# Ngure v Maina (Civil Appeal E166 of 2024) [2025] KEHC 11696 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11696 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E166 OF 2024**

**DKN MAGARE, J**

**JULY 23, 2025**

**BETWEEN**

**GEORGE KINUTHIA NGURE ............................................................ APPELLANT**

**AND**

**BENSON MWANGI MAINA ............................................................ RESPONDENT**

***(Appeal from the Judgment of Honourable R.L. Musiega (SRM) delivered on 17.11 2023 in Nairobi CMCC No. E5990 of 2022)***

## JUDGMENT

1. This is an appeal from the Judgment of Honourable R.L. Musiega (SRM) delivered on 17.11 2023 in Nairobi CMCC No. E5990 of 2022. The Appellant was the defendant in the lower court.
2. The Respondent is said to have suffered the following injuries:
    a. Comminuted fracture of the right femur
    b. Bruised wound and lacerations on the right forehead
    c. very tender right femur
    d. Bruises, swelling and tenderness on the right knee
3. Upon hearing the parties, the court delivered its judgment as follows:
    a. The Appellant was held 100% liable
    b. General damages of Kshs. 800,000/=
    c. Special damages of Kshs. 127,485/=

d. Plus, costs and interests of the suit

4. The Appellant filed this appeal vide a Memorandum of Appeal dated 02.02.2023 and set forth the following humongous grounds:

    a. That the learned magistrate erred in law and fact in failing to consider and find that the Appellant had shown a prima facie case with a high probability of success;

    b. That the learned magistrate erred in law and fact in failing to consider and find that the Appellant was not blamed for causing the accident by apportioning 100% liability against the Appellant.

    c. That the learned magistrate erred in law and fact in failing to consider and find that there was no concrete evidence placed before the court to determine who was to blame for the accident between the Appellant and the Respondent.

    d. That the learned magistrate erred in law and fact in failing to consider and find that the contents of a police abstract as extracted from the records held by the police is merely evidence that a report of an accident was made and not that an accident occurred.

    e. That the learned magistrate erred in law and fact in failing to consider and find that a police abstract is not conclusive proof of liability.

    f. That the learned magistrate erred in law and fact in failing to consider and find that the police officer was not present at the scene of the accident and as such cannot render any account leading up to or surrounding the alleged accident which goes against the evidentiary rules of direct evidence thereby rendering his testimony as hearsay.

    g. That the learned magistrate erred in law and fact in failing to consider and find that where there is no concrete evidence to determine how the accident occurred and who is to blame for causing an accident, both parties should be held equally liable.

    h. That the learned magistrate erred in law and fact in failing to consider and find that there can be no liability without fault.

    i. That the learned magistrate erred in law and fact in failing to consider and find that in assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike.

    j. That the learned magistrate erred in law and fact in failing to consider and find that in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss suffered and not to punish the tortfeasor for the injury he has caused.

5. There remains a pertinent issue regarding the timeliness of filing the memorandum of appeal. From the record, there is no clear indication that the appeal was filed within the prescribed time. Nonetheless, the appeal was admitted and proceeded to hearing. In the circumstances, this Court is precluded from interrogating the matter further, as the question of timeliness was not raised or addressed at the appropriate stage.

6. The memorandum of appeal is not supposed to be a thesis. Advocates counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric. It is provided for under Order 42 Rule 1 of the Civil Procedure Rules as follows:

(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.

(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.

7. The Court of Appeal had this to say about compliance with Rule 86 [now rule 88] of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

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

8. 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."

9. There are only 2 issues disclosed in the appeal. That is quantum and liability. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

## Evidence

10. PW1 Corporal Njeru Njoka testified that he was the investigating officer in the matter. He testified that an accident occurred on 21.08.2022, at around 1230 hours, involving motorcycle registration number KMFK 067X ranger, and the Appellant's motor vehicle Registration No. KCR 680F. The accident was at Kastemii area along the Thika Superhighway. The circumstances were that appellant's motor vehicle, a Toyota Axio registration number KCR 680F rammed onto motorcycle registration number KMFK 067X from behind. This resulted in the Respondent and one Mwangi getting injured. He was cross examined on the insurance of the motor cycle and not on the occurrence of the accident.

11. PW2 was the respondent who adopted as his evidence-in-chief a statement filed on 07.10 2022. He stated that the said accident occurred when the Appellant's motor vehicle Registration No. KCR 680F rammed onto his motorcycle registration number KMFK 067X from behind. He testified that the Appellant was to blame for the accident by failing to keep distance resulting in the respondent being hit from behind.

12. PW3 was Joseph Mwangi who adopted his statement saying he was a pillion passenger. The accident occurred motor vehicle, a Toyota Axio registration number KCR 680F rammed onto motorcycle registration number KMFK 067X from behind. He suffered injuries for which he claimed in E5992 of 2022. He was not cross examined.

13. Medical reports for both parties were produced by consent. The Appellant did not testify or give any evidence on liability. Parties filed comprehensive submissions.

## Appellant's submissions

14. The Appellant submitted the trial court erred in its assessment of liability by failing to correctly apportion the degree of blame attributable to each party, considering the prevailing circumstances of the accident, the evidence adduced, and the probative value of that evidence. This is a convoluted statement whose import is not easy to fathom. It is hyperbolic. The appellant submitted in a rather bizarre manner that in determining matters liability, there is no standard principle to be applied. This is fallacious, since, if there is no principle to be applied then the court cannot err and everything holds. Reliance was placed on the case of Omoke v Owino & 3 others [2024] KEHC 2652 (KLR), where H. I. Ong'udi, held as follows:

    20. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR, where it was held:

    > " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows: "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.............................."The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as

the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

19. Further, in Farah Vs Lento Agencies [2006]1 KLR 124,125, the Court of Appeal held that: -

> "…Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame."

15. The Respondent herein stated that he blamed the Appellant for the alleged accident but failed to produce any evidence that the Appellant was to blame by way of occurrence book extracts (OB) and sketch maps/sheets from the scene of the accident or otherwise. The appellant proceeded that in Civil Appeal No. 12 of 2017, Margaret Wambui Thidigwa v Eliud Sidigu Otiato [2021] KEHC 8765 (KLR), Chemitei J stated as follows:

    16. … The police abstract was obviously issued after the incident and way after the OB had been filled.

    17. As a matter of fact, the police abstract is an abridged version of the OB. In this case the name of the deceased does not feature in the OB which is essentially the official document from the traffic police department showing the incidence, the vehicles and parties involved and the step-by-step action taken by the police.

16. They continued that the trial magistrate failed to consider the fact that a police abstract is not conclusive proof of liability and neither is it proof that an accident occurred but rather that an accident was reported. They relied on 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), where R E Aburili, stated that:

> 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.

17. The Appellant proceeded that a police abstract is not conclusive proof to apportion blame and evidence must be adduced to support. Reliance was based on the first sentence in the following quotation which I have set out in full for proper conceptualization in the case of Kennedy Nyangoya v Bash Hauliers [2016] KEHC 2616 (KLR), where the court, Njoki Mwangi stated 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. Another shortcoming in the appellant's case was the unexplained failure to call the Driver who was driving the matatu at the time of the accident. The said Driver could have shed light on how the accident happened, thus assist the Court in determining who was liable for the said accident.

18. They stated that the police officer who testified was not the investigating officer in the matter and confirmed that he did not visit the scene of the accident. He neither witnessed nor heard how the accident occurred firsthand; rather, his account was based solely on information relayed to him by other parties. Reliance was based on the cases of Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR) and Omwoyo v Nyangira (Civil Appeal E049 of 2021) [2022] KEHC 16086 (KLR).

19. On quantum, they relied on the case of Eston Mwirigi Ndege & another v Joseph Macharia Kawira [2019] KEHC 231 (KLR), where A Mabeya, set aside an award of Kshs. 650,000/= and substituted the same with Kshs. 500,000/= for a fracture of the right femur, right arm and right forearm and was admitted for 3 months.

20. The Appellant submitted that the Respondent sustained only a single fracture of the right femur and, as such, an award of Kshs. 350,000/=, subject to liability, would be adequate compensation. Reliance was placed on the case of Jitan Nagra v Abidnego Nyandusi Oigo [2018] KEHC 3078 (KLR), where Honourable Justice D.S. Majanja set aside an award of Kshs. 1,000,000/=, finding it inordinately high, and substituted it with an award of Kshs. 450,000/=. In that case, the respondent had sustained more severe injuries than those in the present matter, including two fractures and multiple soft tissue injuries —namely: a segmental distal fracture of the right femur, a compound fracture of the right tibia/fibula, lacerations to the occipital region, deep cut wounds on the back, right knee and lateral lane, bruises on the back extending to the right lumbar region, blunt chest trauma, and bruises on the left elbow.

21. Finally reliance was placed in the case of DKM v Mwangangi [2023] KEHC 18105 (KLR), the claimant sustained multiple injuries, including a fracture of the right femur, a fracture of the left femur, a medial fibula fracture, and a wound on the right lateral aspect of both legs. The trial court awarded Kshs. 500,000/= as general damages for the three fractures, which award was subsequently upheld by the Appellate Court.

22. The Appellant reminded the court that it should be noted that in assessing compensatory damages, the law aims to indemnify the victim for the loss they have suffered and is not meant to penalize the tortfeasor as held in the case of FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] KEHC 557 (KLR).

23. They also prayed for costs. It is noted that the Appellant did not address any aspect of the evidence of PW2 and PW3 and that is where his Achilles heel lies.

**Respondent's submissions**

24. The respondent filed submissions defending the judgment as reasonable. They stated that they opposed the appeal vide an affidavit dated 8.8.2024. The court shall ignore such an affidavit. An appeal is not an application to be responded to. It is a question of assessing the record in the court below.

25. They submitted that according to the police abstract and the investigation report, the Appellant's authorized driver failed to maintain a safe distance. This resulted in the same colliding with the Respondent's motorcycle registration number KMFK 067X from behind. He thus blamed the Appellant fully for the accident.

26. Reliance was placed on the case of Statpack Industries v James Mbithi Munyao [2005] eKLR, where the court, Alnashir Visram, as he then was, held that:

> Coming now to the more important issue of "causation",... the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same.

27. He also noted that in the case of John Kanyungu Njogu vs Daniel Kimani Maingi [2000] KECA 242 (KLR), the Court of Appeal stated as follows:

> That when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

28. It was his conclusion that from the proceedings before the trial court and the documents produced as exhibits by the Respondent, it is evident that the Respondent proved his case on a balance of probabilities. It is therefore reasonable and fair to conclude that, upon analysing the evidence, the scales of justice tilted in favour of the Respondent. On the other hand, the Appellant neither called any witnesses nor tendered any evidence in support of his case. They relied on the case of Kenya Bus Services Ltd v Dina Kawira Humphrey [2003] KECA 179 (KLR), where the court of appeal stated as follows:

> “Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”

29. They further submitted that their evidence, particularly on the issue of liability, was not controverted. It is trite law that “where evidence is adduced and not controverted, it stands the test.” In the present case, the Appellants did not call any witnesses or file any documents in support of their case. Reliance was placed on the case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 where Ali-Aroni J stated as follows:

> “In this matter, apart from filing its statement of defence the defendant did not adduces any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remains uncontroverted and the statement in the defence therefore remains mere allegations…”

30. On quantum, they submitted that the award was reasonable for the injuries suffered. They relied on the case of Reuben Mongare Keba v LPN [2016] eKLR, where the claimant therein sustained a fracture of the tibia-fibula of the right leg, dislocation of the right hip joint, bruises on the chin, fracture of the right femur, and a degloving injury of the right leg, for which he was awarded general damages of Kshs. 800,000/=. This appears to be more serious injuries but also relied on a very old decision.

31. They also relied on the case of EWO (Suing as the next friend of minor COW -VS- Chairman Board of Governors-Agoro Yombe Secondary School [2018] EKLR, where the court upheld an award of Kshs. 800,000/- where the Plaintiff had suffered femur fracture and fractures of tibia and fibula in 2018. It was their considered submissions that the court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that comparable injuries should attract comparable awards.

32. It was their submissions that the appeal on liability and quantum be dismissed 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 the 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 v Shah [1968] EA 93, the Court of Appeal held that an appellate court should not interfere with a trial court's finding unless it is shown that the court misdirected itself in some matter and as a result arrived at a wrong decision, or that it is manifestly wrong. The duty of the first appellate court was discussed by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, 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."

34. In the case of Peters v Sunday Post Limited [1958] EA 424, the court of appeal for the former Eastern Africa emphasized the restraint with which an appellate court should exercise its power to re-evaluate evidence and interfere with factual findings of the trial court. This principle underscores the deference owed to the trial court's advantage in observing the demeanour and credibility of witnesses.

35. However, it does not absolve the appellate court of its duty to independently evaluate the evidence where necessary, particularly where it is alleged that the trial court erred in law or fact. The court stated:

> " 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..."

36. The burden was on the Respondent to prove his case. This is on the basis of Sections 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya, which provides that:

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."

37. 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.”

38. The burden of proof is placed upon the accused and is to be discharged on a balance of probabilities as stated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR), where the Court of Appeal [J Karanja, G.G. Okwengu, CM Kariuki, JJA] stated as follows:

The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

> “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

39. It is not in dispute that the appellant did not testify hence did not rebut the respondent’s case. The Respondent was still bound to prove his 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:
>
> 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.

40. The duty to prove even in formal proof was stated by 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."

Can hearing, therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by the parties. 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."

41. Since the appellant failed to call evidence they had, then the court is bound to make adverse inference. The driver knew what happened on the scene of accident but could not testify, then the court must hold that had the driver's evidence been called, it could have supported the Respondent's case. In any case, the evidence on the happenings as given by PW1, PW2 and PW3 was clear that the motor cycle was hit from behind. This in itself is evidence of carelessness, recklessness and negligence of the Appellant. It was not rebutted. 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 vs. 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:
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> > '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.'
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> 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 –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

42. What then is the effect of failure by the appellant to tender evidence in rebuttal? In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR Justice 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 vs 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.

> 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."

43. The evidence reached a prima facie standard and is now uncontroverted. The Respondent tendered evidence on how the accident occurred. The police officer indicated what the police records contain. 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.

44. 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 appellant's pleadings that the accident was inevitable. The burden of proving this was on the defendant.

45. The Respondent proved liability for the accident. However, no contributory negligence was proved. The particulars of contributory negligence were not proved. They were pleaded but remained bare. The appellant had a duty to tender evidence to prove contributory negligence. Where the Respondent proved his case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view he 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".

46. In this case contributory negligence was raised as a defence. When such a defence is raised, it is only the defendant who can show a want of care on the part of the plaintiff for his own safety in contributing to his injury. Without such evidence the court cannot find a plaintiff who has tendered evidence liable. It is even surprising that there was no evidence of contributory negligence elicited in cross examination.

47. The Respondent was cross-examined on whether he held a valid insurance policy and other related matters. However, none of these questions addressed the core issues in dispute. Whether or not the Respondent had valid insurance falls within the province of the Director of Public Prosecutions under Article 157 of *the Constitution* and is not relevant to the determination of civil liability in this case.

48. While the question of whether the Respondent was an unlicensed or untrained driver could potentially bear on liability, this line of inquiry was not pursued. Moreover, the issue of expired insurance, although raised, has no probative value in the absence of any evidence linking it to the cause of the accident. 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:
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> > "......When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

49. In the circumstances, the appeal on liability lacks merit and is accordingly dismissed.

50. With regard to general damages, it is trite law that these are damages at large, and the court exercises its discretion to award a sum that reasonably reflects the nature, severity, and long-term impact of the injuries sustained. This principle guides the court to ensure that while each case turns on its own facts, awards must remain just, comparable, and proportionate to the injuries proved. This was succinctly stated in the case of Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others (2019) eKLR, where Justice D.S. Majanja aptly observed:

> " General damages are damages at large and the court does the best it can in assessing an award that reflects the nature and gravity of the injuries. The court must, however, be guided by previous decisions, the age of the authority, the nature of the injuries, and the inflationary trends to ensure consistency and fairness in the awards."

51. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court. In Simon Taveta v Mercy Mutitu Njeru [2014] KLR, the Court of Appealed VISRAM, KOOME, & OTIENO - ODEK, JJ.A. held as follows:

> In the instant case, the context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

52. 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 to ensure that the award is not too high or too low as to be an erroneous estimate of damages. In assessing damages, Court should

consider the general picture of all prevailing circumstances as held by the Court of Appeal in the case of case of Butter v Butter, CivilAppeal No. 43 of 1983 [1984] KLR as follows.

> In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts.

53. 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.

54. Law JA (as he was then) in Butt versus Khan [1982-88] 1KAR, 1, posited as follows in regard to an appellate court. The court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. The said law Lord posited as follows:

> " An appellate court will not disturb an award of damages unless it is so in ordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles; or that he must have apprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

55. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. To ascertain whether the award is simply not justified from evidence.

56. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. In the case of Prima Management Ltd v Wilson Suba Kindaranga (2017) eKLR the plaintiff suffered a fracture of the left femur with 12% permanent disability and the trial court's award of Kshs. 900,000/= was upheld. In Jackson Mbaluka Mwangangi v Onesmus Nzioka & another [2021] eKLR the Appellant sustained blunt injury to the right shoulder and fracture of the femur. The court on appeal increased the award of damages from Kshs. 350,000/= to Kshs. 600,000/=.

57. In the case of Mutuku v Mwangi & 2 others (Civil Appeal 100 of 2022) [2023] KEHC 24468 (KLR) (25 October 2023) (Judgment), the court awarded a sum of Ksh 600,000/= for comminuted subtrochanteric fracture of the left femur, soft tissue injuries of the chest and soft tissue injuries of the right wrist. In the case of Pestony Limited & another v Samuel Itonye Kagoko [2022] eKLR, the court, C.Meoli, awarded a sum of Ksh 800,000/= where the Respondent suffered inter alia, fracture of the left femur mid-shaft and swollen left tender thigh.

58. The court awarded Ksh. 800,000/=. This was upon making reliance on the two medical reports, which were produced without calling the makers. This then brings to the fore the role of experts in circumstances as this. 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 vs. 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."

59. Further, the Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. 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."

60. 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 vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, that:

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

61. The Appellant in the lower court submitted for an award of Ksh 800,000/=. They relied on the cases of Godfrey Mugnicholas Mwiti Mwirebua V Marcella Mpaka Kiambi [2022] eKLR where the High Court upheld an award of Kshs. 900,000/- as general damages, Pestony Limited & another v Samuel Itonye Kagoko [supra] and FM (Minor suing through Mother and Next Friend MWM) V JNM & Another [2020] eKLR. They concluded that 'in light of the foregoing, an award of Kshs. 800,000/= would be befitting given the nature of injuries sustained by the Plaintiff with inflation factored in.'

62. The court below agreed with the said submissions. I equally agree. This is informed by the fact that the reports agreed that the respondent suffered a comminuted fracture of the right femur. Dr. Okere estimated permanent disability at 30%. Dr. Waithaka Mwaura was inconclusive. ipso facto, the finding of 30% was not controverted. The report by Dr. Okere was the first in time. However, Dr. Mwaura did not bother, to given any reason or methodological differences that gave rise to the inconclusiveness of permanent disability. I find and hold that the report by Dr. Okere was the more believable one.

63. Given the foregoing authorities, an award of Ksh. 800,000/= was proper. I find no merit in the appeal on quantum. There is no dispute on special damages. In any case the same were pleaded and proved. Given the circumstances, the appeal on quantum lacks merit and is accordingly dismissed.

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

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

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

65. 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.

66. 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.

67. In the circumstances, the appeal is dismissed in limine with costs of Ksh. 85,000/=

**Determination**

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

a. The appeal is dismissed in limine.

b. The Respondent shall have costs of the appeal of Ksh. 85,000/=.

c. 30 days stay of execution.

d. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF JULY, 2025**.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Waithiegeni for the Appellant

Mr. Odhiambo for the Respondent

Court Assistant – Michael