Kibichi v Mathai (Civil Appeal E003 of 2023)
[2024] KEHC 4065 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E003 OF 2023

RB NGETICH, J

APRIL 25, 2024

BETWEEN

JOHN KIBICHI ..... APPELLANT

AND

JOHN MUGO MATHAI ..... RESPONDENT

(An Appeal from the Judgment and/or Decree of Honorable Magistrate, Honorable A.C. Towett in Eldama, Ravine CMCC No. 11 of 2017 delivered on 16th January,2023)

JUDGMENT

1. The appeal herein emanates from a suit filed by the appellant against the Respondent in the lower court through plaint dated 18th April 2017 seeking the following reliefs: -

    a. General damages;

    b. Special damages of Kshs 34,500/= plus VAT and future cost of operation;

    c. Cost of the suit and interest; and

    d. Any other relief that this court may dim fit to grant.

2. The suit initially proceeded before Hon. Tamar who delivered Judgment on 4th July 2019 in favour of the Plaintiff. The Respondent/Defendant applied for stay which was dismissed by the trial court. The Respondent/Defendant filed appeal being Kabarnet HCA No 15 of 2019 and by a judgment delivered on 21st May, 2020 the Respondent was granted a stay pending the hearing of the said application.

3. The application was heard and a ruling delivered on 17th September 2020;- the same was allowed (refer to pages 98-104 of the record of appeal) and the Respondent was granted leave to filed documents and the matter proceeded de novo. The suit was heard a fresh on 11th January 2022 by Hon. Towett (refer

to pages 109-115 of the record appeal) and upon hearing the parties herein, the trial court then rendered itself in the judgment delivered on 16th January 2023 and dismissed the suit by the Appellant herein.

4. The Appellant being dissatisfied with the decree and judgment by Honorable A.C. Towett delivered on 16th January 2023 has filed this appeal against the entire finding on liability and quantum and sets forth the following grounds of appeal:

   i. That the learned trial magistrate erred in law and fact in failing to consider appropriately the evidence adduced by the appellant hence arrived at a wrong conclusion that the appellant did not prove his case to the required standards.

   ii. That the learned Trial magistrate grossly erred in law and in fact in dismissing the appellant's case in its entirety and against the weight of the evidence adduced during trial.

   iii. That the learned magistrate erred in law and fact in misdirecting himself by not considering the evidence by the police officer and the production of the police abstract proving that the respondent was the owner of motor vehicle Registration Number KAH 941 C.

   iv. That the learned magistrate erred in law and fact in considering facts that were mere allegations and were not proved by the respondent in evidence.

   v. That the learned magistrate erred in law and fact in failing to consider the evidence by the appellant, the evidence on record, and the submissions.

   vi. That the learned magistrate erred in law and fact in not appreciating the - fundamental principles of the rule of evidence, that if the respondent was opposed to being the owner of motor vehicle Registration Number, -KAH 941.C, it was upon him to give evidence to the contrary.

   vii. The learned magistrate erred in law and fact in failing to appreciate that the respondent was in possession of the motor vehicle registration number KAH 941 C at the time of the accident and as such the owner of the same.

   viii. That the learned trial magistrate grossly erred in law and in fact in dismissing the appellant's case contrary to the evidence on record and without assessing adequately the number of damages that she could have awarded.

5. The appellant prays for judgement as follows: -

   a. That the finding of the Trial Magistrate on both liability and quantum be set aside, be reviewed and/or revised and/or be substituted with the judgment of this Honourable Court.

   b. That this Honorable Court do make such further orders as it may deem fit.

   c. That this Appeal be allowed with costs to the Appellant.

Appellant's Submissions

6. The appellants filed their submissions dated 19th January,2024 and listed the following issues for determination: -

   i. Whether the accident occurred in view of the Learned Magistrate's assessment

   ii. Whether the Learned Magistrate correctly determined the issue of Liability in relation to the issue of ownership of Motor vehicle Registration Number KAH 941C

iii. Whether the Learned Magistrate erred in law and facts in failing to assess quantum

7. On whether an accident occurred, the appellant submit that the trial magistrate did not delve into determination of the occurrence of the accident which occurred on 27th August 2016 at around 9:00pm whereas occurrence of the said accident was not in issue. That to prove the accident, the Appellant produced a Police Abstract captured at Page 15 of the Record of Appeal, which clearly indicated the place of the accident and the parties involved and occurrence of the accident was not challenged by the defence counsel during trial.

8. In respect to ownership of the vehicle and Liability of the Respondent, the appellant submits that the Learned Magistrate acknowledged production of a Police Abstract containing details of the Respondent as the owner and the person liable for negligence in this matter; that the suit motor vehicle was supplying water at the Respondent's premises as was captured in the Appellants statement at Page 10 of the Record of Appeal. That the trial magistrate erred in holding that liability of the Respondent could only be established through production of Certificate of Search, and failed to appreciate implied agency between the driver of the suit Motor vehicle and the Respondent as they were in a mutually beneficial contractual or master- servant relationship; further that the fact that the Respondent is the owner of the premises where the lorry was supplying water, then in the event of failure to establish ownership of the lorry, then it can be implied that Respondent was the owner at the time of the accident.

9. Further that the trial magistrate failed to appreciate that no evidence was tendered by the defendant challenging the Plaintiff's claim that the Lorry was working for the benefit of the defendant at the time of the accident, and the Plaintiff was also among the visitors of the Respondent's club at the time of the accident, hence under the care of the Respondent under the principle of Occupiers liability and placed reliance in the case of *Nadwa v Kenya Kazi Ltd* (1988) eKLR, where the Court of Appeal observed as follows:-

> " In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."

10. The Appellant submit that he proved liability against the Respondent on a balance of probability and the respondent being the known owner and/or the beneficial owner of the suit motor vehicle and the Club, owed a duty of care, to the appellant which was breached leading to serious injuries on the Appellant and relied on the case of *William Kabogo Gitau v George Thuo & 2 others*[2010] 1 KLR 526.

11. On Quantum, the appellant submit that the trial magistrate erred in failing to award damages to the Appellant despite undisputed evidence of injury and urged this court to set aside Judgement and determine the issue of Quantum as prayed.

Respondent's Submissions

12. The Respondent filed submissions dated 8th February,2024 and on proof of ownership, the respondent submits that no police officer was called to testify on police abstract produced as an exhibit and the police abstract though produced was challenged by the defendant both in the defence and in cross examination. That on cross examination, the appellant said he did not conduct a search in respect to the motor vehicle in question at the NTSA office and the certificate of ownership filed does not show the owner of the accident motor vehicle and he did not have the investigation report and he was not

sure whether the driver was charged with a traffic case and whether police conducted any investigation; and further stated that police did not confirm identity of the person who was driving the accident motor vehicle at the time of the accident and he did not avail any details on the insurance policy for the offending vehicle; that he did not see the vehicle and he was told by his brother that the defendant was the owner of the lorry in question.

13. And further on re-examination, the Appellant stated as follows: -

> " The lorry driver as per the police abstract is Mr. John Mugo Mathai. The police abstract has indicated the insurance policy number. The police investigated this case and confirmed that the defendant is the owner of the accident motor vehicle. My brother reported the accident on the same date."

14. They submit that the Appellant in his defence at pages 113-114 of the record of appeal testified that his name is John Mathai Mugo and denied that the subject motor vehicle belonged to him or his late father. That he denied being involved in any accident. He produced his identity Card and the court had a chance to record that the names on the police abstract reading John Mugo Mathai did not tally with his ID card which read John Mathai Mugo.

15. They submit that the police abstract indicates that the owner of the motor vehicle is Mr. John Mugo Mathai c/o Oloika. That on re-examination, it became apparent that there was Oloika Country Club in Nakuru town East and Oloika Country Lodge in Kabarak. That there is so much doubt that the vehicle in question belonged to the Respondent herein and having been notified in the defence and even the previous proceedings in Kabarnet HCA No 15 of 2019, it was upon the Appellant herein to furnish the court with a search record for the subject motor vehicle clearly showing that it belonged to the Respondent.

16. On the evidentiary value of a police abstract as regards proof of ownership of a motor vehicle, they rely in the Court of Appeal sitting at Kisumu famous case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another*, (2010) eKLR.

17. That in the present case, the Appellant was aware that the Respondent was disputing that he was the owner of the subject motor vehicle and that was clear from the defence at paragraph 3 page 35 of the record of appeal. That by his admission, he contended in cross-examination that he was aware that the Respondent was disputing the said ownership of the vehicle.

18. They submit that the parties herein contended that on the material day of the accident, there was a function in the Respondent's premises and there were several vehicles at the scene. That he further confirmed that he was not the one who reported the incident to the police and the same was done by his brother. The brother was not called to testify in this case, in support of this they rely in the Court of Appeal's case of *Thuranira Karauri v Agnes Ngeche* [1997] eKLR.

19. They submit that the Appellant herein did not prove that the subject motor vehicle belonged to Respondent and or John Mathai Mugo to construe that he was liable. That the Appellant did not go the extra mile to prove his claim and urged this court to dismiss the appeal.

20. Further that in re-examination, the Appellant did not clarify who signed the verifying affidavit for him or explain the discrepancy. Order 4 rule 1(2) provides as follows.

> " The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint."

21. That by his admission, it is clear that the Appellant herein did not sign the verifying affidavit filed together with the pleadings. That the Appellant herein denounced the signature on the verifying affidavit in open court which was meant to confirm the averments on the plaint a conclusion that the Appellant herein did not bring the action against the Respondent herein.

22. That further, the Appellant herein contended that he did not see the driver of the vehicle. He was not the one who reported the matter to the police but rather his brother who did not testify in court. Every information that the Appellant herein testified on was based on what he was told.

23. That a look at the plaint and the contested verifying affidavit, the Plaintiff is indicated as John Kibichi at pages 5-8 of the record of appeal but in the statement at page 10 of the record of appeal the witness is identified as Jonah Kibichi. That the said contradiction is also seen in the documents produced and more so in the discharge summary at page 17 of the record of appeal where the patient is indicated as Jonah Kibichi Konga. That the Appellant did not produce any Identity Card (ID) to clarify his name. In cross-examination, he confirmed that he was not known as Jonah and no explanation was given as to the distinction in names and it cannot be assumed that the documents produced with contradicting names belong to him and relied in the case of *Karukenya v Republic* 1982- 88 KAR 540, 557.

24. The Respondent urged this court to find that the suit herein was not presented by the Appellant herein and the trial court was right in dismissing the suit. That while it is unfortunate that the Appellant herein was involved in an accident and sustained some injuries, the appellant did not prove his case on a balance of probabilities and urged this court to dismiss this appeal with costs to the Respondent.

Analysis And Determination

25. This being the first appellate court, the guiding principle for the first appellate court was set out in the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 where the court stated as follows:-

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally."

26. In view of the above, I have perused and considered evidence adduced before the trial court together with the submissions filed herein and wish to consider whether the appellant who was the plaintiff in the trial court proved his claim against the respondent on a balance of probabilities. The legal burden of proof in a civil case was discussed in the case of *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR where the court stated as follows: -

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as

Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

27. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v 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 opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

28. Further in the case of *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* (2015) eKLR, the judges of Appeal 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 more probable than not; the burden is discharged, but if the probability 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 loose, because the requisite standard will not have been attained."

29. In view of the above, the burden of proof at all times lay with the Plaintiff/Claimant to prove the case and not the Defendant. In the instant case, ownership of motor vehicle Registration No KAH 941C was in issue; whether the respondent owned the vehicle. The Appellant had the burden of proving that the Respondent owned the said vehicle at the time of the accident. Record show that the appellant relied on the contents of the police abstract which he produced to prove ownership of the suit motor vehicle.

30. Various courts have found that a Police Abstract when produced as evidence can be sufficient proof of ownership unless it is successfully challenged. In the case of *Joel Muga Opija v East African Sea Foods Ltd* [2013] eKLR the court in affirming this position held:

> "In our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

31. The same court before arriving at the above finding had quoted with approval another Court of Appeal decision in the case of *Ibrahim Wandera v P.N. Mashru Ltd.* (Ksm C.A. Civil Appeal No 333 of 2003 (unreported) where the court made the following observations:

> " The issue of liability was not specifically raised as a ground of appeal before the superior court. Tanui J. proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned judge with respect to him, did not at all make any reference to the police abstract report which the appellant had tendered in evidence. In that document the accident bus is shown as KAJ 968W with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged....."

32. In the above case, the court found that the contents of a Police Abstract is sufficient to establish ownership of a motor vehicle. It is worth noting that in civil cases, the standard of proof is that of balance of probabilities unlike criminal cases where proof is beyond reasonable doubt. The court is required to weigh evidence adduced by both parties and decide on a balance of probabilities and not beyond reasonable doubt, whether the vehicle belonged to the respondent or not.

33. The appellant herein relied on police abstract to prove ownership of the vehicle herein. The question is whether the police abstract is sufficient to proof ownership.

34. In respect to proof ownership by way of police abstract I am guided by the court of appeal in the case of Joel Muga Opinja v East African Sea food limited (2013) eKLR where the court stated that the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, the contents cannot later be denied.

35. From the foregoing, it is clear that proof of ownership is not only by registration by registrar of motor vehicles but it can also be proved by of other documents which include police abstract unless there is sufficient challenge and each case has to be considered on its own peculiar facts.

36. When the respondent testified in his defence, he denied owning motor vehicle KAH941C and also denied being involved in an accident on 27th August 2016.He denied ever being summoned by police for interrogation concerning the accident. He however said his name is John Mathai Mugo. He went ahead to state that they have several vehicles and lorries labelled Oloika. He further denied having instructed an Advocate to act for him earlier in the proceedings set aside.

37. Even though the respondent stated in his defence that police abstract produced does not indicate the owner of the vehicle, I have perused the police abstract produced in court on part of the owner, the name Mr. John Mugo Mathai c/o Oloika. The respondent however besides stating that he is not the owner of motor vehicle registration number KAH941C, did not adduce any evidence to rebut/ challenge contents of police abstract availed in court by the appellant /plaintiff.

38. In the case of *Z O S & C A O (Suing as the Legal Representatives in the Estate of S A O (Deceased) v Amollo Stephen* [2019] eKLR the court expressed itself in respect to police abstract as follows:

> " The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred. The police abstract produced as PEx. 3 dated 21/8/2018

only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.....That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo Police Station, who investigated the accident to shed light on the results of the investigations; and as to who was to blame for the subject accident wherein the deceased lost his life."

39. From the foregoing, the police abstract is intended to capture particulars of the reported accident, owner of subject vehicle, injured person, insurance company and particulars thereof. I take note of the fact that police abstract is a public document and contents are filled by trained police officers who understand their work, understand integrity of public documents and the need to accurately fill particulars required to be filled in the police abstract. The contents of police abstract were not rebutted through any other evidence by the respondent/defendant. Bearing in mind that burden of proof on part of the appellant/plaintiff was on a balance of probabilities, in my view his prove through police abstract was sufficient in the absence of evidence to the contrary.

40. From the foregoing, I find that the appellant proved on a balance of probabilities that the respondent was the owner of motor vehicle registration number KAH941C which was involved in the accident herein.

41. Having found that the respondent was the owner of the said motor vehicle, I now wish to consider liability. The appellant said he was standing in a que to enter the county club when the said vehicle which was carrying water to the club lost control and knocked him. I note that from the evidence adduced by the appellant, he did not indicate whether he made any effort to avoid the accident. The lorry driver had greater responsibility to take control of the vehicle but on the other hand the appellant had responsibility to quickly move to a safe side to avoid collision on seeing the lorry having lost control. In view of the above I will apportion liability of 10% to the plaintiff. The respondent /defendant to shoulder 90% liability.

ii. Whether the appellant is entitled to prayers sought

42. Trial court was expected to assess damages which would have been awarded in the event the appellant was successful in his claim against the respondent. I however note that the trail magistrate did note assess damages. I will therefore proceed to assess damages. I note from the plaint under particulars of injuries that the plaintiff suffered compound fracture mid shaft left femur and severe soft tissue injuries of the left thigh. In his testimony the plaintiff said he sustained a fracture to the left leg and lost consciousness.

43. I have perused authorities cited by the parties. The plaintiff/appellant proposed general damages of Kshs 2,000,000 and cited two authorities *George William Awuor v Beryl Awuor* [2020] eKLR and *Evans Osuga Mboi v James Lesaaya & another* [2021] eKLR where plaintiffs were awarded Kshs 1,200,000 and Kshs 800,000 respectively. I note that the injuries are similar to injuries suffered by plaintiff and upon comparing with injuries suffered by the plaintiff herein, I am inclined to award General damages of Kshs 900,000/=.

44. In respect to special damages, the plaintiff testified that he spent Kshs 60,000 for treatment and produced receipts but in his pleadings, he prayed for Kshs 34,500 in total which include medical report, P3 form, police abstract, search certificate and medical expenses of Kshs 24,750. Parties are bound by their pleadings and I will therefore award Kshs 34,500 prayed for under special damages.

45. The appellant also stated that he still had plate fixed in his left leg which will be removed at an expense and prayed for Kshs 100,000. Dr Omuyoma confirms from the medical report filed that the cost of removal of interlocking nail will cost Kshs 100,000. No other figure was proposed by the defendant/ Respondent and will therefore allow Kshs 100,000 for future treatment.

46. From the foregoing I enter judgment for the plaintiff against the respondent for Kshs 1,034,500 subject to contribution of 10% plus costs of this suit both in the trial court and appeal.

Final Orders:

1. This appeal is hereby allowed.

2. Liability apportioned at 10:90 as against the respondent. Plaintiff to shoulder 10% liability and Respondent 90% liability.

3. Damages awarded as hereunder: -

    i. General damages Kshs 900,000.

    ii. Special damages Kshs 34,500.

    iii. Cost for future treatment Kshs 100,000

    iv. Grand total Kshs 1,034,500 less 10% (103,450).

    v. Net Kshs 931,050.

4. Costs for trial court and appeal to be paid by the respondent to the appellant.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 25TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Elvis/Momanyi – Court Assistants.

Ms Wangare for Respondent.

Mr Wafula for Appellant.