Chebet v Mangere (Civil Appeal E005 of 2020)
[2026] KECA 768 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 768 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E005 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

APRIL 24, 2026

BETWEEN

FRIDAH CHEBET ..... APPELLANT

AND

JONATHAN MANGERE ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii, (Ougo, J.) dated 5th November, 2019 in HCCA No. 61 of 2017)

JUDGMENT

1. This is a second appeal arising from a dispute between Fridah Chebet, the appellant, and Jonathan Mangere, "the respondent". The dispute originated in the Principal Magistrate's Court at Kilgoris where the appellant by way of a plaint sued the respondent claiming that the respondent, who shared an adjacent plot of land with her, instructed his workers to clear his sugarcane farm. In the process of clearing the farm, the respondent's agents lit a fire to burn the piled sugarcane foliage but were unable to contain the fire which spread to the appellant's land and burnt her sugarcane thereby causing her loss. The appellant claimed Kshs. 285,750/- for the loss of crop and Kshs. 5,000/- towards the demand notice as well as costs of the suit with interest at court rates.

2. The respondent denied the claim and stated in the alternative that if at all the appellant's sugarcane was burnt, then the same was instigated by the appellant to facilitate a quick harvest and payment from Trans-Mara Sugar Company Limited.

3. The trial court in its judgment delivered on the 28th June 2017 found that the appellant had proved her case and granted her the orders sought.

4. Being dissatisfied by the decision of the trial court, the respondent filed an appeal in the High Court of Kenya at Kisii, in which appeal he faulted the outcome saying the trial magistrate failed to properly analyze the evidence before him thus arriving at a wrong decision notwithstanding the fact that the

appellant had failed to prove her case on a balance of probabilities. The respondent further impugned the decision of the trial court for its failure to comply with the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

5. The High Court upon considering the appeal held that the trial court erred in finding in favour of the appellant as she had failed to prove her case before the trial court and allowed the appeal.

6. The appellant owned 6 acres of land parcel No. LR Trans Mara/OIolchani/790 on which she had planted sugarcane. The evidence that was presented to the trial court was that on 6th November 2015, the appellant while in the neighbourhood in the company of David Muigai, PW3, received information through a phone call made to PW3, that her sugar cane farm in Trans-Mara was burning. They rushed to the scene, and found the respondent's workers putting out the fire, but upon seeing her, they took off on their heels. She was assisted by members of the public to put out the fire, but by then, 3.4 acres of cane had been consumed by the fire.

7. The respondent was informed about the incident on phone, and he proposed that the sugar company with whom the appellant had a contract, be requested to harvest the cane so as to mitigate on the loss. The following day, 180 tonnes of cane was harvested and delivered to the factory, for which the appellant received Kshs.254,774.25 out of the burned cane. It was her evidence that she suffered a loss of Ksh.285,750/=, a figure arrived at by a surcharge of Ksh.600/= per ton amounting to Kshs.108,492/=; apart from that she incurred a loss of Kshs.177,250/=, being what she would have received if the cane had been harvested as matured.

8. This evidence was fortified by the evidence of Jeremiah Ruto, PW2, an Agricultural Officer who visited the farm and assessed the damage, recoded in a report which was produced at the trial. He stated that the 3.4 acres.

> "...had a potential of producing 238 tonnes of cane with an average yield of 70 tonnes. Assessment was based on the remaining portion that was into (sic) damaged. The loss suffered amounted to 57.18 tonnes amounting to Kshs.177, 257 (each Kshs.3,100/= per tonne). The factory deducted that Kshs.600/= per tonne for burned loss. This amounted to Kshs.108,492/=. Total loss was Kshs.282, 750/=. I was guided by status of the crop, potential of the area, crop management and the statement from the sugar factory..."

9. The respondent in his testimony confirmed that his farm was adjacent to that of the appellant; that indeed, the appellant's sugar cane farm caught fire, but insisted that he had no worker, nor had he sent anyone to his farm. He denied making any proposals aimed at mitigating the appellant's loss, and denied liability.

10. The learned judge in making a finding in favour of the respondent stated thus:

> "...Although PW1 and PW2 did not know the name of the appellant's employees who were working on the material day they testified that they recognized them as they had seen them on the defendant's land before. While I appreciate that the respondent's testimony that she saw the appellant's employees trying to put off the fire she did not call a direct witness who saw the fire spread from the appellant's farm into the respondent's farm. There was no indication from PW1 and PW3 that the fire was from the appellant's farm. When PW1 and PW3 arrived only her farm was burning... Other than the respondent's pleadings there was no evidence that the fire was caused by burning of foliage at the appellant's farm. The (sic) patrol watchman who was a key witness and present when the fine (sic) started was not called to give evidence to shed light on what caused the fire. I find that the trial court erred

> in finding that PW2 was present at the scene when the appellant's workers lit the fire that spread onto the respondent's farm as Pw2 gave clear testimony that he visited the farm on 15th November 2015, after the fire incident to assess damage. After considering the evidence as a whole I am persuaded that the respondent failed to establish on a balance of probability that the fire was caused by the appellant."

11. Dissatisfied with the High Court's judgement and decree, the appellant is now before this Court, on a second appeal on grounds that the High Court erred in Law by: failing to properly analyze and/or review the evidence on record thus reaching an erroneous decision that was against the weight of evidence on record, elevating and applying the standard of proof which is equivalent to 'beyond reasonable doubt', overturning the trial court's decision for alleged lack of sufficient evidence whereas there was overwhelming material warranting sustaining of the trial court's decision and finally by misapprehending the cogent evidence on record as liability against the respondent was strict. The appellant thus prayed that the appeal be allowed and the judgment and decree of the High Court be set aside.

12. The appeal was canvassed wholly by way of written submissions.

    The appellant submitted that the evidence adduced in the trial court and High Court was overwhelming and much above the balance of probabilities thus sufficient to hold the respondent liable; that the loss suffered was discernible from the assessment report presented and the accounts statement from Transmara Sugar Company Limited; that her evidence remained unshaken even in cross-examination; that the High Court thus failed in evaluating the evidence presented before her which is a point of law.

13. Conversely, the respondent submitted that the appellant failed to discharge her duty to prove her case on a balance of probabilities, that the mere fact that they shared a boundary did not imply that it was the respondent and/or his workers who were liable for the fire leading to the loss. That the instant appeal thus lacked merit and ought to be dismissed with costs to him.

14. This being a second appeal, this Court is confined to dealing with issues of law only unless it is demonstrated that the courts below considered matters, they ought not to have considered or failed to consider matters they ought to have considered, or that the decision was plainly perverse section 72 of the *Civil Procedure Act*. This scope has been delineated in many decisions of this Court including but not limited to Kenya Breweries Ltd vs. Godfrey Odoyo [2010] eKLR, where the court held that:

> " In a second appeal, the Court confines itself to matters of law unless it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered or that the decision is plainly perverse."

15. Having carefully reviewed the record, the submissions of counsel, the judgments of the two courts below, the authorities cited and the law, we are satisfied that the appeal turns on a single issue of law: whether the first appellate court erred in interfering with the trial court's decision.

16. This appeal invites this Court to, firstly, reanalyze the facts leading up to the decision by the High Court and find that the evidence presented by the appellant was sufficient to sustain her claim as held by the trial court. That cannot be our role on a second appeal. What we discern as appropriate for consideration is the appellant's invitation to this Court to consider whether the High Court shifted the standard of proof from a "balance of probabilities" to one of "beyond reasonable doubt" thus arriving at erroneous decision.

17. The applicable law as to proof in civil matters is set out under Sections 107, 108 and 109 of the *Evidence Act*. This Court, differently constituted, in Mumbi M'Nabea vs. 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."

18. And in Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another [2015] eKLR, this Court, again differently constituted, held that:

> " Denning J, in Miller –vs- 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."

19. From the foregoing guiding authorities, it is clear that the duty of the court was thus to consider the evidence presented by both parties and determine whether the evidence presented by the appellant was more probable than that of the respondent.

20. In her analysis of the appellant's evidence, the High Court while referring to the appellant's pleadings of negligence particularized against the respondent stated that there was no evidence that the fire was caused by burning of foliage at the appellant's farm as alleged; that the appellant failed to call the patrol watchman who was a key witness and present when the fire started; and that the reliance of the trial court on PW2 being at the scene when the fire started was wrong as PW2 in his own testimony stated that he visited the scene after the incident to assess the damage. Further, that the appellant failed to call a direct witness who saw the fire spread from the respondent's farm to her farm and thus in light of the spirited defence put forth by the respondent, she failed to prove her case.

21. Did the learned judge raise the standard of proof to "beyond reasonable doubt"? Our perusal of the decision discloses a common ground that the appellant's sugarcane was burnt down; that the appellant and PW3 had passed by the farm on their way to another farm owned by the appellant in the area and saw the respondent's employees who were working on his farm; they recognized these workers as they had previously seen them working on the respondent's land; that the appellant and the respondent farm shared a common boundary, and when the respondent's workers saw them after the fire had spread into the appellant farm, they fled away, - conduct of a guilty mind. Why would the balance of probability shift against the appellant? The evidence that was presented was that the respondent's workers were burning the foliage cleared from the respondent's land, that in itself would explain why the entire farm belonging to the respondent could not have caught fire, the workers had collected the foliage which they were burning, and that is what ran amok into the adjacent land which had cane. Both PW1 and PW2 evidence was enough and the failure to call patrol watchman to testify as to what caused the fire was not fatal to her case.

22. In our considered analysis, we concur with the appellant's submissions that the account advanced by the appellant was sufficient to hold the respondent liable. The Learned trial judge applied a subjective test instead of a balance of probability test in arriving at her decision, invoking a theory of self-inflicted harm, yet there wasn't a scintilla of evidence to support this theory; and in so doing erred in overturning the trial court's decision for alleged lack of sufficient evidence

23. In conclusion, the appellant has demonstrated that the High Court misapprehended the law on standard of proof in civil cases and ignored matters it ought to have considered. Accordingly, we find merit in this appeal and hereby allow it by restoring the judgment of the trial court which held the respondent liable. We award costs of this appeal and in the High Court to the appellant.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

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