

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. E011 OF 2025

LILIAN ANYANGO ACHIENG.....APPELLANT

VERSUS

THE HONOURABLE ATTORNEY

GENERAL.....RESPONDENT

(Being an appeal from the Judgment and decree of Hon. B. Limo (PM) in Siaya CMCC No. 29 of 2020 delivered on 5/12/2023)

BETWEEN

LILIAN ANYANGO ACHIENG.....PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL

.....DEFENDANT

JUDGMENT

1. The Appeal arises from the Judgment and decree of **Hon. Benjamin Limo (PM)** delivered on 5th December 2023 in Siaya CMCC No. E029 of 2020 wherein he dismissed the Appellant's suit with no orders to cost.
2. The Appellant was aggrieved and filed a Memorandum of Appeal dated 12th February 2025 wherein she raised the following grounds of appeal.
 - i) That the learned trial magistrate erred in law and fact in arriving at a decision that was erroneous in the circumstances.
 - ii) That the learned trial magistrate erred in both law and in fact when he dismissed the Appellant's suit without considering the submissions and decisive authorities by the Appellant.
 - iii) That the learned trial magistrate erred in both law and in facts when he held that the Appellant did not prove her case on a balance of probabilities while ignoring the evidence and testimony of the Appellant.
 - iv) That the learned trial magistrate erred in fact and in law when he failed to give regard to the material lack of the

evidence which the Defendant failed to lead at the trial and dismissed the suit.

The Appellant therefore prayed that the appeal be allowed and that the court re-evaluate the evidence and arrive at its own independent decision and further that the Appellant be awarded costs of the appeal.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).**

4. The hearing of the matter commenced on 20/6/2023 as follows:

5. PW1 **Lilian Anyango Ochieng** stated that she is a business lady and that she filed statement dated 2/5/2018

and that the same be adopted as her evidence in chief. The same is as follows:

That on the material date, the Plaintiff was a lawful pedestrian within Uranga Area within Siaya County when police officers in police uniform and under the instruction, control or direction of the Inspector General of Police and the Permanent Secretary of the Ministry of Interior and Coordination of National Government attacked, shot and severally injured the Plaintiff without justifiable cause or provocation and as a consequence, the Plaintiff herein sustained grievous bodily injuries. She further stated that she sustained the injuries due to the negligence on the part of the police officers.

On cross examination, she stated that she resides in Rabango and that she was heading to a funeral at Bondo. That she was walking on foot and that she did not reach the funeral venue. That she went to hospital for treatment and later went to report about the accident at Siaya Police Station. That she has not resorted to engaging IPOA or the Police Internal Affairs Unit over the incident of assault.

The Appellant closed her case at that juncture.

6. The Respondent, on its part, closed its defence case without calling any witnesses.
7. The parties were directed to file and exchange written submissions. The learned trial magistrate later made a determination which has precipitated to this appeal.

8. The appeal was canvassed by way of written submissions.
9. The Appellants submissions are dated 24th November 2025. The Appellant's submissions dwelt on her grounds of appeal.
10. On the issue of whether the learned trial magistrate erred in law and in fact in arriving at a decision that was erroneous in the circumstance, counsel for Appellant submitted that it is evident that the Appellant was assaulted without justifiable cause or provocation by people whom she knew to be uniformed police officers on or about 30/08/2017 while she was a lawful pedestrian at Uranga Area within Siaya County. That as a result of the assault, she sustained severe grievous bodily injuries. That in her testimony she testified to having been brutally beaten and injured by the police officers despite her pleas and sought medical treatment at Jalsonga Medical Clinic. That she reported the incident at Siaya Police Station but was threatened and chased away. That she produced treatment forms to corroborate the injuries sustained.
11. It was also submitted that indeed the learned trial magistrate did not consider the fact and evidence adduced by the Appellant herein. That the learned trial magistrate also did not consider the the fact that the Defence did not rebut the Plaintiff's allegation and evidence as produced. That they equally did not dispute neither did they bring any evidence contrary to the Appellant's case and therefore, this submission must be allowed and the evidence adduced be

considered before this Honourable Court and the Appellant be compensated for the pain and suffering encountered.

12. On the issue of whether the learned trial magistrate erred in both law and in fact when he dismissed the Appellant's suit without considering the submissions and decisive authorities by the Appellant, it was submitted that a trial court is mandated to consider all the evidence on record before arriving at its conclusion. This includes the written submissions filed by the Appellant together with all the enabling authorities accompanying the submissions. All this was in support of the Appellant's case before the trial court. That submissions and relevant authorities attached are meant to guide the trial court in arriving at a favorable decision. That the Appellant filed well detailed submissions with guiding authorities to support the case. That the Defence did not file submissions, neither did they file any evidence to the contrary of the Appellant's case. That from the submissions, the Plaintiff clearly demonstrated that she indeed suffered bodily harm after being assaulted by the police officers. The relevant authorities filed were meant to guide the trial court in awarding the damages vis a vis the nature and the gravity of the injuries. The case of **Peter Njoroge Gichii vs Benard Thimangu & Another (2006) eKLR** was relied upon.

13. As regards the ground of appeal that the learned trial magistrate erred in both law and in facts when he held that the Appellant did not prove her case on a balance of

probabilities while ignoring the evidence and testimony of the Appellant and failed to give regard to the material lack of the evidence which the Defendant failed to lead at the trial and dismissed the suit. It was further submitted that it is trite law that he who alleges must prove. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya, provides 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.”

Counsel placed reliance in **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, where the court held that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

14. It was submitted that it is evident that the Appellant proved her case on a balance of probability. She produced convincing evidence that indeed she was attacked by police officers and that she sustained injuries and was treated afterwards. That also when she went to report the incident, she was chased away by officers on duty. That indeed the

Plaintiff was a victim who has suffered from the actions of Kenya Police, whom the Respondent represents.

15. Counsel submitted that the Appellant lodged her case, attached relevant document that she managed to obtain. Her testimony was supported by the treatment sheet produced. In her statement she stated that she was unable to obtain P3 Forms because the police officers at Siaya Police Station were uncooperative and chased her away. This meant that she only relied on the treatment sheet adduced. Upon closing of the Appellant case, the Respondents did not call witnesses or adduced contrary facts to the evidence produced. This makes the evidence and testimony of the Appellant to hold waters and convincing enough for the judgement to be in her favor.

14. It was further submitted that the Respondent chose not to call any witness or to bring any evidence that could overturn the Appellant's case despite being given an opportunity to rebut. With the evidence produced and unchallenged, this meant that the scales of justice must lean in favour of the Appellant as parties are bound by their pleadings.

It was further submitted that the Appellant has established that indeed the trial magistrate did not consider the evidence and testimony adduced by the Appellant in reaching the decision. That it is clear that she sustained grievous bodily injuries after being attacked by police officers in uniform who were acting under instructions,

control, or directions of the Inspector General of Police and the Permanent Secretary of the Ministry of Interior and Co-ordination of National Government who attacked, shot and severely injuring the Plaintiff.

16. Further, the counsel for the Appellant submitted that it was the duty of the trial court to rely on the evidence produced by the Appellant to reach a determination and not to decide in favour of the Respondent who did not tender their evidence to rebut the allegations. Counsel relied on the maxim “**Equity aids the vigilant, not the indolent.**”
17. Counsel further submitted that the appeal is merited and should be allowed. That the Appellant has satisfactorily demonstrated that the learned trial magistrate erred in both law and fact by failing to properly evaluate the uncontested evidence on record and by dismissing a claim that was proved on a balance of probabilities.
18. The counsel prays that the Honourable Court allows the appeal in its entirety, that the judgment and decree of the Chief Magistrates’ court at Siaya in CMCC No. 29 of 2020 and delivered on 5th December 2025 be set aside, judgment be entered for the Appellant on liability at 100% against the Respondent, award of general and special damages as per the assessment by this court as well as award of costs of the suit in the lower court and costs of this appeal to the Appellant.

19. The Respondent submissions are dated 3rd December 2025. It was submitted that the burden of proof lay with the Appellant in accordance with section 107 (1) and (2) of the Evidence Act which provide that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. It was submitted that the Appellant sued the Respondent pursuant to the principle of vicarious liability on the basis that the police office officers were alleged to have assaulted the Appellant on the material date. It was contended that the Appellant's claim should fail on grounds inter alia; that she was alone; no evidence of an OB entry over the incident; that no evidence that the alleged incident was ever reported to any police station or IPOA for investigations; that there was no eye witnesses; that only medical documents were relied upon without support of the medical personnel who treated and examined the Appellant; that the evidence was not corroborated at all to have the Respondent to be held vicariously liable in damages. It was further contended that the makers of the documents relied upon by the Appellant were not called to testify in accordance with the provisions of section 35 of the Evidence Act. Reliance was placed in the case of **Vilji Jetha Kerai & Another Vs Julius Ombasa Manono & Another [2019] eKLR** where the court cited with approval the Court of Appeal decision in **Mohamed Musa & Another Vs Peter**

M. Mailanyi & Another Civil Appeal No. 243 of 1999

where it expressed itself as follows:

“ Under section 35 (b) of the Evidence Act, the medical report ought to have been produced by the maker thereof. The Plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the Defendants as well as to the Plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court to make a calculation or to reach a conclusion thereon; otherwise the award cannot stand.....In this case , the finding of the trial court cannot stand, as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases ex parte, the required standard of proof must be observed, particularly where there is a denial of material pleadings by an opposing party.”

20. It was submitted that even the injuries were genuine, then the Appellant should have presented evidence showing that the injuries had been inflicted by police officers and not any other person or something else.

21. It was also submitted that the Appellant failed to establish a prima facie case against the Respondent in the trial court and hence the Respondent was entitled to close its case

without leading evidence as the burden of proof did not shift to the Respondent. Reliance was placed in the case of **Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 Others Nbi HCC No. 1243 of 2001** where the court held :

“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.”

22. It was finally submitted that all the grounds of appeal by the Appellant were not proved as the trial court considered all the issues on merit and came up with the decision which should be upheld by this court. It was thus urged that the appeal should be dismissed with costs and the judgement of the trial court be upheld.
23. I have considered the appeal in light of the evidence on record and written submissions filed on behalf of the parties herein. The question to be determined is whether the Appellant proved her case on a balance of probabilities, and if proved, whether she is entitled to the reliefs sought in the Plaint.
24. It is noted that the Appellant has pitched camp on the ground that the Respondent’s case was closed without any witness testifying and hence her evidence which was tendered ex parte remained uncontroverted and should have sailed through an ought to have been sustained by the trial court. **Odunga J.** (as he then was) in **Republic vs County Government of Machakos [2019] KEHC**

8492(KLR) delved into the consequences of a party failing to adduce evidence. Guided by court decision, the learned Judge held that the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged. However, the learned Judge held that a party must satisfy the particular burden and standard of proof even when his/her claim is not opposed. The learned Judge held that:

“38. I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in a matter the Court may still decline to grant the orders sought and this must be so even in cases where the application is not opposed. This was the Court of Appeal’s position in Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 where it was held that it is an error for the Court to hold that a failure to file grounds of opposition automatically entitles the applicant to orders ex parte as the applicant is not relieved of the onus on him of justifying his application.

39. This is my understanding of the holding of Rajah, JA in Britestone Pte

Ltd vs. Smith & Associates Far East Ltd [2007] 4 SLR (R) 855 at 59 that:

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.”

25. In the same vein, Section 107 of the Evidence Act dictates that whoever desires a court to give judgment regarding a legal right or liability dependent on facts they assert, must prove that those facts exist. The burden lay on the Appellant to prove her claim on a balance of probabilities. As the Respondent had duly entered appearance and filed a statement of defence, the legal burden of proof was on the Appellant to prove the claim as pleaded in the Plaint on a balance of probabilities.

26. However, the burden may shift to the Defendant to disprove the alleged claim. This is the *evidential burden of proof*, which is well captured under Sections 109 and 112 of the Evidence Act. See **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334** where the court held that: -

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative

of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

27. The two concepts are well illustrated by the Court of Appeal in the case of **Mbuthia Macharia v Annah Mutua & Another [2017] eKLR**, that:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.” See **Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR**,

28. The standard of proof is well captured in the case of **Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, where the Court 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 the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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.”

29. Kimaru J. (as he then was) in William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526 stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than

not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.”

Even though the Appellant had presented her evidence without the Respondent giving evidence in rebuttal, i find that it was the responsibility of the Appellant to first establish a prima facie case so as to require the Respondent to bring evidence in rebuttal. As the Appellant did not manage to surmount that hurdle, the Respondent had no obligation to present evidence since the evidential burden was not shifted to it in the circumstances.

30. As noted in the foregoing authorities, the burden of proof lay with the Appellant in accordance with section 107 (1) and (2) of the Evidence Act which provide that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist and that when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. A perusal of the Plaintiff dated 4/3/2020 shows that the Appellant sued the Respondent pursuant to the principle of vicarious liability on the basis that police office officers were alleged to have assaulted the Appellant on the material date. However, what

transpired in the proceedings were inter alia; that she was alone; no evidence of an OB entry over the incident was presented; that no evidence that the alleged incident was ever reported to any police station or IPOA for investigations; that there was no eye witnesses; that only medical documents were relied upon without support of the medical personnel who treated and examined the Appellant. It is thus clear that the evidence was not corroborated at all to have the Respondent to be held vicariously liable in damages. It also transpired that the makers of the documents relied upon by the Appellant were not called to testify in accordance with the provisions of section 35 of the Evidence Act. In the case of **Vilji Jetha Kerai & Another Vs Julius Ombasa Manono & Another [2019] eKLR** the court cited with approval the Court of Appeal decision in **Mohamed Musa & Another Vs Peter M. Mailanyi & Another Civil Appeal No. 243 of 1999** where it expressed itself as follows:

“ Under section 35 (b) of the Evidence Act, the medical report ought to have been produced by the maker thereof. The Plaintiff cannot expect the court to make an award without any basis. The court can only award a sum of money and, in justice to the Defendants as well as to the Plaintiffs, that sum must be commensurate with the injuries suffered. The onus lies on the plaintiff to adduce the evidence to enable the court to make a calculation or to reach a conclusion thereon; otherwise the award cannot stand.....In this case , the finding of the trial court

cannot stand, as the respondent, having failed to call the doctor who wrote the medical report, did not prove his case. He presented his case with a lot of assumption simply because the other side was not represented. Litigants must bear in mind that even in prosecuting cases ex parte, the required standard of proof must be observed, particularly where there is a denial of material pleadings by an opposing party.”

31. As noted from the foregoing authority, it was incumbent upon the Appellant to have called the medical doctors who had treated and examined her for the alleged injuries. No reasons were given by the Appellant as to why she did not see the need to call such crucial witnesses to back up her case. The fact that the Respondent did not call witnesses was not a reason for her not to call the said witnesses since the burden of proof still lay with her. The Appellant appears to have made assumptions and hoped that her case would sail through without breaking a sweat.

32. Again, it was necessary for the Appellant to present evidence linking the police as the ones responsible for her alleged injuries and that no other person or something else were responsible which could then tie or rope in the Respondent herein. The Appellant just made claims of having been injured by police officers and fail to avail witnesses or even evidence that she lodged reports with the Independent Police Oversight Authority or Police Internal Affairs Unit. It is instructive that even though the Appellant claims that she was turned away by Siaya police, nothing

prevented her from lodging a complaint with the superior officer in the County in the title of Police County Commander who would have dealt with the issue. It is common knowledge that the reporting systems in the police force are usually strictly adhered to and therefore the reasons given by the Appellant are lame and unbelievable.

33. It was also the duty of the Appellant failed to establish a prima facie case against the Respondent in the trial court and hence the Respondent was entitled to close its case without leading evidence as the burden of proof did not shift to the Respondent. In the case of **Trust Bank Ltd Vs Paramount Universal Bank Ltd & 2 Others Nbi HCC No. 1243 of 2001** the court held:

“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.”

34. The Appellant has relied on her grounds of appeal in which she has blamed the trial court for not considering her case on merit. However, a perusal of the said grounds of appeal appear to me to be reactionary by the Appellant who did not proved her case on the balance of probabilities and that the trial court, in my view, considered all the issues on merit and came up with the decision which should be upheld by this court. I am inclined to agree with the finding of the learned trial magistrate that the Appellant miserably failed to prove her case within the requisite threshold of proof.

The Appellant had thought that her case would sail through after the Respondent failed to tender evidence. This was her undoing since she was aware that she was obliged to prove her case as per the provisions of Section 107, 108 and 109 of the Evidence Act. She did not discharge that burden of proof.

35. In view of the foregoing observations, it is my finding that the Appellants' appeal lacks merit. The same is dismissed. The judgement of the trial court dated 5/12/2023 is hereby upheld. I order that each party do bear their own costs of this appeal.

Dated and delivered virtually at Naivasha this 24th day of March 2026.

D. K. KEMEI

JUDGE

In the presence of:

Adeka for M/s Wafula.....for Appellant

M/s Odhiambo for M/s Esendi..... for Respondent

Maurine.....Court Assistant

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