case No. 3 of 2015** (hereinafter referred to as '**the suit**'). The suit was filed by **Milka Akinyi Ouma**, the Appellant herein, in her capacity as the personal legal representative and on behalf of the Estate of Samwel Otieno Ouma. The Appellant was also the mother of Samwel Otieno Ouma. I will hereinafter refer to Samwel Otieno Ouma as '**the deceased**'.

2. The suit was against the Respondents herein, **Kenya Power & Lighting Company Limited** and **James Obenge Ochieng**, who were sued as the owners of Motor Vehicle registration number KBK 065Y make Toyota Saloon.

3. Primarily, the suit sought damages for the fatal injuries the deceased sustained in a road traffic accident on 14/05/2014 involving the deceased's motor cycle registration number KMCQ 876Q and the Respondents' motor vehicle registration number KBK 065Y.

4. The suit was defended. The Respondents entered appearance and filed defence. They jointly denied liability.

5. The suit was later on heard. Both parties were represented by Counsels. The Appellant testified and called 4 witnesses. They were one **Caroline Achieng Ondiwo (PW2)**, No. 96879 PC **Maurine Makhoka** attached to Awendo Police Station (**PW3**), **Mark Okello Otieno (PW4)** and **Dr. Denis Owuor (PW5)**. The Respondents did not testify neither did they call any witnesses.

6. In a decision rendered on 03/12/2018 the suit was dismissed with costs for want of proof of liability.

7. The Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment. In a Memorandum of Appeal filed on 04/12/2018 the following four grounds were preferred: -

1. THAT the learned magistrate erred in law and fact in holding that the appellant did not prove any liability.

2. THAT the learned trial magistrate erred in law and facts in passing his judgment on liability on the theories and hypothesis that flew in the face of the evidence before him.

3. THAT the trial magistrate erred in law and facts by totally disregarding the evidence of the appellant hence came to the wrong conclusion on liability.

4. THAT the trial magistrate erred in law and facts by failing to consider the authorities cited by the appellant.

8. Directions were taken and the appeal was disposed of by way of written submissions. Both parties filed their respective submissions.

9. Counsel for the Appellant, **Mr. Ojala**, submitted at length on liability and quantum. He contended that liability against the Respondents was proved more so given that the defence called no evidence at the close of the Appellant's case. The Appellant referred to several decisions in support of the position. He prayed that the appeal be allowed, the order dismissing the suit be set-aside and this Court do assess damages accordingly.

10. The Respondents opposed the appeal. They vehemently argued that the duty to prove the case was on the Appellant until the burden of proof shifts to the Respondents. In this case they contended that the burden of proof did not shift to the Respondents hence there was no need of the Respondents adducing any evidence. Counsel for the Respondents, **Miss Pandit**, also relied on several decisions in buttressing the Respondents' position.

11. The appeal was the Appellant's first appeal. In such instances the appellate Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). The Court must nevertheless appreciate that it will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. (See **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga -versus- Kiruga & Another (1988) KLR 348**).

12. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

13. According to the Memorandum of Appeal the appeal is mainly on liability. However, the Appellant ventured into the aspect of quantum of damages in her submissions. Be that as it may, I will still deal with the aspect of quantum of damages if liability is proved against the Respondents or any of them.

14. From the parties' submissions on liability there is need to deal with the aspect of burden of proof in civil cases. The burden of proof is comprised of *the legal burden of proof* and *the evidential burden of proof*. I dealt with this subject in an election petition in **Bungoma High Court Election Petition No. 4 of 2017 Levi Simiyu Makali vs. Koyi John Waluke & 2 Others (2018) eKLR**.

15. Since I find the legal analysis on the burden of proof to be applicable in civil cases, I will reiterate what I stated in paragraph 14 of the foregone decision: -

14. Likewise, I dealt with this discussion in the Bungoma Petition and this is what I stated: -

21.

22. That is the rationale why the incidences of proof are to be intently looked at.

(i) The legal burden of proof: -

23. The legal basis for the legal burden of proof is provided in Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya. The said section states as follows: -

(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 the burden of proof lies on that person."

24. The onus is therefore upon a Petitioner who seeks the annulment of an election 'on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds 'to the satisfaction of the court'. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....' (See paragraph 131 of the 2017 majority judgment).

25. That is the legal burden of proof.

(ii) The evidential burden of proof: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27.

28. The Supreme Court in the 2017 majority judgment had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof as follows: -

[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static

and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....”

29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

16. The foregone is hence the nature and extent of the legal and evidential burden of proof applicable even in civil cases.

17. Initially, the Appellant had both the legal and evidential burden of proof at her door step. Whereas the legal burden of proof remained static, the evidential burden of proof would only shift to the Respondents once the Appellant adduced sufficient evidence in support of the suit. On one hand, if the Appellant failed to discharge the evidential burden of proof then the matter ended there. There would infact be no need of the Respondents calling any evidence or at all. The suit would be unproved and suitable for dismissal. On the other hand, if the Appellant successfully adduced evidence capable of shifting the evidential burden of proof to the Respondents then the onus befell upon the Respondents to prove the Appellant otherwise.

18. It is hence not automatic that when a Defendant does not call any witness then the suit is unopposed or evidence uncontroverted. Filing a defence in a civil case is opposing that suit. Cross-examining witnesses is likewise an act in opposition to a suit. Even in instances where a Defendant does not call any witnesses still a court must be satisfied that the evidence has attained the required standard of proof for the burden to shift. The standard of proof in civil cases required to discharge the evidential burden is on the balance of probability.

19. I captured the foregone way back in 2016 in **Kakamega High Court Civil Case No. 99 of 2012 Otieno Joseph Okwach vs. Amolo K. T. Wilson (2016) eKLR** as follows: -

12. Whereas I fully and respectfully agree with the foregone legal position, I wish to state that even in situations where a court is faced with uncontroverted evidence, such a court remain under the legal duty to scrutinize the uncontroverted evidence and satisfy itself that the cause of action is proved as required in law. In other words, a Plaintiff in an undefended suit must prove the ingredients of the claim as required in law for judgment to be entered in its favour.

20. I will now look at the evidence.

21. The accident that led to the death of the deceased was a collision between two vehicles. The vehicles were the deceased’s motor cycle registration number KMCQ 876Q and the Respondents’ motor vehicle registration number KBK 065Y. There was only one eye-witness. She was PW2.

22. PW2 testified and was cross-examined. There was however no re-examination.

23. During examination-in-chief, PW2 narrated how the accident occurred. I will reproduce the evidence verbatim as under: -

I am Caroline Achieng Ondiwo from Kasera rear Winyo I am a farmer, I recall on 14/5/14, I went to Rongo hospital for clinic I was expectant. I stopped a motorcyclist before he stopped, he was knocked down. I stopped the motorcycle on Homa-Bay - Rongo road. The motorcycle was from Rongo heading to Homa-Bay, I was at Nyarach side I walked, I was on the left side of the road. I stood on the right side of the road, I was facing Rongo the motorcycle was on the opposite direction, I stopped him, the vehicle knocked him while he was still riding it, the vehicle was behind her, there were both on the same side, the vehicle approached when the motorcycle tried applying brakes, the vehicle knocked him, it was driven in a zig-zag manner, the vehicle was 056Y. I left after the motorcyclist was taken he was taken to hospital in Rongo the Michage hospital, I heard later that he died. I used to see the deceased ridding. I don’t know his name I witnessed the accident, I blame the driver of the vehicle since the motorcycle was ridding off the road as he intended to block me, the vehicle lost control and knocked him.

24. While shortly being cross-examined by the Respondents’ Counsel PW2 responded as follows: -

...I cannot recall what happened since when an accident happens one may loose their mind, I was shocked I can’t recall if the motorcycle took a U-turn,..... I did not record the zig-zagging of the vehicle in my statement..... I can’t recall what happened on that day since I was shocked and sick..... I cannot recall which side of the road the accident occurred there were many people there.....

25. As said, PW2 was not re-examined.

26. PW3 was a police officer from Awendo Police Station where the accident was reported. She was however not the investigating officer. That aside, she only produced the police abstract whose contents she could not even vouch. According to the police abstract investigations

were still underway.

27. The police file was not produced.

28. That was the status of the evidence that sought to establish liability against the Respondents. *Was that evidence therefore sufficient to shift the burden of proof to the Respondents?* I do not think so. I say so for two reasons. **One**, PW2 was not re-examined. Re-examination was an opportunity for PW2 to be assisted to recollect her memories and put the occurrence of the events straight. That opportunity was not utilized. **Two**, PW3 would have at least produced the police file. Through that evidence maybe the court would have perused the accident scene sketch map. The map would have aided the court in attempting to reconstruct the scene of accident.

29. The state of the Appellant's evidence was hence so scanty. PW2 who was the star witness recanted her evidence. With such evidence there was no basis at all on which the trial court would assign liability against the Respondents. Simply put, there was no evidence on how the accident occurred. On a balance of probability, the evidence did not establish a case to shift the burden to the Respondents.

30. The trial court therefore properly analyzed the evidence and arrived at a safe and correct finding. Given the state of the evidence, the trial court did not err in finding the Respondents not liable. The suit was rightly dismissed.

31. As the Appellant did not appeal against the quantum, I would have adopted the proposals made by the trial court had I found the Respondents liable.

32. The upshot is that the appeal is unmerited and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of February, 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ojala Counsel instructed by the firm of Messrs. P.R. Ojala & Company Advocates for the Appellant.

Pandit Counsel instructed by the firm of Messrs. Nishi Pandit & Company Advocates for the Respondents.

Evelyn Nyauke – Court Assistant