Dul Dul Holdings Ltd & another v Mwita (Suing as the legal representative of the Estate of Elizabeth Nyaboke Nyamohanga) (Civil Appeal E117 of 2020) [2024] KEHC 9150 (KLR) (21 May 2024) (Judgment)

Neutral citation: [2024] KEHC 9150 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E117 OF 2020

SM MOHOCHI, J

MAY 21, 2024

BETWEEN

DUL DUL HOLDINGS LTD ..... 1ST APPELLANT

RAPHAEL MUTHAURA KAHURA ..... 2ND APPELLANT

AND

SIRARE MARWA MWITA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH NYABOKE NYAMOHANGA) ..... RESPONDENT

(Being an appeal arising out of the judgment and decree of Hon. E. Usui Chief Magistrate in Nakuru Chief Magistrate's Court Civil Case No. 1258 of 2014 delivered on 28/05/2020)

JUDGMENT

1. The Appellant was the Defendant in Nakuru Chief Magistrate's Court Civil Case No. 1258 of 2014 Sirare Marwa Mwita (Suing as the Legal representative of the estate of Elizabeth Nyaboke Nyamohanga) Vs Dul Dul Holdings Ltd & Another. The Respondent brought the initial suit, Nakuru CMCC No. 1258 of 2014, as the legal Representative of the late Elizabeth Nyaboke Nyamohanga claiming compensation from the Defendant/Appellants as a result of her death, from a road traffic accident that occurred on the 22nd January 2013.

2. By judgment of the trial court dated 28th May, 2020, the Respondent was awarded damages in the sum of Kshs. 1, 793, 864/= plus costs and interest as a result of an accident.

The Appeal

3. The Appellant being aggrieved by the findings of the trial court filed this Appeal vide his memorandum of appeal dated and filed on 19th June, 2020, the Appellant impugned the trial court's decision on the following Ten (10) grounds:

    i. That, the Learned Trial Magistrate erred in law and in fact in failing to address all the issues for determination.

    ii. That, the Learned Trial Magistrate erred in law and in fact in holding that the respondent had proved that the deceased's death was consequent to the injuries sustained.

    iii. That, the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the death certificate only referred to "sudden death" as the cause of death and thus no link between the injuries sustained and the death was thus established.

    iv. That, the Learned Trial Magistrate erred in law and in fact in holding that in the absence of any other explanation on the cause of death, then it could only be linked to the injuries yet there was no documentary or medical oral evidence to link the death to the injuries.

    v. That, the Learned Trial Magistrate erred in law and in fact in venturing into the arena of litigants and trying to explain her findings which were not supported by evidence.

    vi. That the Learned Trial Magistrate erred in law and in fact in failing to critically analyze the evidence on record, the submissions made on behalf of the appellant's and thus arriving at the erroneous findings.

    vii. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that there was no evidence placed before her to prove that the alleged issues/dependants were indeed dependants of the deceased.

    viii. That, the Learned Trial Magistrate erred in law and in fact in making the award under the Fatal Accident Act whereas there was no proof of the alleged dependants by either a Chief's letter or birth certificate and more so considering that the plaintiff was allegedly a brother-in-Law to the deceased.

    ix. That, the learned trial magistrate erred in law and in fact, in awarding unreasonably excessive awards under the *Law Reform Act*.

    x. That, the learned Trial Magistrate erred in law and in fact in failing to consider and apply the principles regarding burden of proof being place on a person who alleges and the required standard of proof and thus arrived at the erroneous and unjustifiable judgment.

4. In light of the foregoing, the Appellant prayed that the Appeal be allowed by setting aside the judgment of the trial court with a substituted order that judgment be entered in his favor against the Respondent. He also prayed for costs of the appeal.

Hearing of Appeal

5. The appeal was disposed of by way of written submissions. The Appellant's submissions dated and filed on 19th June, 2023 lay a background abridgment of the facts at trial to argue that, based on the evidence adduced before the trial court, the only inescapable conclusion that ought to have been arrived at was a finding that the Respondent did not prove his case on a balance of probability and that no causal-link between the death and the accident was established.

6. Based on the foregoing, the Appellant submitted that, it is incumbent upon this Court to re-evaluate the evidence or lack of it and analyze the material presented to determine whether the death of the deceased was a result of the accident. Causation and blameworthiness are two important elements that need to be considered in apportionment or liability. The Respondent must have proven a causal nexus between the Appellant's negligence and alleged death/ loss. The Court's attention was drawn to the case of *Statpack Industries vs. James Mbithi Munyao Civil Appeal Case No 152 of 2003*. Justice Alnashir Visram, (as he then was) stated:

> " Coming now to the more important issue of causation, It is trite law that 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"

7. That, the Respondent was under obligation to prove the link between that accident and the allegations of negligence made by him at paragraph 4 of the Amended Plaint. It is important to note that the subject accident occurred on 22nd January 2013 where the Deceased was a passenger aboard the Defendant's vehicle. The Deceased sustained soft tissue injuries on the head and fractures of tibia and fibula.

8. That, during the hearing, the Respondent testified that the Deceased was admitted to PGH on 22nd January 2013 and was discharged two days later, on 23rd January 2013. A discharge summary, at Page 11 of the Record of Appeal, was produced as PEX 2 which clearly showed that the Deceased was stable at the time of discharge. For avoidance of doubt, the Appellant replicated the relevant content of the discharge summary as hereunder;

> " History, Physical Examination and treatment while in the ward:
>
> Patient was involved in RTA on 22/1/13 in the evening. Patient sustained cut wound to the frontal side of the head and was unable to move the left lower limb. There was no history of LOC (Loss of Consciousness) or convulsions neither vomiting. Reports little bleeding and chest pains.
>
> Condition of the patient on discharge: stable patient, painful limb, immobilized
>
> Discharge instruction/Remarks:
>
> Discharge through GOPC (General Out-Patient Clinic); Application of POP; Follow up in Comprehensive care clinic"

9. That the above replication taken directly out of the discharge summary clearly indicates that, the patient was stable on discharge and her painful left leg which sustained fractures was immobilized in a plaster (POP). Her entire history shows no convulsions, vomiting or loss consciousness which are

usually the symptoms of a serious head injury/ concussion. That the deceased was healthy and in good condition when she was discharged.

10. That, however, in total disregard of this data, the Trial Magistrate at Page 3 of the judgment states that, the Deceased was in a very poor condition, no evidence whatsoever backed-up these statements that she made. Further, no evidence whatsoever was produced before the court to link the accidentand the death, which events are over a month apart. The Trial Magistrate clearly went ahead to link a death to fractures of the tibia and fibula. The death certificate reads otherwise. The cause of death therein is stated as "sudden death"

11. That, the standard of proof is quite clear in civil cases and Section 107 of the *Evidence Act* Cap 80 Laws of Kenya is clear on this point: -

> "(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."

12. That, the Respondent, upon cross-examination, confirmed that he cannot read the discharge summary and could not remember when the Deceased was admitted. He further confirmed that he is the one who applied for the death certificate and he gave the cause of death as "sudden death *

13. That, whilst the Discharge Summary indicates the Deceased was in stable condition, the Respondent stated that, she was very sick and as such he decided to take her closer to home.

14. That, the Respondent would want us to believe that, a patient in stable condition and her fracture immobilized in plaster was very sick. The doctor in the discharge summary reports otherwise. Funny enough, the Respondent has gone ahead to state that despite the patient purportedly being very sick, he opted to discharge her from hospital and take her close to home. The Trial Magistrate was in agreement with this line of thinking and hence the judgment.

15. Reference is made to the case of Stapley v Gypsum Mines Ltd (2) [1953| AC 663 at p 681, Lord Reid had the following to say, which has been quoted with approval by the Court of Appeal in Michael Hubert Kloss & Another v David Seroney & 5 Others [2009] eKLR

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. 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."

16. That, from the evidence on record and as confirmed by the hospital records and the Police Officer's testimony, the Deceased sustained a fractured leg and soft tissue injury on the head and foot. The Respondent has failed to entirely discharge the burden of proof in linking the death to the accident and we submit that the matter be dismissed. As was held in the above case, in addition to cogent evidence, common sense must prevail. Common sense would suggest that an adult human being cannot just die as a result of a fractured leg.

17. That, it is a fact that a fracture of the tibia and fibula takes 2-6months to heal completely. Over a month after the accident, it would mean that the fracture would have fairly healed and the Deceased would have at least minimal use of the leg. There ls no way death occurs from a fracture of the leg. Upon

discharge the doctor indicated that there were no signs of a head injury (no convulsions. no loss of consciousness, no vomiting) and very little bleeding from the accident.

18. That, it is trite law that the burden of proof of any fact or allegation is always on the plaintiff. The Respondent has not shown a causal link between the accident and the death. If at all the Appellants were negligent and hence caused the accident, they would have been liable for the injuries. The Respondent pleaded for damages for a fatal claim which have no connection with the Appellant.

19. That, the Defendants' purported negligence and the death of the deceased are not linked to warrant the claim for quantum of damages as no evidence has been proffered by the Respondent to prove. Reference is made to the case of Lilian Wanjiku Wanjohi -vs- Tornado Carriers Ltd (2016) eKLR where Justice J. Mulwa on dismissing an appeal for lack of evidence and causal link between the accident and the respondent's negligence held that:

> " It was Incumbent upon the appellant to link the death of the deceased to the respondent's negligence. The appellant has to prove the claim on a balance of probability whether or not the respondents tendered enough evidence or not."

20. That, the Trial Magistrate misapprehended the evidence in some material respect and so arrived at a wrong determination. The Trial Magistrate further erred in law and in fact by venturing into the arena of litigants and trying to explain her findings which were not supported by evidence. No postmortem was done and the death certificate did not in any way establish a causal link. Whether evidence is Controverted or not, the evidence must bring out the fault and negligence of a defendant, and a court should not take its truthfulness without interrogation for the reason only that, it is uncontroverted. A plaintiff must prove his case on a balance of probability whether the evidence is unchallenged or not. This were the sentiments of the court in Kenya Power & Lighting Company Limited... Vs... Nathan Karanja Gachoka & another [2016] eKLR.

21. That, the court in the above case of Lilian Wanjiku Wanjohi v Tornado Carriers Ltd [2016] eKLR held that; as to the causation of the death of the deceased, it was incumbent upon the plaintiff to adduce factual evidence to prove that the death was caused by negligence of defendant. It was the duty of the plaintiff to discharge his burden by tendering sufficient evidence not withstanding that the Defendants failed to testify. An injury per se is not sufficient to hold someone liable for the same. There can also be no liability without fault against the defendant and the Respondent has failed to adduce evidence which, on a balance of probability, a connection between the two must be drawn. In Muthuku -vs- Kenya Cargo Services Ltd (1991) KLR the court observed that:

> " In my view it was for the appellant to prove upon a balance of probability one of the forms negligence as was alleged in the plaint. Our law has not yet reached the state of liability without fault. The appellant failed to prove any sort of negligence against the appellants and in respectful view his claim was rightly dismissed"

22. That, the Appellants pleaded res ipsa loquitor in paragraph 9 of their Amended Defence. This principle of res ipsa loquitor is now abundantly clear and much has been written about it in eminent literary works as well as judicial decisions. But, as was written in Winfield & Jolowicz on Tort 17th Edition-

> " This has traditionally been described by the phrase res ipsa loquitur - the thing speaks for itself. .... Its nature was admirably put by Morris L. J. when he said that it:
>
> 'Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying:

> 'I submit that the facts and circumstances which I have proved, establish a prima facie case of negligence against the defendant...: There are certain happenings that do not normally occur in absence of negligence and upon proof of these a court will probably hold that there is a case to answer."
>
> The learned author further wrote:
>
> "The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant."

23. That, in applying this test, is there reasonable evidence of negligence which suggest that the accident was in any way the cause of the death of the Deceased? That It is evident for everyone to see that the accident had nothing to do with the death. That the evidence before this court speaks for itself. The Deceased sustained a fractured leg and soft tissue injuries to the head and foot. She was admitted and discharged after two days in tip-top shape, stable and the injured left leg immobilized in a plaster. All throughout while in admission, she was well, had no signs of a head injury. She was awake, no loss of consciousness neither did she ever convulse. Unfortunately, over a month later, it is reported that she died, cause of death being Sudden Death. It is untenable for an adult human being to die from a fractured leg which has been tended to by a medical professional.

24. That, the issue of causation has not been proved on a balance of probability which is always the burden of the Plaintiff as was stated by Musinga J in Amalgamated Saw Mills Limited Vs. Stephen Muturi Nguru HCA 75/2005:

> " Revisiting the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must proof a casual 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 as a result of Someone's negligence. An injury per se is not sufficient to hold someone liable."

25. Further reference is made to the case of Gideon K. Kemobi Vs. Nyayo Tea Zone Development Corporation (2015) eKLR the court dismissed the case for failure on the apart of the Plaintiff to proof the case on a balance of probability: in addition, in the case of MMbua Charles Mwalimu vs. Coast Broadway Company Limited (2012) eKLR the court dismissed the Plaintiffs case for failure to demonstrate any evidence in support of the allegations of particulars of negligence as pleaded in the plaint.

26. That, Liability in this case is accident/fractures sustained down to proving causation and devoid of the link between the accident and the death, then it follows that the claim must be dismissed in its entirety. Therefore, submits that the Respondent failed in proving this cardinal element of causation without which the tort of negligence cannot be implied and thus the Trial Magistrate erred in her determination on liability.

27. The Appellant further submitted extensively on determination of general damages and costs without explicitly faulting the same of being excessive under the circumstances.

28. All in all, the Appellant urges the court to find in favor of his appeal, set aside the judgment and dismiss the claim.

29. The Respondent opposed the Appeal in its written submissions dated 2nd December, 2023 filed on 4th December, 2023. The Respondent submitted on ground 1, 2, 3, 4, 5, & 6 jointly contending that:

a. The question would be what is the difference between a matter of fact and a matter of law? Matters of fact focus on the actual events of a case that may be examined by the court. They are issues that are material to the outcome of the case and require an interpretation of conflicting views of the factual circumstances surrounding the case. Matters of law concern the legal rules and principles applicable.

b. It is an established principle of law that an appellate court will be slow to disturb the Learned Trial Magistrate's findings on facts unless it is found that the trial court proceeded on wrong principles of law taking into consideration factors that ought not have been considered or omitted to consider factors it ought to have considered.

c. In the instance, the Appellants at the trial failed to rebut the prima facie case a case which had been properly established since the Respondent had established a causal link between the accident and the deceased's injuries and further establish that the medical treatment the deceased received was inconsistent with the accident. The Honorable Learned magistrate observed that the Respondents established this as elaborated in Page 7l-72 of the Record of Appeal where she states that:

> " A Certificate of death dated 14.6.2014 indicates that the deceased died on 26.2.20l3. A discharge summary from PGH Nakuru indicates that the deceased was admitted in the hospital on 22. 1. 13 same date of the accident. She was diagnosed with fracture of tibia fibula of soft tissue injury of the head and foot. She was discharged on 25.1. 2013.In the discharge summary it was noted that the deceased had sustained a cut wound to the front side of the head and was unable to move to the left lower limb. When she was discharged it was noted that she was stable, had painful limb which was immobilized and was for follow-up in ...clinic. From the Discharge summary, the deceased was discharged when she was still in a very poor condition due to the injuries sustained in the accident. The death certificate indicates that the deceased died 4 weeks after the discharge. Cause of death is indicated as sudden death from the circumstances of the deceased illness and the fact that the court has not been shown any other cause of the deceased death, the court finds sufficient evidence to base the findings that the deceased died as a result of injuries Sustained in the accident herein..."

d. The principle of res ipsa loquitor would apply here and the Learned Trial Magistrate exercised her judicial discretion and found that with no rebuttable evidence from the Appellant, there was sufficient evidence linking the injuries to the deceased's death.

e. Further to allege that the Learned Trial Magistrate disregarded the submissions, when the Appellants were accorded right of audience and rebuttal during hearing, is the highest peak of falsehood hence the Learned Trial Magistrates interpretation of the law was sound As connection between the injuries and the death elaborated in Page 60 of the Record of appeal, the Plaintiffs written submissions touched on the discharge summary (PEx2) and the death certificate (PEx3). The Plaintiff showed the connection between the injuries and the death.

f. That the Plaintiff was not present during the accident but was present during the discharge of the deceased. At page 44-45 of the Record of Appeal, the Plaintiff during cross-examination and re-examination stated:

> " She was not in good health when we discharged her. She was very sick but we just decided to take her closer to home. She spent a week at the hospital. I do not recall the date of her

admission It is the accident that caused her death....She died after another week following her discharge. The accident was the cause of death"

g. Notably the Appellants failed to bring witnesses to rebut the Respondent's evidence hence the mere assertions that the Learned Magistrate was erroneous is not backed up by cogent reasons to sustain such serious allegations.

30. While submitting jointly on grounds 7, 8, 9 & 10 the Respondent contends that;

a. The Learned Trial Magistrate took consideration of all the facts and the material placed before her and accordingly rendered the decision. The Respondent noted that the deceased is his sister -in- law and could not access the birth certificates of the issues. At page 44-45 of the Record of Appeal, the Respondent stated that:

" The deceased was my brother's wife. My said brother is deceased. I have no proof of the same I left document at home .... The deceased's children. They have no birth certificates. The deceased worked in Kericho.....I have proof that we spent Kshs.50, 000/- as funeral expenses"

b. Notably the Respondent is a legal representative of the deceased and he testified that the deceased was his sister-in- law having been married by the Respondent's brother. The Respondent testified that the deceased and his brother had children. To have children is a fact that can be proved by oral or documentary evidence. The Respondent's oral testimony that the deceased had 4 sons was not rebutted. To demand for documentary evidence is to raise degree of proof beyond reasonable doubt. At page 44 of the record of appeal the Respondent testified that:

" -My late sister in law had three children

1) Marwa Mwita - aged 16 years old.

2) Bunyige Nyamohoga - aged 13 years

3) Douglas Nyamohanga - aged 10 years old. ".

c. That the Appellants never brought any rebuttal evidence or produce testimonies on their behalf to refute the Respondent's cogent evidence in Support of paragraph 7 of the plaint at page 5 of the record of Appeal.

d. This was reiterated at cross examination at page 5 of 45 line 5 of the record of appeal page5.

e. That, the Learned Trial Magistrate applied all the factors in the fatal Accident Act considering the children as defendants. The Learned Trial Magistrate rightly applied the relevant provisions of the *Law Reform Act*. At page 45 of the Record of Appeal, the Respondent stated that:

" she plucked tea leaves. At paragraph 7 of the Plaint I have indicated that the deceased was a business woman. She was also a business woman. She sold vegetables, tomatoes etc. I don't recall if I indicated her occupation. In the death certificate, she is stated to be a housewife. It is true she was."

f. Reliance was placed on the case of Jacob Ayiga Mlaruja & another y Simeon Obavo, Civil Appeal No. 167 OF 2002 cited in Michael Murigi Karanja v Mohammed Salim Kassam |2015] eKLR Justices Omolo, Tunoi & Githinji, JJ.A held that;

> " We do not subscribe to the view that the only way to prove tlhe profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

g. That the Appellant failed to bring witnesses to rebut the Respondent's evidence. It is the Respondent's submissions that the deceased was a woman of means and she used to earn and support her family

h. That the learned trial magistrate took into account the law and evidence in arriving at a finding on liability and quantum. The awards made under the *Law Reform Act* and fatal accidents of Kshs. 1, 793, 864/= was not inordinately high. The Respondents submission at the trial relied on judicial authorities made in 2013 to 2015 therefore subject to inflation. In the circumstances, it prayed that the appeal be dismissed with costs.

Analysis and disposition

31. This being a first Appeal, this Court is obligated to re-evaluate and re-appraise the evidence adduced in the trial court in order to arrive at its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. [Selle vs. Associated Motor Boat Company Ltd [1968] EA 123.]

32. It follows that the general rule is that, the initial burden of proof lies on the plaintiff, the Respondent in this appeal, but the same may shift to the Appellant in this appeal depending on the circumstances of the case.

33. The burden of proof was on the Respondent who sought the relief of the Trial Court, he tendered his evidence and blamed the Appellant for the accident. The burden of proof shifted to the Appellant to rebut.

34. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

35. I conform with the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof

proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

36. The question then is what amounts to proof on a balance of probabilities. Kimaru, J (as he then was) in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " 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 that 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."

37. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

38. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " 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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This, burden 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...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

39. In this instance the Appellant did not offer any counter evidence in defence on the causal link of the death or on any other factual basis and thus the trial court's finding proof on a balance of probability was sound and that its exercise of discretion as to common sense test of causation of the death of the deceased was anchored on the evidence of PW1, the Medical Discharge Summary reports as well as the death certificate.

40. The question as to what constitutes as sudden death was never in contest in trial and was not put to test by evidence, and the construct thereof by the trial court, was based on the evidence before it, on a balance of probability.

41. In this case, the Trial Court determined the case in favour of a Respondent who persuaded it that, the allegations he had pleaded in his case was more likely than not, to be what took place. He has established

that it is probable than not that the allegations that he made occurred which evidence could only be displaced by counter evidence.

42. It was the Trial Court's finding after warning itself that, while the deceased died almost one month after the road traffic accident, she had been discharged one day after the accident and it was noted that she was still in a serious condition. PW1 testified how the deceased succumbed to the injuries after a few weeks and the court thus found that the death occurring was as a result of the accident and that no other alternative cause of death was offered to the trial court.

43. The Appellant never contested its liability, and in essence and respectfully, sat by the sidelines, never offered any defence only to cherry pick aspects to attack on appeal from the judgment. This court is of the view that this Appeal would have taken a different tangent had the Appellant offered alternative evidence to thereafter argue that the balance of probability standard was not achieved.

44. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

45. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> "In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

46. No arguments have been presented on Appeal on the assessment of damages having been premised on the wrong principles of law to warrant disturbance and as such the court shall not move.

47. The Appellant never presented any evidence in support of its case before the Trial Court and never raised the issues in contestation on Appeal during the trial or in submissions and that the Arguments on the causal link was resolved by the trial magistrate in trial.

48. Consequently, this court makes the following orders:

    i. The Appeal is disallowed for want of merit and is dismissed.

    ii. The judgment of the trial court dated 28th May 2020 be and is hereby confirmed.

    iii. The Respondent shall have costs of the Appeal and those at trial Court.

iv. The amount in (2) above shall attract interest at court rates from the date of filing until payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 21ST DAY OF MAY 2024.

MOHOCHI S.M.

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR