



**Gichuhi & another (Suing as legal representatives of the Estate of Stephen Gichuhi Migwi - Deceased) v Kenya Power & Lighting Co. Ltd (Civil Appeal E031 of 2022) [2025] KEHC 11983 (KLR) (28 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11983 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E031 OF 2022  
DKN MAGARE, J  
JULY 28, 2025**

**BETWEEN**

**EZEKIAH MIGUI GICHUHI & MILKA WANJA IRUNGU (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF STEPHEN GICHUHI MIGWI - DECEASED) ..... APPELLANT**

**AND**

**KENYA POWER & LIGHTING CO LTD ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and decree of Hon. D.N. Bosibori (RM) delivered in Múkûrwe'iní PMCC No. E003 of 2021 on 31.05.2022. The court dismissed the suit for lack of merit with costs to the Respondent.
2. The Appellant was aggrieved and filed a Memorandum of Appeal on 4.7.2024. The memorandum of appeal raised prolixious 10-paragraph argumentative grounds that are unseemly and do not please the eye. The grounds of appeal are:
  - a. The learned magistrate erred in fact and in law in dismissing the appellants cause against the respondent despite not finding the appellant not liable in negligence or contributed to the accident in any way.
  - b. The learned magistrate erred in law and in fact by finding that the respondent was wrongly sued despite there being cogent evidence in support that the respondent was culpable.
  - c. The learned magistrate erred in law and in fact in failing to find that the respondent was duty bound to invoke Order 15 Rule 1 of the Civil Procedure Rules and join a third party whom they claimed to be in the accident.



- d. That the learned trial magistrate erred in law and in fact by taking the position that the respondent ought not to bear the responsibility to join a third party to the proceedings thereby disregarded Order 1 rule 15 of the Civil Procedure Rules. In the case of *Hass Petroleum (K) Limited Vs Lota Engineering and Construction Limited (formerly Lota Excavations and Rentals Ltd) White Lotus Projects (intended 3rd party)* (2021) eKLR while ruling on the question of third party, Muigai J quoted the case of *Gachago Vs Attorney General* (1981) KLR where it was held that third party proceedings are not dependent on there being a contract binding the intended third party nor on there being a different case pending before court or before court of equal jurisdiction.
  - e. That the learned magistrate erred in law and in fact by subjecting the appellant's case to a standard of proof beyond reasonable doubt and dismissing the appellant's suit with costs on the basis that she had not proved liability against the respondent on a balance of probability.
  - f. That the learned magistrate grossly misdirected herself by failing to take into account case law and submissions filed by the parties herein before her and consequently coming to a wrongful conclusion on the same.
  - g. That the learned magistrate erred in law and in fact by failing to award the appellant damages despite having discharged her burden of proof against the respondent.
  - h. That the learned magistrate proceeded on wrong principles when arriving at the judgment, ignoring and avoiding to consider the damages sustained by the appellant.
  - i. That the learned magistrate erred in law and in fact by failing to take into consideration evidence on record while considering her judgment hence dismissing the appellant's claim.
  - j. That the learned magistrate erred in law and in fact by finding and holding the appellant had not proved her case on a balance of probabilities notwithstanding the evidence on record.
3. There must be restraint on the structure of pleadings in a manner to stick to the core matter in controversy. Repetition is acceptable as a tool of art to demonstrate emphasis but there is no utility in setting forth an imprecise and argumentative ground of appeal repeated more than twice. The Court of Appeal had this to say in regard to Rule 86 (which is *pari materia* with Order 42 Rule 1) 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:

“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...”

4. Parties and counsel ought to apply the art of proper drafting of pleadings. The rationale for concise, precise and brief pleadings is for the certainty of legal issues and a safeguard to the precious judicial time. Further, in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal 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:

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.

5. In short, the Appellant faults the learned magistrate for dismissing her case despite no finding of negligence or contributory fault on her part. She contends that the magistrate erred in holding that the Respondent was wrongly sued without any cogent evidence to support that conclusion. Further, the trial court failed to appreciate that it was the Respondent’s duty to initiate third-party proceedings under Order 1 Rule 15 of the Civil Procedure Rules if it believed another party was liable. By ignoring this legal requirement, the court misapplied the law, contrary to binding precedent.
6. The Appellant also argued that the magistrate applied the wrong standard of proof, that is, equating civil liability with proof beyond reasonable doubt, and failed to consider case law, submissions, and the evidence on record. As a result, the court wrongly concluded that the Appellant had not proved her case on a balance of probabilities and denied her damages, despite uncontroverted evidence of injury and loss.
7. The appeal raises the following issues for determination:
  - a. Liability
  - b. General Damages
8. The Appellants filed suit via plaint dated 18.12.2020 wherein they stated that on 19.05.2019 the deceased minor was electrocuted when he attempted to air his wet clothes on a clothes line that was electrified due to the negligence of the Defendant.
9. The Respondent filed a defence dated 20.04.2021, wherein they denied paragraphs 3, 4 and 5 and attributed negligence on the part of the Appellant and particularized the same at paragraph 7 of the defence.

## Evidence

10. PW1, Jane Nduta, testified that her son, Stephen Githinji, was electrocuted. She adopted her witness statement and relied on the supporting documents filed in court. She stated that at the material time, she was in Thika while her son was staying with his grandmother. She was informed of the incident by



her father-in-law on 19th May 2021 and immediately rushed home, where she found a crowd gathered and learned that her son and his cousin had both been electrocuted.

11. On cross-examination, she maintained that Kenya Power and Lighting Company (KPLC) had left an electrical cable hanging from the roof, even though there was no internal electrical wiring in the house. She also stated that there was a clothes line running between the kitchen and a neighbouring house belonging to one Ezekiel. She found the clothesline broken and was informed that it had been damaged by a Good Samaritan who had attempted to rescue the children.
12. PW2, No. 88703 PC Joram Muthengi attached to Múkúwe'inî DCI stated that he was tasked by sub-county DCI IP Stephen Ndungu to visit the scene of electrocution within Nyagichie within Gikondi location. On arrival he found the lifeless bodies lying outside the house.
13. He stated that he established that the power conductor connecting KPLC post to the house was exposed at its head and its tip was in direct contact with the deceased's house roof made of iron-sheets.
14. On cross-examination, he testified that he visited the scene immediately after the incident and conducted witness interviews. Although he recorded their statements, he did not file them in court, stating that they merely formed part of his investigative process. He further stated that the electric wire in question was connected on 18th May 2019. Upon interviewing staff from Kenya Power and Lighting Company (KPLC), he confirmed that it is KPLC's responsibility to carry out power connections, and that there had been no report of any illegal connection at the premises.
15. DW1, George Kimondo, a Safety Engineer of the Respondent stated that on 19.05.2019 a report was made to Nyeri KPLC and media and he made a visit on 20 and 21.05.2019. He made a visit to Nyagichie village to conduct investigations and he filed a report. He produced D.exh 1 – Electrocution Accident Report. He stated that a project was done under the Rural Electrification and Renewable Energy Corporation (REREC) and they sub-contract to other entities. He stated that KPLC is not liable of the doings of REREC.
16. On cross-examination, George Kimondo confirmed that finding No. 2 in his report identified Mr. Mumo as the supervisor in charge of the subject area, which was classified as low voltage. He explained that KPLC must jointly inspect and approve such sections with REREC before energization to ensure system stability and safety. If the inspection is satisfactory, KPLC takes over; otherwise, it does not.
17. He stated that the high-voltage section had been approved by KPLC. However, as of 18.05.2019, there was no active electrification in the village; conductors and cables were in place, but power had not yet been connected. Preliminary works had been done by REREC, which had indicated that the subject house was not a beneficiary of the project.

### **Submissions**

18. The Appellant submitted that at paragraph 21 of the judgment, the court erred by holding that the burden of proof never shifted to the Respondent to warrant the pursuit of REREC as a Third Party. They stated that a plain reading of Order 1 Rule 15 of the Civil Procedure Rules reveals that it was incumbent upon the Respondent to apply for leave to issue a third-party notice. This is because it was the Respondent who introduced the allegation that negligence, if any, lay with REREC. Having raised that defence, the Respondent bore the procedural burden to bring REREC on board for proper determination of liability. The trial court's failure to appreciate this legal position amounted to a misdirection.



19. They rely on the case of James Gikonyo Mwangi V DM (Suing through his mother and next friend, IMO) [2016] eKLR, which aptly discussed the rationale behind the defendant being tasked with the burden of seeking leave to join a third party by stating as follows:

The plaintiff had no reason to enjoin a third party to the suit as she was positive that it was the defendant's fault and nobody else. It was the defendant who introduced the aspect of a third party in these proceedings and under those circumstances, it was incumbent upon the defendant, if his case was that a third party was to blame for the accident, to enjoin the third party.

20. They also relied on the case of Cheruiyot Edwin Mutai Vs Cyrus Ngaruiya [2020] eKLR, where the court stated as follows:

It is plain from the foregoing that third party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Subrules (b) and (c) of Order 1 rule 15 (1) of Civil Procedure Rules, 2010, envisage other scenarios. Subrule (c) thereof is particularly instructive. It foresees issues that may arise not only between the third party and the defendant but between all the three parties in the suit viz: the plaintiff, defendant and third party. Strange as it may seem, Subrule (c) envisages a situation where an issue may arise between the third party and the plaintiff, with the defendant not necessarily being centrally involved. This becomes clearly manifest when one considers the language used in Subrule (c), which, in the relevant part, is as follows: determined not only as between the plaintiff and the defendant and the third party or between any or either of them.

21. They further relied on the case of Kubai Kithinji Kaiga vs Kenya Wildlife Service [2021] eKLR, where the court stated that the duty to join a third party lies with the defendant who is attributing fault to the acts of the third party. Accordingly, the duty to seek the joinder of a third party lies with the party that seeks to have the court find fault on the third party.

22. They submitted that the burden of proof was discharged. They relied on the cases of Kenya Power and Lighting Company Limited vs AMK (Suing as the mother and next friend of JMK – Minor) [2021] KECA 52 (KLR) and Kenya Power and Lighting Company Limited Vs Lukas Okinyi Laktar & 2 others [2024] KEHC 5445 (KLR).

23. They submitted that the injuries were reasonably foreseeable as the respondent should have reasonably expected that leaving the uncoated cable in direct contact with the iron sheets of the subject house would have caused an electrocution accident. In this respect they quoted part of evidence from the Respondent's witness as follows:

“The cable was one and roofing sheet metallic. Cloth line in contact with iron sheet was on. No one got electrocuted as the house was unoccupied. If it was the accident would have occurred earlier.”

24. Further reliance was placed on the case of Elizabeth Mumbi Kinyua vs Samuel Wanjohi Murage [2024] eKLR. In that case, this court observed that the court cannot apportion liability between parties who were not party to the suit.

25. The Appellant submitted that having found the respondent was not liable for the accident, the lower court failed to assess the damages sought by the appellant, which was a serious indictment on its part, making its judgment inherently flawed and a candidate for setting aside.



26. On damages, the Appellant placed reliance on the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja – deceased) Vs Kiarie Shoe Stores Limited [2015] eKLR, where the court held as follows:

As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor 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 the damages.

27. The Appellants submitted on general damages under both the Law Reform Act and the Fatal Accidents Act as follows:

- a. Pain and suffering - Ksh. 50,000/=
- b. Loss of expectation of life - Ksh 200,000/=
- c. On loss of dependency, they submitted that a multiplier of 25 was proper as well as a minimum wage of Ksh. 12,522.70/=, under the Regulation of Wages (General) (Amendment) Order, 2018.

28. The Respondent filed submissions dated 17.04.2025. They stated that 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.”

29. They relied on the case of Lawina Company Limited v Kenya Power & Lighting Company [2021] eKLR, where the court stated as follows:

30. The Plaintiff must show that the damages suffered are as a result from the Defendant’s negligence. Without proof of causation, negligence cannot be actionable and/or sustainable. This was addressed by Visram J (as he as then) in the case of Elijah Ole Kool Vs George Ikonya Thuo (2001) eKLR, where he stated:-

“When will an act or omission be said to be the cause of the Plaintiff’s injuries” a defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff’s injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.”

30. The Respondent posited that the Appellant bore the age-old principle that whoever alleges must prove. Reliance was placed on Sections 107-109 of the Evidence Act. They provide 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.”
31. Further reliance was placed on the case of Interactive Advertising Limited & another v Equity Bank Limited & 2 others [2016] eKLR which stated as follows:
- In *EK Kagwa vs. Costa* (1963) EA 213 & *Sango Bay Ltd vs. Dresdner Bank Ltd* (1971) EA 307, the Court stated as follows;
- Before the court can exercise its discretion to issue third party notice it has to evaluate the allegations of the plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the defendant’s allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice.
32. They argued that the Respondent is a stranger between a third party and the contractor. They urged the court to dismiss the appeal with costs.

### **Analysis**

33. This being a first appeal, this court is under a duty to 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 first hand. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
34. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. 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...”



35. This position was re-emphasized in the case of *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999), in the following manner:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned lower Judge are to stand or not and give reasons either way.”

36. The accident herein happened on 19.5.2019. The area had received a transformer on 18.5.2019. It was the case of the Appellant herein that the Respondent was liable for the electrocution. For a duty of care to arise herein, and thus a claim for negligence, the Appellant must show her relationship with the Respondent and flowing from that relationship, a duty of care to have flowed from it. Negligence is defined in the *Black’s Law Dictionary*, 10<sup>th</sup> Edition as:

1. “The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation..... The elements necessary to recover damages for negligence are (1) the existence of a duty on part of the Respondent to protect the Appellant from the injury complained of, and (2) an injury to the Appellant from the defendant’s failure.”

37. Negligence is a specific tort that comes from the common law jurisprudence. In a claim of negligence, the Appellant ought to establish that the Respondent owed her a duty of care, that there was a breach of the duty of care and as a result of that breach, the Appellant suffered damages. The principles involved in a claim of negligence were established in the case of *Donoghue Vs Stevenson* (1932) UKHL 100, where it was held: -

“The law takes no cognisance of, carelessness in the abstract. It concerns itself with carelessness only where there is duty of care and where failure in that duty has caused damage. In such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in breach of that duty.”

38. For a claim to succeed in an action for negligence, the damages alleged must be recognized by law. In the case of *Anastassios Thomos Vs Occidental Insurance Company Limited* (2017) eKLR, the High Court held that: -

“When it comes to remoteness of damages, the court ought to determine whether there was sufficient cause or proximate connection between the defendant’s negligence and the damages suffered by the Appellant that is recognizable as a matter of policy that the Respondents should pay the damages.”

39. The plaintiff must show that the damages suffered are as a result of the Defendant’s negligence. Without proof of causation, negligence cannot be actionable and/or sustainable. This was addressed by Visram J (as he then was) in the case of *Elijah Ole Kool Vs George Ikonya Thuo* (2001) eKLR, where he stated: -

“When will an act or omission be said to be the cause of the Appellant’s injuries” a Respondent will only be held liable for negligence if his act or omission is either the sole



effective cause of the Appellant's injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions."

40. It is common position that the live wire caused the electrocution. The Respondent stated that it was not their responsibility for connecting, as their duty was regarded as the distribution of electricity and stated that the mandate fell on Rural Electrification and Renewable Energy Corporation (REREC) to which the lower court agreed.
41. The Respondent being the monopolistic supplier of electricity in the country has a duty to ensure that the supply is well maintained and in safe condition. This duty was expounded in the case of Kenya Power and Lighting Company Limited Vs James Muli Kyalo and Another (2020) eKLR. The Court while discussing Kenya Power and Lighting Company's duties stated:-
- "The Appellant's responsibility, as far as the duty to maintain electric supply lines is concerned, is a matter of statutory obligation under the *Energy Act*, 2006. Section 51 required the Appellant as licensee, or any person authorized by it, from time to time as it becomes necessary, to enter land on which electric supply lines are laid, for the purpose of inspecting or repairing lines, or removing lines where such electric supply lines are no longer required."
42. The same position is mirrored in Section 176(1) of the *Energy Act*, 2019 (Revised 2022), which provides as follows:
- After energy infrastructure has been laid in accordance with this Act, the licensee or any person authorized by the licensee may, from time to time as it becomes necessary, enter the land on which the energy infrastructure is laid with such assistance as may be necessary, for the purpose of operating, inspecting or repairing the infrastructure, or removing such infrastructure in case where the infrastructure is no longer required.
43. For the sake of clarification, the *Energy Act* 2006 and *Energy Act* 2019 (revised 2022) deem a license and licensee as:
1. "licence" means any document or instrument in writing granted under this Act, to any person or authorizing the importation, exportation, generation, transmission, distribution and supply of electrical energy or the exploration and production of geothermal energy, in the manner described in such document or instrument;
  2. "licensee" means a holder of any licence issued under this Act;
44. The Respondent had claimed that there was vandalism on the affected transformer that was involved in the accident herein.
45. The story of Rural Electrification and Renewable Energy Corporation will qualify as a nice fable in the world series of famed fables in competition with Hekaya Za Abunuwasi Na Hadithi Zingine published in Mumbai; London, by Macmillan in 1942.
46. The problem with the public sector is that they have institutionalized lying to a level that is of epidemic proportions. The epidemic of tergiversation, equivocation, circumlocution, and prevarication is of epic proportions. The evidence of the Respondent's witnesses was of no effect whatsoever and should have been disregarded.
47. While describing evidence similar to one led by the Respondent, Odunga J, (as he then was) in *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR, lamented as follows:



In my view to marked such remarkable averments can only be taken to be meant to mislead the court. 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 he 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.”

5. 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...”

48. The Appellant pleaded that he was injured. The Respondent pleaded that the Appellant was to blame. The duty of the court was to determine who between the parties was to blame. The postulation on the liability of the Rural Electrification and Renewable Energy Corporation was an afterthought. It was not in the defence pleadings. A party must first plead before proving. A party who needs the court to determine an issue, must first plead it. Parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

“

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

49. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled “The Present Importance of Pleadings” published in [1960] in *Current Legal Problems* at p. 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

50. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

51. The court cannot use discretionary power to decide a case not before it. In animating the discretionary powers of the Court in the case of *Ramakant Rai vs. Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to



spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.

52. No evidence was led that the Appellant vandalized the electric supply. There were no pleadings on the role of Rural Electrification and Renewable Energy Corporation. They are not parties to the suit. The court had no jurisdiction to determine the role of Rural Electrification and Renewable Energy Corporation in the case. The Appellant was found to have no role in the electrocution. The Respondent, supplied power, which to their knowledge is a dangerous thing but took no precaution to ensure its safety. In the case of *Kinyua v Murage* (Civil Appeal E016 of 2023) [2024] KEHC 7882 (KLR) (11 June 2024) (Judgment), this court stated as follows:

The respondent was blaming the driver who was not party to the suit. The court cannot apportion liability between parties who were not party to the suit. The rider was not joined and as such I cannot apportion liability. The evidence led showed the respondent was to blame. Had he thought for once that the Rider is to blame, he ought to have done one of the following:

- (a): Join the rider as a party, and
- (b): Plead and prove the rider was to blame.

53. The pronouncement of Mabeja J, in the case of *AMK* (suing as the mother and friend of JMK-Minor) Vs Kenya Power & Lighting Company Limited (2020) eKLR, comes in handy:

The Respondent is the sole installer, distributor and supplier of electric energy in Kenya. It has a statutory duty of supervising, inspecting and maintaining its electric installations under Section 52 of the [Energy Act](#). This calls for a higher degree of vigilance on its part in order to avert accidents.

54. In as much as evidence was tendered that other entities such as Rural Electrification and Renewable Energy Corporation are involved, such evidence is of no use without anchoring pleadings. The Respondent itself or through anyone it may have subcontracted to do its work ought to have properly insulated the entry of electricity on 18.05.2019 to avert the incident of 19.05.2019 of the electrocution of the deceased.

55. Where the Appellant proved his case to the required standard, it was the duty of the Respondents to prove contributory negligence which in my view they failed. In the case of *Mac Drugall 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.

56. When such a defence of contributory negligence 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 the case of *Mombasa Maize Millers & another v Elius Kinyua Gicovi* [2021] eKLR 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:

“.....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.”

57. There was no evidence tendered or led relating to the contribution of the deceased to the electrocution. In the circumstances, I find that the respondent is liable at 100% the accident. I set aside judgment on liability and enter judgment for the Appellant against the Respondent on 100% basis.

58. Thus, the lower court ought to have considered general damages which this court will proceed to do. More fundamentally, the Rural Electrification and Renewable Energy Corporation is not a party to this suit.

59. The court cannot find Rural Electrification and Renewable Energy Corporation liable without the same being party to the suit. The Respondent did not bother to take out third-party proceedings if they wished to join the said entity. In the case of *Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah* [2016] KEHC 1666 (KLR), the court, Janet Mulwa held that:

18. The owner and driver of the said pick-up Registration No. KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See Order 1 Rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequences as held in the case *Jemimah Wambui Njoroge -vs- Philip Mwangi* (2001) e KLR. The defendant has only himself to blame.

60. In the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR, F. Gikonyo J, posited as follows:

The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the Defendant, and cannot be a bona fide issue triable between the Defendant and the Plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the Plaintiff and the Defendant. Looking at the defence and the generalized denials, it is a mere sham.

61. It is cavalier that the court chose not to assess damages knowing that it is not the last court. After dismissing the case, a court must, as a corollary assess damages. In *Lei Masaku Versus Kalpama Builders Ltd* [2014] eKLR, the court noted as follows:

It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial



court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum.”

62. Further, in the case of *Kamau v Coast Bus (Mombasa) Limited (Civil Appeal 76 of 2022)* [2024] KEHC 3232 (KLR) (5 April 2024) (Judgment), D.A.S. Majanja held as hereunder:

On whether the trial court ought to have assessed damages even after finding that the Respondent was not liable for the Appellant’s ordeal, the answer is in the affirmative and I fault the subordinate court for not doing the same. This court has always maintained that it is good practice for the trial court or court of first instance to assess damages even if it finds that liability has not been established. To dismiss a suit and fail to address the issue of damages is a serious indictment on the part of the trial court and both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand.

63. In the case of *William Mbugua Ng’ang’a v Mohammed Salim & another* [2020] KEHC 5355 (KLR), the court held as follows:

25. It must however be noted that even if the suit was dismissed on the merits, a court of first instance has the unwavering obligation to assess damages. In *Lei Masaku V Kalpama Builders Ltd Civil Appeal No. 40 OF 2007*[2014] EKLR Mabeya J. held that. ...

26. In failing to assess damages, the trial court committed an error of law thus call upon this court for rectification as of right. The rectification calls upon this court to now assess the damages.

64. The court is thus obligated to assess damages after the catastrophic failure to assess damages in spite of the court of appeal being very firm on this aspect. This is because, the assessment of damages is a discretionary order. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 the Court of Appeal stated as follows:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

65. The court of appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd Vs Meru Express Servcie 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.

66. On damages, the Appellant prayed for general damages under the *Law Reform Act* and sought for pain and suffering for Ksh. 50,000/=. For loss of expectation of life they sought Ksh.200,000/=. Under the *Fatal Accidents Act*, for loss of dependency, they adopted a multiplier of 25 as the deceased was



12 years old and stated that he would have completed his Primary and Secondary school education. They adopted Kshs. 12,522.70/= as the minimum wage as per the Regulation of wages (General) (Amendment) Order 2018. The Appellants sought special damages for KES.151,146./=.

67. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously in the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.
68. The principles of making awards in personal injury claims were laid down by the Court of Appeal in *Cecilia W. Mwangi Vs Ruth Mwangi Nyeri C.A. No.251 of 1996* (unreported) where the court stated as follows:

It has been quite often pointed out by this court that awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. Large awards inevitably are passed on to members of the public, the vast majority of whom cannot afford the burden, in the form of increased costs for insurance cover or increased fees.”

69. For pain and suffering and loss of expectation of life, I am guided by the holding in *Hyder Nthenya Musili & Another -vs- China Wu Yi Limited & Another* [2017] eKLR, where the Court stated as follows:

-.... As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is KES. 100,000/= while for pain and suffering the awards range from KES. 10,000/= to KES. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.... .

70. The parties contended that the deceased died on the spot. Under Pain and Suffering an award for Ksh. 10,000/= will suffice since the deceased died on the spot.
71. The damages for pain and suffering were awarded at 100,000/= after some hours of excruciating pain. The court awarded nominal damages of 100,000/=. In *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi* (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W Musyoka stated as doth; -

13. In *Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015* [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

“[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”



72. Under Loss of Dependency, it has been stated that the same must show how the dependents were dependent on the deceased. The Appellants herein have not shown the same and further the deceased being a minor was dependent on the Appellants as he was a school going child in class 4. They proposed the multiplicand approach which proposal was not considered by the lower court, needless to say that the lower court did not consider the global sum approach either, thus no discretion was applied. This being a scenario where a minor has lost his life, I find direction by the Court of Appeal which made awards on loss of dependency using global sums. In the circumstances, a global sum will be ideal.
73. In *Kenya Breweries Ltd v Saro* [1991] eKLR the Court of Appeal addressed the question of loss of dependency to a parent of a child, where they stated that:
- “Damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution.”
74. There is no uniform method of assessing damages for estates of minors for loss of dependency. In the case of *Chitabhadhiya Enterprises & Another Vs. Gladys Butali*, Kakamega HCCA No. 10 of 2017 the learned Judge stated as follows after analyzing the two methods:
- “...A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in *Kenya Power & Lighting Company Limited Vs E.K.O & Another*, Kiambu HCCA No. 169 of 2016 (2018) eKLR where he said that: “...It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned lower magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned lower magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand...”
75. The lower court having not exercised discretion on either, I opine that a global sum approach would be applicable herein. The global sum is not a figure given arbitrarily but rather, it is an award based on the circumstances of the case and similar decisions by courts in the past. In the case of *Frankline Kimathi Maariu & another Vs Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased (2020) eKLR, the court was dealing with a similar issue. It stated:
- In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.
76. From the above cases, it is clear, therefore, that the choice of whether to adopt a multiplier or global approach is an issue of discretion of the lower court, to be determined on a case-by-case basis. There is no fixed and definitive method that must be applied. In *Daniel Mwangi Kememi & 2 Others V JGM & Another* [2016] eKLR the court (Gikonyo J) awarded Ksh. 1,000,000/= for loss of dependency where



- the deceased child was aged Nine (9) years, a bright student who was always in position one to three in their class and expressed her desire to be a doctor upon completion of her education but all her dreams were shattered by the untimely death.
77. In *Twokay Chemicals Limited vs. Patrick Makau Mutisya & another* [2019] eKLR, the appellate court upheld a global sum of Ksh.1,500,000/= for loss of dependency for a minor aged sixteen (16) years.
  78. In *Francis Odhiambo Nyunja & 2 Others -vs- Josephine Malala Owinyi* (suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, a global award of Ksh. 1,500,000/= was held to be sufficient for loss of dependency of a 17-year-old.
  79. In *Kenya Power & Lighting Company v Gacugu & another* (Suing as Legal Representatives of the Estate of Gideon Gachugu Ngugi - Deceased) (Civil Appeal 162 of 2020) [2024] KEHC 7712 (KLR) (Civ) (28 June 2024) (Judgment) a global award of Ksh. 2,000,000/= was held to be sufficient for loss of dependency of an 8-year-old boy.
  80. In this instance the deceased was 12 years of age. A global sum award for general damages at Ksh. 1,200,000/= as a global sum for loss of dependency shall suffice taking into account inflation and the prevailing economic circumstances.
  81. On loss of expectation of life, the minor was 12 years old. The entire of his life was ahead of him. In the case of *Utete & another v Bosire & another* (All suing as the Personal Representatives & Legal Administrators of the Estate of Evans Nyang'au Maturu [Deceased]) (Civil Appeal E036 of 2023) [2024] KEHC 5155 (KLR) (25 April 2024) (Judgment), the court, W.A. Okwany, J confirmed an award of Ksh. 100,000/= for a 17-year-old.
  82. In the case of *South Nyanza Sugar Company Limited v Odhiambo & another* (Civil Appeal E001 of 2020) [2023] KEHC 22778 (KLR) (29 September 2023) (Judgment), Wendow J awarded 150,000/= for a 47 years old. The court stated as follows:
 

On damages for loss of expectation to life, the general acceptable convectional ward is Kshs. 100,000/=. Again, this is dependent on the time the deceased took before he died. I find that the sum of Kshs. 150,000/= for loss of expectation to life is reasonable.
  83. Given the age of the minor, the inflation and circumstances of the case, an award of Ksh 200,000/= will suffice. On special damages, a sum of Ksh. 151,146./= was pleaded. These include the following:
    - a. Storage/Mortuary fees Kshs. 20,000/=
    - b. Postmortem examination charges Kshs. 5,000/=
    - c. Coffin and Transport expenses Kshs. 56,000/=
    - d. Burial expenses Kshs. 50,000/=
    - e. Letters of administration ad litem Kshs. 20,000/=
    - f. Police abstract Kshs. 150/=

Total - Kshs. 151,146/=
  84. Police abstract and letters of administration were not proved. Letters go to the root of the title of the Appellant and as such costs are not payable by the tortfeasor. However, burial expenses are payable. In



the case of *Coast Bus Services Limited v Sisco E. Murunga Denyi & 2 Others* C.A. No. 192 of 1992 (UR) the Court of Appeal stated as follows:

“We would restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection it is not enough simply to aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial. If at the time of filing the suit the special damages is not known with certainty then those particulars can only be supplied at the time of trial amending the plaint to include the particulars which were previously missing. It is only when the particulars of Special Damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars.”

85. The Court of Appeal, in *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* [2016] eKLR, posited as follows:

We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.

86. Special damages were discussed in the case of *David Bagine Vs Martin Bundi* [1997] eKLR. The Court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it”

87. Lack of receipts do not in any way take away the burial expenses. In the case of *JNK (Suing as the legal representative of the Estate of the Estate of KMM(Deceased) vs Chairman Board of Governors [...]) Boys High School* (2018) eKLR, it was held that;

In spite of lack of receipts this Court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

88. In this case a sum of Ksh. 130,996/= was proved as special damages. The same are accordingly allowed.

89. The award of costs is discretionary. 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.

90. 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.

91. Costs of Ksh. 85,000 would be right and just.

92. The net effect is that the appeal is allowed. The judgment of the lower court is set aside. In lieu thereof, I enter judgment for the Appellant against the Respondent on 100% liability basis.

### **Determination**

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

- a. The appeal is allowed and judgment of the lower court is set aside.
- b. Judgment is entered for the Appellant against the Respondent at 100% liability in favour of the Appellant.
- c. Special damages Ksh. 130,996/=.
- d. General damages for loss of dependency in the sum of Ksh.1,200,000/=.
- e. Pain and suffering - Ksh. 50,000/=.
- f. Loss of expectation of life - Ksh. 200,000/=.
- g. The Appellant shall have costs of the suit in the lower court.
- h. The Appellant shall have costs of the suit on appeal of Ksh. 85,000/=.
- i. 30 days stay of execution.
- j. 14 days right of appeal.
- k. The file is closed.



**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28<sup>TH</sup> DAY OF JULY, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Mr. Macharia for the Appellant

Mr. Bosire for the Respondent

Court Assistant – Michael

