



9. Being dissatisfied with the judgment, the Appellant moved this court, by way of an appeal.

10. The Appellant submitted that there is no legal requirement that evidence tendered by the Plaintiff be corroborated by an independent witness, before the said evidence can be deemed as proof.

11. On its part, the Respondent submitted that in the absence of corroboration by an independent witness;

***“..... the Appellant’s evidence remains a mere allegation; it is not worth the candle nor the wick.”***

12. Secondly, the Appellant submitted that it duly discharged its burden of proof, to the standard required.

13. It was common ground that the standard of proof in a civil case, such as the one before me, is on a balance of probability.

14. On its part, the Appellant believes that it discharged that burden of proof, on a balance of probability, but the Respondent submitted that the Appellant failed to adduce sufficient evidence to meet the required standard of proof.

15. In determining the appeal, I have reminded myself, that being the first appellate court, I am obliged to re-evaluate all the evidence on record. Secondly, I remind myself that when drawing conclusions from my analysis, I must bear in mind the fact that I did not have the benefit of observing the witnesses when they were testifying.

16. The analysis of the evidence commences by first looking at the pleadings. I say so because the evidence which is adduced at the trial, can only advance the case of the party on whose behalf the evidence is tendered, if the said evidence supported the pleadings.

17. Evidence which was irrelevant to the pleadings, cannot advance the case.

18. Similarly, evidence which was inconsistent with or at variance with the pleadings, cannot advance the case.

19. In this case the issue of ownership of the Appellant’s vehicle was first raised at paragraph 3 of the Plaintiff, where it was stated thus;

***“At all material times the plaintiff was the registered and/or equitable or beneficial owner, and the insured of Motor Vehicle Registration No. KBP 755E.”***

20. **PW1, GEOFFREY OCHAKO TINEGA**, produced a Certificate of Search which was issued by the Registrar of Motor Vehicles; and it indicated that the owner of the Toyota Registration **KBP 755E** was the **KENYA CONFERENCE OF CATHOLIC BISHOPS**.

21. In a literal sense, therefore, the Plaintiff was not the registered owner of that vehicle.

22. But from the “Assessment Receipt”, [Exhibit 9]; the Receipt for Excess Fees [Exhibit 10]; and the Satisfaction Note [Exhibit 12], it is clearly indicated that the Insured was the Catholic Medical Mission Board.

23. In my understanding, the fact that the Plaintiff was the insured, first, confirms one of the averments in the Plaintiff. Secondly, the said fact brings out the nexus between the Plaintiff and the motor vehicle Registration **NO. KBP 755E**.

24. When he was testifying, **PW1** said;

***“I made a statement and explained the relationship between the Kenya Conference of Catholic Bishops and the Catholic Medical Mission Board. The Catholic Medical Mission Board is a programme that is run by the Kenya Conference of Catholic Bishops.”***

25. Earlier in the testimony, **PW1** had said the motor vehicle Registration **KBP 755E** was assigned to him, for use in driving staff.

26. By utilizing the vehicle for the purposes of conveying staff, the Plaintiff had a beneficial interest in the said vehicle. That would explain why it was the Plaintiff who had the vehicle insured.

27. Accordingly, the evidence on record proves not only that the Plaintiff was the insured, but also that the Plaintiff was the beneficial owner of the motor vehicle Registration **KBP 755E**.

#### **Was there an accident?**

28. As the learned trial magistrate noted in his judgment, the only witness who testified at the trial, did give details of how the accident occurred. He said that on the material day, he was driving within the Mountain View Estate, from the direction of Kenya Breweries.

29. He was driving uphill, when he noted a trailer which was coming downhill, from the opposite direction.

30. As the trailer was covering the whole road, **PW1** moved completely off the road, so as to give way to the trailer.

31. Although the trailer passed by, the vehicle which was being towed by the said trailer, veered off the road and rammmed into the Plaintiff's vehicle.

32. The witness identified the vehicle which rammmed into his vehicle as a lorry Registration **NO. KBM 763S**. He produced a Certificate of Search from the Registrar of Motor Vehicles, which showed that that vehicle belonged to the Defendant, Mombasa Maize Millers Kisumu Limited.

33. Notwithstanding that evidence, the trial court held that;

***“The Plaintiff's evidence as to the occurrence of an accident has not been corroborated by an independent witness and not produced to prove that an accident occurred on 23/5/2013 as alleged.***

***In the absence of any further evidence to corroborate the plaintiff's witness as to the occurrence of an accident, the Plaintiff's evidence remains to be a mere allegation.”***

34. Neither the learned trial magistrate, nor the Respondent have provided any legal foundation for the contention that unless the evidence of a witness was corroborated by an independent witness, it remains an allegation.

35. In the case of **MAKUBE Vs NYAMURO, CIVIL APPEAL NO. 8 OF 1983**, the Court of Appeal held that the trial court had misdirected itself when it had held that the evidence tendered required corroboration.

36. The learned Judges of Appeal noted that corroboration might only have been required if the witnesses were children of tender years; and if the case was of a criminal nature.

37. Hancox Ag JA said;

***“While as a matter of law the evidence of children of tender years in a criminal case would require corroboration, this was neither a criminal case, nor were the children of tender years.***

.....

***In these circumstances, I have no doubt that the reference by the learned Judge to the necessity for corroboration of the evidence of the boys, and each of them, was a misdirection.”***

38. On his part, Law JA stated that;

***“Their evidence did not require corroboration, it was consistent, and in my view fully discharged the onus of proving a wilful assault and battery, as against the Respondent's unsupported story of a pure accident.”***

39. I find that the learned trial magistrate misdirected himself when he held that the evidence adduced by the Plaintiff's witness required corroboration by an independent witness.

40. In any event, even if the law had required corroboration, I find that the exhibits which confirmed the degree of damage to the Plaintiff's vehicle, and the extent of the repairs that were undertaken, re-affirmed the testimony of the witness, concerning what had transpired.

41. There was evidence from only one witness. There was therefore no other “story” about how the Plaintiff's vehicle was damaged. Therefore, there was no reason why the said evidence, which was uncontroverted, should have been rejected.

42. At any rate, the trial court did not give any reason why it could not accept the only testimony that was tendered before it.

43. Although the Defence contained denials of the averments in the Plaintiff, it must be borne in mind that both sets of pleadings constitute assertions or averments. Pleadings are not evidence.

44. That is why I held that the evidence tendered by the Plaintiff was uncontroverted, because the Defendant did not call any witness to lead any evidence to prove its assertion.

45. Cross-examination of a witness does not constitute evidence by the party who was cross-examining the witness.

46. Cross-examination is intended to test the veracity of the evidence tendered.

47. When the witness makes a concession, his testimony is discounted to the extent of such concession.

48. In this case, I find that the evidence tendered by the Plaintiff proved, on a balance of probabilities, that;

*(a) The Defendant's lorry, Registration NO. KBM 763S was driven so negligently that it collided with the Plaintiff's Toyota Hilux Double-Cabin vehicle, Registration NO. KBP 755E.*

*(b) The Defendant was thus liable for the accident, and the cost for the repairs of the resultant damage to the Plaintiff's vehicle.*

*(c) The cost of the repairs was Kshs 766,894/00, as demonstrated through the receipts which the Plaintiff produced in court.*

49. In the result, I find that the trial court erred in law and in fact, when it dismissed the Plaintiff's case. Accordingly, the appeal is allowed.

50. I set aside the order dismissing the suit; and I substitute it with an order granting judgment in favour of the Plaintiff, for Kshs 766,894/=, together with interest at Court rates from 5<sup>th</sup> October 2018, when the trial court rendered its judgment.

51. The Appellant is also awarded the costs of the appeal, together with the costs of the suit.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF MAY 2020**

**FRED A. OCHIENG**

**JUDGE**