**Naked Wilderness Africa Limited & another v Nkukuu (Civil Appeal E251 of 2023) [2025] KEHC 10714 (KLR) (Civ) (22 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10714 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL E251 OF 2023**

**DKN MAGARE, J**

**JULY 22, 2025**

**BETWEEN**

**NAKED WILDERNESS AFRICA LIMITED ..... 1ST APPELLANT**

**NORMAN MULINGE KALEI ..... 2ND APPELLANT**

**AND**

**SAMMY LEMAYIAN NKUKUU ..... RESPONDENT**

## JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. E.M. Kagoni [PM] delivered on 06.09.2023 in Nairobi CMCC No. E3486 of 2020. The Appellant were the defendants in the lower court.

4. After hearing the parties, the court entered judgment as follows:

   a. Liability 100%

   b. General damages Ksh. 450,000/=

      Special damages Ksh. 3,550/=

      Total Ksh.453,550/=

   c. Costs and interest

2. The Appellants were aggrieved and filed this appeal vide a Memorandum of Appeal dated 11.10.2023. It is unnecessary to set out the grounds of appeal as they are repetitive.

**Pleadings**

3. The respondent filed suit in which he pleaded that the 1st Appellant was the registered owner while the 2nd appellant was the driver of motor vehicle registration number KBR 335S. The respondent was the rider of motor cycle registration number KMET 248F. It was pleaded that an accident did occur on 29.02.2020, involving the motor cycle and the motor vehicle, and the Respondent was injured as a result.

4. The respondent pleaded the following injuries:

    a. Deep cut wound on the left knee

    b. Fracture of the left patella

5. Special damages pleaded were as follows:

    a. Search Ksh. 550/=

    b. Medical report Ksh. 3,000/=

    Total Ksh. 3,550/=

6. The Appellants filed defence dated 21.09.2020 where they blamed the respondent for not being in adequate control of the motor cycle. Issues were joined vide a reply to defence dated 07.10.2020.

**Submissions**

7. The Appellant filed submissions dated 29.02.2024, where they submitted that there can be no liability without fault. Reliance was placed on the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal stated that:

> " 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."

8. It was their submissions that the respondent had a duty to prove elements of negligence as set out in the case of Stephen Kanjabi Wariari v Dennis Mutwiri Muriuki & another [2022] KEHC 2664 [KLR]. They stated, that the respondent had told the court that he had a right of way and did not owe other users a duty of care. This is said to find favour in the case of Monda v Suji & another [Suing as the Legal Representatives of the Estate of Mathew Okello Ombonya Deceased] [2023] KEHC 2778 [KLR], where RE Aburili, posited as follows:

> " 34. In Masembe v Sugar Corporation and another [2002] 2 EA 434, it was held that: "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object."
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> 35. Further, in the case of Mary Njeri Murigi v Peter Macharia & another [2016] eKLR, this court expressed itself thus;"A person who is driving a vehicle is

under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof."

9. This was also buttressed in the case of Kennedy Muteti Musyoka v Abedinego Mbole [2021] KEHC 1751 [KLR], where G v Odunga J, as he then was, posited as follows:

> " Taken holistically, I find that it is clear that there was an accident on the said day in which the Appellant was injured. In Zarina Akbarali Shariff and Another v Noshir Pirosesha Sethna and Others [1963] EA 239, it was held that:
>
> "A driver on the main road...is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his prima facie right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have certiorated him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road."

10. They continued that the respondent breached the duty of care by knocking the appellant's motor vehicle. They questioned why the respondents relied on a police abstract instead of cogent evidence. This was due to the failure to call the investigating officer. To them, the appellants' evidence remains unchallenged on the occurrence of the accident. They posited that the vehicle was hit on the left rear side. Reliance was placed on the case of Mutahi Kiranga v Margaret Wangari Waweru & another [2018] KEHC 4018 [KLR], where the court held as follows:

> Had he rushed to the police station that night and made that report, it could have been believable. His conduct after the accident compounds his guilt. As the driver he must have known he had done something wrong. Hence I find no evidence that the deceased contributed in any way to the accident.

11. They posited that the court should find the respondent liable or at least 50:50. Reliance was placed in the case of Hussein Omar Farah v Lento Agencies [2006] KECA 388 [KLR], where the Court of Appeal stated as follows:

> " 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. In the case of Barclay – Steward Limited & Another vWaiyaki[1982-88] 1 KAR 1118, this Court said:-
>
> "The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."
>
> The Court said further:-
>
> "The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."

In Baker v Market Harborough Industrial Co-operative Society Ltd[1953] 1 WLR 1472 at 1476, Denning L.J. [as he then was] observed inter alia as follows:-

"Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them..... "

See also Welch v Standard Bank Ltd[1970] EA 115 at 117 and Simon v Carlo[1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame....."

12. There were no submissions on either proof of the case or quantum. This was deemed to have been abandoned.

13. The Respondent filed submissions dated 18.03.2024, which they wrongly attributed to the Appellant. Unfortunately they were led down the garden path and parked there. On the first issue they submitted that the award of Ksh. 453,550/= is premised on the loss suffered by the respondent. They stated that the evidence was to the effect that the Appellants did something wrong. Reliance was placed on the case of [2019] eKLR where Mary Kasango J held as follows:

" The court of appeal in the case Mbuthia Macharia v Annah Mutua & Another [2017] eKLR discussed the burden of proof and stated thus:

[16] The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant."

14. In that connection, they submitted that they were able to convince the court that the appellants were liable. Thy stated that thy relied on the evidence provided and at no point were their pleadings struck out. They stated that a sum of Ksh 450,000/= awarded was proper. Reliance was placed on the case of Bildad Onditi & Another v Belinda Atieno Onyuka [2013] KEHC 4943 [KLR]. It is a dated case and it is not necessary to set out the injuries in that case. It is also irrelevant to the appeal.

15. They also relied on the case of Pauline Gesare Onami v Samuel Changamure & another [2017] eKLR. In this case, the claimant suffered fracture of the right tibia and fibula bone, fracture of left tibia and fibula bone, laceration on the neck area, blunt trauma to the chest and deep cut wound on both legs mid shaft. Further reliance was placed on the cases of Agroline Hauliers Limited & another v Michael Abongo Kisemba [2015] KEHC 5014 [KLR] and Julia Mucece v Rehan Trading Company Limited, Peter Mwamba Murira & Laurence Maingi [2018] KEHC 3673 [KLR]

Evidence

16. PC George Oduor testified that the motor cycle was pushed on the left side. The witness was questioned on the driving licence. The plaintiff testified as PW2 and adopted his statement. He blamed the motor vehicle for the accident. He stated he was riding the motor cycle, along Kenyatta Street and on reaching the Muindi Mbingu street junction, the appellant rammed onto him. He was taken to hospital and suffered the pleaded injuries. On cross examination he stated that he was attached to GSU. He was robbed by members of the public at the scene and personal effects taken. The said motor vehicle was joining Kenyatta Street but did not stop, hence the collision. He hit the vehicle on the left side.

17. DW1 testified that he was driving from the direction of the Stanley Hotel. On reaching the junction at Muindi Mbingu he stopped to give way, and turned into Muindi Mbingu street, and felt an impact on the left side. It was found that the vehicle was hit at the left rear. He blamed the Respondent.

18. On cross examination he stated that he was from the Stanley and joining Muindi Mbingu. He was required to give way when joining the highway.

**Analysis**

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

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

20. The duty of the first appellate Court was settled long ago 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 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."

21. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd v Kenya Grange vehicle Industries Ltd [2017] eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

22. It is a strong thing for an appellate court to differ from the findings on a question of fact, of the magistrate who had the advantage of seeing and hearing the witnesses. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

23. The burden was on the Respondent to prove his case. On this subject, Section 107-109 of the *Evidence Act*, Cap 80 Laws of Kenya 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.
>
> 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."

24. 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."

25. This was further enunciated in the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 [KLR], where the Court of Appeal [J Karanja, 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."

26. The memorandum of appeal raised prolixious 9-paragraph argumentative grounds that are unseemly and do not please the eye. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth:

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    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."

27. The Court of Appeal had this to say in regard to rule 86 [now rule 88] of the court of appeal rules [which is pari materia with Order 42 Rule 1] in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. [See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR] and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "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..."

28. The court abhors repetitiveness of grounds of appeal which tends 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."

29. The grounds raise only three issues, that is, evidence and quantum. There is no appeal on liability. Ground 1, 2 and 9 are on evidence. Ground 3 is superfluous and not stand alone hence dismissed in limine. Grounds 4, 5, 6, 7, 8 are on quantum.

30. Though the appeal is largely on quantum, the Appellant abandoned the same in their submissions. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited v Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

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

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

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

32. The appellant did not raise any question on how the quantum is excessive as to amount to an erroneous estimate of damages. The court rightly took into consideration the case of Agroline Hauliers Limited & another v Michael Abongo Kisemba [2015] KEHC 5014 [KLR] which is in all fours with this matter. Therefore, had quantum not been abandoned, then I will still have dismissed the appeal on the same as unmerited. For avoidance of doubt the appeal on quantum is dismissed.

33. The Appellant addressed the court exclusively on liability. I do not see any ground on liability. The grounds on proof of the case are so general they cannot be said to be on liability. Indeed, the Appellant does not attribute liability to any ground. The jurisdiction of the court is circumscribed and this court cannot by craft take up jurisdiction it does not have or eschew jurisdiction it has. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission [Applicant], Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the

legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

34. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. Order 42 rule 4 gives powers to this court in an appeal of this nature 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:

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.

35. The question of liability was not raised in the appeal and ought to be dismissed. Even if the court was to strain the king's language to include proof to mean liability, the evidence against the appellant was overwhelming. It does not matter that the left side rear was hit. The evidence reached a prima facie standard and is now uncontroverted. The Respondent tendered evidence on how the accident occurred. The Appellant's evidence corroborated the respondent's evidence that the appellant was to give way and did not give way.

36. The evidence that they gave was unbelievable since, he could have seen the motor cycle which was already on the main road. The police officer indicated what the police records indicate. There is no other explanation for the accident other than negligence of the 2nd Appellant. The driver joined the main high way without regard to other road users and The Highway Code.

37. In this case, I do not find any evidence of contributory negligence on part of the Respondent. In the case of Keith Mukolwe Keya v Fredrick O. Were [2020] KEHC 5564 [KLR], J. NJAGI J held as follows:

> "6. A person driving a motor vehicle on the road is under a duty of care to other road users. In the case of Teresia Sebastian Massawe [suing as the legal Administratix of the estate of the late Silvia Sebastian Massawe v Solidarity Islamic [Kenya Office] & Another [2018] eKLR, Nyakundi J. cited the English case of M. Jones v Livior Quarries Ltd [1992] 2QB 608 where Lord Denning had the following to say on what constitutes contributory negligence:-
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> "A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man or woman he or she might be hurt himself or herself and in his or her reckoning he or she must take into account the possibility of others being careless."

38. The question of the investigating officer not testifying is irrelevant as in this case the facts are fairly clear. The Appellant's vehicle was joining a highway from a feeder road and hit a motor cycle on the roads. The appellant admitted as such in evidence that he was under duty to give way.

39. 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".

40. 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."

41. In the circumstances, the appeal on liability lacks merit. It is accordingly dismissed.

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

> [1] Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> [2] The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

43. 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.

44. 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."

45. The appellant has lost the appeal. The respondent is entitled to costs, since costs follow the event.

**Determination**

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

    a. The appeal is dismissed with costs of Ksh. 75,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

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

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Kwamboka for the Appellant

Ms. Mwenja for Mr. Wanjohi for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**