Nkonge v Nzula (Civil Appeal E576 of 2023)
[2025] KEHC 13492 (KLR) (Civ) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E576 OF 2023

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

SILAS MBAABU NKONGE ..... APPELLANT

AND

SIMON NDAMBUKI NZULA ..... RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Benard Kasavuli (Principal Magistrate) in Nairobi [Milimani] CMCCC No. E3823 of 2020 delivered on 30 th May 2023)

JUDGMENT

Introduction and Background:

1. The appeal subject of this judgment mainly interrogates whether a suit brought under the doctrine of subrogation can still succeed if the Plaintiff fails to testify.

2. Madison Insurance Company Limited [hereinafter referred to as 'the Insurance Company'] instituted Nairobi [Milimani] CMCC No. E3823 of 2020 [hereinafter referred to as 'the suit'] through its insured one Simon Ndambuki Nzula, the Respondent herein who was then the Plaintiff, against Silas Mbaabu Nkonge, the Appellant herein, and one John Mwangi Kamau [hereinafter jointly referred to as 'the then Defendants'] claiming that the Respondent's motor vehicle registration number KCC 243T [hereinafter referred to as 'the car'] was unlawfully hit by motor vehicle registration number KBK 522K [hereinafter referred to as 'the offending vehicle'] along Ngong Road within Nairobi County.

3. In isolating the particulars of negligence in the suit against the then Defendants, the Respondent pleaded inter alia that the Defendants drove the offending vehicle at an excessive speed, failed to exercise the requisite care and skill failed to slow down and were generally negligent in the manner they managed and controlled the offending vehicle thereby ramming into the car and causing extensive damage

whereof the car was declared written off. On special damages, the Respondent pleaded for value of the car at Kshs. 800,000/=, assessment fees at Kshs. 6,980/=, investigation fees at Kshs. 53, 480/= and vehicle search fees at Kshs. 550/=.

4. The then Defendants separately denied any liability for the accident. They posited that none of them was to blame for the accident, if any was proved. They further pleaded in the alternative that if any accident was proved, then it was the Respondent was the author of his own misfortune by failing to take necessary caution and care on the road thereby causing the accident. They further particularised acts of negligence on the part of the Respondent.

5. The suit was heard by way of viva voce evidence. The Respondent did not testify, but called three witnesses namely PW1No. 62350 Cpl Timi Chemangu, a police officer attached at Kilimani Police station who produced the Police Abstract on the accident. PW2 was Samuel Wambugu, a Motor Vehicle Assessor and Valuer. He produced an Assessment Report on the damage to the car. PW3 was a Claims Analyst at the insurance company. She was one Joan Kibiku who confirmed that the insurance company had instructed PW2 to assess the car whereof it was found uneconomical to repair. She also confirmed that the insurance company paid for the value of the car and filed the suit. PW3 produced several exhibits including sketch maps, reports and photographs in demonstrating how the accident occurred.

6. The then Defendants testified at trial, but did not call any witness. John Mwangi Kamau [DW1] confirmed being the registered owner of the offending vehicle which was driven by the Appellant at the time of the accident. He did not witness the accident. The Appellant testified as DW2. He confirmed driving the offending vehicle when the accident occurred and blamed the Respondent for not adhering to traffic rules and that he was drunk.

7. It was upon assessment of the evidence and the application of the law that the trial Court entered judgment for the Respondent as against the then Defendants. The Court found the then Defendants wholly liable for the accident and awarded Kshs. 565,000/= being the value of the car less salvage value, assessment fees at Kshs. 6,980/=, investigation fees at Kshs. 53, 480/= and vehicle search fees at Kshs. 550/= respectively thereby amounting to Kshs. 626,010/=. The Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment.

The Appeal:

8. Through a Memorandum of Appeal dated 30th June 2023, the Appellant preferred the following grounds of appeal: -

    1. The learned magistrate erred in law and in fact for failure to find that the none attendance of the plaintiff, Mr. Siman Ndambuki Nzula was fatal to the case since his case founded on negligence against the defendants was not proven.

    2. Failure to find that a suit is a solemn action solely owned by parties therefore Madison Insurance Company Limited, a Limited Liability Company could not substitute Mr. Nzula or preclude him from attending the case and testify on the occurrence of the accident.

    3. For failure to find that any testimony by a witness who did not witness the said incidence can only be said to be hearsay evidence and as a rule of evidence, hearsay is inadmissible as evidence of a stated fact.

    4. Erred in law and fact not to find that the termination of who is liable is a judicial function and not the function of the police, and therefore a police

abstract is not conclusive proof of liability, and therefore without evidence of the occurrence of the accident the Court had no evidence upon which to exercise such judicial discretion but to dismiss the case.

5. Erred in law and fact for failure to find that the pleadings, answers, in cross-examination and/or submissions do not amount to evidence or defense.

6. The liability of the Respondent was 100% absence of his none attendance to testify.

7. Failed to consider the evidence, pleadings and submissions of the Appellant and binding case law placed before court.

9. In his written submissions dated 14th March 2025, the Appellant contended that since the Respondent did not testify at trial, then the evidence of the then Defendants was uncontroverted and as such liability was not proved a consequence of which the suit was not proved. It was argued that the insurance company could not substitute the Respondent and that it was mandatory that the Respondent testifies such that failure thereof renders the rest of the evidence as hearsay. Several decisions were cited in support of the appeal. In the end, the Appellant prayed that the appeal be allowed and the suit be dismissed with costs.

10. The Respondent filed written submissions dated 20th May 2025 in opposing the appeal. He argued that the suit was essential for the benefit of the insurance company, but the law was that it must be instituted in the name of the insured for locus standi requirements. Therefore, argued the Respondent, as long as there is evidence in proof of the suit, the testimony of the insured is not mandatory. Several decisions were referred to. The Respondent further submitted that liability was rightly found in his favour and that no basis had been laid for interference thereof. He also submitted that since the special damages were properly proved, then the appeal be dismissed with costs.

Analysis:

11. Having considered the record, the parties' submissions and the decisions referred to therein, the following issues arise for determination: -

(i) Whether the Plaintiff must testify in a suit brought under the doctrine of subrogation.

(ii) If the above issue is answered in the negative, whether the suit was proved.

12. Before venturing into a consideration of the above issues, suffice to look at the role of this Court as the first appellate Court. This Court is to re-consider the evidence afresh with a view to arriving at its own conclusions. In Selle -vs- Associated Motor Boat Co. [1968] EA 123, the Court of Appeal for East Africa discussed the foregoing as follows: -

> ... 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.

13. A look at the subject issues now follow.

    (a) Whether the Plaintiff must testify in a suit brought under the doctrine of subrogation:

14. This issue will not be conclusively considered if a legal tour of the doctrine of subrogation is not undertaken. The good news is that the doctrine is not novel since several Courts and legal jurists have rendered on the same. For instance, in Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR the Court of Appeal had the following to say on the doctrine: -

    > 26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated....
    >
    > 28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co. [1994] eKLR and Michael Hubert Kloss & another vs. David Seroney & 5 others [2009] eKLR.

15. In the case of Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 the Court defined the basis of the doctrine of subrogation as follows: -

    > The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation. (emphasis added)

16. In Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991, the Court stated as follows: -

    > ... The right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured. (emphasis added)

17. In Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR, where the Court rendered as follows: -

    > The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance...
    >
    > It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine

> of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured....

18. Deriving from the foregoing, it is apparent that a suit brought under the doctrine of subrogation is essentially one by an insurance company to recoup the sums paid to its insured out of an accident where a third party was to blame. Therefore, the contract between the insurance company and insured, the sums paid by the insurance company to the insured and the aspect of liability are some of the cardinal issues which must be proved in such a matter. Further, as legally deduced above, the claim must be made in the name of the insured, but for the benefit of the insurance company.

19. In this matter, the Appellant contended that since the Respondent did not testify in the suit, then the evidence adduced by the then Defendants was uncontroverted and the suit ought to have failed. This contention was no doubt made on the auspices of the doctrine of burden of proof. Legally speaking, there are two limbs to the burden of proof being the legal burden of proof and the evidential burden of proof. Sections 107, 108 and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya deals with the legal burden of proof in what may be summed up as 'he who alleges must prove'. The legal burden of proof is always on the part of the Plaintiff or Claimant and never shifts to the Defendant or Respondent as the case may be. In instance where a Plaintiff or Claimant adduces sufficient and admissible evidence in proof of a fact, the party is said to have discharged its incidence of burden [Section 108 of the *Evidence Act*] and that burden now shifts to the opposite party to either affirm or controvert the evidence. That burden which shifts to the opposing party is what is known as the evidential burden of proof. Therefore, whereas the legal burden of proof is static on the Plaintiff or Claimant, the evidential burden of proof shifts from one party to the other depending on the evidence adduced. [See the Supreme Court of Kenya in Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment].

20. In the suit, for the Respondent to have succeeded, he must have fully discharged his incidence of burden on a balance of probability. In doing so, what the law calls for is evidence. A party must adduce evidence. It, therefore, means that as long as there is sufficient evidence in proof of a fact in civil proceedings, then the need for the Plaintiff or the Claimant to testify in person is not mandatory. It is this state of the law that takes care of instances where a Plaintiff or the Claimant is unable to testify for instance on account of age or unsoundness of mind. In such cases, as long as the evidence adduced by witnesses attains the standard of proof in law, a case stands proved.

21. The legal requirement on adducing evidence as opposed to a party mandatorily testifying in civil proceedings was dealt with in Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others [2009] eKLR, where the Court had this to say: -

> ..... The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged....

22. On the same score, Hon. Mbaluto, J [as he then was] in Autar Singh Bahra And Another vs. Raju Govindji HCCC No. 548 of 1998(UR) held as follows: -

..... Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.

23. The above affirms this Court's position that as long as sufficient evidence is adduced in proof of a fact, the necessity of the Plaintiff or Claimant to personally testify does not arise. In fact, in the two cases referred to above, no witnesses testified at all and reliance was only placed on the pleadings. The Courts, rightly so found, that the parties' cases were not proved. Therefore, a party in civil proceedings opting not to testify must ensure that appropriate admissible evidence is adduced on its behalf otherwise it risks rendering the claim unproved. It is on the foregoing rendition that this Court finds and hold that it is not legally mandatory for a Plaintiff or Claimant to personally testify in civil proceedings and that a civil case can still succeed even on account of the testimony[ies] of witness[es], as the case may be, as long as the legal standard of proof is attained.

24. The first issue is, hence, answered in the negative thereby paving way to the next issue.

b. Whether the suit was proved: -

25. As pointed out elsewhere above, the standard of proof in civil proceedings is on a balance of probability. Therefore, the totality of evidence on record should sustain the averments in the suit.

26. Three witnesses testified in the suit. PW1 was a police officer attached at Kilimani Police station who produced the Police Abstract on the accident. PW2 was a Motor Vehicle Assessor and Valuer who produced an Assessment Report on the damage to the car. PW3 was a Claims Analyst at the insurance company who confirmed that the insurance company had insured the car and also instructed PW2 to assess the car after the accident whereof it was found uneconomical to repair. She also confirmed that the insurance company paid for the value of the car and filed the suit. The witnesses produced several exhibits including sketch maps in demonstrating how the accident occurred.

27. It was DW2 who was driving the offending vehicle who witnessed the accident. He alluded that the Respondent was drunk and did not keep to traffic rules. On the part of the Respondent, the evidence on how the accident occurred can be deduced from PW1 and PW3. According to PW1, the accident involving the car and the offending vehicle was duly reported at Kilimani Police station and a Police Abstract confirming the said report was issued. It was that Abstract which PW1 produced in evidence. PW1 stated that although he was neither the investigating officer nor did he visit the scene, the Police Abstract was clear that investigations were conducted and DW2 was blamed for the accident. On cross-examination, PW1 confirmed that apart from what was stated in the Police Abstract, he had nothing more to hold the then Defendants culpable. However, on re-examination, PW1 confirmed that the investigation officers on the accident had been transferred and that the police records were clear on who was to blame for the accident.

28. PW3 produced all the documents in the Plaintiff's List of Documents dated 3rd August 2020 as exhibits except those produced by PW1 and PW2. The documents included a Motor Accident Insurance Claim Form, sketch maps and photographs of the damaged car. As said, these documents were produced by the consensus of the parties. On being cross-examined, DW2 stated that he did not disapprove the sketch maps produced by PW3 and agreed that he could not prove that the Respondent was drunk.

29. On account of the above evidence, the occurrence of the accident is not disputed. DW2 did not state which of the traffic rules the Respondent breached. He also failed to prove that the Respondent was

drunk during the accident. He further agreed with the sketch maps on how the accident occurred. The car was hit by the offending vehicle from behind. As such, and without more, DW2 failed to keep a safe distance while driving. In as much as no indication on what further happened to DW2 was made, his conduct in managing the offending vehicle amounted to a traffic offence punishable under the *Traffic Act*. There was, therefore, evidence on how the accident occurred. Simply put, it was DW2 who rammed into the car on its rear as evidenced by the Motor Accident Insurance Claim Form, sketch maps and the photographs. Having hit the car from the rear, DW2 bore was wholly responsible since the Appellant did not state what the Respondent would have done to avoid the accident.

30. On a careful analysis of the evidence on the manner in which the accident occurred, this Court cannot fault the trial Court in holding the then Defendants 100% liable. In sum, the Respondent's witnesses adduced evidence that proved the Respondent's case on a balance of probability.

31. Next is a consideration of the awards made. The trial Court, correctly so, awarded Kshs. 565,000/= being the value of the car less the salvage value. This Court further finds no fault on the Assessment fees and the Motor vehicle search fees. However, the Court finds that the award on tracing fees of Kshs. 53,480/= was unfairly made. The Court of Appeal in Nkuene Dairy Farmers Co-op Society Ltd & Another -vs- Ngacha Ndeiya (2010) eKLR observed that in an accident claim where a suit is yet to be filed, a motor vehicle search certificate suffices instead of incurring all manner of unnecessary expenses well ahead of the execution process. Therefore, in this matter, the tracing and investigation fees was not only an unnecessary expense but also premature and the Respondent wouldn't have incurred it simply because the then Defendants were at fault. As such, the sum of Kshs. 53,480/= is hereby declined. This Court must, however, clarify that whereas a party is at liberty to conduct investigations arising from an accident, costs which are unnecessarily incurred stand the risk of not recovered in a subsequent suit.

32. Having considered all the contentions raised by the Appellant in this appeal, the matter has to come to an end.

Disposition:

33. As the appeal has considerably failed except on the award of Kshs. 53,480/=, this Court now makes the following final orders: -

    (a) Save for the sum of Kshs. 53,480/= awarded as tracing fees which is hereby declined, the rest of the appeal is hereby disallowed. The judgment in Nairobi [Milimani] CMCC No. E3823 of 2020 delivered on 30th May 2023 is hereby reviewed to Kshs. 572,530/= with interests and costs as awarded.

    (b) Parties shall bear their respective costs.

34. It is so ordered.

DELIVERED, DATED ANDSIGNED ATNAIROBI THIS30TH DAY OFSEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Okemwa, Learned Counsel for the Appellant.

Michael/Amina – Court Assistants.