**Elgon View College Limited v Samuel (Civil Appeal E127 of 2023) [2025] KEHC 3034 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3034 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**CIVIL APPEAL E127 OF 2023**

**DKN MAGARE, J**

**MARCH 5, 2025**

**BETWEEN**

**ELGON VIEW COLLEGE LIMITED ..................................................... APPELLANT**

**AND**

**ROBERT ONYIEGO SAMUEL ........................................................... RESPONDENT**

## JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. C.A. Ogweno (SRM) dated 19.09.2023 arising from Kisii CMCC No. 815 of 2019.
2. The Respondent filed a suit on 18.10.2019 vide a plaint dated 17.10.2019, claiming damages for an accident on 14.8.2019. The accident involved the Respondent's motorcycle, Registration No. KMDQ 825S, and the Appellant's motor vehicle Registration No. KBH 576N, along Kisii-Kilgoris road. The said motor vehicle is said to have lost control and collided with the motorcycle, causing the Respondent injuries.
3. The Respondent set forth particulars of negligence for the accident and pleaded Ksh. 70,620/= as special damages as well as general damages. The injuries were also pleaded as follows:
    a. Left tibia fracture
    b. Left fibula fracture
    c. Left radius fracture
    d. Left ulna fracture
    e. Bruises on the face
    f. Right 4th, 5th and 6th rib fracture

g. Bruises on the face

h. Bruises on the right forearm

i. Abrasions on the right chest

4. The special damages were as follows:

   a. Medical report -Ksh. 6,500/=

   b. Treatment/medical expenses -Ksh. 62,350/=

   c. Copy of records -Ksh 550/=

   Total -Ksh. 70.620/=

5. The Appellant entered an appearance and filed a defence denying the particulars of negligence and injuries set out in the plaint. The Appellant did not blame the Respondent for negligence, and no particulars were set out in the defence. The Appellant indicated that the Respondent was not insured, was unlawfully 'driving' the said motorcycle, and that the Appellant did not have a driving license.

6. The lower court heard the parties and proceeded to render the impugned judgment, which the Court found as follows:

   a. 100% liability against the Appellant

   b. general damages, Ksh. 600,000/-

   c. Special damages Ksh. 70,620/=

7. Aggrieved by the lower court's finding, the Appellant lodged the Memorandum of Appeal dated 18.10.2023. The memorandum of appeal is christened as a draft memorandum of appeal. I cannot find one which is not a draft. The grounds of appeal were as follows:

   a. The learned trial magistrate erred both in fact and in law when by entering judgment in favour of the Respondent when the Respondent did not discharge the burden of proof to the requisite standard.

   b. That the learned trial magistrate failed to properly evaluate evidence tendered before her.

   c. That the learned trial magistrate erred in law and, in fact, in awarding the Respondent general damages in the sum of Kshs.600,000/=, which damages were excessive in the circumstance considering the injuries sustained and not proved at all.

   d. That the learned trial magistrate failed erred in law and fact by disregarding the 2nd medical Report, which had been produced and admitted on record by consent of both parties.

   e. The learned trial magistrate erred in law and, in fact, by holding the Appellant liable at 100%, whereas the evidence on record did not disclose any negligence or breach of any duty of care on the part of the Appellant, and neither did the same proved or at all.

   f. Learned trial magistrate erred in law and, in fact, by failing to dismiss the Respondent's suit with costs to the Appellant.

8. The Appellant prayed for:

   a. Judgment and/or decree of the learned trial magistrate dated 19.9.2019 be set aside and or quashed.

b. The Honourable court be pleased to substitute an order dismissing the Respondent's suit in the subordinate court vide Kisii CMCC 815 of 2019.

c. Costs of the appeal herein and those incurred in the subordinate court be borne by the Respondent.

9. I cannot find any decision of the court made on 19.9.2019. This alone is enough to dispose of the appeal. However, submissions relate to the final judgment. Consequently, I shall address the same, ex abundanti cautela. The Memorandum of Appeal raises only two issues, that is: -

a. Liability

b. Quantum of damages

10. The Appellant filed a record of appeal that is difficult to read as it neither has an index nor pagination. A supplementary record of appeal was filed, with the same failings equally. The lower court file became more valuable as a reference tool in that context. It is not the best way to file a record of appeal.

**Evidence**

11. The matter had several false starts until the court put its foot down on 7.3.2023. The court gave a date for hearing on 5.6.2023. The Respondent testified that he was involved in an accident on 14.08.2019 when he was hit by a motor vehicle registration number KBH 576N. He produced all documents in support of his case. He was cross-examined on his qualifications as a driver and insurance thereof.

12. The Respondent stated he did not file the documents related to qualifications as a driver and insurance in court. He testified that he had healed. The medical report was produced as defence exhibit 1 by consent. There was no cross-examination on liability at all. The Appellant did not turn up. The second medical report was again produced by consent on 11.7.2023. The parties filed submissions.

**Submissions**

13. The Appellant raised issues related to liability, which are important, but irrelevant to the appeal, having not pleaded any particulars of negligence. The issues raised were:

a. The Respondent, as a rider, did not possess nor did he produce a valid riding license.

b. The Respondent, as a rider, did not have or produce an insurance certificate for the said motorcycle.

c. The police abstract relied upon whether the motorcycle was ever availed by the plaintiff.

d. No pre-accident report for the said motorcycle was ever availed by the plaintiff.

e. The Appellant was never charged for any offence.

14. The Appellant submitted that a sum of Ksh. 300,000/= will suffice. They relied on the case of Reamic Investment Limited v Joaz Amenya Samuel [2021] eKLR. In that case, R. E. Ougo J set aside an award of Ksh 600,000/= and, in lieu thereof, entered judgment for 350,000/= in 2021. The injuries suffered in that case were an open left femur fracture, abrasion on the left knees, face, neck, right upper lip, and left upper lip, as well as a contusion on the anterior chest. These injuries are less severe than the Respondent herein.

15. The Respondent filed lengthy submissions. He submitted that the Respondent's evidence was conclusively attested to by compelling evidence, including uncontroverted testimony. They stated that

no single piece of evidence was tendered, discounting the seriousness of the injuries. They relied on the decisions of the court of appeal to the effect that this court cannot substitute its own figures that it could have awarded differently. The first one was Catholic Diocese of Kisumu v Tete [2004] eKLR, where the court of Appeal [Tunoi, O'kubasu & Githinji JJ A] held as follows:

> It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles,
>
> As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470).

16. They also relied on the case of Jane Chelagat bor v Andrew Otieno Onduu & Others, (1990) 2 KAR 288. The Respondent submitted that a sum of Ksh 650,000/= was proper in the circumstances. Reliance was placed on the case of George Raini Atungu v Moffat Onsare Aunga [2021] KEHC 1679 (KLR

**Analysis**

17. This being a first appeal, this court must re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

18. The court must remember that it neither heard nor saw the witness. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " …this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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…"

19. The Appellant urged me to find that the lower court erred in finding 100 liability against the Appellant. They propose that the judgment of the trial court be set aside. On the other hand, the Respondent's case is that the lower court's judgment was correct on both quantum and liability and should not be disturbed.

20. The first question before me is whether the lower court erred in finding, on a balance of probabilities, that the Appellant was 100% liable for the accident. The legal burden of proof lies upon the party who

invokes the aid of the law and asserts an issue based thereon. The said burden is set out in sections 107-109 of the *Evidence Act*. The same provides as follows:

> " 107.
>
> (1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

21. This general proposition under Section 107 (1) of the *Evidence Act* was discussed in the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal 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."

22. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " 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."

23. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 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 that 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."

24. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability….."

25. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability but not as high as required in a criminal case, for such a standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal 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."

26. The Appellant's case is that the court erred in not apportioning liability. The case was not before the court. Before the court apportions liability, there must be a pleading to that effect. Order 4 Rule 4(2)1, provides that particulars of negligence must be pleaded before they are proved. The same states as hereunder:

    (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example, performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

        (a) which he alleges makes any claim or defence of the opposite party not maintainable;

        (b) which, if not specifically pleaded, might take the opposite party by surprise;

27. No issue was raised, evidentiary or by pleading, on contributory negligence. Order 2 Rule 10(1) of the Civil Procedure Rules provides as follows:

    1. Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing

        a. particulars of any misrepresentation, fraud, breach of trust, wilful default, or undue influence on which the party pleading relies; and

b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

28. These grounds raised in submissions will not be useful given Order 2 Rule 4(1) of the Civil Procedure Rules, which provides as follows:

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

29. Mwera J posited as follows when postulating on the role of submissions. He stated that they are course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 the learned Judge stated:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

30. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, where the Court held that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. Final submission is a way by which counsel or sometimes (enlightened) parties themselves crystallize the substance of the case, the evidence, and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

31. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally

parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

32. A party cannot, therefore, build his case on evidence or submissions in the absence of pleadings to that effect. The court was not open to determining contributory negligence without pleading. Further, the entire evidence on liability was not cross-examined. The impact of the motorcycle being uninsured or the Respondent not having a valid driving license was not conceptualized, problematized, and contextualized. What is it that the lack of the documents did to the accident? Did they cause the motor vehicle to veer off? These were not unnecessary, but there must be a causal link to the causation. Without contributory negligence being pleaded and proved, the questions became irrelevant to the matter before the court.

33. On the other hand, the Respondent gave cogent evidence on how the accident occurred. This evidence was neither controverted nor cross-examined. The court had no option other than accepting the evidence on occurrence. The Respondent was an eyewitness to the accident. He saw what happened to him. No other evidence was necessary.

34. The driver was also present during the accident but conveniently chose not to testify. The only plausible explanation is found in Section 112 of the *Evidence Act*. It states:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

35. An adverse inference should be drawn upon a party who fails to call evidence in his possession. The failure to call the driver, ipso facto, means that had he given evidence, it would have been adverse to the Appellant. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G.V. Odunga as then he was stated as doth:

> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
> >
> > Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

36. There is no basis for which the lower court could apportion liability for the Respondent. I find that the Appellant was negligent in the accident. I find no basis to interfere with the discretion of the lower court.

37. Whereas the Respondent had a duty to prove that the Appellant and its agents were to blame, he had no duty to prove motorcycle registration No. KMDQ 825S was or was not to blame. There was thus no evidence blaming Respondent.

38. The Appellant failed to plead and prove that the Respondent was liable in any way. The Appellant has to plead and prove contributory negligence, which they failed on both fronts. In the case of MacDrugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

39. Therefore, without the proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that caused the damage was caused by the negligent acts of different persons so as to assess the degree of their respective responsibility and blame-worthiness and apportion liability between or among them. The Appellant failed in this duty. The lower court was correct in its finding on liability, which is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly… There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

40. In Kilet v E-Coach Company Limited & 2 others (Civil Appeal E007 of 2020) [2023] KEHC 17950 (KLR) (18 May 2023) (Judgment), Limo J, posited as doth:

> The Position taken by the trial Court was in error for the following reasons.
>
> i. The evidence placed before the trial court including the Police Abstract Prima facie showed that an accident occurred and the Appellant testified and squarely blamed the Respondents for over speeding. The Respondent did not call the driver of the subject motor vehicle or any witness to rebut the same,
>
> ii. .Secondly, one does not necessarily need to see a motor vehicle's speedometer to tell that it is moving fast.
>
> iii. Thirdly, in his pleadings, the Appellant had pleaded the doctrine of res ipsa loquitor. The doctrine of Res ipsa loquitor (latin for the thing explains itself) operated in favour of a party who presents facts from which a Court can draw inference from the surrounding circumstances to conclude that negligence has been proved even if there is no evidence to directly point to the same.
>
> iv. The Appellant established that he was a fare-paying passenger and that an accident occurred in a situation where the control of the motor vehicle was in the hands of the driver. Those facts in my view in conjunction with the doctrine was sufficient to establish a prima facie case against the Respondents

it required a rebuttal to persuade the trial to make a finding that negligence had not been proved to the required standard in law.

41. In an action for negligence, the burden is always on the plaintiffs to prove that the negligence of the defendant caused the accident. In the case of Nandwa v Kenya Kazi Ltd (1988) eKLR, the Court of Appeal posited as follows:

> "In an action for negligence, the burden is always on the plaintiffs to prove that the accident was caused by the defendant's negligence. However, if in the cause of trial, there is proven 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 plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that interference."

42. There was no evidence tendered rebutting cogent evidence by the Respondent. The Appellant was wholly to blame for veering off the road and ramming onto the Respondent. Therefore, there is no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on liability.

43. On quantum, the injuries were fairly serious but not life-threatening. The court relied on an authority relied on by the Respondent, George Raini Atungu v Moffat Onsare Aunga [supra]. The court awarded Ksh. 600,000/= as general damages for chest contusion, fracture of the left radius and ulna, pelvic contusion, contusion to the right leg, and fracture of the right tibia/fibula bones.

44. In the case of A O (minor suing through next friend MOO) v The Registered Trustees of the Anglican Church of Kenya Maseno North Parish KSM HCCA No. 95 of 2014 [2017] eKLR the claimant sustained multiple fractures. The court awarded Ksh. 600,000/= in 2017.

45. In Martin Ireri Namu & another v Alicalinda Igoki Kiringa [2019] eKLR the Respondent therein sustained the following injuries: dislocation on the left shoulder and fractures to the right tibia, fibula and left radius ulna and the court awarded her Kshs 800,000/=.

46. The award of Ksh 600,000/=, is proper in the circumstances. The appeal on quantum, therefore, lacks merit and ought to be dismissed.

47. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

48. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

49. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

50. In the circumstances the Respondent shall have costs herein.

**Determination**

51. In the upshot, I make the following orders: -

   a. The appeal is not merited and is dismissed.

   b. The Respondent will have costs of the appeal of Ksh.65,000/=.

   c. 30 days stay of execution.

   d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Orucho for the Appellants

No appearance for the Respondent

Court Assistant – Michael

Page 10 of 10 M. D. KIZITO, J.