Ngure v Murage (Civil Appeal E350 of 2024)
[2025] KEHC 10997 (KLR) (Civ) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10997 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E350 OF 2024

DKN MAGARE, J

JULY 23, 2025

BETWEEN

GEORGE KINUTHIA NGURE ..... APPELLANT

AND

JOSEPH MWANGI MURAGE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the Chief Magistrates Court at Milimani, Before Honourable R.L. Musiega (SRM) Delivered on 17.11.2023 in CMCC No. E5992 of 2022. The Appellant was the defendant in the lower court.
2. Upon hearing the parties, the court delivered its judgment as follows:
    a. The Appellant was held 100% liable
    b. General damages of Kshs. 150,000/=
    c. Special damages of Kshs. 9,554/=
    d. Plus, costs and interests of the suit
3. The Appellant filed this appeal vide a Memorandum of Appeal dated 02.02.2023 and set forth the following humongous grounds:
    1. 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.
    2. That the learned magistrate erred in law and fact in failing to ascertain who the injured parties were in the purported subject accident.

3. That the learned magistrate erred in law and fact by failing to note that the purported Plaintiff was not involved or injured in the purported subject accident.

4. 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 the circumstances surrounding the purported subject accident.

5. 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.

6. 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.

7. 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 at the time the alleged accident occurred neither did he witness the occurrence of the alleged accident which goes against the evidentiary rules of direct evidence thereby rendering his testimony as hearsay.

4. The main case is that the appellant faulted the magistrate for failing to find a *prima facie* case, misidentifying the injured party, relying on insufficient and hearsay evidence, and treating the police abstract as proof of liability, despite its limited evidentiary value and the officer not witnessing the alleged accident. This is rather convoluted since the Respondent was a pillion passenger.

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. Ground one is bogus and is accordingly dismissed. A memorandum of appeal is not supposed to be a thesis. 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:

> " "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 is only one issue disclosed in the appeal, that is, liability. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. I dismiss the submissions on quantum as they are not anchored on the memorandum of appeal pursuant to Order 42 rule 4, which provides as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
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> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

10. This is the very reason the court will not address the question whether the appeal was filed within time. It is in the same vein that parties should always file the order granting leave in the court file.

Evidence

11. Proceedings were taken in E5990 of 2022. The court will thus recap the same proceedings herein except as it relates to injuries. 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.

12. 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 rider and the Respondent getting injured. He was cross examined on the insurance of the motor cycle and not on the occurrence of the accident.

13. PW2 was the rider of motorcycle registration number KMFK 067X 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 motorcycle registration number KMFK 067X from behind. He testified that the Appellant was to blame for the accident by failing to keep distance.

14. PW3 was the Respondent who adopted his statement saying he was a pillion passenger. The accident occurred when 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.

15. 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

16. 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.

17. 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 v 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."

18. He stated that 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), where 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.

19. 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.

20. 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.

21. 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).

22. He relied on the the Court of Appeal decision in *Eastern Produce (K) Ltd v Christopher Atiado Osiro* [2006] eKLR, where the court stated as follows;

> " The onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant(s).

23. The appellant stated that the court in the foregoing case cited the famous decision of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal stated as follows:

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

24. He also relied on the case of *John Simon Ashers & another v Nelson Okello Onjao* [2020] KEHC 3056 (KLR), where TW Cherere held as follows:

> 14. In *Hussein Omar Farah v Lento Agencies* [2006] eKLR, the Court of Appeal faced with a similar situation as the one subsisting in this case held as follows:
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> > " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."
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> 15. Applying the same principle case to this case, I have come to the conclusion that the learned trial magistrate fell into error when he whole relied on the entries on the police abstract, without corroborating evidence, to find that the Appellant's were wholly liable for the accident. Accordingly, I apportion liability at 50:50 % as between the Appellants jointly and severally on one hand and Respondent on the other hand.

25. He urged the court to set aside the lower court's decision to apportion 100% liability on the part of the Appellant and apportion the same at of 50:50% between the Appellant and Respondent.

26. They also have lengthy submissions on quantum which are of no relevance to the case.

Respondent's Submissions

27. The respondent filed submissions defending the judgment as reasonable. They stated that they opposed the appeal vide an affidavit dated 2.12.2024. 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.

28. They did not address liability, which was the only question in the memorandum of appeal.

Analysis

29. 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.

30. 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 v Associated Motor Board Company and Others* [1968] EA 123, where the Judges in their usual gusto, held 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."

31. 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. 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..."

32. 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.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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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."

33. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v 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."

34. 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 v Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
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> > " "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."

35. It is not in dispute that the appellant did not testify hence did not rebut the respondent's case. More fundamentally, the appellant was a pillion passenger. There is no claim against him. The court cannot hold a nonparty liable for an accident. Though the two cases proceeded together, the driver was not a party in this matter. In *Badar Hardware Limited & another v Waweru & 3 others* (Civil Suit 23 of 2022) [2023] KEHC 27227 (KLR) (20 December 2023) (Judgment), this court posited as follows:

> In *Mbiti v Maingi & another* (Civil Appeal E77 of 2022) [2023] KEHC 20833 (KLR) (10 July 2023) (Judgment), I stated as doth:"The attribution of negligence to a non party, like the rider was completely unhelpful in the case *EN v Hussein Dairy Limited & 3 others* [2020] eKLR, the Court stated as doth:"I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of *Pauline Wangare Mburu v Benedict Raymond Kutondo* NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows. The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 v to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."
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> 31. The above remains good law. Finally, a party who was a proper party against whom there was interlocutory judgment, is not a party in this appeal. The Appeal falls on the same trap. In respect of the 3rd respondent, he was the father of the deceased. There is nothing special attributable to him.

36. In the case of *Muhoro v Stanley & another* (Civil Appeal E031 of 2021) [2024] KEHC 9788 (KLR) (24 July 2024) (Judgment), the court addressed the question of liability against a non-party. The court stated as doth:

> That attribution of negligence to a non-party, the deceased rider was not helpful. A person cannot be condemned unheard. In *EN v Hussein Dairy Limited & 3 others* [2020] eKLR, the Court posited as hereunder:
>
> > " I agree with the Appellant's submissions that this point was moot and given that in the absence of the third party, the trial magistrate could not apportion liability in the manner he did. This position was similarly adopted in the case of *Pauline Wangare Mburu v Benedict Raymond Kutondo* NKU HCCC No. 210 of 2003 [2005] eKLR where the court observed as follows,The defendant did not deem it necessary to issue a third party notice to enjoin the owner of motor vehicle registration number KAH 129 v to this suit. In the circumstances therefore, it would be moot for this court to apportion liability to a person who is not a party to this suit. The defendants shall therefore bear 100% liability."

37. 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.

38. 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."

39. 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 couldn't testify, then the court must hold that had the driver's evidence been called, it could have supported the Appellant's case. In any case, the evidence on the happenings 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 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:
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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 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."

40. 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 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."

41. 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.

42. 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.

43. The Respondent proved liability for the accident. However, no contributory negligence was pleaded and proved against him. Pleadings that the rider was to blame are of no use in absence of the rider as a party. The particulars of contributory negligence were not proved. They were pleaded but remained bare. The appellant had a duty to render 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".

44. In this case contributory negligence was raised as a defence. When such a defence is raised, it is only a 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.

45. 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.

46. There is no appeal on quantum. They cannot be based only on submissions. They must first be raised in the memorandum of appeal before the same is proved. It cannot be based just on submissions. Mwera J, posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that

should be given the closest scrutiny in order to firmly establish a claim. In the case of *Nancy Wambui Gatheru v Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 it was stated that:

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

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

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

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

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

49. Given the circumstances, there is no valid appeal on quantum. The same lacks merit and is accordingly dismissed. 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.

50. 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.

51. 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.

52. In the circumstances, the appeal is dismissed in limine with costs of Ksh. 65,000/=

Determination

53. 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. 65,000/=.

    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