Mose v Omenta (Civil Appeal E007 of 2024)
[2025] KEHC 3778 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3778 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E007 OF 2024

DKN MAGARE, J

MARCH 10, 2025

BETWEEN

FREDRICK KEPHA MOSE ..... APPELLANT

AND

JOASH OGORO OMENTA ..... 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. E614 of 2022.

2. The appeal concerns both liability and quantum. The court below found the Appellant 100% liable for the accident on 04.04.2022 along Kisii-Keroka road around the Coca-Cola area. The court awarded Ksh. 650,000/= as general damages and Ksh. 7,050/= as special damages.

3. The Respondent sued vide a plaint dated 18.08.2022, claiming damages arising from an accident on 04.04.2022. The accident involved a motorcycle Registration No. KMFB 341S and a motor vehicle Registration No. KCE 032R. The Appellant was the vehicle's owner, while the Respondent was the motorcycle rider.

4. The Respondent set forth particulars of negligence against the Appellant. He pleaded Ksh. 7,050/= as special damages and injuries as follows:

    a. Dislocation of the left knee

    b. Right shoulder dislocation

    c. Pelvic fracture

    d. Cut wounds on the occipital region of the head

    e. Chest contusion

f. Blunt trauma to the back

g. Multiple bruises on the upper limbs.

5. The Appellant filed an 8-paragraph Memorandum of Appeal. It is unnecessary to regurgitate the contents therein as it is repetitive and unseemly. Such a memorandum offends Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

6. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. The court abhors repetitiveness of grounds of appeal, which tends to cloud the key issues in dispute for determination by the Court. The court of appeal in the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that

memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

8. The appeal raises only two issues, that is: -

   a. The quantum of damages

   b. Liability

Evidence

9. PW1 was Dr. Morebu Peter Momanyi. He produced his medical report. According to him, the Respondent suffered injuries in the said accident.

10. PW2 was No. 88300 PC Moses Kasera of Kisii Police Station. He produced a police abstract. He stated that the investigating officer was away. The motor vehicle overtook a chain of vehicles. He hit a vehicle coming from the opposite direction. He lost direction and landed in a ditch.

11. On cross-examination, he stated he was not the investigating officer. He produced a police abstract and the occurrence book. He did not have the police file, and the motorcycle could not be traced at the scene.

12. The Respondent, Joash Ogoro Omenta, testified as PW3. He relied on his witness statement dated 18.08.2021. He produced medical documents. He reiterated the facts set out in the plaint and the pleaded injuries. He blamed the Appellant and stated that the driver was reckless. On cross-examination, he said he blamed the Appellant's recklessness. He suffered dislocation of the left knee, right shoulder dislocation, pelvic fracture, cut wounds on the occipital region of the head, chest contusion, blunt trauma to the back and multiple bruises on the upper limbs.

13. PW4, Daniel Nyameino produced the clinic card and treatment notes.

14. DW1 was the Appellant who testified that he was a public health officer. He adopted his evidence in chief. He stated he was overtaking on the motorcycle's lane. He stated that the motorcycle was not involved in the accident. He was able to successfully evade the Respondent. He stated that he did not hit the motorcycle. The Respondent thus fell on his own.

15. DW2 was Walter Odero. He stated that he does not remember when he examined the Respondent. He stated that he did not conduct X-rays.

Submissions

16. The Appellant submitted that the court did not in law appreciate that this was a fraudulent claim. He stated that Dr. Odero re-examined the Respondent and found that management was vague. He stated that the burden of proof lay with the Respondent. He relied on the case of Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR, where the court, [Waki, Makhandia & Musinga, JJ.A] observed as follows:

    25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

        "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also

settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

17. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. They stated that the report by Dr. Odera did not tally with documents he had. They prayed the suit to be dismissed.

18. On quantum they argued that the amount was excessive. He relied on the case of S J v. Francesco Di Nello & Another (supra), which provided guidance as follows:

> " The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case we refer to that of Ossuman Mohamed & Another V Saluro Bundit Mohumed, Civil Appeal No. 30 of 1997 (unreported) wherein the following passage, in the case of Kigaragari v Aya [1982 – 1988] IKAR 768 is employed;
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> "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance or increased fees.""

19. They relied on a decision of Munene vs. Mbarire [2023] KEHC 18417 (KLR) (Njagi, J), where the court awarded Kshs. 450,000/= for fractures of the right tibia and fibula bones; and bruises on the right side of the head, both elbows, right groin and right knee.

20. The Respondent filed submissions dated 11.12.2024. They stated that management was set out in the treatment notes. It was also stated that the X-ray films also showed the pelvic fracture. He stated that doctors from Kisii Teaching and Referral Hospital testified and gave evidence on the injuries.

21. They stated that there is no specific second medical report showing the Respondent being examined. They relied on the case of Catherine Mbithe Ngina v Silker Agencies Limited [2021] eKLR, where Odunga J stated as follows:

> In Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd and Another [1979] KLR 76; [1976-80] 1 KLR 1168, it was held by the Court of Appeal that:
>
> "Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. A higher standard of proof is required to establish such findings, proportionate to the gravity of the offence concerned.

22. On liability they stated that the Appellant's vehicle overtook a chain of vehicles, thus causing the accident. It was his case that the Respondent had a consistent case. He posited that the evidence was not shaken.

23. On quantum the Respondent relied on the case of Daneva Heavy Trucks & another v Chrispine Otieno [2022] eKLR, where a claimant suffered fracture of the pelvis and fractures of the left tibia and fibula. He prayed that the court dismisses the appeal.

Analysis

24. 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 demeanor of the witnesses and hearing their evidence firsthand.

25. 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..."

26. 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..."

27. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

28. The foregoing statement had been ably elucidated by the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, where Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
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> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
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> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
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> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

29. Therefore, for the appellate court to interfere with the award, it is not enough to show that the award is high or that if I had handled the case in the subordinate court, I would have awarded a different figure. However, where damages are at large, they must be commensurate with similar injuries.

30. In assessing injuries arising from a road traffic accident, consistency in awarding damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

31. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

32. In Peter Gakere Ndiangui v Sarah Wangari Maina [2021] eKLR, the plaintiff suffered a healing bilateral superior and inferior pubic rami fracture and a permanent degree of incapacity at 15%. The court, J.K. Sergon reduced the award from 1,000,000/= to 500,000/= on 21.5.2021.

33. In Gakuo v *Mugo (Civil Appeal 57 of 2018)* [2023] KEHC 874 (KLR) (15 February 2023) (Judgment), the court, Kariuki J, awarded 750,000/= for fracture of the pelvis, soft tissue injuries of the right temparo-parietal region, soft tissue injuries of the chest and soft tissue injuries of the hip joint.

34. In the case of Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, the court awarded Kshs. 800,000/- for injuries for fracture of the left femur mid-shaft in 2022.

35. In the case of Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR the court enhanced the award to Kshs. 600,000/= for an Appellant who had suffered a fracture of the left femur in 2021.

36. To comment on the question of the medical report by Dr. Odero, it is sad that it was relied on. The same was not a medical report properly so-called. It is such evidence that bring to shame the profession of medicine. While evaluating a near similar situation, Odunga JA in Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR, while lamenting the evidence was clearly out of line, stated:

    Parties and Counsel ought to give the court's some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 expressed himself in the following terms:

    > " I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that

my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

37. Dishonesty is an act which is antithesis to transparency. In the South African case of Matatiele Municipality & Others vs. President of the Republic of South Africa & others (1) (CCT73/05) (2006) ZACC 2: 2006 (5) BCLR (CC); 2006(5) SA 47 (CC) it was held that

> " In my view a person who deliberately either by commission or omission misleads the court and the public that a particular state of affairs exist while knowing very well that that is not the position cannot be said to be open, candid and transparent. Dishonest in my view is an Act which is antithesis to transparency and vice versa..."

38. The said report is worthless and not worth the paper it is written on. It is fallacious and a breach of the Hippocratic Oath to have a summary of findings for various clients without examining them. The court was, therefore, right to disregard the so-called report. It should not have even been admitted evidence. The duty of the court, in light of expert evidence was well enunciated in the case of Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, as follows:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts, but as has been repeatedly held, the evidence of experts must be considered along with all other available evidence, and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say: "Because this is the evidence of an expert, I believe it."

39. The doctor's evidence is unbelievable and of no probative value. The remaining report was that of Dr. Morebu. The injuries suffered were serious. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " 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 different 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

40. The award of Ksh. 650,000/= was not excessive. I, therefore, dismiss the appeal on quantum.

41. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " 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."

42. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. 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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

43. The Appellant raised contributory negligence in his defence. I find no evidence presented by the Appellant as to how he could not avoid the accident. He did not prove circumstances that could make it difficult to slow down, swerve or stop. Consequently, the defence of contributory negligence was not plausible. I align with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

44. On liability, the Appellant raised the issue of 100% liability awarded by the court. He stated that the accident did not occur. He had hitherto also admitted to overtaking onto the cyclist's lane. It was not

safe to do so. The question of causation was addressed in the case of Elijah Ole Kool v George Ikonya Thuo[2001] eKLR, where A. Visram J observed that;

> " Although the Plaintiff may be able to trace even a consequential connexion between an injury and the negligence of the Defendant, the law does necessarily attach liability to the Defendant who has been negligent. In Walker v. Goe [1859], 4 H. & N. 350, it was held that there can be no liability unless the damage is the "proximate" result of the negligence. It, therefore, remains upon the Plaintiff to prove both that the Defendant was negligent and that his negligence caused or materially contributed to the damage (see Graig v. Grasgaw Corpn. [1919] 35 T.L.R. 214, at p. 215 per LORD BUCKMASTER). The Learned Authors of Volume 28 of HALSBURYS LAWS OF ENGLAND (3rd Edition) say as follows at page 28:
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> - "Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability fallows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen."
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> In other words, causation is a matter of fact to be determined by common sense principles. Lord Wright said as follows in Yorkshire Dale S.S. Co. Ltd. V. Minister of War Transport [1942] A.C. 691, H.L. at p. 706:-
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> ".....the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.
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> "As Lord Denning said in Davies v Swan Motor Co. (Swansea) Ltd. [1949] 2 C.B. 291 at p. 321; "the efficiency of causes does not depend on their proximity in point of time." It is enough that the cause forms part of a chain of events which has in fact led to the injury. What cause will be effective? The Learned Authors of Halsburys Supra at p. 28 say as follows:-
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> "In the absence of intervention by voluntary human action the original act is to be regarded as a cause of the injury, provided that its effect is still actively continuing and has not been superseded by some independent natural cause.....If in fact the defendant's neglect of a proper precaution has caused the injury, the court will not enter into hypothetical inquiry to establish whether the Plaintiff's injury must necessarily have happened with or without the defendant's negligence."
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> In other words, the defendant's negligent act or omission is the cause of the Plaintiff's injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff's injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence.
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> In The Oropesa [1943] 1 All E.R. 211 at 213 LORD WRIGHT said as follows:-
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> "Certain well -known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens. These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other."

45. There was no aspect of novus actus interviniens involved. Consequently, the Appellant was the direct cause of the injuries suffered. It is not in question that there were several vehicles being overtaken. How,

can someone, overtake several vehicles without regard to other road users. Even if his evidence was for a moment to be believed, it showed a reckless person. Any evasive action is taken by the Respondent can be attributed directly to the actions of the Appellant, and no-one else. Therefore, causation was established.

46. The Respondent gave viva voce evidence of what transpired. The Appellant was solely to blame for the accident. I align with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

47. There was nothing the Respondent did or could have done to avoid the accident. The Respondent was correctly on his lane. In the circumstances, there is no basis to interfere with the finding on liability.

48. The last issue was fraud. This was an afterthought and had no grounding in evidence. It was based on the erroneous assumption that Dr. Odero's evidence was capable of being considered. The court below found it worthless and so do I. The Respondent gave cogent evidence on the occurrence of the accident. The Appellant admits there being an accident on the said date. The duty to prove the there was no injury was squarely on the Appellant. The police evidence was not impeached at all. It behooves a party who is asserting to prove. The burden was on the Appellant to prove fraud, which they failed. This has its roots in sections 107-109 of the *Evidence Act* , which provides as follows:

> " 107.
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> (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.
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> (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.
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> 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."

49. The question of fraud is provided for under Order 2 Rule 10 (1) (a) of the *Civil Procedure Act* which 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."

50. The party seeking to prove fraud must not only plead but must also prove fraud. The Court of Appeal in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR posited as follows:

As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.

51. The standard and degree of proof was addressed in the case of Orieny & another v *National Bank Of Kenya (Civil Appeal E016 of 2023*) [2024] KEHC 6002 (KLR) (20 May 2024) (Judgment) by RE Aburili, J as hereunder:

In R.G Patel v Lalji Makanji [1957] EA 314 the former Court of Appeal for East Africa stated as follows: "Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

36. In Belmont Finance Corporation Ltd v Williams Furniture Ltd Buckley L.J said:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity."

37. The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the court stated that:

> "We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

52. The Court of Appeal [Ouko (P), Nambuye & Karanja, JJ.A] in the case of Demutila Nanyama Pururmu v Salim Mohamed Salim [2021] eKLR posited as follows as regards fraud:

20. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-

> "...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to

prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."(Emphasis ours)

21. The onus was therefore on the appellant who sought to rely on fraud on the part of the respondent and alleged forgery on his documents to prove to the court that she did not sign any of the documents relied upon by the respondent in support of his case. The trial court on application by the appellant's counsel issued orders directed at the District Land Registrar Bungoma for the originals of the disputed documents to be released to appellant's counsel for purposes of authentication by the documents examiner. The court was not told whether that was ever done. The appellant was evidently given ample opportunity to prove fraud on the part of the respondent but she failed to discharge that burden.

53. The court has analyzed the evidence. The evidence tendered by the Respondent was overwhelming. The Appellant's evidence fell far too short. Fraud was not proved as pleaded. Fraud is not proved by getting another expert. It is by testing the documents and evidence tendered by the Respondent. This is more so, where the expert is facing other experts and the question will be which expert to believe.

54. The foregoing is enough to show that the appeal lacks merit. The same is consequently dismissed.

55. The next question will be who will pay for the 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 percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

56. 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 is 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.

57. 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.

58. In the circumstances, the appeal is dismissed with costs of Kshs. 105,000/= to the Respondent.

Determination

59. The upshot of the foregoing is that I make the following orders: -

    a. The appeal is dismissed with costs of Kshs.105,000/= to the Respondent.

    b. 30 days stay of execution.

    c. 14 days right of appeal.

    d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ms. Chepkorir for the Respondent

Court Assistant – Michael