Gatonye & another v Kinyae & 2 others (Civil Appeal E244 of 2024)
[2025] KEHC 11706 (KLR) (Civ) (22 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11706 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E244 OF 2024

DKN MAGARE, J

JULY 22, 2025

BETWEEN

JEREMIAH NG'ANG'A GATONYE ..... 1ST APPELLANT

EXPORT HYDRO PUMP AND SERVICES (AFRICA) LTD ..... 2ND APPELLANT

AND

SHIRLEEN MUENI KINYAE ..... 1ST RESPONDENT

JULIUS MULANDI ..... 2ND RESPONDENT

HIGHBURY MERCHANT LTD ..... 3RD RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Irene Ruguru [Mrs.] SPM delivered on 09.02.2024 in Nairobi CMCC No. E043 of 2021. Directions were given for hearing through written submissions.

2. The Appellants were the 1st and 2nd defendants in the lower court. The 1st respondent was the plaintiff while the 2nd and 3rd respondents were the third and 4th respondents in the said court. After hearing the parties, the court entered judgment as follows:

    a. Liability 50:50%

    b. General damages Ksh. 2,400,000/=

    c. Special damages Ksh. 6,000/=

    Total Ksh. 2,406,000/=

    d. Costs and interest

3. The Appellant was aggrieved and filed this appeal vide a Memorandum of Appeal dated 17.02.2024. The memorandum of appeal raised prolixious 10-paragraph argumentative grounds that are unseemly and do not please the eye. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same 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."

4. The Court of Appeal had this to say in regard to rule 86 [now Rule 88] of the Court of Appeal Rules, 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:
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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..."

5. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of 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:
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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."

6. In a nutshell, grounds 1-5 are on a single issue of liability while 6-10 are on a single issue of quantum. The issues for determination will therefore be:

    a. Liability

    b. quantum of general damages

Pleadings

7. The 1st Respondent filed the suit through a plaint dated 4th January 2021. It is not immediately clear from the plaint who the 1st Respondent is, other than being identified as a student at the University of Nairobi. However, her witness statement clarifies that she was a passenger in motor vehicle registration number KBW 636J.

8. The Appellants were the driver and owner of motor vehicle registration number KBN 165F, while the second and third Respondents were the driver and owner of motor vehicle registration number KBW 636J. The two vehicles are said to have been involved in a head-on collision along the Southern Bypass on 12th April 2018. The accident involved the 1st Appellant and the 2nd Respondent as drivers. It is not lost on the court, that Southern Bypass is a one-way road.

9. Particulars of negligence were set out. The first appellant was said to have stopped in the middle of the road. The second respondent was said to be driving in excessive speed. The plaintiff is said to have suffered serious injuries, that is:

    a. Severe head injury leading to degloving wound and traumatic oculomotor palsy.

    b. Curved scar on the forehead measuring 9cm long noticeable suture marks.

    c. Left eye injury leading to residual ptosis.

    d. Requirement of future ophthalmological follow up due to diplopia.

    e. 20% degree on disability[sic].

10. To contextualize the injuries, degloving injuries involve the separation of skin and underlying tissue from the muscle and bone. On the other hand, oculomotor nerve palsy, specifically, results from damage to the third cranial nerve. further, A left eye injury can lead to residual ptosis, which is the drooping of the upper eyelid. This can, depending on severity of the ptosis, range from a slight droop to a significant blockage of vision. Diplopia or double vision, is the perception of two images of a single object.

11. The 1st Respondent sought general damages, cost of future medical expenses and sought the following special damages:

    a. Hospital bill in Kenya -Ksh. 402,831.51/=

    b. Hospital bill in south Africa -Ksh. 20,650/=[rand 3,252]

    c. Flight ticket -Ksh. 160,000/=

    d. medical report -Ksh. 6,000/=

    e. search certificates -Ksh. 1,500/=

Total - Ksh.590,981/=

12. The appellant and the second and third respondents entered appearance and filed defences denying the averments in the Plaint. The Appellants denied the occurrence of the accident. They attributed liability to the second and third respondents. They also attributed liability to the 1st Respondent for not taking precautions for her own safety. The second and third respondent equally blamed the Appellants and the 1st Respondent. These kinds of pleadings, where a passenger is blamed for a collision resulting in injury to the passenger, is not edifying, as it is unnecessary.

13. The Appellants blamed the second and third respondents for ramming onto the rear of motor vehicle registration number KBN 165F.

Evidence

14. PW1 was 67801 PC Eric Misiani of Langata traffic department. He testified that an accident was reported involving motor vehicle registration numbers KBN 165F and KBW 636J. The same were being driven by the 1st Appellant and the second respondent. The said motor vehicle had two passengers; that is the late Abdi Kazungu and the 1st Respondent. He produced an abstract reported vide OB number OB67/12/4/2018 PAR. The driver of KBW 636J was blamed for the accident. Motor vehicle registration number KBW 636J rammed into the rear of motor vehicle registration number KBN 165F. On cross examination by the appellants, he posited that motor vehicle registration number KBN 165F was in motion. On cross examination by the second and third Respondents, he stated that he was the investigating officer. After investigating, he blamed the second respondent.

15. PW2 was Dr. Waitheka Mwaura who produced the medical report. He gave the degree of permanent disability. He had read the report by Dr. Nyenze who gave a permanent disability. He stated that the disability on the face was 20.8% disability.

16. On cross examination by the Appellants, he stated that the permanent disability is based on double vision and tearing of the left eye. On cross examination by the second and third respondents, he stated that 20% was assessed on 11.1.2020 and could get worse.

17. PW3 was the 1st respondent. She relied on her statement dated 4.1.2021. She stated that she was a passenger in motor vehicle registration number KBW 636J. She saw a stationary vehicle without lights. She later learnt that the vehicle was motor vehicle registration number KBN 165F. Motor vehicle registration number KBW 636J could not stop in time due to distance. On impact, motor vehicle registration number KBW 636J caught fire. The second respondent helped her get out of the vehicle. Her friend died. She sought specialized eye treatment both in Kenya and South Africa. She blamed both vehicles.

18. She continued that she lost her memory due to the brain injury and had to put school on hold. On cross examination she stated that the second respondent was her friend but she was not defending him. It was her evidence that the lorry stalled in the middle of the road.

19. On cross examination by the second and third respondents, she said she did not see the lights or reflectors. She said that had motor vehicle registration number KBN 165F not stalled, the accident could not have occurred. She stated that she was wearing a safety belt.

20. The Appellant closed their case without calling witnesses.

21. The second respondent testified as DW1, he relied in a prerecorded statement to the police dated 14.11.2018 at the police station. He blamed motor vehicle registration number KBN 165F lorry for the accident. He stated that he suddenly noticed parked lorry and applied emergency brakes. He did

not blame the 1st respondent. On cross examination by the Appellant, he stated that if the vehicle was moving, it was moving very slowly. On re-examination, he stated that he was not drinking on that day [the typed record says otherwise, hence erroneous]. The correct record, is the handwritten one.

Submissions

22. The Appellant filed submissions dated 15.11.2024 seeking that liability against the Appellant be set aside. An award of Ksh 2,000,000/= be set aside and substituted with 800,000/=. They stated that the Appellant was not to blame at all. They set out in extensio the first respondent's submissions in the lower court. They urged the court to rely on the 1st respondent's submissions in the lower court. They urged that the 1st respondent's evidence was that the vehicle was moving uphill slowly. They stated that the court should not blame them for not tendering evidence.

23. On quantum, they submitted that the injuries should attract a lower award. They relied on the case of Easy Coach Ltd v Emily Nyangasi [2017] eKLR and Beatrice Khamede v Eric Wanunu & Another [2019] eKLR.

24. The first respondent filed submissions dated 28.01.2025. The 1st Respondent posited that the Appellant had made heavy weather on their submissions, when submissions cannot take the place of evidence. Reliance was on the case the decision of the Court of Appeal in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR on what is the place of submissions in a case, as follows:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

25. It was her case that the evidence of PW1 and DW1 was succinct on what happened while PW1 relied on hearsay. Further, she stated that the Appellant did not adduce any evidence that motor vehicle registration number KBW 636J was wholly to blame. The 1st respondent relied on the decision by Odunga J on the effects of not calling evidence in the case Linus Nganga Kiongo & 3 Others v Town Council Of Kikuyu [2012] eKLR, thus-

> " What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi [Milimani] HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another v Raju Govindji, HCCC No. 548 of 1998 stated:
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> " Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."
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> Again in the case of Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi [Milimani] HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate

its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

26. They submitted on medical reports of Dr. Mwaura and Dr. Nyenze on the injuries. It was her submissions that the award is proper and similar to the one given in the case of Great Rift Express Shuttle Services Ltd v Moses Kipchumba Kipkemoi [2020] KEHC 2804 [KLR]. In that case, H.A. Omondi, as she was then, found that the award of Kshs. 2,000,000/= for the injuries sustained by the respondent is reasonable. The injuries referred to were bruises on the face, corneal perforation right eye, foreign body in the left eye [pieces of glasses, cut wound on the left upper eye lid, cut wound on the left forearm, open left femur fracture with bone loss. The award was made on 18.05.2018 and confirmed by the said court on 22.05.2020.

27. On the duty of the court, they relied on the decision of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681 on the question of damages. They prayed for the dismissal of the appeal. Further, on the principles to be considered, she relied on the court of appeal, decision of Kemfro Africa Ltd v Meru Express Service v A.M Lubia & Another 1957 KLR 27.

28. The second and third respondents filed 14-page humongous submissions. Half of the submissions are a regurgitation of the pleadings which is totally unnecessary. On liability they submitted that there is no dispute that the accident occurred. It was the Appellant's burden to prove that the vehicle was not stationary. It was thus incumbent upon the Appellant to controvert unequivocal testimony of the first respondent.

29. They also stated that the second and third respondents equally agree with the 1st respondent's direct evidence. It was their submissions that the appellants cannot blame the lower court in absence of their evidence. Reliance was placed on Sections 107-109 as read with Section 112 of the *Evidence Act*. They stated that there was no evidence to show that the motor vehicle registration number KBN 165F was not stalled. Reliance was placed on the case of University of Nairobi v Leonard Lisanza Muaka [2020] eKLR, where, Mugai J posited as doth:

> " In Gateway Insurance Co Ltd v Jamila Suleiman & Anor [2018] eKLR the Trial Court held with regard to lack of evidence with reference to the following cases;
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> Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 Others [2012] eKLR thus;
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> > " In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."
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> Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others HCC1243
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> > " It was held that it is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."
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> Edward Muriga thro Stanley Muriga v Nathaniel D. Schulter C.A. 23 of 1997 held;
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> > " In this matter, apart from filing its statement of Defence, the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and statement

> of Defence therefore remains mere allegations.... Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

30. Reliance was placed on the case of Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] KEHC 9074 [KLR], in support of the averments that where a party fails to call evidence in support of his case, the adverse party's evidence remains uncontroverted. The court stated as follows:

> " The appellant opted not to adduce evidence at all. However, the appellant's counsel cross-examined the Respondent and her witness. Thus, the only evidence on record is the evidence tendered by the Respondent and his witnesses. In Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR, it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted."

31. This was buttressed by the decision of Jamlik Muchangi Miano v Attorney General [2017] KEHC 8422 [KLR], where John M. Mativo, as he then was, held as follows:

> " Where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defence is uncontroverted and therefore unchallenged."

32. It was their submissions that the police officer was not an eye witness and his evidence was only limited to production of the police abstract. The two eyewitnesses confirmed that motor vehicle registration number KBW 636J was stationary [this submission is not correct. It was motor vehicle registration number KBN 165J]. They continued that direct evidence is more reliable. The police abstract cannot be used to impute liability. Reliance was placed on the cases of Peter Kanithi Kimunya v Aden Guyo Haro [2014] KEHC 1547 [KLR] and Kennedy Nyangoya v Bash Hauliers [2016] KEHC 2616 [KLR], the latter of which the court, Njoki Mwangi, J held as follows:

> " Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it."

33. They concluded that the said motor vehicle registration number KBN 165F stalled on the road, without reflectors, or warning signs. In the circumstances they prayed that the court maintains the finding by the court below. In that respect they relied on the case of Motrex Limited v Akamba Public Road Services Limited & another [2011] KECA 318 [KLR], where the court of Appeal [Githinji, Aganyanya & Nyamu, JJ.A.] held a driver who blocked the road to the extent of 70%. They also relied on the cases of Kanake Peter Wahiire v Joseph Maina Kamau & Geoffrey Kamau Maina [Suing As The Administrators of the Estate of Cicilia Ruguru Maina] [2022] KEHC 1335 [KLR] and Pelican Haulage Contractors Limited v Khalid Salim Mohamed [2018] KEHC 8766 [KLR] where drivers who parked in the middle of the road were held liable. They also submitted that where there is doubt on who is to blame, 50:50 suffices. Reliance was placed on the cases of Hussein Omar Farah v Lento Agencies [2006] KECA 388 [KLR] and Pandal v Aiya & another [2023] KEHC 19122 [KLR].

34. On quantum, they submitted that the sum of Ksh. 2,400,000/= awarded was adequate.

Analysis

35. 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 locus classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

> " .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

36. 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. It is a strong thing for an appellate court to differ from the findings on a question of fact of the magistrate who had the advantage of seeing and hearing the witnesses. In the case of Peters v 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..."

37. The burden of proof lay on the 1st Respondent to establish her case. In this regard, Sections 107 to 109 of the *Evidence Act*, Cap. 80 Laws of Kenya, provide the legal framework for the burden of proof, stipulating that he who alleges must prove, in particular 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.
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> 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."

38. Proof on a balance of probabilities means that the court is satisfied that the occurrence of the event was more probable than not. In other words, the evidence adduced by the plaintiff must carry a degree of probability which is more than just plausible. It must be cogent, convincing and must tilt the balance in the plaintiff's favour. This question of what constitutes proof on a balance of probabilities was authoritatively discussed by Kimaru, J in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526, where the learned judge stated 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."

39. The burden of proof lies with the Appellant and must be discharged on a balance of probabilities. In Miller v Minister of Pensions [1947] 2 All ER 372, as cited by the Court of Appeal [J Karanja, G.G. Okwengu, CM Kariuki, JJA], in Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 [KLR], Denning J [as he then was] explained the standard of proof in civil cases as follows:

> " 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. In other words, the evidence must tip the balance in favour of the claimant. 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."

40. The appellant did not testify hence did not rebut the respondent's case. The Respondent was still bound to prove her case even where no evidence was tendered. In the case of Peri Formwork Scaffolding v White Lotus Projects Limited [2021] eKLR, the court stated as follows:

> " In Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR, the Court held:
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> In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits. 8. In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the court as to its truth."

41. The duty to prove in formal proof was stated by Justice J. B. Havelock in the case of Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR: -

> " In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;
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> > " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules [of evidence]. On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed

is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

42. The court will make an adverse inference when a party failed to call evidence they have. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice Odunga J as he then was stated as doth: -

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

43. The record shows that the appellant pleaded that they were hit from behind. The 1st respondent testified and was cross examined. The evidence was that the vehicle was stalled on the road. There was speculation that it may have slowed down. The only person who could answered this question was the 1st Appellant, who was driving the said vehicle on the said day. He decided not to testify. He had information that if he tendered his evidence, he could have cleared the air. He chose not to do. This was knowledge that none else could have tendered other than the Appellants. Section 112 of the *Evidence Act* provides as follows:

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

44. Having failed to testify, then what is the effect of pleadings that they were hit from behind? Failure by the appellant to tender evidence in rebuttal meant that the allegations of not having stalled remained so. It is even more poignant where the dispute was not liability between the plaintiff and defendants but between defendants. In the decision of Leo Investment Limited V Mau West Limited & Another [2019] eKLR, C Kariuki, J, stated as doth: -

> " But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited v County Government of Machakos [2018] eKLR [supra] addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.
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> 39. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

45. The evidence of the respondents reached a prima facie standard and remained uncontroverted. The Respondent tendered evidence on how the accident occurred. The police officer indicated what the police records indicate. The police evidence was not cast in stone. The police record indicates what parties, including the Appellant told the police. The evidence to the police includes stories that tend to be one sided. It is only after being tested on cross examination that the truth comes out. The decision of R.E Aburilli in Anyona v Wells Oil Limited & 2 others [Civil Appeal E091 of 2022] [2023] KEHC 26833 [KLR] [20 December 2023] [Judgment] brings out the issue properly.

> According to John Wigmore, [The Principles of Judicial Proof by John Henry Wigmore Review by: E. R. T. Harvard Law Review, Vol. 27, No. 7 [May, 1914], pp. 692-694 (3 pages)]
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> " Cross-examination is the greatest legal engine ever invented for the discovery of truth. You can do anything with a bayonet except sit on it. In the same way, a lawyer can do anything with cross-examination if he is skillful enough not to impale his own cause upon it." Cross-examination seeks out the truth. When a witness brings their account of disputed events, cross-examination gives the cross-examiner the ability to question all evidence brought forward by the witness. Separating lies from the truth is essential during cross-examination
>
> Cross examination also establishes inaccuracies in a case. Determining inaccuracies in a witness' statement can damage the overall case brought forward by the opposing party.

44. Cross examination also tests the credibility of the witness. The credibility of a witness relates to their sincerity and whether they are speaking the truth as they believe it to be.

45. Cross examination also challenges the reliability of the witness and the evidence adduced Challenging the reliability of the witness's testimony will make or break a case. If the witness brought forward unreliable evidence in their testimony, it is the duty of the cross-examiner to challenge such a testimony. Points such as accuracy, truthfulness, and credibility all come in play here. If the cross-examiner notices questionable areas in a testimony, they can challenge the reliability of these areas to ensure that the evidence presented in the case is true, reliable, and fair.

46. The driver, who was the other party to the accident decided not to testify. Failure to testify leads the court to make an adverse inference. However, I am equally persuaded by the reasoning of Odunga, J as he then was in Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR where the learned Judge stated as follows:

> 53. In this case the only people who could have explained the circumstances under which the accident occurred were Musyoka Mutiso who was ahead of the deceased, PW2 and the Appellant. PW2 gave evidence that tended to show that the accident was caused by the negligence of the Appellant while Musyoka Mutiso was not called to testify. In those circumstances one would have expected the Appellant to testify in order to controvert the evidence of PW2 but he chose not to do so. Accordingly, I find that not only was the evidence of PW2 uncontroverted but the conduct of the Appellant invited the inference that his evidence, had he testified, would have been adverse to his case as pleaded.

47. Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would

be adverse to such a party. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was, stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
>
> " Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be [so as to save the necessity for formal proof of each document]."

41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho v KCB [2003] 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

48. Failure by the appellant to testify only means one thing, had the appellant or his driver testified, the evidence would have been adverse to them. Then, what was the evidence they were to tender? Evidence can only be tendered in support of pleadings. In this case, it was the appellants' pleadings that the accident was inevitable. The burden of proving this was on the defendant. A police abstract is not in itself proof of liability. Even the evidence of a police officer who tenders the police abstract in evidence is merely a record prepared by the police following an accident, based on the accounts given to them. Unless corroborated by other independent evidence, such as eyewitness testimony or expert opinion, a police abstract alone cannot be relied upon to establish liability. In the case of Z O S & C A O [Suing as the Legal Representatives in the Estate of S A O [Deceased] v Amollo Stephen [2019] KEHC 9268 [KLR], the court expressed itself in respect to police abstract as follows:

> " The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident but proof of the fact that following an accident, the occurrence thereof was reported to the police who took cognizance of that accident. It is therefore the police, having received information or a report of occurrence of an accident, would investigate and establish circumstances under which such an accident occurred. The police abstract produced as Pex. 3 dated 21/8/2018 only provides particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereof.....That being the case, it was incumbent upon the appellant, at the time of hearing, to either call an eye witness who saw the accident take place to prove any of the listed particulars of negligence attributed to the Respondent, or to call the police from Bondo

Police Station, who investigated the accident to shed light on the results of the investigations; and as to who was to blame for the subject accident wherein the deceased lost his life."

49. The Respondents proved liability for the accident. The first respondent showed both drivers were to blame. The second and third respondents rebutted some liability. The appellant left the evidence uncontroverted. They did not tender evidence on the second and third Respondents contributory negligence. With the evidence on record the court was fair otherwise it should have held the Appellant slightly more liable.

50. The particulars of contributory negligence set out in the Appellant's defence remains just that, allegations. They were pleaded but remained bare. The appellant had a duty to render evidence to prove contributory negligence. Where the Respondents proved their cases to the required standard, it was the duty of the Appellant to prove contributory negligence. 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".

51. 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 failed to take reasonable care for their own safety and that such failure contributed, in some degree, to the accident or the damage suffered. The essence of contributory negligence lies not in a breach of duty to the defendant, but in a failure to take reasonable precautions to avoid foreseeable harm to oneself. In the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] KEHC 1105 [KLR], Nyakundi J stated:

> In Wayne Ann Holdings Limited [T/a Superplus Food Stores] v Sandra Morgan, the Court 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 Ena Pearl Nance v British Columbia Electric Railway Company [[1951] UKPC 19;[1951] A.C. 601 [P.C.], 611, Lord Simon posited as follows:
> >
> > 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 to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself, and contributed, by that 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."

52. Lord Simon in Ena Pearl Nance v British Columbia Electric Railway Company [[supra] continued as follows:

> " This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Generally speaking, when two

parties are so moving in relation to one another as to involve risk of collision, each owes the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. When a man steps from the kerb into the roadway he owes a duty to traffic which is approaching him with risk of collision to exercise due care.

Dictum of Denning, L.J., in Davies v Swan Motor Co. [Swansea] Ld., [1949] 2K. B.291, 324, that "when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down", if it is to be interpreted in a contrary sense, disapproved."

53. The appeal is thus without any basis. Having found no merit in the appeal on liability, the court is duty bound to dismiss the same.

54. The 1st respondent sustained a severe head injury, which resulted in a degloving wound and traumatic oculomotor palsy. As a consequence, there is a curved scar on the forehead, approximately 9 cm in length, with visible suture marks, making it noticeably disfiguring. Additionally, the claimant suffered a left eye injury, which has led to residual ptosis. This is the drooping of the upper eyelid and also experiences diplopia [double vision], necessitating ongoing ophthalmological follow-up. The injuries have been assessed to result in a 20% degree of permanent disability by both doctors. The injuries cannot be said to be idle in any extent possible. The 1st respondent indicated loss of memory as a result of the head injury. There was no serious controverting of the medical evidence.

55. In reviewing the evidence of both Dr. Mwaura and Dr. Nyenze, I am enjoined to subject the same to the test of expert witnesses. It is not lost on the court that parties did not call the doctors to testify. The medical evidence was produced by consent. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another v Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

56. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

57. 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 as stated in Parvin Singh Dhalay v Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held 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 v George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-

> " 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."

58. The reports were not different in practical terms. The empirical findings were the same on injuries and prognosis. It is thus not necessary to consider one report over another.

59. All the respondents were agreed that the award is proper. On quantum, the court awarded Ksh. 2,400,000/=. The Appellant on the other hand sought that a sum of Ksh 800,000/= be awarded. The 2nd and 3rd respondents relied on Rentworks East Africa Limited v Coley Njeru Bildad [2021] KEHC 8591 [KLR] in the lower court but no other authority in this matter.

60. The 1st Respondent also relied on the decision of Great Rift Express Shuttle Services Ltd v Moses Kipchumba Kipkemoi [2020] KEHC 2804 [KLR], where the H.A. Omondi confirmed an award of Ksh. 2,000,000/= for the claimant who sustained multiple facial bruises, indicating blunt force trauma to the face. There was a corneal perforation in the right eye, signifying a serious ocular injury with potential for lasting visual impairment. In addition, foreign bodies, identified as glass fragments, were lodged in the left eye, further complicating the injury. A cut wound was also present on the left upper eyelid, and another laceration was noted on the left forearm. Most significantly, the claimant suffered an open fracture of the left femur, accompanied by bone loss, representing a severe orthopedic injury with a high likelihood of long-term disability and the need for surgical intervention.

61. The appellant relied on Easy Coach Limited v Emily Nyangasi [2017] KEHC 5131 [KLR], where the claimant suffered facial injuries, consistent with blunt trauma to the head region. There was also an injury to the chest, injury to the back, right hand had a cut wound, and cut wound was present on the right leg. These injuries were far less severe than the injuries suffered by the 1st respondent herein.

62. They also relied on the case of Beatrice Khamede v Erick Wanunu & another [2019] eKLR, where the claimant sustained a fracture of the left shoulder blade [scapula], resulting in multiple breaks. Additionally, she suffered an injury to the left brachial plexus, the complex network of nerves originating from the neck and responsible for motor and sensory functions of the upper limb. This nerve injury led to weakness in the left upper limb, and recovery has remained incomplete. A puncture wound was also noted on the left ankle joint, indicating further trauma.

63. According to the attending doctor's medical, clinical, and radiological assessment, the claimant had suffered major trauma to the left shoulder, with the nerve damage contributing to substantial hemiparalysis. The injury has resulted in stiffness of the shoulder and elbow, significantly impairing limb function. The prognosis was poor, with the doctor noting that any further recovery is expected to be minimal. The claimant has been assessed to suffer from a permanent disability of 35%, to the extent she could no longer carry out many of the routine tasks both at home and at work as a chef. The appeal decision was made on 14.11.2019 confirming a judgment given on 08.12.2017. In other words, the decision relied on is very old, almost 8 years.

64. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> "...in this regard, both the East African Court of Appeal [the predecessor of this Court] and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law [as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach], or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

65. The principles guiding this court as the first appellate court have crystalized. This is in recognition that the award of damages is discretionary. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another [No 2] [1985] eKLR as follows:

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage."

66. Quantum of damages are the discretion of the court hearing the matter. 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 or the discretion was not exercised judiciously. In the case of Mbogo and Another v 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 is 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."

67. The court relied heavily on the case of Great Rift Express Shuttle Services Ltd V Moses Kipchumba Kipkemoi [Supra]. However the said case had more severe injuries. The degree of disability was the same. However, there was a risk of development of early left knee osteoarthritis and deformed left thigh. In this case the injury was limited to the head. Whereas the head injury is a serious one, in this case, the court erred in ignoring the severity in Great Rift Express Shuttle Services Ltd case.

68. In the circumstances, I set aside the award of Ksh 2,400,000/=. In lieu thereof, I award a sum of Ksh 1,800,000/= as general damages. The rest of the claim is dismissed.

69. The next issue is costs. Costs are 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.

70. 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."

71. 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."

72. The Appellants have had mixed results. In the circumstances, each party to bear their own costs.

Determination

73. In the upshot, I make the following orders:

a. The appeal on liability is dismissed.

b. The award of quantum for Ksh. 2,400,000/= is set aside as against the Appellant only. In lieu thereof, I substitute with a sum of 1,800,000/= less 50% leaving Ksh 900,000/= payable by the Appellant.

c. Interest shall be from the date of judgment in the lower court in any case.

d. Since there can be no appeal by implication, the second and third Respondents, having not appealed, shall settle the decree in general damages for a sum of Ksh. 1,200,000/= against them as originally ordered.

e. All other awards remain.

f. Each party bears their own costs.

g. Costs be paid within 30 days, in default execution do issue.

h. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JULY, 2025.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Ndeti for the 1st Respondent

Ms. Njeri for the 2nd and 3rd Respondents

Court Assistant – Michael